NORTH CAROLINA REPORTS

Vol. 266

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1965

SPRING TERM, 1966

JOHN M. STRONG

REPORTER

RALEIGH:

BYNUM PRINTING COMPANY

PRINTERS TO THE SUPREME COURT

1966

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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.

FALL TERM, 1965
SPRING TERM, 1966.

CHIEF JUSTICE:
EMERY B. DENNY.[1]

ASSOCIATE JUSTICES:
R. HUNT PARKER,[2] CLIFTON L. MOORE,
WILLIAM H. BOBBITT, SUSIE SHARP,
CARLISLE W. HIGGINS, I. BEVERLY LAKE,
J. WILL PLESS, JR.[3]

EMERGENCY JUSTICES:
J. WALLACE WINBORNE, WILLIAM B. RODMAN, JR.[4]

ATTORNEY GENERAL:
THOMAS WADE BRUTON.

DEPUTY ATTORNEYS-GENERAL:
HARRY W. McGALLIARD, RALPH MOODY,
PEYTON B. ABBOTT, HARRISON LEWIS.

ASSISTANT ATTORNEYS-GENERAL:
CHARLES D. BARHAM, JR., WILLIAM W. MELVIN,
JAMES F. BULLOCK, BERNARD A. HARRELL,
PARKS H. ICENHOUR GEORGE A. GOODWYN,
ANDREW H. McDANIEL, MILLARD R. RICH, JR.

DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS:
J. FRANK HUSKINS.

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]Resigned effective 5 February 1966.
[2]Appointed Chief Justice 7 February 1966.
[3]Appointed Associate Justice 7 February 1966.
[4]On recall 7 February 1966 to 26 March 1966.

FIRST DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Eilzabeth City.
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	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	Twenty-First-B	Winston-Salem.
JOHN R. MCLAUGHLIN	Twenty-Second	Statesville.
ROBERT M. GAMBILL	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

W. E. ANGLIN	Twenty-Fourth	Burnsville.
JAMES C. FARTHING	Twenty-Fifth	Lenoir.
FRANCIS O. CLARKSON	Twenty-Six-B	Charlotte.
HUGH B. CAMPBELL	Twenty-Sixth-A	Charlotte.
P. C. FRONEBERGER	Twenty-Seventh-A	Gastonia.
B. T. FALLS, JR.	Twenty-Seventh-B	Shelby.
W. K. MCLEAN	Twenty-Eighth	Asheville.
J. WILL PLESS, JR.[1]	Twenty-Ninth	Marion.
GUY L. HOUK	Thirtieth	Franklin.

SPECIAL JUDGES.

H. L. RIDDLE, JR.	Morganton.	WALTER E. BROCK	Wadesboro.
FRED H. HASTY	Charlotte.	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]Appointed Associate Justice of the Supreme Court 7 February 1966. Succeeded by J. W. Jackson, Hendersonville, 12 February 1966.

SOLICITORS.

EASTERN DIVISION

Name	*District*	*Address*
HERBERT SMALL	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

THOMAS W. MOORE, JR.	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.
W. HAMPTON CHILDS, JR.	Sixteenth	Lincolnton.
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.

FIRST DIVISION.

First District—Judge Hubbard.
Camden—Apr. 4.
Chowan—Mar. 28; Apr. 25†.
Currituck—Jan. 24†; Feb. 28.
Dare—Jan. 10†(2); May. 23.
Gates—Mar. 21; May 16†.
Pasquotank—Jan. 3†; Feb. 14*(2); Mar. 14†; May 2†(2); May 30*; June 6†.
Perquimans—Jan. 31†; Mar. 7†; Apr. 11.

Second District—Judge Mintz.
Beaufort—Jan. 17*; Jan. 24; Feb. 14†(2); Mar. 14*; Apr. 11†; May 2†; June 6†; June 20.
Hyde—May 16.
Martin—Jan. 3†; Mar. 7; Apr. 4†; May 30†; June 13.
Tyrrell—Apr. 18.
Washington—Jan. 10; Feb. 7†; Apr. 25.

Third District—Judge Parker.
Carteret—Jan. 31†(A); Mar. 7†(2); Mar. 28; Apr. 25(2)†(A); June 6(2).
Craven—Jan. 3(2); Jan. 31†(2); Feb. 21†(A)(2); Mar. 7(A); Apr. 4; May 2†(2); May 23(2); June 13†(A)(2).
Pamlico—Jan. 17(A); Apr. 11.
Pitt—Jan. 17†; Jan. 24; **Feb. 21†(2);** Mar. 14(A); Mar. 21; Apr. 11†(A); **Apr. 18; May 16; May 23†(A); June 20.**

Fourth District—Judge Fountain.
Duplin—Jan. 17*; Feb. 28*(A); Mar. 7†(2); May 9*; May 16†(2).
Jones—Jan. 10†; Feb. 28.
Onslow—Jan. 3; Feb. 21; Mar. 21†(2); Apr. 4(A); May 16(A).
Sampson—Jan. 24(2); Feb. 21†(A); **Apr.** 4†(2); Apr. 25*; May 2†; May 30†(2).

Fifth District—Judge Cowper.
New Hanover—Jan. 10*; **Jan. 17†(2);** Feb. 7†(2); Feb. 21*(2); Mar. 7†(2); Mar. 28*(2); Apr. 11†(2); May 2†(2); **May 16*** (A)(2); May 23†(2); June 6*; June 13†(2).
Pender—Jan. 3; Jan. 31†; Mar. 21; Apr. 25†(A).

Sixth District—Judge Cohoon.
Bertie—Feb. 7(2); May 9(2).
Halifax—Jan. 24(2); Feb. 28†; Apr. 25; May 23†(2); June 6*.
Hertford—Feb. 21; Apr. 11(2).
Northampton—Jan. 17†; Mar. 28(2).

Seventh District—Judge Peel.
Edgecombe—Jan. 17*; Feb. 7†(A); **Feb.** 21*(A); Apr. 18*; May 16†(2); **June 6.**
Nash—Jan. 3*(A); Jan. 24†; **Jan. 31*;** Feb. 28†(2); Mar. 28*; May 2†(2); May 30*.
Wilson—Jan. 3†(2); Feb. 7*(2); **Mar.** 14*(2); Apr. 4†(2); May 2*(A)(2); **June** 13†(2).

Eighth District—Judge Bundy.
Greene—Jan. 3†; Feb. 21; June 13(A).
Lenoir—Jan. 10*; Jan. 17†(A); Feb. 7†(2); Mar. 14(2); Apr. 11†(2); **May 16†**(2); June 13*(2).
Wayne—Jan. 17*(2); Jan. 13†(A)(2); Feb. 28†(2); Mar. 28*(2); May 2†(2); May 30†(2).

SECOND DIVISION.

Ninth District—Judge Braswell.
Franklin—Jan. 31*; Feb. 21†; **Apr. 18†**(2); May 9*.
Granville—Jan. 17; Jan. 24†(A); Apr. 4(2).
Person—Feb. 7; Feb. 14†; Mar. 21†(2); May 16; May 23†.
Vance—Jan. 10*; Feb. 28*; Mar. 14†; June 6†; June 20*.
Warren—Jan. 3*; Jan. 24†; May 2†; May 30*.

Tenth District—Wake.
Schedule A—Judge Mallard.
Jan. 3†(2); Jan. 17†(3); Feb. 7*(2); Feb. 21*(2); Mar. 14†(2); Mar. 28†(2); Apr. 11*(2); Apr. 25*(2); May 16†(2); May 30*(2); June 13*(2).
Schedule B—Judge Hall.
Jan. 3*(2); Jan. 10(A); Jan. 17*(3); Feb. 7†(2); Feb. 14(A); Feb. 21†(2); Mar. 7(A); Mar. 14*(2); Mar. 28*(2); Apr. 11†(2); Apr. 11(A); Apr. 25†(2); May 9(A); May 16*(2); May 30†(2); May 20(A); June 13†(2); June 20(A).

Eleventh District—Judge Bailey.
Harnett—Jan. 3*; Jan. 10†(A); Feb. 7†(A)(2); Feb. 21†; Mar. 14*; Apr. 4†(A)(2); Apr. 18†(2); May 16*; May 23†(A)(2); June 6†(2).
Johnston—Jan. 10†(2); Jan. 24†(A)(2); Feb. 7(2); Feb. 28†(2); Mar. 28†(2); Apr. 11*(A); May 2†(2); May 30; June 20*.
Lee—Jan. 24; Jan. 31†; Feb. 28†(A); Mar. 21*; May 2†(A); May 23.

Twelfth District—Judge Carr.
Cumberland—Jan. 3†(A)(2); Jan. 3*(2); Jan. 17†(2); Jan. 31*(2); Jan. 31†(A)(2); Feb. 14†(2); Feb. 14*(A)(2); Feb. 28†(A); (2); Mar. 7*(2); Mar. 14†(A)(2); **Mar. 28†**(2); Mar. 28*(A)(2); Apr. 11*(2); Apr. 18†(A)(2); May 2†(2); May 16*(2); May 16†(A)(2); May 30†(2); June 13*(2); **June** 13†(A)(2).
Hoke—Jan. 24(A); Feb. 28†; Apr. 25.

Thirteenth District—Judge McKinnon.
Bladen—Feb. 14; Mar. 14†; Apr. 18; May 16†.
Brunswick—Jan. 17; Feb. 21†; Apr. 25†; May 9; May 30†(2).
Columbus—Jan. 3†(2); Jan. 24*(2); Feb. 7†; Feb. 28†(2); Apr. 4†(2); **May 2*(A);** May 23†; June 20.

Fourteenth District—Judge Hobgood.
Durham—Jan. 3*(2); Jan. 3†(A)(2); Jan. 17†; Jan. 24*(3); Jan. 24†(A); Feb. 14*(2); Feb. 14†(A)(2); Feb. 28†(2); Mar. 7*(A)(3); Mar. 21†(2); Apr. 4*(2); **Apr. 4** †(A)(2); Apr. 18†(2); Apr. 18*(A)(2); May 2*; May 2†(A); May 16†(2); **May 23** *(A); May 30*; June 6†(3); June 6*(A)(2).

Fifteenth District—Judge Bickett.
Alamance—Jan. 3†(2); Jan. 17*(A); Jan. 31†(2); Feb. 28*(2); Mar. 28†(A); Apr. 11†(2); May 2*; May 16†(2); **June 6** *(2).
Chatham—Jan. 24†(A); Feb. 14; **Mar.** 14†; May 9, May 30†.
Orange—Jan. 17†(2); Feb. 21*; Mar. 21† (2); Apr. 25*; June 13†(A)(2).

Sixteenth District—Judge Johnson.
Robeson—Jan. 3*(2); Jan. 17†(2); Feb. 21†(2); Mar. 7*; Mar. 21†(2); Apr. **4*(2);** Apr. 18†; May 2*(2); May 16†(2); **June** 6*(2).
Scotland—Jan. 31†; Mar. 14; **Apr. 25†** (A); June 20.

THIRD DIVISION

Seventeenth District—Judge Armstrong.
Caswell—Feb. 21†; Mar. 21(A).
Rockingham—Jan. 17*(2); Feb. 14†(A)(2); Feb. 28†(2); Mar. 14*(A); Apr. 11†(3); May 16†(2); June 13(2).
Stokes—Jan. 31; Apr. 4; June 20(A).
Surry—Jan. 3*(2); Feb. 7†(2); Mar. 21†(2); May 2*(2); May 30†(2).

Eighteenth District—Guilford.
Schedule A—Judge McConnell.
Greensboro—Jan. 17†(2); Jan. 31*(2); Feb. 14*(2); Mar. 7†(2); Mar. 21†; May 2*(2); May 16†(2); May 30†(2).
High Point—Jan. 3†(2); Mar. 28†(2); Apr. 11*; Apr. 18†; June 13†(2).
Schedule B—Judge Johnston.
Greensboro—Jan. 3*(2); Jan. 17*; Jan. 24; Jan. 31†(2); Feb. 28*(2); Mar. 21†(3); Apr. 11*(2); Apr. 25†(2); May 30*(2); June 13†(2).
High Point—Feb. 14†(2); May 16†(2).
Schedule C—Judge to be assigned.
Greensboro—Jan. 3†(A)(2); Jan. 24†(A)(2); Feb. 14†(A)(2); Feb. 21*(A)(2); Mar. 14(A); Mar. 21*(A)(3); Apr. 4†(A)(2); Apr. 18†(A)(2); Apr. 25(A); May 9†(A); May 16(A); May 23*(A)(2); June 6†(A)(2); June 13*(A)(2); June 20(A).
High Point—Jan. 17*(A); Feb. 7*(A); Mar. 7*(A); May 9*(A); June 6*(A).

Nineteenth District—Judge McLaughlin.
Cabarrus—Jan. 3*; Jan. 10†; Jan. 31†(A)(2); Feb. 28†(2); Apr. 18(2); May 23(A); June 6†.
Montgomery—Jan. 17; Apr. 4(A); May 23†.
Randolph—Jan. 3†(A)(2); Jan. 24*; Jan. 31†(2); Feb. 28†(A)(2); Mar. 28*(A); Apr. 4†(2); May 2†(A)(2); May 30†(A)(2); June 20*.
Rowan—Jan. 17†(A)(2); Feb. 14*(2); Mar. 14†(2); May 2(2); May 16†; May 30*.

Twentieth District—Judge Gambill.
Anson—Jan 10*; Feb. 28†; Apr. 11(2); June 6*; June 13†.
Moore—Jan. 17†; Jan. 24*; Mar. 7†(A); Apr. 25*; May 16†.
Richmond—Jan. 3*; Feb. 7†; Mar. 14†(2); Apr. 4*; May 23*(2); June 20†.
Stanly—Jan 31†; Mar. 28; May 9†.
Union—Feb. 14(2); May 2(A).

Twenty-First District—Forsyth.
Schedule A—Judge Gwyn.
Jan. 3(3); Jan. 24†(3); Feb. 14†(2); Feb. 28(2); Mar. 21†(2); Apr. 4†(2); Apr. 18†(3); May 9†(2); May 23†#(A); May 30(2); June 13(2).
Schedule B—Judge Shaw.
Jan. 3†(3); Jan. 24†#; Jan. 31(2); Feb. 14(2); Mar. 7†(3); Mar. 28†#; Apr. 4(2); May 2(3); May 23†(2); June 6†(3).

Twenty-Second District—Judge Lupton.
Alexander—Mar. 7; Apr. 11.
Davidson—Jan. 17†(A); Jan. 24; Feb. 14†(2); Mar. 7†(A); Mar. 14; Mar. 28†(2); Apr. 25; May 9† May 16†(A); May 30†(2); June 20.
Davie—Jan. 17*; Feb. 28†; Apr. 18(A).
Iredell—Jan. 31(2); Mar. 14†(A); Mar. 21*; May 2†; May 16(2).

Twenty-Third District—Judge Crissman.
Alleghany—Jan. 24; Apr. 18.
Ashe—Mar. 28; May. 23.
Wilkes—Jan. 10†(2); Feb. 14*; Mar. 7†(2); Apr. 11; Apr. 25†(2); May 30†(2); June 13*(2).
Yadkin—Jan. 31(2); May 9.

FOURTH DIVISION.

Twenty-Fourth District—Judge Clarkson.
Avery—Apr. 25(2).
Madison—Feb. 21; Mar. 21†(2); May 23*(2); June 20†.
Mitchell—Apr. 4(2).
Watauga—Jan. 17; Apr. 18(A); June 6†.
Yancey—Feb. 28(2).

Twenty-Fifth District—Judge Froneberger.
Burke—Feb. 14; Mar. 7; Mar. 14(A); May 2†(2); May 30(2).
Caldwell—Jan. 17†(2); Feb. 21(2); Mar. 21†(2); May 16(2).
Catawba—Jan. 3†(2); Jan. 31(2); Apr. 4(2); Apr. 18†(A); Apr. 25†; June 13†(2).

Twenty-Sixth District—Mecklenburg.
Schedule A—Judge McLean.
Jan. 3*(2); Jan. 17†(2); Jan. 31†(2); Feb. 14†(3); Mar. 7*(2); Mar. 21†; Mar. 28†(A); Apr. 4*(2); Apr. 18†(2); May 2†(2); May 16†(2); May 30†(2); June 13*(2).
Schedule B—Judge Pless.
Jan. 3†(2); Jan 17†(2); Jan. 31*(3); Feb. 21†; Mar. 7†(2); Mar. 21†(2); Apr. 4†(2); Apr. 18†(2); May 9*(2); May 23†; May 30†(2); June 13†(2).
Schedule C—Judge to be assigned.
Jan. 3*(A)(2); Jan. 3†(A)(2); Jan. 17†(A)(2); Jan. 31*(A)(3); Jan. 31†(A)(2); Feb. 14†(A)(3); Mar. 14†(A)(3); Apr. 4*(A)(2); Apr. 4†(A)(2); Apr. 18†(A)(2); May 2†(A)(2); May 9*(A)(2); May 16†(A)(2); May 30†(A)(2); June 13*(A)(2); June 13†(A)(2).
Schedule D—Judge to be assigned.
Jan. 3†(A)(2); Jan. 17†(A)(2); Jan. 31†(A)(2); Feb. 14†(A)(3); Mr. 14†(A)(3); Apr. 4†(A)(2); Apr. 18†(A)(2); May 2†(A)(2); May 16†(A)(2); May 30†(A)(2); June 13†(A)(2).

Twenty-Seventh District.
Schedule A—Judge Houk.
Cleveland—Mar. 21†(2).
Gaston—Jan. 3†; Jan. 10†(3); Jan. 31*(2); Feb. 21†; Mar. 7†(2); Apr. 4†; Apr. 25*(2); May 23†(2); June 6†(2); June 20†.
Lincoln—May 9(2).
Schedule B—Judge Anglin.
Cleveland—Jan. 24; Apr. 25(2).
Gaston—Jan. 3*; Jan. 31† Feb. 7†(2); Feb. 21*(2); Mar. 21†; March 28*(2); Apr. 11†(2); May 9†(2); May 30*(3).
Lincoln—Jan. 10(2).

Twenty-Eighth District—Judge Falls.
Buncombe—Jan. 3*(2); Jan. 3†(A)(2); Jan. 17†(3); Jan. 24#(A); Feb. 7*(2); Feb. 7†(A)(2); Feb. 21†(3); Mar. 7#(A); Mar. 14*(2); Mar. 14†(A)(3); Apr. 4†; Apr. 11*(2); Apr. 11†(A)(2); Apr. 25†(2); Apr. 25#(A); May 9*(2); May 9†(A)(2); May 23†; May 30†(A)(2); June 6*; June 13†(2); June 13#(A).

Twenty-Ninth District—Judge Farthing.
Henderson—Feb. 7(2); Mar. 14†(2); May 2*; May 23†(2).
McDowell—June 3*; Feb. 21†(2); Apr. 11*; June 6(2).
Polk—Jan. 24; Jan. 31†(A)(2); June 20.
Rutherford—Jan. 10†*(2); Mar. 7; Apr. 18†*(2); May 9*†(2).
Transylvania—Jan. 31; Mar. 28.

Thirtieth District—Judge Campbell.
Cherokee—Mar. 28(2); June 20†.
Clay—Apr. 25.
Graham—Mar. 14; May 30(2)†.
Haywood—Jan. 3†(2); Jan. 31(2); May 2†(2).
Jackson—Feb. 14(2); May 16; June 13†.
Macon—Apr. 11(2).
Swain—Feb. 28(2).

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

† For civil cases. * For criminal cases.
# Indicates non-jury term.
(A) Judge to be assigned.

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1965

STATE OF NORTH CAROLINA v. RUDOLPH HINES, JAMES WILLIAM LEAK, GEORGE ALBERT McNEILL AND JIMMY LAWRENCE McNEILL.

(Filed 15 December, 1965.)

1. Criminal Law § 87—

Where several defendants are jointly charged with a crime committed by them in concert, their respective motions for a separate trial are addressed to the sound discretion of the trial court, and the court's denial of the motions will not be held for error in the absence of a showing of abuse of discretion.

2. Criminal Law § 74—

A declaration made by one defendant in the presence of the others in perpetrating the common offense is competent as against the other defendants.

3. Criminal Law § 90—

One defendant is not entitled to object to the admission in evidence of the confession of another defendant when the court restricts its admission to the question of the guilt of the defendant making it and instructs the jury not to consider it as against the others.

4. Criminal Law § 151—

Where the charge of the court is not set out in the record it will be presumed that the court correctly instructed the jury on every phase of the case, both with respect to the law and the evidence.

5. Criminal Law § 122—

The allowance or refusal of a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court.

6. Same—

Where it appears that defendant in question did not object to the introduction of the extrajudicial confessions of his codefendants, and it further appears that each confession was restricted to the defendant making it, and that the court's charge to the jury does not appear of record, the refusal of a motion for mistrial on the ground that the admission in evidence of the confessions of his codefendants was prejudicial will not be disturbed, it being presumed that the court correctly limited the admission of the confessions, and therefore, that there was no abuse of discretion in denying the motions.

7. Criminal Law § 71—

A voluntary confession is admissible in evidence, and the fact that the confession was made in the presence of an officer does not render it incompetent if the confession was, in fact, voluntary.

8. Same—

The trial court's findings of fact upon the *voir dire* with respect to the voluntariness of a confession are conclusive when supported by competent evidence, and therefore when the evidence supports the court's findings that defendants, respectively, were warned of their right not to make any statement, their right to counsel, and that any statement made by them might be used against them, and that their confessions were freely and voluntarily made without inducement or threat, the admission of the confessions, respectively, will not be held for error, even though there be evidence to the contrary.

9. Same—

The fact that a defendant was illegally held at the time he made a confession, standing alone, is not sufficient to render his confession, otherwise voluntary, incompetent as a matter of law. G.S. 15-47.

10. Same—

A statement by an officer to defendant that others, jointly indicted, had talked and said that they had gone to the store in question and robbed the proprietor, and that the officer wanted to know what defendant had to say about it, does not render defendant's ensuing confession involuntary as a matter of law, the statement by the officer being true.

11. Same—

The fact that counsel is not present when defendant makes a voluntary confession does not render the confession incompetent when it appears that the defendant had been advised of his right to have counsel and requested none.

12. Same—

The fact that one of the officers present at the time of the making of a confession was not examined upon the *voir dire* does not render the con-

Wright v. Pegram.....244 N.C. 45..... 354
Wyatt v. Equipment Co.....253 N.C. 355.....545, 550

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Yates v. Chappell.....262 N.C. 461.....203, 486
Young v. Barden..... 90 N.C. 424..... 533

fession incompetent when the defendant does not ask for permission to examine the officer.

APPEAL by defendants Rudolph Hines, James William Leak, George Albert McNeill, and Jimmy Lawrence NcNeill from *Copeland, S.J.,* April 1965 Criminal Session of WAKE.

Criminal prosecution on an indictment charging John Thomas Alston, Rudolph Hines, James William Leak, George Albert McNeill, and Jimmy Lawrence McNeill on 16 February 1965 with robbery with firearms, to wit, a pistol, of P. R. Gulley, a violation of G.S. 14-87.

At the time of the trial John Thomas Alston had not been arrested. Each of the other four defendants pleaded not guilty. Verdict: Rudolph Hines, James William Leak, George Albert McNeill, and Jimmy Lawrence McNeill are guilty of armed robbery as charged. Each of these four defendants through his court-appointed counsel asked that the jury be polled, and each juror said that his verdict is that the four defendants are guilty and that he still assents to such verdict.

From a separate sentence of imprisonment of each of the said four defendants, each defendant appeals.

Attorney General T. W. Bruton and Staff Attorney Andrew A. Vanore, Jr., for the State.

Alton W. Kornegay for defendant appellant Rudolph Hines.

Charles H. Sedberry for defendant appellant James William Leak.

Carl C. Churchill, Jr., for defendant appellant George Albert McNeill.

John W. Liles, Jr., for defendant appellant Jimmy Lawrence McNeill.

PARKER, J. The State offered as one of its witnesses Joe Alston. This is a summary of his testimony, except when quoted: He is 26 years old and is a brother of John Thomas Alston, who is 25 years old. Between 8 and 8:30 p.m. on 16 February 1965 he, his brother John Thomas Alston, Rudolph Hines, James William Leak, George Albert McNeill, and Jimmy Lawrence McNeill met at a service station on South Street in the city of Raleigh. All six of them got into George Albert McNeill's automobile. They rode down Highway #401 to its intersection with Highway #70, then they went down Highway #70 to the town of Garner, and then went out on Highway #50. A store operated by P. R. Gulley is just off Highway #50. They rode by Gulley's store, turned around, came back, and

stopped about two blocks from the Gulley store. "We did not have any discussion as to what we were going to do at Mr. Gulley's store, except I heard someone say we were to go to pick up a piece of change. I asked them on the way down there after we got in sight of the place if there was going to be a robbery." When they stopped near Gulley's store they had a flat tire. Rudolph Hines, James William Leak, Jimmy Lawrence McNeill, and his brother got out of the automobile and went towards the Gulley store, leaving George Albert McNeill and himself at the automobile. Someone came back with a jack, and he and George Albert McNeill changed wheels on the automobile. A few minutes later, his brother, Rudolph Hines, James William Leak, and Jimmy Lawrence McNeill came back to the automobile, and one of them had an article that looked like a cash register tray. "I did not see any money but I did hear some change." All six of them got in the automobile and they went back to Raleigh, where he got out of the automobile and went home. "I didn't receive any money, nor did I ask for any because I wasn't in on the deal."

This is a summary of the testimony of P. R. Gulley, a witness for the State, except when quoted: His store is about four miles south of Garner just off Highway #50. It is primarily a sausage business, and he keeps drinks, nabs, and candy for sale. About 9 p.m. on 16 February 1965 he was alone in his store working with his sausage and getting some ready for sale. He heard an automobile stop to the left of his store. Shortly thereafter two Negro men came in, said they had a flat tire, and asked if he had a jack, as they did not know if their old jack would work. He replied that he had an old jack in his truck parked in front of the front door. They bought drinks, talked a few minutes, and left. Shortly thereafter they came back and wanted his jack. He went outside to his truck, got his jack, came back in the store, and gave it to them. They left. He went back to work on his sausage. Pretty soon two Negro men came in and wanted change for a dollar. He did not have sufficient change in his pocket. He went to his cash register, which had hung up the Saturday before, took the tray out of the cash drawer, and set it up on a shelf. He took fifty cents out of the tray and fifty cents out of his pocket, and gave them change for a dollar. They went out of the store. He went to a counter at the end of his store and began working on his sausage. Three of the Negro men came back in the front door of the store. It was cold, and they went and stood by the heater. The same man, who bought drinks before, bought another drink. He told them he did not sell cigarettes. They stood around the heater talking. He went back to his sausage work. The next thing he knew one of them, who he learned later was John

Thomas Alston, stepped from behind his refrigerator with a pistol, and said, "this it it." (The court instructed the jury that the statement, "this is it," should be considered only against defendants James Leak and Rudolph Hines and that they should not consider it as against George Albert McNeill and Jimmy Lawrence McNeill.) Then another of the Negroes, whom he identified in the courtroom, and who is James William Leak, grabbed him around the body. Gulley testified: "My meat block was sitting there. The defendant James Leak comes in between myself and the meat block and grabs hold right around me, this way, right around my body and when he done that, this boy here, Rudolph Hines, comes behind the meat block I think. He comes right up behind me and starts in my pocket in my hip pocket and side pockets and among the two they went all over me, taken everything in my pockets out, pocket knife, keys, billfold, check books, even cleaned this pocket up here. When I said between the two, I am referring to James Leak and Rudolph Hines. Alston was holding the pistol on me. They took everything on me. They dropped one key on the floor that they didn't pick up. I had some money in my billfold. Best I can figure there was around $100.00 or little better in my pockets and in my cash drawer, they got it both. I had around $85 or $90 in my pocket." When they finished going through his pockets, John Thomas Alston, with the gun, stepped to the right and said, "Come out the front door." The back door was open, and he saw another man over that way, but he could not afford to turn and look, when Alston said, "Come out the front door." That man was over in the vicinity where his cash drawer was on the shelf on the right side. He went out the front door with his hands up. Alston told him to drop his hands. He then trotted to a neighbor's house and told his wife to call the sheriff, that he had been robbed. From there he ran home.

The State offered in evidence an extrajudicial confession made by George Albert McNeill to Deputy Sheriffs W. D. Chalk and K. W. O'Neal to this effect: He, James William Leak, Jimmy Lawrence McNeill, Rudolph Hines, John Thomas Alston, and Joe Alston were in an automobile at the home of Joyce McNeill. They drove out on Highway #50 to P. R. Gulley's store where they had a flat tire. They went in his store and borrowed his jack. They carried the jack back in the store, and at that time John Thomas Alston held a pistol on Gulley and they proceeded to take his billfold from his pocket, to empty his pockets, and they also took his cash drawer from on top of the counter, and went back to the automobile. They had planned to go out and rob Gulley's store. John Thomas Alston had mentioned the Swift Creek Grocery, but when they reached it they did

not stop because so many people were there. They left Gulley's store and drove back to Raleigh. Someone threw the cash drawer out the window of the automobile at a bridge in a curve of the road. The court instructed the jury that George Albert McNeill's statement was not to be considered in any way by them against Rudolph Hines.

The State offered in evidence an extrajudicial confession made by Jimmy Lawrence McNeill to Deputy Sheriffs W. D. Chalk and K. W. O'Neal to this effect: He admitted being with them in the robbery. He said he got between $11 and $12, and that John Thomas Alston had the pistol. The court instructed the jury that Jimmy Lawrence McNeill's statement was not to be considered in any way by them against Rudolph Hines.

The State offered in evidence an extrajudicial confession made by James William Leak to Deputy Sheriffs W. D. Chalk and K. W. O'Neal to this effect: He got between eleven and twelve dollars. The money was divided at John Thomas Alston's sister's house. He, Joe Alston, George Albert McNeill, Jimmy Lawrence McNeill and Rudolph Hines were in the automobile. John Thomas Alston had the pistol, and he went into the store. The court instructed the jury that Leak's statement was not to be considered in any way by them against Rudolph Hines.

Deputy Sheriff W. D. Chalk testified as follows: "While each of the defendants Jimmy Lawrence McNeill, James Leak and George McNeill was making these statements, neither of the other two denied any statement made by the other. It was just a general conversation, they all laughing about it and telling again how it happened, how they got together and how they went down to Mr. Gulley's store. Either Deputy Sheriff O'Neal or I had talked to each of them individually before I had the three of them together and they were giving this discussion."

Defendant Hines made no extrajudicial statement.

The defendants offered no evidence, except that defendants Leak and the two McNeills testified in the absence of the jury on the preliminary inquiry as to the competency or incompetency of the extrajudicial confessions made by each one of them.

When the case was called for trial on the joint indictment here, each of the four defendants moved for a separate trial. The court denied the motions, and each defendant assigns it as error, except defendant George Albert McNeill, who states in his brief that he abandons this assignment of error by him. The granting or refusing of the motion for a separate trial by each of the four defendants was a matter which rested in the sound discretion of the trial court.

No abuse of discretion appears on the present record. The defendants were charged in a joint indictment with being partners in crime, and they were tried together as his Honor evidently thought was meet and proper. The assignment of error by each defendant, Hines, Leak, and Jimmy Lawrence McNeill is not sustained. *S. v. Anderson,* 208 N.C. 771, 182 S.E. 643; 1 Strong's N. C. Index, Criminal Law, § 87, p. 757, Strong's Supplement to Vol. 1, Criminal Law, § 87. *S. v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45, is factually distinguishable.

APPEAL BY RUDOLPH HINES

Hines has five assignments of error. His first assignment of error is to the denial of his motion for a separate trial. That has not been sustained, as stated above.

Hines' second assignment of error is to the overruling of his objection to a few words of Gulley's testimony. In his brief he cites no authority to support this assignment of error, which is totally without merit, and it is overruled.

Hines' third assignment of error is to the overruling of his objection to Alston's statement to Gulley, "Come out the front door," made immediately after defendants Leak and Hines had finished going through Gulley's pockets. This declaration of John Thomas Alston uttered in furtherance of the common, illegal design of himself, Hines, and the others to rob Gulley, and uttered in Hines' immediate presence is clearly admissible against Hines. *S. v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *S. v. Ritter,* 197 N.C. 113, 147 S.E. 733. This assignment of error is overruled.

Defendant Hines' fourth assignment of error is the denial of his motion for a mistrial made at the close of the State's evidence, and his fifth and last assignment of error is the denial of a similar motion made by him at the conclusion of all the evidence. The last assignment of error is superfluous, because defendants offered no evidence other than on the preliminary inquiry as to the competency or incompetency of the extrajudicial confessions, and at the close of the State's evidence no further evidence was offered. The defendant contends that his motions for a mistrial should have been allowed, because though the trial court instructed the jury that the confessions of the other three defendants should not be considered in any way by the jury against him, the admission of the confessions of these three defendants prejudiced him.

So far as the record before us discloses, defendant Hines did not object to the admission in evidence of the confessions of his three codefendants James William Leak, George Albert McNeill, and

Jimmy Lawrence McNeill. When the trial judge allowed the State to present in evidence as against Leak, George Albert McNeill, and Jimmy Lawrence McNeill extrajudicial confessions made by each of them, he instructed the jury with particularity as to each extrajudicial confession by each of these defendants that it was not to be considered in any way against the defendant Hines.

The applicable rule is stated in *S. v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876, as follows:

> "Where two or more persons are jointly tried, the extrajudicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, *but only when,* the trial judge instructs the jury that the confession so offered is admitted as evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s). *S. v. Bennett,* 237 N.C. 749, 753, 76 S.E. 2d 42, and cases cited. While the jury may find it difficult to put out of their minds the portions of such confessions that implicate the codefendant(s), this is the best the court can do; for such confession is clearly competent against the defendant who made it."

It is true that the trial judge did not instruct the jury that each of the three extrajudicial confessions is admitted in evidence against the defendant who made it, but is not evidence against defendant Hines. The charge of the court to the jury is not in the record. "Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case, both with respect to the law and evidence." 1 Strong's N. C. Index, Appeal and Error, § 35, p. 112. The allowance or refusal of a motion for a mistrial in a criminal case less than capital rests largely in the discretion of the trial court. *S. v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264; 2 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1548; 88 C.J.S., Trial, § 36, b, p. 96-97; 53 Am. Jur., Trial, § 967. Considering the fact that defendant Hines did not object to the introduction in evidence of the extrajudicial confessions of defendants Leak, George Albert McNeill and Jimmy Lawrence McNeill, and indulging the presumption that the trial judge correctly instructed the jury on every phase of the evidence, and that the trial judge instructed the jury with particularity as to each of the three extrajudicial confessions of defendants Leak and the two McNeills, that each of these three extrajudicial confessions was not to be considered in any way by the jury against defendant Hines, it does not appear that the trial judge abused his discretion in deny-

ing Hines' motions for a mistrial. These assignments of error are overruled.

As to the trial of defendant Hines, we find

No error.

APPEAL BY GEORGE ALBERT McNEILL

This defendant has two assignments of error, the first of which is to the denial of his motion for a separate trial. He states in his brief that he abandons this assignment of error.

His second assignment of error is: The court below erred in its findings of fact and ruling that the alleged confession by him was free and voluntary on his part, and that he was not being illegally detained at the time of the confession, and in admitting into evidence over his objection the alleged confession.

When the admissibility of a purported extrajudicial confession by George Albert McNeill was challenged by him, the trial judge had the jury to leave the courtroom and conducted in the absence of the jury a lengthy preliminary inquiry showing the circumstances under which the purported confession was made. The State offered the testimony of Deputy Sheriffs W. D. Chalk and K. W. O'Neal, and defendant George Albert McNeill testified in his own behalf, all of whom were examined and cross-examined at length by counsel for the State and for defendant George Albert McNeill.

The State's evidence was to this effect: Between 8 and 9:30 p.m. on 25 February 1965 Deputy Sheriffs Chalk and O'Neal went to the home of George Albert McNeill in the city of Raleigh and asked him to go with them to the detective bureau so they could talk with him. McNeill did not object to going. The officers had information a felony had been committed, and they picked McNeill up as a suspect for questioning. They handcuffed him and went to the detective bureau. Upon arrival at the detective bureau, Chalk, before McNeill made any statement, told him he did not have to tell him, Chalk, anything, that if he said anything it could be used for or against him, and that he had a right to call a lawyer if he wanted one. A telephone was in the room. McNeill said nothing about calling a lawyer. He did not ask for permission to call his mother. P. R. Gulley came and looked at McNeill. McNeill was not told what he was suspected of having committed when picked up. Before he made a confession he was told he could be arrested for armed robbery of Gulley. In answer to the officers' questions, McNeill made the confession set forth above. After McNeill confessed, a warrant was sworn out against him, and he waived a preliminary hearing that night.

Defendant McNeill's testimony is in substance: He is 21 years old. When officers Chalk and O'Neal came to his home and said they wanted to carry him uptown, they did not tell him why they wanted to do so. He asked the reason why, and O'Neal replied, "I'll tell you when I get you uptown." They handcuffed him. They did not mention there his constitutional rights. On the way uptown, O'Neal asked him did he know those boys. They carried him to the police station and put him in a little room. He asked to use a telephone to call his mother, and they would not let him. He did not ask for a lawyer. Nothing was said to him about having a lawyer. After the officers questioned him, he telephoned his mother. He never told the officers he robbed Gulley or participated in the robbery of Gulley. John Thomas Alston had him to carry him to Garner to see his, Alston's, grandmother. At Gulley's store he had a flat tire and fixed it. He brought Alston back to Raleigh. Alston paid him $12 for the trip. He does not know where Alston got the money. He did not confess to anything. Jimmy Lawrence McNeill, James Leak, and John Thomas Alston were with him on the trip. He did not say Rudolph Hines was with them. No officer told him he did not have to answer questions, and that if he said anything it could be used for or against him in court. He testified: "I went to school to the tenth grade. No one threatened me that night not as I recall. They were real nice to me."

The trial judge made the following findings of fact in respect to his extrajudicial confession: On the night in question prior to any interrogation by the officers and prior to discussing the matter with him, they warned the defendant that he did not have to make a statement, but that if he did make a statement it could be used for or against him later. He was also advised that he could use the telephone if he wished. That defendant made no request to call any of his people at that time or to call an attorney at that time. The warrant was served on him within a matter of a few hours, and thereupon he waived a hearing and bond was set. Prior to that time defendant made certain statements to Deputy Sheriffs Chalk and O'Neal, and that on all occasions there were no threats made to said defendant of any kind, either physical or mental, and neither was he physically or mentally punished at any time prior or during the making of such statements, and that there was no hope of reward or threat of punishment. He was permitted to call his mother at least thirty minutes to an hour prior to his waiving a hearing in the magistrate's court. Defendant is a person of substantial education, having completed the tenth grade. The court concludes that

the statements made by defendant to officers Chalk and O'Neal were free and voluntary in every respect.

Since *S. v. Roberts,* 12 N.C. 259, this Court has uniformly held that voluntary statements made by a defendant are admissible in evidence. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Painter,* 265 N.C. 277, 144 S.E. 2d 6. The mere presence of officers does not render a confession incompetent. 1 Strong's N. C. Index, Criminal Law, § 71, p. 733. This Court said in *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344:

> "In the establishment of a factual background by which to determine whether a confession meets the tests of admissibility, the trial court must make the findings of fact. When the facts so found are supported by competent evidence, they are conclusive on appellate courts, both State and Federal. *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *certiorari denied,* 365 U.S. 855; *Watts v. Indiana,* 338 U.S. 49; *Lyons v. Oklahoma,* 322 U.S. 596; *Lisenba v. California,* 314 U.S. 219. Of course, the conclusions of law to be drawn from the facts found are not binding on the reviewing courts. In *Watts,* the principle is stated concisely: '(I)n all the cases which have come here . . . from the courts of the various states in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication.' "

The trial judge's findings of fact are amply supported by the evidence. Defendant himself testified: "No one threatened me that night not as I recall. They were real nice to me." And upon his findings of fact his Honor properly drew the legal conclusion that this defendant's extrajudicial confession was made freely and voluntarily. Consequently, the extrajudicial confession of guilt by this defendant was properly admitted in evidence against him. *S. v. Warren,* 235 N.C. 117, 68 S.E. 2d 779, and *Gallegos v. State of Colorado,* 370 U.S. 49, 8 L. Ed. 2d 325, 87 A.L.R. 2d 614, relied on by defendant, are factually distinguishable.

Defendant contends the trial judge erred in concluding as a matter of law that this defendant was not illegally held at the time he made the extrajudicial confession. Defendant contends he was illegally held at the time he made the confession because of the provisions of G.S. 15-47. Even if this defendant was being illegally

held at the time he made the confession, which we do not admit, that fact taken singly, under the facts here, is not sufficient to render his confession, otherwise voluntary, involuntary as a matter of law and incompetent as evidence. The statute does not so provide. *S. v. Exum,* 213 N.C. 16, 195 S.E. 7; *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99.

Defendant's second and last assignment of error is overruled.

In the trial of George Albert McNeill, we find

No error.

APPEAL BY DEFENDANTS JAMES WILLIAM LEAK AND JIMMY LAWRENCE MCNEILL

When the trial court finished a long preliminary inquiry in the absence of the jury showing the circumstances under which the extrajudicial confession of George Albert McNeill was made, it continued the preliminary inquiry in the absence of the jury showing the circumstances under which the purported extrajudicial confessions by Leak and Jimmy Lawrence McNeill were made.

Leak and Jimmy Lawrence McNeill each have three assignments of error, and they are identical. The first assignment of error by each of them is to the denial of his motion for a separate trial, which motion by each defendant has not been sustained, as stated above.

The second assignment of error of Leak is that the trial court erred in finding and concluding that his extrajudicial confession was free and voluntary on his part, and in admitting it in evidence over his objection against him. Jimmy Lawrence McNeill's second assignment of error is identical with Leak's.

Deputy Sheriff K. W. O'Neal was examined at length by counsel for Leak, and then by counsel for the State. This is a summary of his testimony: O'Neal, Deputy Sheriff W. D. Chalk, and other officers between 8 and 9 p.m. on 25 February 1965 went to a girl's house in Raleigh, found Leak hiding behind a refrigerator and carried him handcuffed to the detective bureau for questioning. Upon arrival at the detective bureau, he locked Leak in a small room there and kept him there alone for about 45 minutes before he came back to talk with him. At that time no warrant had been taken out for his arrest. In the meantime John Thomas Alston, Jimmy Lawrence McNeill, and George Albert McNeill had been picked up, were in separate rooms at the detective bureau, and had been questioned. When he went to talk to Leak, before questioning him, he told Leak he had a right not to say anything, and that anything he said could be used against him. Leak made no request to use the telephone or

any other request. He told Leak the persons he had talked to said they had gone down to Gulley's store and had robbed him, and he wanted to know what he, Leak, had to say about it. He had already talked to John Thomas Alston and George Albert McNeill, and they had confessed to the robbery of Gulley. Then Leak made the confession later admitted in evidence over Leak's objection. Deputy Sheriff Chalk was present when he talked to Leak. After this a warrant was taken out against Leak for the robbery here, and before 11 p.m. the same night he waived a preliminary hearing.

After O'Neal testified, Leak testified in his own behalf. We summarize the relevant parts of his testimony: He is 18 years old. He was taken by the officers and carried to the detective bureau about 8:30 p.m. and placed in a small room, where he was kept for about 45 minutes. He was not asked if he wanted to call his family or a lawyer or anyone. While in this room alone he heard a conversation in the next room between detective Bowers and Jimmy Lawrence McNeill. He recognized their voices. McNeill kept saying he did not know anything about it. Bowers was using profanity and saying that if McNeill did not sign he was going to hit him "side his head." When Deputy Sheriff O'Neal came into the room where he was, O'Neal asked his name and address, and told him he did not have to tell him anything because he had already been with those other boys in the room, so he did not have to tell him anything if he did not want to. O'Neal told him the other boys said he was with them in the robbery of Mr. Gulley. He said again that he, Leak, did not have to tell him anything if he did not want to. He told O'Neal he had been with the boys on the night of the alleged robbery. He did not tell him there had been a robbery. He did not know there had been a robbery. He did not ask O'Neal to do anything for him. He did not ask O'Neal to let him do anything. He did not ask O'Neal to use the telephone or to call a lawyer or to talk to a lawyer. He did not tell O'Neal he got part of the money. He told O'Neal he went down to Gulley's store but he did not go in the store. He did not tell the officers that Rudolph Hines carried the money tray out of the store, and he did not tell O'Neal that they went back to John Thomas Alston's sister's house and divided the money. He did not tell O'Neal that Alston had a pistol. O'Neal did not hit him. He threatened to hit him, but he did not.

After Leak had testified, O'Neal was recalled to the stand and testified in substance as follows: He did not threaten Leak and did not hit him.

After the preliminary inquiry in the absence of the jury in respect to the extrajudicial confession of Leak was finished, the trial

court then proceeded with the preliminary inquiry in the absence of the jury showing the circumstances under which the purported extrajudicial confession of Jimmy Lawrence McNeill was made. Deputy Sheriff K. W. O'Neal was examined by Jimmy Lawrence McNeill's attorney and also by counsel for the State. This is a summary of his testimony: About 8 p.m. on 25 February 1965 he and other officers carried McNeill handcuffed from his home in the city of Raleigh to the detective bureau. McNeill at the detective bureau was placed in a room near Leak. City officers Bowers and Haley talked to McNeill before he did. Before talking to McNeill about the robbery of Mr. Gulley, he told him, McNeill, he did not have to say anything, and if he did make a statement it might be used against him in court. McNeill did not ask to use the telephone or to call any member of his family or to call a lawyer or anyone. He did not threaten McNeill or offer to hit him. McNeill made the confession to him which was afterwards admitted in evidence over his objection against him.

Jimmy Lawrence McNeill on the preliminary inquiry testified in his own behalf. This is a summary of its relevant parts, except when quoted: He was carried to the detective bureau and placed in a room by himself for 45 or 50 minutes. Detective Bowers came in and asked him about the Gulley robbery. He told him he did not know anything about it. Bowers kept on questioning him and said, "You going to, all the rest of the boys done confessed I was with them." He told Bowers he was in George Albert McNeill's automobile, but he did not know anything about the robbery. Then Bowers went to reading some things Joe Alston had told him. Bowers talked to him about two cases. He tried to make him sign a piece of paper. He cussed him and told him what he would do to him if he did not sign it. "He told me he would hit me side of the head if I didn't sign it. He was talking real loud. He scared me when talking about fighting. Yes, he is a big man. He did not hit me. He was cussing." He talked with both of the deputy sheriffs. Neither one of them threatened him. The detectives were not present when the deputies talked to him. He never told them he robbed Mr. Gulley. He testified: "Whatever I told the deputies was voluntary on my part. They didn't force me to say anything. . . . They were questioning me about the Gulley robbery. The only thing I said about the Gulley robbery was that I was in the car but I didn't know whether anybody robbed the man or not." He told them he was drunk in the automobile. He is 19 years old and has completed the tenth grade.

After McNeill had testified, detective J. H. Bowers testified as

a witness and was examined and cross-examined by counsel for the State and by counsel for McNeill. This is a summary of the relevant parts of his testimony: During the time he talked with McNeill in a room in the detective bureau of the municipal building, he did not threaten him or offer to hit him or tell him he was going to hit him if he did not confess. He questioned him about a crime committed in the city of Raleigh. He did not speak loud or use any profane or abusive language. He wrote down what McNeill said as to the part he played in the commission of the crime within the city of Raleigh, which had nothing to do with the Gulley robbery. Prior to talking to McNeill, he warned him of his rights and told him to call his folks if he wanted to. He also told him he did not have to make any statement, and that if he made one it could be used against him at a later date.

After Jimmy Lawrence McNeill's confession, a warrant was taken out against him for the robbery here, and before 11 p.m. the same night he waived a preliminary hearing.

The trial judge found as facts, *inter alia,* that Leak and Jimmy Lawrence McNeill were each told by the officers that he did not have to make a statement or answer questions unless he desired to do so, and if he did, anything he said could be used later for or against him, that each one of them was not threatened in any way, and he concluded as a matter of law that the confession of each was free and voluntary on his part. These findings of fact above stated are amply supported by the evidence.

Leak contends his confession is vitiated because Deputy Sheriff O'Neal testified he told him the persons he had talked to said they had gone down to Gulley's store and had robbed him, and he wanted to know what he, Leak, had to say about it. He relies upon *S. v. Anderson, supra.* The *Anderson* case is easily distinguishable, in that in this case defendant Overman successfully contended his confession was involuntary because the following appeared from the testimony of D. P. Stewart, a State's witness: "I think I told him some of the ones in jail had talked and would talk and he might as well do likewise. . . . It was not true that anyone in jail had talked. . . . I believe I told him it would be better for him to go ahead and tell it just like it was and he might as well go ahead and tell it because it was already told." In the instant case it appears that what O'Neal told Leak was true. This statement by O'Neal to Leak under the facts here does not vitiate Leak's confession. See *Jackson v. State,* 180 Md. 658, 26 A. 2d 815; 3 Wigmore on Evidence, 3d Ed., § 841(1); 2 Wharton's Criminal Evidence, 12th Ed. by Anderson, § 385.

Defendants Leak and Jimmy Lawrence McNeill contend their confessions should have been excluded upon authority of *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246, and *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977. In the *Escobedo* case the accused during interrogation by the officers had repeatedly and in terms asked to see a previously retained lawyer who was in the building when he was being interrogated, and was refused, and in addition the accused was not warned, as were Leak and Jimmy Lawrence McNeill here, of his constitutional right to remain silent. Neither Leak nor Jimmy Lawrence McNeill requested counsel. We do not interpret *Escobedo* to mean that counsel must immediately be afforded one taken into custody before he is interrogated by officers, under all circumstances, particularly where no counsel is requested, as in the instant case. In our view the *Escobedo* case does not control here. In support of our opinion as to the *Escobedo* case, see *People v. Hartgraves,* 31 Ill. 2d 375, 202 N.E. 2d 33 (1964); *Anderson v. State,* 237 Md. 45, 205 A. 2d 281 (1964); *Swartz v. State,* 237 Md. 263, 205 A. 2d 803 (1965); *Bean v. State (Nev.),* 398 P. 2d 251 (1965); *Pece v. Cox,* 74 N.M. 591, 396 P. 2d 422 (1964); *Commonwealth v. Patrick,* 416 Pa. 437, 206 A. 2d 295 (1965); *Browne v. State,* 24 Wis. 2d 491, 131 N.W. 2d 169 (1964). The facts in the *Massiah* case are utterly different from the facts here. In *Massiah,* defendant, after being indicted with other persons for violating the federal narcotics laws, retained a lawyer, pleaded not guilty, and was released on bail. While free on bail, the defendant held a conversation in the absence of his counsel with one of his codefendants while sitting in the latter's automobile, unaware that the codefendant, cooperating with government agents, had allowed the installation of a radio transmitter under the front seat of the automobile, by means of which a federal agent listened to the conversation. A majority of the court held that this conversation could not constitutionally be used against him. In our opinion the instant case does not come within the sweep of the *Massiah* decision.

The trial court properly admitted in evidence Leak's extrajudicial confession against him, and Jimmy Lawrence McNeill's extrajudicial confession against him.

The third and last assignment of error by Leak is that the trial court erred in finding as a fact and concluding that the confession made by him was voluntarily made without any *voir dire* examination of Deputy Sheriff Chalk on behalf of him, Leak. Jimmy Lawrence McNeill's last and third assignment of error is identical. The record shows that Chalk was in the courtroom during the trial,

because he testified during the preliminary inquiry in the absence of the jury, and later as to the confessions. Neither Leak nor Jimmy Lawrence McNeill asked for permission to examine him. These assignments of error by them are overruled.

In the trial of James William Leak and Jimmy Lawrence McNeill, we find

No error.

The final result is in the trial of the four defendants here we find

No error.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, ADMINISTRATOR C.T.A., D.B.N., OF THE ESTATE OF SUSAN BORDEN UMPHLETT, DECEASED v. JOHN N. HACKNEY, EXECUTOR OF THE ESTATE AND LAST WILL AND TESTAMENT OF W. W. UMPHLETT, JR.

(Filed 15 December, 1965.)

1. Husband and Wife § 9—

The wife has the right in this jurisdiction to sue her husband for negligent injury, and, in the event such injury causes her death, her personal representative is authorized to sue. G.S. 52-10.1, G.S. 28-173.

2. Descent and Distribution § 1; Death § 8—

Persons entitled to distribution under the Intestate Succession Act are to be determined at the time of the decedent's death, and where the husband survives the wife only a short time after the accident causing the death of both, and children of the marriage survive, the husband and children are the wife's beneficiaries under the Intestate Succession Act.

3. Actions § 5; Descent and Distribution § 6—

Where the husband survives the wife only a short time after the fatal accident proximately caused by the negligence of the husband, there can be no recovery in respect to the share to which the husband or his estate would otherwise be entitled.

4. Same; Actions § 3; Parent and Child § 2; Death § 3—

Where the husband survives the wife only a short time after the accident causing the death of both, and children of the marriage survive, *held* the administrator of the wife may maintain an action against the executor of the husband's estate to recover damages for the wrongful death of the wife for distribution to the children. This result is not against public policy as allowing the children to benefit from a wrong committed by their father. Such action is not demurrable for want of adversary parties, nor does it violate the rule that unemancipated minor children may not sue their parent in tort.

5. Death § 3; Parties § 2—

G.S. 28-173 authorizes the personal representative of the deceased to maintain an action for wrongful death in those instances in which the deceased, had he survived the injuries, would have had a right of action, and the statutory distributees of any recovery in such action are not the real parties in interest within the meaning of G.S. 1-57, and the personal representative is not a mere figurehead but has both authority and responsibility and his right of action is not dependent upon the identity of the persons who will be entitled to the recovery.

6. Pleadings § 12—

A demurrer admits proper allegations of fact but not conclusions of law, and averment in regard to who are the real parties in interest in the action relates to a legal conclusion not admitted by demurrer.

7. Evidence § 3—

It is a matter of common knowledge that car owners customarily purchase automobile liability insurance and that in this State a motorist is required by statute to show proof of financial responsibility as prerequisite to issuance of license.

APPEAL by defendant from *Hubbard, J.*, June 1965 Civil Session of WILSON.

Action to recover damages for wrongful death.

Plaintiff, in brief summary, alleged: On August 26, 1962, Susan Borden Umphlett was a passenger in a 1960 Ford station wagon owned and operated by W. W. Umphlett, Jr., on U. S. Highway No. 64 near Apex. She was fatally injured when the station wagon ran off the highway and crashed into a tree. Negligence of W. W. Umphlett, Jr., in specified particulars, in the operation of the station wagon, proximately caused her death.

Answering, defendant averred a 1960 Ford station wagon occupied by Susan Borden Umphlett and her husband, W. W. Umphlett, Jr., was involved in an accident on U. S. Highway No. 64 near Apex on August 26, 1962, and that Mrs. Umphlett died shortly thereafter. Except as stated, defendant denied, for lack of knowledge or information upon which to form a belief, the essential allegations of the complaint.

By way of further answer, defendant alleged defenses which, in summary, are stated below.

First defense: When Mrs. Umphlett died, W. W. Umphlett, Jr., her lawful husband, survived her; and, if his negligence proximately caused her death, any recovery by plaintiff herein should be reduced by the amount otherwise payable to him (or his estate) as her husband and distributee.

Second defense: Mrs. Umphlett died August 26, 1962, and her husband died on the same day, a short time after the death of his wife. (Note: Defendant's allegations imply and both briefs assert

that Mr. Umphlett died as a result of said accident.) The Umphletts had four minor children, unemancipated, all living in the household of their parents; and, except for the interest of the surviving husband (or his estate) in the wife's estate, these children are the beneficiaries of both estates. It concludes: "As the real parties plaintiffs and defendants are the same, whether in their position as plaintiffs or defendants, no valid final decision can be reached herein, and the action ought, therefore, to be dismissed."

Third defense: The said four children are entitled under the Intestate Succession Act to the proceeds of any recovery herein for the wrongful death of their mother. It concludes: "As the real parties in interest in the action brought by plaintiff are the children of W. W. Umphlett, Jr. and as the action is against the Estate of W. W. Umphlett, Jr., then no valid cause of action exists for this alleged tort."

Plaintiff demurred to and moved to strike said second and third defenses on the ground the facts alleged therein do not constitute a defense to plaintiff's action. Judge Hubbard sustained plaintiff's said demurrer and struck defendant's said second and third defenses. Defendant was granted leave to file an amended answer.

Defendant filed an amendment to his original answer. The answer proper and the first defense are not affected by the amendment. The second and third defenses asserted in the amendment are the same as in the original answer except that each contains this additional allegation: "With the exception of this asserted claim, there are no debts outstanding and unpaid, either for burial expenses or otherwise, on behalf of the Estate of Susan Borden Umphlett, Deceased, or the Estate of W. W. Umphlett, Jr., Deceased."

Defendant then alleged in said amendment a fourth defense which, in summary, is stated below.

Fourth defense: The four unemancipated minor children, who lived in the household of their parents, are the real parties in interest; and such children "have no action at law against their said father, W. W. Umphlett, Jr., or the Estate of their father, W. W. Umphlett, Jr., either in themselves or derivatively."

Plaintiff demurred to and moved to strike said second and third defenses, as amended, and said fourth defense, on the ground the facts alleged therein do not constitute a defense to plaintiff's action. Judge Hubbard sustained plaintiff's said demurrer and struck said defenses in their entirety. Defendant excepted and appealed.

Gardner, Connor & Lee for plaintiff appellee.

Battle, Winslow, Merrell, Scott & Wiley for defendant appellant.

BOBBITT, J. Our wrongful death statute, G.S. 28-173, in pertinent part provides: "When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured party had lived, have entitled him to an action for damages therefor,* the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator, or collector of the decedent; . . . The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death; . . . *but shall be disposed of as provided in the Intestate Succession Act.*" (Our italics.)

In this jurisdiction, a wife has the right to sue her husband and recover damages for personal injuries inflicted by his actionable negligence. G.S. 52-10; *Roberts v. Roberts,* 185 N.C. 566, 118 S.E. 9; G.S. 52-10.1. If her death is caused by the actionable negligence of her husband, G.S. 28-173 creates and authorizes an action by her personal representative to recover for her wrongful death. *King v. Gates,* 231 N.C. 537, 57 S.E. 2d 765. The only party who may maintain such action for the wife's wrongful death is "the executor, administrator or collector of the decedent." G.S. 28-173; *Hall v. R. R.,* 149 N.C. 108, 62 S.E. 899; *Graves v. Welborn,* 260 N.C. 688, 690, 133 S.E. 2d 761, and cases cited.

The persons who, under the Intestate Succession Act, G.S. Chapter 29, are entitled to the recovery in a wrongful death action are to be determined as of the time of the decedent's death. *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203; *Cox v. Shaw,* 263 N.C. 361, 139 S.E. 2d 676. If Mrs. Umphlett had died a natural death, intestate, her husband and children would have been her beneficiaries under the Intestate Succession Act.

Plaintiff did not demur to defendant's alleged first defense. If, as plaintiff alleges, Mrs. Umphlett's death was caused by the actionable negligence of her husband there can be no recovery herein in respect of the share to which the husband (or his estate) would otherwise be entitled. "Public policy in this jurisdiction, buttressed by the uniform decisions of this Court, will not permit a wrongdoer to enrich himself as a result of his own misconduct." *Davenport v. Patrick, supra,* and cases cited; *In re Estate of Ives,* 248 N.C. 176, 182, 102 S.E. 2d 807.

Defendant's second, third and fourth defenses are based on these allegations: The husband survived the wife. The four children of the marriage, except as to the interest to which their father (or

his estate) would be entitled but for his actionable negligence, are the beneficiaries of their mother's estate. They are the persons who, under the Intestate Succession Act, are entitled under G.S. 28-173 to any recovery herein. These four children are also the beneficiaries of their father's estate. With the exception of the claim asserted in this action, "there are no debts outstanding and unpaid, either for burial expenses or otherwise," of either estate.

For present purposes, we treat these allegations as allegations of fact deemed admitted by plaintiff's demurrer. Defendant's allegation that the children are the real parties in interest as plaintiffs and as defendants is a legal conclusion not admitted by plaintiff's demurrer. 3 Strong, N. C. Index, Pleadings § 12, p. 627.

The questions presented are of first impression in this jurisdiction.

Based on his assertion that the children are the real parties in interest as plaintiffs and as defendants, defendant contends the action is in reality an action in which the children are suing themselves, that it cannot benefit the children and that it should be dismissed as futile.

"It is elementary that without adversary parties before it a court is without jurisdiction to render a judgment, and it therefore follows that one person cannot be both plaintiff and defendant in the same action." 39 Am. Jur., Parties § 8. This is in accord with our decision in *Newsom v. Newsom,* 26 N.C. 381, where it is said that a suit and judgment in which the same person is both plaintiff and defendant is an absurdity and can have no legal efficacy. The question is whether this elementary legal principle applies to the facts now under consideration.

Defendant asserts the children are the real parties in interest *as plaintiffs* because they, since there are no outstanding claims for burial, hospital and medical expenses, are the persons who will receive, less expenses of litigation and administration, any amount plaintiff might recover herein. They cite in support of their contention *Davenport v. Patrick, supra,* and *In re Estate of Ives, supra,* in each of which the person entitled to the recovery is referred to as *the real party in interest.* However, the significance of the phrase as used in the cited cases must be considered in the context of the factual situation under consideration.

In *Davenport,* the administrator of the wife's estate instituted the action for wrongful death against the surviving husband. There being no children, the husband, under the applicable statute of distribution then in effect, was entitled to all of the personal estate of the wife. In *Ives,* the intestate, while a passenger in an automobile owned and operated by her son, was killed in a collision.

The administrator and the son's liability insurer compromised the wrongful death claim. It was held that, since the compromise consideration was paid to the administrator in settlement of the son's liability for the alleged wrongful death of his mother, the son was not entitled to share in the distribution of the amount so received by the administrator. As stated above, these decisions are based on the proposition that no person will be permitted to profit from his own wrong. In the present action, it is not alleged or suggested that the children were in any way responsible for the mother's death. Hence, the basic principle on which *Davenport* and *Ives* were decided has no application.

Obviously, the children are not the real parties in interest within the meaning of that term as used in G.S. 1-57. They have no right of action for the death of their mother. *Howell v. Comrs.*, 121 N.C. 362, 28 S.E. 362. The right of action vests in the mother's personal representative. *Graves v. Welborn, supra.*

The personal representative who institutes a wrongful death action is not a mere figurehead or naked trustee but has authority as well as responsibility. See *In re Estate of Ives, supra; McGill v. Freight,* 245 N.C. 469, 474-475, 96 S.E. 2d 438.

Defendant asserts the children are the real parties in interest *as defendants* because they are the beneficiaries of their father's estate. Defendant does not allege that use of any of the general distributable assets of their father's estate would be required to pay, in whole or in part, any judgment plaintiff might recover in this action. Defendant's allegations are silent as to whether the father had purchased a policy of liability insurance sufficient to cover, in whole or in part, his liability, if any, in respect of the claim asserted by plaintiff in this action.

Automobile liability insurance is a fact of present day life which defendant may not ignore. It is a matter of common knowledge that millions of car owners purchase automobile liability insurance. G.S. 20-309 requires every owner of a motor vehicle, as a prerequisite to the registration thereof to show "proof of financial responsibility" in the manner prescribed by G.S. Chapter 20, Article 9A. *Swain v. Insurance Co.,* 253 N.C. 120, 116 S.E. 2d 482. Automobile liability insurance serves two purposes. It protects (1) the injured person and (2) the insured.

A liability policy purchased by the husband-father would constitute a valuable asset. During his lifetime, it would protect him in respect of his personal liability and preserve his general estate from depletion; and, upon his death, such policy would constitute a valuable asset of his estate and safeguard the general assets of

his estate for distribution to the beneficiaries. Absent allegations that the husband-father did not have in force and effect a policy of automobile liability insurance sufficient to safeguard the general assets of his estate from liability, in whole or in part, for the payment of any judgment that might be obtained by plaintiff in this action, it does not appear that use of any of the general distributable assets of the father's estate would be required to pay, in whole or in part, such judgment.

The conclusion reached is that the facts alleged by defendant are insufficient to establish that this is in reality an action in which the children are suing themselves and cannot benefit by a recovery herein.

A second contention advanced by defendant is that the children, beneficiaries of both estates, should not be permitted to receive the distributable assets of their father's estate and also benefit from a recovery in this action. To do so, defendant contends, would permit the children to benefit from their father's wrongful conduct. The contention is without merit.

With reference to the father's estate, the benefits the children may receive therefrom will not be increased by their father's wrongful conduct.

With reference to the mother's estate, the right of action the mother could have maintained, if she had survived, vests in her personal representative. The fortuitous circumstance that those entitled to the recovery under the Intestate Succession Act happened to be the children rather than collateral kin of the decedent is not germane to the administrator's right of action.

In *Brown v. Selby,* 332 S.W. 2d 166 (Tenn.), a *divorced* wife, who had custody of the two children of the marriage, was shot and killed by her former husband. The administrator of her estate brought an action for wrongful death under a Tennessee statute similar in all pertinent respects to ours. The defendant demurred to the declaration (complaint) contending, *inter alia,* the action was in reality an action by the children against the father, not permissible under Tennessee law. On appeal, a judgment sustaining the demurrer was reversed. After reviewing prior Tennessee decisions, Tomlinson, J., said: "If the right of action here asserted is the right of the dead mother, as it is, rather than the right of her children, and if the recovery is in her right, as it is, it would be making a fetish, in this Court's opinion, of the common law rule to hold that her right of action could not be maintained because under the circumstances existing in this case an 'incident' of the recovery had in her right is that her recovery passes to her children."

A third contention advanced by defendant is that the real parties in interest *as plaintiffs* "are the minor, unemancipated children" of Mr. Umphlett, and therefore this action, arising out of an unintentional tort of their father, cannot be maintained against the father's estate. The basis of this contention is that considerations of public policy precludes such an action.

In this jurisdiction, an unemancipated minor child, living in the household of his parents, cannot maintain an action in tort against his parents or either of them. *Small v. Morrison,* 185 N.C. 577, 118 S.E. 12, 31 A.L.R. 1135; *Redding v. Redding,* 235 N.C. 638, 70 S.E. 2d 676. Since, under G.S. 28-173, the personal representative has a right of action only "(w)hen the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor," it is held that the personal representative of such unemancipated minor child has no right of action against the parent for the wrongful death of such child. *Lewis v. Insurance Co.,* 243 N.C. 55, 89 S.E. 2d 788; *Capps v. Smith,* 263 N.C. 120, 139 S.E. 2d 19; 3 Lee, North Carolina Family Law (Third Edition), § 248, pp. 174-175.

The present action does not involve the right of an unemancipated minor to sue the parent on account of injuries to such child caused by the parent's actionable negligence. It is an action by the administrator of the wife's estate to recover for *her* wrongful death as a result of her husband's actionable negligence. There is no exception or provision in G.S. 28-173 to the effect the personal representative's right to maintain such action depends in any way on the identity of the particular persons who, under the Intestate Succession Act, would be entitled to the recovery.

In *Fowler v. Fowler,* 130 S.E. 2d 568 (S.C.), the question was "whether an action will lie . . . by the administrator of the estate of a deceased mother for her wrongful death against her husband for the benefit of the minor unemancipated children of the parties." The administrator of the estate of the wife-mother brought an action for wrongful death under a South Carolina statute similar in all pertinent respects to ours. In South Carolina, while an unemancipated child has no right of action against his parent for a personal tort "a wife can maintain an action against her husband for personal injuries sustained in an automobile accident." In upholding the right of the administrator to maintain the action for the benefit of the unemancipated minor children, the Court, in opinion by Taylor, C.J., said: "The Legislative intent is clear in Section 10-1951 to provide a right of action for wrongful death in

all situations where the deceased could have maintained an action for personal injuries *if he or she had survived.* To exclude the instant action from the terms of the statute would amount to our writing therein conditions which the Legislature failed to include, which we are not permitted to do." (Our italics.) Again: "The right to maintain the action for wrongful death is granted irrespective of the beneficiaries named, if the act was such as would, if death had not ensued, have entitled the injured person to maintain an action therefor."

In *Minkin v. Minkin,* 7 A. 2d 461 (Pa.), the plaintiff, a minor, suing by his next friend, brought the action against his mother to recover for the death of his father, alleged to have resulted from the mother's negligent operation of an automobile. The Pennsylvania statute provided that certain persons, including children of the decedent, could institute and maintain an action for the wrongful death of the parent. Whether the action could be maintained was considered in the light of the Pennsylvania rule that it was against public policy to permit an unemancipated minor to sue his parent in tort on account of personal injuries. A divided Court upheld *the minor's* right to maintain the wrongful death action. In the opinion for the Court, Linn, J., said: "On the face of the statutes, then, the plaintiff, a minor child of the deceased father, is entitled to the share specified. The legislature made no exceptions, such as defendant would imply, to the effect that the child shall be deprived of the benefit of the statute when the surviving parent is the tortfeasor, or if the suit conflicts with a rule at times theretofore prohibiting suits disruptive of the family relation. The words of the conjectured exception are not found in the statute, and as it is complete without them, we are not authorized to add them."

In *Heyman v. Gordon,* 190 A. 2d 670 (N.J.), a different conclusion was reached. Gordon, the defendant, was operating a car in which his wife and their 13-year-old son were passengers. The wife died as a result of a collision. The action against the surviving husband-father was instituted by the administrator of the wife's estate for the sole benefit of the minor son. In a four to three decision, it was held that "the substance of the action is a claim for damages for the benefit of an unemancipated child against his parent" and that such action could not be maintained. While not the basis of decision, it was noted that, under the New Jersey statute, the right to maintain a wrongful death action depends upon whether the decedent could have maintained an action, had she lived, for an injury caused by the wrongful act or omission, and that, "for reasons of policy primarily based on the family relation-

ship," New Jersey did not permit one spouse to sue the other for injuries negligently inflicted. Significantly, the majority opinion states: "Where the policy reason has disappeared, as for example because of the death of the defendant spouse, the reason for the bar is gone and the action is permitted against the latter's estate. *Long v. Landy,* 35 N.J. 44, 171 A. 2d 1 (1961)." The dissenting opinion cites and quotes from *Long v. Landy, supra,* with emphatic approval, relying thereon in part as basis for the dissent.

In *Brown v. Selby, supra,* where the defendant had shot and killed his divorced wife, the court rejected the contention that the wrongful death action instituted by the administrator of her estate, being for the benefit of the defendant's minor children, was barred by the rule that a minor may not maintain an action in tort against his father. After noting that "(t)he common law personal immunity rule which protects a father from a tort action by his minor child is based solely upon the public policy of preserving domestic peace and tranquillity in the family," the opinion states: "In the instant case this father has destroyed the domestic peace and tranquillity of the family. He has forfeited his right to the custody of these children, and has murdered their mother to whom their custody was awarded. The repose of that family cannot be subserved by forbidding this action against him for his wrong. In this case, therefore, the reason for the common law rule does not exist. Where the reason fails the rule should not apply."

In *Fowler, Minkin, Heyman* and *Brown,* discussed above, the action was instituted against *a living parent.* The present action is against the estate of a husband-father who died shortly after the tragic accident and as a result thereof.

"The first judicial precedent for the rule denying recovery in *living* family relationships was *Hewlett v. George,* 1891, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682." *Davis v. Smith,* 126 F. Supp. 497. The following from *Hewlett* is quoted in *Small v. Morrison, supra,* by Stacy, J. (later C.J.): "But, so long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." As stated in *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753: "This rule implements a public policy protecting family unity, domestic serenity, and parental discipline."

"In recent years indications have appeared of a growing judicial inclination to depart very materially from the broad doctrine that an unemancipated minor cannot maintain a tort action against his parent." Annotation, 19 A.L.R. 2d 423, 427. In *Dunlap v. Dunlap,* 150 A. 905, 71 A.L.R. 1055, after a full review of prior cases, Chief Justice Peaslee, speaking for the Supreme Court of New Hampshire, said: "Such immunity as the parent may have from suit by the minor child for personal tort arises from a disability to sue, and not from lack of violated duty. This disability is not absolute. It is imposed for the protection of family control and harmony, and exists only where a suit or the prospect of a suit might disturb the family relations. Stated from the viewpoint of the parent, it is a privilege, but only a qualified one." In *accord: Brennecke v. Kilpatrick,* 336 S.W. 2d 68 (Mo.); *Palcsey v. Tepper,* 176 A. 2d 818 (N.J.); *Davis v. Smith, supra.*

The present case is distinguishable factually from *Strong v. Strong,* 267 P. 2d 240 (Nev.), and *Durham v. Durham,* 85 So. 2d 807 (Miss.). *Strong* and *Durham* were suits by minors, by guardian *ad litem* and next friend, respectively, against *a living parent* to recover damages resulting from the wrongful death of the other. In each, it was held that the pertinent wrongful death statute did not repeal the common law immunity of a parent from suit by an unemancipated child.

Here, by reason of the death of the mother and father, there exists no child-parent or other family relationship that may be disturbed by this action. In this factual situation, according to the weight of authority and sound reason, the immunity doctrine has no application.

In *Shumway v. Nelson,* 107 N.W. 2d 531 (Minn.), an action was instituted against her father's estate by a trustee for his minor daughter to recover for the wrongful death of her mother. Both the wife-mother and the husband-father were killed as a result of an automobile accident allegedly caused by the negligence of the husband-father. In upholding the plaintiff's right to recover, it was held that the Minnesota common law rule that "a wife could not maintain an action to recover damages against her husband for injuries received as a result of his tortious conduct" did not preclude a statutory action for the benefit of her next of kin under the Minnesota wrongful death statute. With reference to the Minnesota common law rule "that an unemancipated minor child may not maintain an action against his parents for damages on account of their negligence," the Court rejected the defendant's contention

that said rule operated as a bar to the action brought on her behalf against her father's estate.

In *Krause v. Home Mutual Insurance Co.*, 112 N.W. 2d 134 (Wis.), Mrs. Krause was a guest-passenger in an automobile operated by her husband. The Krause car was involved in a collision that resulted in the immediate death of Mrs. Krause and in the death five days later of Mr. Krause. It was held that the children, under the Wisconsin wrongful death statute, could maintain an action against the father's estate.

In *Brennecke v. Kilpatrick, supra,* a six-year-old minor, represented by her father as next friend, instituted an action against the estate of her mother. A car operated by the mother, in which the minor daughter was a passenger, collided with a truck. As a result, the mother was killed instantly and the minor daughter was injured. The appeal was from an order in which the trial court had dismissed the petition (complaint), basing its decision on the Missouri rule that "an unemancipated child could not maintain a suit against its living parent" based on negligence. However, the Supreme Court, in reversing, stated: "The rule is not an absolute one . . . but generally exists or is adhered to only when the court concludes that to hold otherwise would seriously disturb the family relations and thus be contrary to public policy. The immunity of the parent usually has been predicated upon the premise that to allow such an action against a parent would either disrupt the tranquillity of the domestic establishment or subvert parental control and discipline." The Court concludes: "It is our view that where an unemancipated minor child by next friend is suing the representative of his deceased parent's estate for his negligently inflicted personal injury by that parent public policy does not prohibit such suit and recovery. The doctrine of intrafamily immunity from such suits expires upon the death of the person protected and does not extend to the decedent's estate for the reason that death terminates the family relationship and there is no longer in existence a relationship within the reasonable contemplation of the doctrine. Although there may be immunity from suit between parent and child during life, the immunity does not extend to the personal representative of the deceased parent. The rationale of the rule of parental immunity has been extinguished by the death of the parent and neither logic nor justice persuades that it remain."

In *Palcsey v. Tepper, supra,* unemancipated minors were guest passengers in an automobile operated by their father. The car was involved in a collision that resulted in the death of the father and in injuries to the children. An action was instituted in behalf of the

minors by guardian *ad litem* against the executrix of their father's estate for damages caused by the father's actionable negligence. The question presented was stated as follows: "Does the doctrine of immunity from suit between unemancipated minor children and their parents, which exists during the life of the family relationship, extend to and protect the personal representative of the deceased member of the family?" The court stated: ". . . the question is not one of the absence of duty owed by a parent to his minor child, but instead is one of immunity or disability from suit. The cause of action exists as of the date of the wrongdoing but the courts have interposed a shield of immunity between the family members where the family relationship is still intact." Again: "It is self-evident that if the family relationship no longer exists, having been dissolved by death, then the public policy consideration which supports the rule of immunity likewise no longer exists."

In *Davis v. Smith, supra,* a decision of the United States District Court for the Eastern District of Pennsylvania, it was held that, under Pennsylvania law, the doctrine of immunity of spouses from suit against each other and the doctrine of the immunity of a living parent from suit by an unemancipated child were defenses personal to a living husband and father and were not available after his death. The opinion contains a full discussion of the reasons underlying the immunity doctrines.

In *Ruiz v. Clancy,* 162 So. 734 (La.), it was held that, notwithstanding the wife could not have sued her husband for injuries she sustained on account of his negligent operation of an automobile, the children, by their tutrix, could sue the father's administrator in succession for "the loss of the companionship and care and affection of their mother, and for the grief which the sudden death of their mother brought upon them." A provision of the Louisiana Code of Practice provided: "Children, as long as they are subjected to paternal power, that is to say, while their fathers and mothers are living and they not enamcipated, can not bring suit against them." In view of the father's death, presumably as a result of the same accident, it was held the action was not barred by the quoted statute. Decision was based on the ground that such action would not impair or affect in any way family harmony or parental authority.

In *Long v. Landy,* 171 A. 2d 1 (N.J.), referred to in *Heyman v. Gordon, supra,* the husband was operating a car in which the wife was a passenger. As a result of a collision, the husband died (two days after the accident) and the wife sustained personal injuries. It was held that, while under New Jersey law, "one spouse may not

sue the other in tort," the widow was entitled to bring a tort action against her deceased husband's estate. As stated by Haneman, J.: "The marital status which has been dissolved by death cannot be deleteriously affected by an interspousal action. The public policy which seeks to prevent disharmony in the home has no further factual basis, there being no matrimonial harmony to protect."

Castellucci v. Castellucci, 188 A. 2d 467 (R.I.), is at variance with the decisions discussed above. Mr. Castellucci was the operator of a car in which his wife and two minor sons were riding. As a result of a collision, both parents were killed and the sons were injured. Three actions were instituted against the estate of the husband-father, one by the administrator of the estate of the wife-mother and one in behalf of each minor son. It was held the widow's administrator could not recover because under the Rhode Island statute no action could be maintained "except in cases where had the deceased person lived he would have had an action." It was held that the actions of the minors were barred by the Rhode Island rule "that a minor child could not maintain an action in tort to recover damages against his father." The Court rejected plaintiffs' contention that this rule "should not be extended so as to preclude a minor child from bringing such action against the estate of his deceased parent," on the ground "that a declaration of public policy in this area should preferably be made by the general assembly." It it noteworthy, as indicated above, that the immunity rule, stemming from *Hewlett v. George, supra,* is based on policy considerations declared by the Court rather than by legislative enactment.

Since the policy reasons on which the immunity doctrine rests do not apply to the factual situation under consideration, we are of opinion, and so hold, that the immunity doctrine is of no avail to defendant in this action.

For the reasons stated, the conclusion reached is that the judgment of the court below must be and is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. MAE MALLORY, HAROLD REEP, RICHARD CROWDER, JOHN C. LOWRY, AND RESOLUTE INSURANCE COMPANY AND TIDEWATER BONDING AND SURETY AGENCY, INC., SURETIES FOR MAE MALLORY, HAROLD REEP AND RICHARD CROWDER.

(Filed 15 December, 1965.)

1. Appeal and Error § 19—

Where there is no exception by an appellant to the denial of his motion to strike a judgment of forfeiture entered against him, his assignment of error in regard to the matter is ineffectual, since an assignment of error must be supported by an exception duly entered.

2. Appeal and Error § 21—

An exception to the judgment presents the face of the record proper for review for the purpose of determining whether error of law appears on the face of the record and whether the judgment is regular in form.

3. Arrest and Bail § 10—

A bail or appearance bond ordinarily binds the principal to appear and answer to a specific charge, to stand and abide the judgment of the court, and not to depart without leave of the court, and each of these obligations are separate and distinct.

4. Same—

An appearance bond conditioned upon defendant appearing at a specified term of Superior Court and each succeeding term "pending the final disposition" of the cause, and not to depart without leave of the court, and a cash bond upon like conditions, are not discharged by decision on appeal quashing the indictments, stipulating that defendants are not entitled to their discharge, and stating that the State might proceed upon new indictments.

5. Same—

Service of notice of judgment *nisi* upon the attorney in fact of the surety is service upon the surety.

6. Same—

Upon breach of condition of a cash appearance bond neither issuance of a *scire facias* nor other notice is necessary, and judgment absolute may be entered after 30 days or at the next term of court, whichever is later. G.S. 15-113.

7. Same—

Defendants breach their appearance bonds when they are called and fail to answer upon the return of new indictments after quashal of the original indictments, and judgment *nisi* is thereupon properly entered, and after service of notice upon the surety, judgment of forfeiture is properly entered at the term designated in the notice, but the judgment of forfeiture should further provide that the State should have and recover from the principals and the sureties the amount stipulated in the respective bonds.

APPEAL by defendants from *McConnell, J.*, 30 August 1965 Session of UNION.

Proceeding by the State of North Carolina to enforce forfeited appearance bonds and a forfeited cash deposit for appearance posted in lieu of bond.

At the February 1964 Mixed Session of Union County Superior Court the individual defendants were tried on two separate indictments, consolidated for trial. One indictment charged them jointly on 17 August 1961 with unlawfully, wilfully, feloniously and forcibly kidnapping one Mabel Stegall, a violation of G.S. 14-39. The other indictment is identical except that it charges the kidnapping of G. Bruce Stegall.

Plea: Not guilty. Verdict: Guilty as charged. Judgment of imprisonment was entered as to each defendant, and each defendant appealed to the Supreme Court.

Defendant Mallory gave an appearance bond when she appealed to the Supreme Court as follows:

"NORTH CAROLINA UNION COUNTY	IN THE SUPERIOR COURT CASES NOS. 1088 & 1089
STATE OF NORTH CAROLINA v. May (Mae) Malory	APPEARANCE BOND IN CASES ON APPEAL TO SUPREME COURT

KNOW ALL MEN BY THESE PRESENTS:

"That May (Mae) Malory, as principal, and Resolute Insurance Co., as surety, are held and firmly bound unto the State of North Carolina in the sum of Fifteen Thousand ($15,000) Dollars, for which payment well and truly to be made, the parties hereto bind themselves, their heirs, executors, administrators, and assigns, jointly and severally firmly by these presents.

"Signed, sealed and dated this the 16 day of March, 1964.

"The condition of this bond is such that, whereas the above bounden, May (Mae) Malory having been convicted in the Superior Court of Union County, North Carolina, in the above numbered cases and having appealed from the judgments and sentences of the Court to the Supreme Court of North Carolina, and the Court having fixed her appearance bond in these cases Nos. 1088 Kidnapping G. Bruce Stegall; Nos. 1089 Kidnapping Mabel Stegall in the amount of Fifteen Thousand ($15,000) Dollars:

"Now, therefore, if the above bounden defendant, May (Mae) Malory shall make her appearance AT THE MAY 4th, 1964 TERM OF UNION COUNTY SUPERIOR COURT AND AT EACH SUCCEEDING TERM OF SAID COURT PENDING THE FINAL DISPOSITION OF THE ABOVE CASES, AND SHALL NOT DEPART THE SAME WITHOUT LEAVE OF THE COURT, THEN THIS OBLIGATION SHALL BE VOID; OTHERWISE TO REMAIN IN FULL FORCE AND EFFECT.

s/ May Malory SEAL
May (Mae) Malory
RESOLUTE INSURANCE CO.
By Richard F. Taylor SEAL
Attorney in Fact

"Witness:
Carroll R. Lowder
Clerk of Superior Court
"State of NORTH CAROLINA
UNION COUNTY

"The execution of the foregoing instrument was acknowledged before me by RESOLUTE INSURANCE Co. By Richard F. Taylor, Attorney in Fact, for the purposes therein expressed.
"Witness my hand and seal, this the 16 day of March, 1964.

Carroll R. Lowder
Clerk Superior Court Union County"

Defendant Reep, when he appealed to the Supreme Court, gave an appearance bond identical with that of defendant Mallory, and with the same surety, except that his bond is in the amount of $7,500.

Defendant Crowder, when he appealed to the Supreme Court, gave an appearance bond identical with that of defendant Mallory, and with the same surety, except that his bond is in the amount of $10,000.

Defendant Lowry's wife posted with the Superior Court of Union County $5,000 in cash as security for his appearance, when he appealed to the Supreme Court. In the record Lowry's name is

spelled Lowry and also Lowery. The appearance bond signed by Lowry and his wife is as follows:

"STATE OF NORTH CAROLINA } February 28 Term, 1964
UNION COUNTY } Superior Court

STATE
v. RECOGNIZANCE
John Cyrl Lowry

"In this case the defendant John Cyril Lowry, and Mrs. Marcia Lowry his sureties, come into court and acknowledge themselves indebted to the State of North Carolina in the sum of Five ($5,000.00) Thousand Dollars.

"The conditions of the above obligation are such that if the above-bounden defendant John Cyrl Lowry shall make his personal appearance at the next term of this court, to be held on May 4, 1964 and at each succeeding term of said Court pending the final disposition of the above cases, 19....., and not depart the same without leave, then this obligation to be null and void, otherwise to remain in full force and effect.

"Witness our hands and seals, this 28 day of February, 1964.

"Sworn and subscribed before me this 28 day of February, 1964.

/s/ JOHN C. LOWRY SEAL
/s/ MRS. MARCIA LOWRY SEAL

/s/ CARROLL R. LOWDER, C.S.C.

(on reverse side)

"NORTH CAROLINA, UNION COUNTY.

"Mrs. Marcia Lowry, one of the subscribers to the above undertaking, being duly sworn, says that he [*sic*] is a resident and freeholder in the State of North Carolina, and is worth the sum of $5,000.00 over and above all his [*sic*] debts and liabilities and exclusive of property exempt from execution.

"Sworn and subscribed before me, this 28th day of February, 1964.

/s/ MRS. MARCIA LOWRY

/s/ CARROLL R. LOWDER, C.S.C."

The decision on the appeal in this case was filed by this Court on 29 January 1965, and is in 263 N.C. 536, 139 S.E. 2d 870. We

quashed the two indictments for racial discrimination in the selection of the grand jury that returned the indictments. The Court closed its opinion with this language:

> "The indictments are quashed and the verdict and judgments are vacated for want of valid indictments to support them. It does not follow that defendants are entitled to discharge and dismissal of the charges. If the State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried thereon for the offenses alleged."

The opinion of this Court was certified down to the Superior Court of Union County on 8 February 1965.

At the 15 February 1965 Session of Union County Superior Court, Burgwyn, E.J., entered an order commanding the county commissioners of Union County to prepare a new jury list without regard to race, creed or national origin, and place it in the jury box.

At the 3 May 1965 Session of Union County Superior Court, Shaw, J., had a hearing and found as a fact that the county commissioners had complied with Judge Burgwyn's order, and that the jury drawn for that session of court was properly drawn and constituted. Whereupon, from the jury drawn for that session a grand jury was duly chosen, sworn, impaneled and charged. On 4 May 1965 this grand jury found two separate indictments against all the individual defendants here and one Robert F. Williams. One indictment charged them jointly with feloniously and forcibly kidnapping Mabel Stegall, and the other indictment is identical except that it charges the kidnapping of G. Bruce Stegall. On the day these two indictments were returned by the grand jury, Mallory, Reep and Crowder were each called out in open court, and each failed to answer. Whereupon, the court entered a judgment *nisi* against each one of these three defendants and the surety on the appearance bond of each one of these defendants, and further ordered that a *scire facias* be issued by the clerk. On the same day Lowry was called out in open court, and failed to answer. Whereupon, the court entered a judgment *nisi* on his cash bond.

Notice of judgment *nisi* was issued on 10 May 1965, and served on 28 May 1965 on Richard F. Taylor, Attorney in Fact for the Resolute Insurance Company, the surety on the appearance bond of Mallory; Mallory could not be found so notice of the judgment *nisi* was not served on her. This notice commands Mallory and the Resolute Insurance Company, the surety on her appearance bond, to be and appear before the presiding judge of the Superior Court

for Union County at the courthouse in Monroe, North Carolina, on 30 August 1965, and then and there to show cause, if any they have, why the said judgment *nisi* shall not be made absolute against them, according to their aforesaid appearance bond. Similar notices of judgment *nisi* were issued on the same day and served on the same day on the same Attorney in Fact for the Resolute Insurance Company, surety on the appearance bonds of Reep and Crowder; Reep and Crowder could not be found, so notice of the judgment *nisi* was not served on them.

An answer to the notices of judgment *nisi* served upon the Resolute Insurance Company was filed by it and by its agent, Tidewater Bonding and Surety Agency, Inc., on 30 August 1965. In their answer they admit that they became sureties on the appearance bond of Mallory in the amount of $15,000, on the appearance bond of Reep in the amount of $7,500, and on the appearance bond of Crowder in the amount of $10,000. They allege in substance as follows: During the Spring Term 1965, the Supreme Court rendered its decision in which the convictions of these three persons were reversed and the indictments quashed. From the time of the Supreme Court decision until 4 May 1965, Mallory, Reep, and Crowder were not charged with any criminal offense in the State of North Carolina. That neither the individual defendants nor they were put on notice that the cases would be called for trial at the May 1965 Session of court. That by reason of the aforesaid matters the appearance bonds of Mallory, Reep, and Crowder were absolutely discharged, and were no longer liable for their appearance in Union County Superior Court. Wherefore, they pray that the court issue a judgment discharging them from liability on these appearance bonds, and returning the appearance bonds to them.

The individual defendants here made a motion in writing before Judge McConnell in which they state that their appearance bonds, which the court at the May Session 1965 "had presumed to forfeit," had already expired by virtue of the opinion of the Supreme Court quashing the indictments against them. That the cases against these defendants were prematurely called for trial at the May Session 1965, in that their cases should only have been called for the purpose of determining whether or not the mandate of the State Supreme Court had been complied with and for the purpose of setting new appearance bonds and trial dates. The failure of the solicitor to notify these defendants of his election to proceed with new indictments, and the fact that the solicitor had never sought to admit defendants to new appearance bonds, constitute a denial of their rights under Article I, Section 17, of the North Carolina Con-

stitution, and of the due process clause of the Fourteenth Amendment to the United States Constitution. Wherefore, these defendants, in order to safeguard their constitutional rights, through their attorneys moved the court for a dismissal of the bond forfeitures entered against them, and for a striking of the judgments *nisi* which were entered against them at the May 1965 Session. The court denied this motion by the individual defendants. To the denial of this motion the individual defendants did not except.

Judge McConnell, after reciting in his judgment that none of the individual defendants were in court and that they and the sureties on their bonds have failed to show proper and sufficient cause why their appearance bonds should not be forfeited and judgment absolute entered thereon, and that Lowry had posted a cash bond in the amount of $5,000, entered a judgment forfeiting the appearance bond of Mallory in the amount of $15,000, the appearance bond of Reep in the amount of $7,500, the appearance bond of Crowder in the amount of $10,000, and the cash bond of Lowry in the sum of $5,000.

From this judgment the individual defendants and the corporate defendants appeal to the Supreme Court.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for the State, and Smith & Griffin by C. Frank Griffin for the Board of Education of Union County.

Mitchell & Murphy and W. B. Nivens for defendant appellants Mallory, Reep, Crowder and Lowry.

Seawell & Harrell by Bernard A. Harrell for defendant appellants Resolute Insurance Company and Tidewater Bonding & Surety Agency, Inc.

PARKER, J. The individual defendants and the corporate defendants have brought up separate appeals from the same judgment. We have consolidated these appeals for the purpose of decision in one opinion.

The individual defendants here have two assignments of error: (1) to the entry of the judgment absolute on their appearance bonds, and (2) to the denial by Judge McConnell of their motion for a dismissal of the bond forfeitures entered against them and for a striking of the judgments *nisi* which were entered against them at the May 1965 Session. The individual defendants did not except to Judge McConnell's denial of their motion. "This Court has universally held that an assignment of error not supported by an exception is ineffectual." *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223.

The corporate defendants here have one assignment of error, and that is to the entry of the judgment absolute on the appearance bonds they signed as surety.

It is well-settled law in this jurisdiction that an exception to the judgment presents the face of the record proper for review, and the review is limited to the questions whether error of law appears on the face of the record proper and whether the judgment is regular in form. 1 Strong's N. C. Index, Appeal and Error, § 21, and Supplement thereto, Appeal and Error, § 21.

The contention of the individual defendants and of the corporate defendants is this: When the Supreme Court in its decision on the appeal of the individual defendants reported in 263 N.C. 536, 139 S.E. 2d 870, quashed the indictments against them, there was then no formal and valid charge against the individual defendants, and the individual defendants and the corporate defendants were by this decision released and discharged from any liability on their appearance bonds. With this contention we do not agree.

The Court said in *S. v. Schenck,* 138 N.C. 560, 49 S.E. 917: "It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) not to depart without leave of the court; and that each of these particulars are distinct and independent. This was said, too, with reference to a bail bond worded precisely like the one in this case. It was contended by counsel in that case, which we will presently cite, that the stipulation not to depart the court without leave was an unusual one and of no binding force whatever, and in answering this contention the Court said: 'That a stipulation of this kind was valid and obligatory at common law is not to be doubted. It was so declared more than thirty years ago by this Court after full consideration.' *S. v. Hancock,* 54 N.J. Law, 393. That was a well considered case and seems to be a conclusive authority against the appellant upon the main question presented in the record."

S. v. Hancock, 54 N.J. Law 393, 24 A. 726, is in point here. The facts of that case are as follows: One Bush, being under an indictment for a statutory offense, entered into a recognizance with the defendant, Hancock, as his surety, the recognizance containing a condition "for the appearance" of Bush "to answer said indictment on November 18th, 1890, and not to depart the court without leave." Before the day designated for trial, the indictment was quashed, and a motion was made thereupon to discharge Bush's bail. That motion was refused. Subsequently, Bush, having been again indicted

under the same statute in a different form, notice was given to his surety to produce him before the court on a given day, and, default being made at the time specified, the recognizance was duly forfeited of record. The position taken by Hancock is, that one of the express stipulations of the obligation entered into by him should be held by the court to be of no binding force whatever. He stipulated that Bush "should not depart the court without leave." That stipulation has been broken, and Hancock asserts that such breach is nugatory inasmuch as the stipulation has no legal efficacy. The opinion, written by Chief Justice Beasley, states:

> "That a stipulation of this kind was valid and obligatory at common law is not to be doubted. It was so declared more than thirty years ago by this court, after full consideration, in the case of the *State v. Stout,* 6 Halst. 125. It was there judicially determined that a recognizance in general binds to three things — *first,* to appear to answer either to a specified charge, or to such matters as may be objected; *second,* to stand to and abide the judgment of the court, and, *third,* not to depart without leave of the court; and that each of these particulars was distinct and independent. The court further said that the party was not to depart until discharged, although no indictment should be found against him, or although he be tried and found not guilty by a jury.
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> * * *
>
> "Thus far the subject seems to be free from difficulty, but there is another aspect of it which has laid the ground for the principal argument in behalf of the defence. It is argued that our statute relating to recognizances has annulled the condition usually contained in them, to the effect that the culprit shall not depart the court without leave. The statutory language thus relied on is this: 'That every recognizance entered into, before any court having criminal jurisdiction in this state, shall remain in full force and effect until the cause in which said recognizance shall be entered into, shall be finally determined or the same discharged by the order of the court.'
>
> "In the application of this statute to the case before the court, it was insisted by the counsel of the defendant that the present recognizance having been given in a proceeding under the indictment in question, when that indictment was quashed there was within the purview of the act a final determination of the cause to which the recognizance related. It was argued that the only cause pending before the court was the indict-

ment, and that to annul it was to annul and, consequently, to determine such cause.

"It will be observed that in this course of reasoning it is assumed that the indictment is synonymous with 'the cause,' but this is not to be admitted. The indictment is not 'the cause,' the accusation of criminality is the cause, and the indictment is an incident in pursuing the accusation. It is true that the term 'cause' sometimes expresses a suit or action, but it has a broader signification, which comprises the prosecution of a purpose or object, and it seems to me that the word 'cause' in this act is used in the sense expressed by the word prosecution. Taken in this signification, the cause cannot be said to be finally determined when the indictment is quashed, for the indictment is but a formal part of the prosecution.

"All rational intendment is adverse to the narrower and special meaning of the word cause as employed in the statute, for it is hardly conceivable that it was the legislative purpose to absolve a criminal who was under bail from all obligation to render himself in court in the event of the existence of a flaw in the indictment. In that way criminals of the highest grade and of the most dangerous character would often escape the pursuit of justice. In my opinion, the quashing of this indictment did not finally determine the cause — that is, the prosecution of this culprit.

"And, in addition to this view, it seems to me that the contention on the part of the state that the statute under consideration has not the effect of invalidating the legal operation of the recognizance in any particular, is well founded. The statutory language does not express, and there is no indication of, such a purpose. As we have seen, the common law bound the recognizor to appear up to the final determination of the prosecution, and, then, beyond that occurrence, to remain in the power of the court until he was discharged by the order of the court. The statute declares that the recognizance shall remain in full force until the final determination of the cause, and so far it is merely declaratory of the common law; but it does not say that the recognizance shall have no effect beyond the event so designated. The familiar rule is that statutes derogatory of the common law are to be construed strictly, and it is not perceived how, in the light of such a principle, it can be claimed that the effect which, on general legal rules, is to be given to this clause of the recognizance has been annulled by an act that has no reference to it in terms or by necessary im-

plication, and when such abolition would, in a large degree, be hostile to public policy.

"Let the Circuit Court be advised that it is the opinion of this court that, as the case stands upon the certificate before us, the procedure on this recognizance is sustainable."

The third headnote in the New Jersey Reports reads:

"A culprit giving a recognizance to appear to an indictment, and not to depart from the court without leave, is not discharged from his obligation by the quashing of the indictment."

In *United States v. White,* Case No. 16,678, 28 Federal Cases, Circuit and District Courts, 1789-1880, the Court held, as stated in the second headnote:

"A recognizance, to appear in court from day to day, to answer to a certain indictment, and not to depart without the leave of the court, is not discharged by the quashing of that indictment, but remains in force until the defendant has leave from the court to depart, and if a new indictment be found, he and his bail are bound for his appearance to answer such new indictment."

In *State v. Warden,* 119 Wash. 290, 205 P. 372, the first headnote in the Pacific Reporter reads:

"Obligation of bond given under Rem. & Bal. Code, § 1957, by one bound over to the superior court for trial conditioned to appear and answer the charge is not discharged by demurrer being sustained to the information first filed, because of its failure to state some of the statutory elements of the offense, but requires answer to the 'charge,' which is the crime, and not a particular pleading on amended information being filed."

In its opinion the Court said:

"The obligation of the bondsmen was to see that the defendant appeared in court and answered to the charge, which was that of rape, and they are not discharged on their obligation until the defendant has been released from that charge. The obligation was not to answer the complaint actually on file, but to answer to the charge of rape, whether presented by the complaint or subsequent information properly alleging the crime."

We have found meager authority on the precise question before us for decision. From the number of cases on the subject we have

read, it seems to be generally held that whether the quashing of an indictment will discharge the bail must be determined by the conditions of the bond in question. 8 C.J.S., Bail, § 79(d); 8 Am. Jur. 2d, Bail and Recognizance, § 137; Annotation 20 A.L.R. 604.

In *S. v. Eure,* 172 N.C. 874, 89 S.E. 788, the Court said:

> "An appearance bond by its terms, and under the uniform ruling of the Court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court."

In language crystal clear Mallory, as principal, and Resolute Insurance Company, as her surety, entered into an obligation firmly binding themselves to the State of North Carolina in the sum of $15,000, for which payment well and truly to be made, they bound themselves, their heirs, executors, administrators, and assigns, jointly and severally. This obligation has a condition expressed in language also crystal clear that whereas Mallory has appealed her conviction and sentence for kidnapping in cases Nos. 1088 and 1089 to the Supreme Court and the court has set her appearance bond at $15,000, "Now, therefore, if the above bounden defendant, May (Mae) Malory shall make her appearance AT THE MAY 4th, 1964 TERM OF UNION COUNTY SUPERIOR COURT AND AT EACH SUCCEEDING TERM OF SAID COURT PENDING THE FINAL DISPOSITION OF THE ABOVE CASES, AND SHALL NOT DEPART THE SAME WITHOUT LEAVE OF THE COURT, THEN THIS OBLIGATION SHALL BE VOID; OTHERWISE TO REMAIN IN FULL FORCE AND EFFECT." Her appearance bond "is in the nature of a conditional judgment that may be discharged by performance of conditions or enforced on breach of conditions." 8 Am. Jur., 2d, Bail and Recognizance, § 2. Reep, as principal, and Resolute Insurance Company as his surety, and Crowder, as principal, and Resolute Insurance Company as his surety executed appearance bonds identical with the appearance bond of Mallory, except that Reep's bond is in the amount of $7,500 and Crowder's is in the amount of $10,000. In language crystal clear Lowry, as principal, and Mrs. Marcia Lowry as his surety entered into an obligation acknowledging themselves indebted to the State of North Carolina in the sum of $5,000. This obligation has a condition expressed in language also crystal clear that "the conditions of the above obligation are such that if the above-bounden defendant John Cyrl Lowry shall make his personal appearance at the next term of this court, to be held on May 4, 1964 and at each succeeding term

of said Court pending the final disposition of the above cases, 19....., and not depart the same without leave, then this obligation to be null and void, otherwise to remain in full force and effect." Lowry or his wife posted a cash bond in the sum of $5,000.

This Court closed its opinion in the case quashing the indictments against the individual defendants with these words:

> "The indictments are quashed and the verdict and judgments are vacated for want of valid indictments to support them. *It does not follow that defendants are entitled to discharge and dismissal of the charges. If the State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried thereon for the offenses alleged.*" (Emphasis supplied.)

It is manifest from the clear and express language of all four appearance bonds here and from the clear and express language of this Court in its opinion quashing the indictments against the defendants that the quashing of these indictments did not discharge the appearance bonds, but they remained in full force. When the new indictments were found against the four individual defendants here at the 3 May 1965 Session of Union County Superior Court, each of these four individual defendants at that session were called out in open court, and each one failed to answer, which was a breach of the conditions of each one of the four appearance bonds by each one of the four individual defendants. Pursuant to G.S. 15-113, notices of judgment *nisi* were issued on 10 May 1965 in respect to the Mallory, Reep and Crowder bonds, and served on 28 May 1965 on Richard F. Taylor, Attorney in Fact for Resolute Insurance Company, but the individual defendants could not be found for service on them of the notices. The contention of Resolute Insurance Company that notices of judgment *nisi* were not served upon it as required by G.S. 15-113, but only served on the Attorney in Fact is without merit. The three appearance bonds executed by Resolute Insurance Company are signed Resolute Insurance Company, "By Richard F. Taylor, Attorney in Fact." Service on him was service on Resolute Insurance Company. Further, the corporate defendants filed an answer to the notices of judgment *nisi*, which alleges no sufficient reason why the appearance bonds signed by Resolute Insurance Company should not be enforced for breach of their conditions as above set forth.

In respect to Lowry's cash bond, G.S. 15-113 reads in relevant part:

"Provided, where the defendant deposits cash in lieu of bond or recognizance, upon his failure to appear for trial in accordance with the requirements of such cash bond then judgment *nisi* on the cash bond shall be entered and the defendant shall be charged with legal notice thereof without issuance or service of a *scire facias* or other notice and after thirty days or at the next term, whichever is later, judgment absolute forfeiting and condemning the cash bond shall be entered if the defendant then fails to appear or upon appearance fails to show legal excuse or other satisfactory explanation of his nonappearance at the term when judgment *nisi* was entered."

Judge McConnell properly and correctly entered judgment absolute on the three appearance bonds signed by Mallory, Reep, and Crowder respectively as principals and Resolute Insurance Company as surety on the bonds of each of them, and also in entering judgment absolute forfeiting and condemning Lowry's cash bond.

The contention of the individual defendants that "the failure of the solicitor to notify these defendants of his election to proceed with new indictments, and the fact that the solicitor had never sought to admit defendants to new appearance bonds, constitute a denial of their rights under Article I, Section 17, of the North Carolina Constitution, and of the due process clause of the Fourteenth Amendment to the United States Constitution," is totally without merit. The individual defendants had actual knowledge of the contents of the appearance bonds they signed as principals, and have actual knowledge of the opinion rendered in their case by this Court, or are charged with notice of it.

At the 30 August 1965 Session of the Superior Court of Union County, all four individual defendants were called and failed to answer, and so far as the record and briefs before us disclose all four are still outside the State of North Carolina. In passing we might add that G.S. 15-122 provides: "The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself. . . ."

Judge McConnell's judgment orders that the bonds of Mallory, Reep and Crowder, and the cash bond of Lowry, be, and they hereby are, forfeited absolutely. When this case is certified back to the Superior Court of Union County, the presiding judge shall add to the judgment language in substance as follows: It is further ordered that the State of North Carolina shall have and recover from Mallory as principal and Resolute Insurance Company as surety the

penalty of her appearance bond in the sum of $15,000, and similar language as to Reep's and Crowder's appearance bonds. See *S. v. Bradsher,* 189 N.C. 401, 404, 127 S.E. 349, 351; 18 Am. Jur., Pleading and Practice Forms, p. 189, "18:194. Order for Judgment on *Scire Facias* — Against Sureties on Forfeited Bond or Recognizance."

In the separate appeal of Resolute Insurance Company it appears from a stipulation by counsel of that company and the solicitor that Tidewater Bonding and Surety Agency, Inc., is an agent of Resolute Insurance Company.

The assignments of error by the individual defendants are overruled. The assignment of error by the corporate defendants is overruled.

The judgment below is

Modified and affirmed.

STATE OF NORTH CAROLINA v. CECIL HOLLARS.

(Filed 15 December, 1965.)

1. Criminal Law § 26—

Plea of former jeopardy is not apposite upon a retrial obtained by defendant pursuant to G.S. 15-217.

2. Constitutional Law § 30—

The fundamental law secures to every defendant the right to a speedy trial.

3. Same—

The constitutional right to a speedy trial extends to convicts and prisoners.

4. Same—

Neither the constitution nor the statutes attempts to fix the exact time in which a trial must be had in order to comply with the constitutional requirement of a "speedy" trial, and in the practical application of this relative term four factors are to be considered: the length of the delay, the reason for the delay, prejudice to defendant, and waiver by defendant, the burden being upon defendant to show that the delay was due to the neglect or wilfulness of the State.

5. Same— Record held not to support conclusion that defendant was denied constitutional right to speedy trial.

Some two years elapsed between the vacation of defendant's sentence pursuant to G.S. 15-217 and the retrial. The record disclosed that during this period defendant had counsel for all but a very short time, that de-

fendant had access to the courts both through his counsel and *in propria persona*, that he was tried at the next term after he moved for trial, that during this period he was serving a series of sentences for other offenses except for less than a month prior to the retrial, and that presiding judges at two of the intervening terms were connected with the original trial, that the docket was congested, that it was desirable to try defendant's case with a companion case, and that at least one continuance was at the request of defendant. There was no showing of prejudice to defendant from the delay. *Held:* The record supports the court's ruling that defendant's right to a speedy trial has not been transgressed.

6. Criminal Law § 173—

Once a trial has been declared a nullity in a post-conviction proceeding, defendant may not be allowed to withdraw his petition and reinstate the vacated sentence.

APPEAL by defendant from *Bone, E.J.*, July Special Criminal Session 1965 of NASH.

Defendant was retried upon two bills of indictment charging escape (Case No. 8976) and armed robbery (Case No. 8977) after previous convictions upon the same bills of indictment were set aside in proceedings under G.S. 15-217 *et seq.* The two cases were consolidated for trial. Defendant was again found guilty as charged in both indictments. In Case No. 8976, he was sentenced to two years in the State Prison; in Case No. 8977, to not less than five nor more than seven years. From these judgments, he appeals.

In brief summary, the State's evidence at the retrial tends to show: On March 8, 1960, defendant, Rufus Gainey, and Fred Bowman were among a group of nine convicted felons and "a water boy" from the Nash County Prison Camp who were working "under the gun" on Highway #301 near Battleboro. During the lunch period, pursuant to plan, defendant, Fred Bowman, and Rufus Gainey disarmed the two guards. Taking their pistol and rifle, they locked them and three other prisoners in the cage of the prison truck and drove away with all the prisoners except one "gunman" and the water boy who were left at the scene. Rufus Gainey drove the truck; defendant and two others got in the back, where the guards ordinarily sat. Defendant forced one of the guards to give him his cap and topcoat. After driving some distance, between Nashville and Wilson, the prisoners spotted a Buick automobile in the yard of F. L. Hines, an elderly colored man, who came up as Gainey drove into the yard. The prisoners dismounted; defendant took the pistol from Bowman and shot it into the ground at Hines' feet. Gravel flew up, cutting Hines' face and head. Defendant demanded that Hines give him his car keys. While Hines was "trying to get his mind together," someone said, "Old man, it's your

keys or your life. It don't make any difference." Hines gave the keys to defendant, who then attempted to tie him to a chair. When Hines' wife told defendant that they had no telephone, someone called, "Let's go, Cecil." He went outside and drove the Buick away. After some persuasion, and against the advice of his wife, who told him, "Just don't turn out no more of them things here," Hines released the two guards and the three prisoners who had been left behind locked in the cage.

Defendant's evidence tends to show that before the truck stopped in Hines' yard, defendant "hit the ground" and ran back down the shoulder of the highway, and that he did not leave the Hines yard in the Buick. Defendant did not testify. His witness, Rufus Gainey, said: "I am not testifying that he (defendant) was not there. I testified that I seen him leave there running. Now, if he come back I don't know. He was not in the car when I drove it out of this colored man's yard."

Defendant's criminal record since 1957 is pertinent to this appeal. It follows chronologically:

(1) At the September 1957 Term of Watauga, in Case No. 173, defendant entered a plea of *nolo contendere* to a charge of breaking and entering and larceny. He received a sentence of 2-4 years in the State's Prison. At the same time he received concurrent sentences totaling 6 months in two misdemeanor cases (driving drunk and worthless check).

(2) In September 1958, in the Recorder's Court of Alexander County, Case No. 3788, defendant was convicted upon a charge of destroying State property. His sentence was six months to begin at the expiration of the sentence in Case No. 173.

(3) On December 12, 1959, defendant escaped from the custody of the Prison Department and was recaptured the same day. At the October 1960 Term of Nash, in Case No. 8902, he was convicted of this escape and received a sentence of two years to begin at the expiration of Case No. 3788.

On March 8, 1960, defendant again escaped. He was recaptured August 1, 1960, in the State of Florida. For this escape, a felony, he was indicted at the November 1960 Term of Nash in Case No. 8976. At the same term he was also indicted for armed robbery, an offense allegedly committed in that county on March 8, 1960, in furtherance of the escape. These two cases (Nos. 8976 and 8977) were consolidated for trial. The jury returned a verdict of guilty as charged in each case. (These are the two cases involved in this appeal.)

(4) In Case No. 8976, defendant's sentence was two years, to begin at the expiration of the sentence in Case No. 8902.

(5) In Case No. 8977, his sentence was 5-10 years, to begin at the expiration of the sentence in Case No. 8976.

(6) At the December 1960 Term of Johnston, in Case No. 9795, defendant, represented by counsel, was tried and convicted of armed robbery, for which he was sentenced to not less than 20 nor more than 30 years in the State Prison, this sentence to begin at the expiration of the sentences imposed in Nash County in Cases Nos. 8976 and 8977. Because of the escapes in Cases Nos. 8902 and 8976, defendant did not complete his sentence in Case No. 173 until December 14, 1960. (As a result of an error in prison bookkeeping he was credited with having served the six-month sentence in Case No. 3788 concurrently with No. 173.) On December 14, 1960, he began serving the two-year sentence for escape in Case No. 8902. This sentence was completed on July 1, 1962. He then began serving the two-year escape sentence in Case No. 8976. Under ordinary circumstances he would have completed this sentence on November 19, 1963. However, on April 8, 1963, in post-conviction proceedings under G.S. 15-217 *et seq.*, the two Nash County sentences (Nos. 8976 and 8977) were vacated by Honorable Albert W. Cowper, judge presiding, and new trials ordered upon the original bills of indictment. The State's petition for *certiorari* to review Judge Cowper's order was denied by this Court July 20, 1963. On July 26, 1963, the attorney who represented defendant in the post-conviction proceedings was permitted to withdraw. On August 19, 1963, his present counsel, Don Evans, Esquire, was appointed.

On August 31, 1963, defendant's counsel, pursuant to his request, petitioned the court to transfer him from the Nash County jail to Central Prison until the next Criminal Term of Nash. On the same day, Judge Fountain, the resident judge, entered the requested order.

On September 18, 1963, as the result of a petition directed to this Court by defendant *in propria persona,* we directed the Superior Court of Johnston County to vacate the sentence in Case No. 9795, which was to begin at the expiration of the Nash County sentences, and to enter a proper sentence in view of the vacation of the sentences in Cases Nos. 8976 and 8977. *State v. Hollars,* 260 N.C. 195, 132 S.E. 2d 325. At the October 1963 Term, upon defendant's request, resentencing was delayed until the December 1963 Term, at which time the sentence pronounced was imprisonment for not less than 20 nor more than 30 years. In accordance with the opinion of this Court, however, it was ordered that this sentence be deemed to have begun at the expiration of the sentence in Case No. 8902. This sentence thus began July 1, 1962, and all

credit for the Nash County sentences (Nos. 8976 and 8977) was transferred to the Johnston County sentence.

(7) At this same December 1963 Term, in Case No. 1094, defendant pled guilty to an attempted escape. His sentence was two years to run concurrently with that in Case No. 9795. Commitment on this sentence issued December 2, 1963.

On April 16, 1964, upon defendant's petition, under G.S. 15-217 *et seq.*, the Johnston County sentence in Case No. 9795 was vacated and a new trial ordered. Defendant was returned to Central Prison to complete his sentence in Case No. 1094. Case No. 9795 is still pending on the docket in Johnston County awaiting trial. Defendant finished serving the sentence in Case No. 1094 on May 17, 1965.

When these two cases, Nos. 8976 and 8977, were called for retrial at the July 1965 Special Criminal Session of Nash, defendant (1) entered a plea of former jeopardy; (2) moved for his discharge on the ground that he had been denied a speedy trial; and, when these motions were overruled, (3) moved that he be allowed to withdraw his 1963 petition for a new trial and that the order of Cowper, J., ordering his retrial, be struck, and that the previous judgment entered against him in November 1960 in these two cases be reinstated. This motion was likewise denied. To each of these rulings defendant excepted.

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

Don Evans for defendant appellant.

SHARP, J. Defendant's first assignment of error is to the failure of the court to sustain his plea of former jeopardy. He argues that, since the State failed to protect his constitutional rights in the first trial of these two cases, the court could not again try him for the same offense. The judge correctly denied this plea; this contention has heretofore been decided against defendant. *State v. Gainey*, 265 N.C. 437, 144 S.E. 2d 249; *State v. Anderson*, 262 N.C. 491, 137 S.E. 2d 823; *State v. White*, 262 N.C. 52, 136 S.E. 2d 205.

Defendant next assigns as error the court's denial of his motion that he be discharged because he had not been given a speedy trial. In support of this motion, defendant's counsel made a statement to the court. The solicitor for the State then made a statement. It was upon these statements, which contained no material conflict, that the court made its ruling. They are summarized as follows: Defendant was not tried immediately after his sentence was va-

cated because the solicitor petitioned the Supreme Court for a writ of *certiorari* to review the order of Cowper, J. He was not tried at the August 1963 Term because the presiding judge, Honorable George Fountain, felt that the Nash County cases should await the retrial of the Johnston County Case (No. 9795). According to defendant's counsel, the allegation is that "after this particular armed robbery, (defendant) went to Johnston County and participated in another armed robbery there." (As previously noted, the Johnston County case has not yet been retried.) From time to time, defendant wrote his counsel inquiring why his case was not tried, but counsel did not move the court that he be brought to trial. In February 1964, he wrote defendant that his case would be tried in March; but, at the March Term, for personal reasons, defendant's attorney requested and was granted a continuance. In August, at defendant's instance, counsel requested the solicitor to calendar the case, and the solicitor agreed to try the case at the August Term. The case was not tried, however; nor was it called to the court's attention. At the October Term, the presiding judge was the Honorable Rudolph Mintz, who had presided at defendant's first trial in November 1960. He was also the presiding judge at one other term. He preferred not to retry defendant and counsel did not insist. At another term Honorable Hubert E. May, the presiding judge, had, as solicitor, prosecuted defendant in November 1960. He disqualified himself. The case was calendered for trial at the May 1965 Session. At that time, the post-conviction petition of Rufus Gainey, filed under G.S. 15-217, was pending. He had also been convicted in November 1960, of the escape and armed robbery in which defendant was alleged to have participated, and it was the solicitor's desire to retry defendant and Gainey at the same time if Gainey were awarded a new trial. See *State v. Gainey, supra.* The order awarding Gainey a new trial was entered Thursday afternoon. At noon on Friday, the following day, counsel for defendant, for the first time, made a motion that he be granted a speedy trial. It was then too late to try defendant at that term, but the court set the case for trial at the next term, at which time it was tried.

The fundamental law of this State secures to every defendant the right to a speedy trial. *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870; *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891; *State v. Webb,* 155 N.C. 426, 70 S.E. 1064.

> "The right to a speedy trial is intended to avoid oppression and prevent delay by imposing on the courts and on the prosecution an obligation to proceed with reasonable dispatch. It has been said that the basic policy underlying the constitu-

tional guaranty and the statutes enacted to implement it is to protect the accused from having criminal charges pending against him an undue length of time. However, the guaranty has been held to serve a threefold purpose: it protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and, like statutes of limitation, it prevents him from being exposed to the hazard of a trial after the lapse of so great a time that the means of proving his innocence may have been lost." 21 Am. Jur. 2d, Criminal Law § 242, (1965).

The law grants the right of a speedy trial to every accused. A convict in the penitentiary is not excepted; he too is entitled to a speedy trial of the charges of other crimes pending against him in the same jurisdiction. 22A C.J.S., Criminal Law § 467(3) (1961); 21 Am. Jur. 2d, *supra* § 249; Annot., Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense, 118 A.L.R. 1037 (1939). However, "when the man is in prison, a trial might be longer delayed than when the man is held in jail an unreasonable length of time to await trial because an acquittal in the case where the question is raised would not necessarily terminate the imprisonment when the man is in the penitentiary." *Gerchman v. State,* 206 Tenn. 109, 116, 332 S.W. 2d 182, 185. Nevertheless, release from imprisonment is only one of the purposes of a speedy trial, and the danger that long delay may result in impaired memories and the loss of witnesses is as real to a convict as to any other person charged with crime. Presumably, his anxiety with reference to the pending trial is as great as, if not greater than, that of one who has been admitted to bail.

Speedy is a word of indefinite meaning, *State v. Webb, supra* at 429. Neither the constitution nor the legislature has attempted to fix the exact time within which a trial must be had. "Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court. 22A C.J.S., Criminal Law § 467(4), pp. 24, 25, 30. 'Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportions: the length of the delay, the reason for the delay, the prejudice to defendant, and waiver by defendant. See Note, 57 Colum. L. Rev., 846, 861-63 (1957). These factors are to be considered together because they are interrelated. For example, even a short delay might constitute a violation of defendant's constitutional right where defendant is

held without bail, and there is no reason for the delay.' *United States v. Fay,* 113 F. 2d 620 (C.C.A. 2C 1963)." *State v. Lowry, supra* at 542, 139 S.E. 2d at 875.

The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the State's prosecution. The right to a speedy trial is not violated by unavoidable delays nor by delays caused or requested by defendants. 21 Am. Jur. 2d, *supra* §§ 251, 252, 253 (1965); See Note, 57 Colum. L. Rev. 846, 855, 859 (1957).

In the majority of jurisdictions a defendant waives his right to a speedy trial unless he demands it.

> "It has been held generally that an accused is not entitled to a discharge for delay in bringing him to trial unless it appears that he resisted postponement, demanded a trial, or made some effort to procure a speedier trial than the state accorded him. Accordingly, it is ordinarily deemed that a defendant, in the absence of such effort, has waived his right to a speedy trial under the Constitution and the statutes in aid thereof." Annot., Speedy Trial — Waiver or Loss of Right, 129 A.L.R. 572, 587 (1940); Supp. Annot., 57 A.L.R. 2d 302, 326 (1958).

As pointed out in the Columbia Law Review note, *supra* at 853, this judicially created rule requires a defendant to demand trial or resist postponement since the right to a speedy trial "is not designed as a sword for defendant's escape but rather as a shield for his protection." The courts reason that requiring demand for trial on the merits will prevent a technical evasion of the charge. A strong minority, however, rejects the "demand doctrine" and requires only a motion to dismiss filed before trial. See 21 Am. Jur. 2d, *supra* § 254. Some courts also relieve a prisoner serving another sentence from making such a demand. See Annot., 118 A.L.R. 1037, 1043 (1939).

In *O'Brien v. United States,* 25 F. 2d 90 (7th Cir.), defendant, in default of bail, was confined in jail for 13 months awaiting trial. During the interim he made no demand for a speedy trial, but when his case was called, he moved for his discharge on the ground that his constitutional right to a speedy trial had been transgressed. In affirming the District Court's denial of defendant's motion, Alschuler, Circuit Judge, said: "This defendant does not appear to have been unduly restricted in his access to the court, personally or by counsel. Without determining whether delay alone, or what delay, in bringing to trial would entitle to discharge, we may say

delay unobjected to, without effort to secure earlier trial, does not alone indicate transgression of right to speedy trial." *Id.* at 92.

When defendant's counsel, on the afternoon of the last day of the May 1965 Session, first moved the court that defendant be given a speedy trial, the case was set for trial — *and tried* — at the next term. From the time Judge Cowper vacated the original sentences in these cases on April 8, 1963, until his trial in July 1965, defendant was without counsel only for the period between July 26, 1963, and August 19, 1963 — 24 days. During 1963, defendant himself wrote many letters to the Clerk of this Court with reference to his various sentences. On May 31, 1963, he filed, *in propria persona,* a petition in this Court with the result that we ordered credited on his Johnston County sentence (Case No. 9795) all the time he had served on the Nash County sentence (No. 8976) since the expiration of his sentence in Case No. 8902. It was thereafter that the Johnston County sentence was vacated upon his petition in post-conviction proceedings. If defendant wrote any letters to the judge presiding in Nash County demanding a speedy trial in these two cases, the record before us does not disclose it. It is quite clear that his imprisonment has not restricted this defendant's access to the court, and that it did not prevent him from demanding, *in propria persona,* or through counsel, a speedy trial.

In support of his motion for a discharge from these indictments defendant offered no evidence — indeed, he makes no contention — that he has been prejudiced by the delay in his retrial. Nothing in the record suggests that his ability to present his defense was in any way impaired by the delay. Indeed, the State, in view of the age of two of its witnesses, risked more by the delay than did defendant. See *State v. Patton, supra,* at 365, 366. Defendant's motion for his discharge is purely technical, based upon the lapse of time between July 20, 1963, the date this Court denied *certiorari* to review the August 4, 1963 judgment of Cowper, J., and July 15, 1965, the Special Criminal Session at which these cases were tried. From May 17, 1965, to July 15, 1965, defendant was in jail awaiting trial of these two cases; at all other times he was a prisoner serving a series of sentences.

We do not approve a delay of two years in trying any defendant's case. We must note, however, that the ever-increasing number of criminal cases is putting a heavy strain upon speedy trial. The flood of post-conviction petitions engendered by *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733, and the retrials which some of the petitions — as here — have necessitated, have further burdened courts which were even then

struggling to keep abreast of congested dockets. The combination of circumstances here — the previous connection of two of the presiding judges with defendant's former trial, the desirability of trying defendant's case with the companion case of Rufus Gainey, at least one request by defendant's counsel for a continuance, the congested condition of the docket, plus the fact that a retrial could not have resulted in defendant's immediate release from prison — negate any wilful failure on the part of court officials to give defendant a speedy trial. Considering the reasons for the delay, the lack of prejudice to defendant from it, and his failure to demand a trial earlier, his Honor's ruling that defendant's right to a speedy trial had not been transgressed will not be disturbed.

Defendant's third assignment of error is to the refusal of the court to permit him to withdraw his petition to review the legality of the original trial of these cases and to set aside the judgment in which Judge Cowper vacated the original sentences. Once a trial has been declared a nullity in a post-conviction proceeding, "this nullity cannot be resuscitated and made to serve as the basis for a sentence." *Ruckle v. Warden, Maryland Penitentiary,* 335 F. 2d 336, 338 (4th Cir.). The rationale is that no one may be sentenced without a valid conviction. When a trial is annulled, so is the sentence, and it cannot be reimposed without a new trial. The Post-Conviction Hearing Act was rewritten by N. C. Sess. Laws 1965, ch. 352. Since July 1, 1965, G.S. 15-220 has provided that "the court may, in its discretion, grant leave at any stage of the proceeding *prior to the entry of judgment* to withdraw the petition." (Emphasis added.) After the sentences imposed at the March 8, 1960 Term of Nash were vacated upon defendant's petition in the post-conviction proceedings, Judge Bone was without authority to reinstate the vacated sentences by vacating Judge Cowper's order.

Defendant's other assignments of error challenge the merits of the retrial itself. They relate to the admission of evidence and the charge. We have carefully examined each and find no merit therein. The transcript reveals that defendant has had a fair trial by an able and a conscientious judge, who was careful to preserve all defendant's rights.

In the trial below we find

No error.

STATE v. JOHN EARL BROWN AND JAMES VAN DeLOACH.

(Filed 15 December, 1965.)

1. Criminal Law § 91—

Where a witness competently testifies that defendant offered to sell him a specified chattel, the fact that the witness incompetently adds that the chattel had been taken from a specified place, is not ground for a new trial when the court immediately withdraws the incompetent part of the testimony and instructs the jury not to consider it, the fact that the chattel had been stolen from the place specified being supported by ample, competent evidence.

2. Criminal Law § 122—

In a trial for a felony below a capital offense, whether the judge will sustain a motion for a mistrial is ordinarily within his discretion.

3. Criminal Law § 80—

Where a defendant takes the stand as a witness he may be cross-examined with respect to prior criminal convictions and prior indictments returned against him for similar or like offenses for the purpose of impeaching his credibility as a witness.

4. Burglary and Unlawful Breakings and Enterings § 7—

If any person feloniously breaks and enters or enters any storehouse, shop or other building where personal property is situate, with intent to commit the felony of larceny G.S. 14-72 does not apply, and such person is guilty of a felony notwithstanding the specified chattel taken from the building has a value of less than $200. G.S. 14-54.

BOBBITT, J., concurring.

SHARP, J., joins in concurring opinion.

APPEAL by defendants from *Carr, J.*, May Regular Criminal Session 1965 of WAKE.

The defendants were tried upon a bill of indictment charging that (1) they did break and enter a building occupied by Oldham & Worth, Inc., a corporation, wherein merchandise, chattels, money and valuable securities were being kept, and unlawfully, wilfully and feloniously did break and enter with intent to steal, take, and carry away the merchandise, chattels, money and valuable securities of said Oldham & Worth, Inc.; and (2) did feloniously steal, take, and carry away a Monroe calculating machine of the value of $400.00, of the goods of said Oldham & Worth, Inc.

The State's evidence tends to show that at sometime after 12:00 noon Saturday, 27 March 1965, and before 7:15 a.m. Monday, 29 March 1965, the place of business of Oldham & Worth, Inc., in the City of Raleigh, North Carolina, had been broken into; that three vending machines had been broken into and a Monroe calcu-

lating machine had been taken; that the Monroe calculating machine cost Oldham & Worth, Inc., $400.00 on the date of its purchase several years prior thereto.

Leonard Yates, State's witness, testified that "(A)round the 28th or 29th of March (1965), they (defendants) came to my place of business, and wanted to know if I wanted to purchase an adding machine. They asked $15.00 for it. They did not have the machine with them at that time. * * * I told them I would buy it for a friend." Yates testified, and was corroborated by police officers, Jordan and Gregory, that he "had a conversation" with the police after having been approached by defendants, and related defendants' offer. The police "asked him (Yates) if he would get this machine for * * * (them) and he said he would." Yates further testified that the defendants returned to his place of business later the same day and he informed them he would buy the machine for a friend for $15.00. "They (defendants) said that they would have to go and get the machine and bring it back. They went and got the machine. My car was parked directly in front of the place (Yates' place of business) across the street; they (defendants) put the machine in the back of the front seat on the floor; then came over to the store. They warned me not to say anything or tell anyone where the machine came from or that I was buying it, but they would wait for the money if I would go get it." Yates then drove his car "a couple of blocks" to where the police were waiting, and turned the machine over to them. The machine was later identified as the machine which had been taken from Oldham & Worth, Inc., during the period between noon Saturday, 27 March 1965, and 7:15 a.m. Monday, 29 March 1965.

Evidence of defendant Brown was, in effect, that he had not been with defendant DeLoach "(f)rom Friday night, March 26 (1965) until Monday morning March 29 (1965) * * *"; that he had remained in the vicinity of his home throughout that weekend; and that he had never been in the place of business of Oldham & Worth, Inc., and had not stolen the Monroe calculating machine.

Evidence of defendant DeLoach was that he had been shot on late 26 March 1965 or early 27 March 1965 and had received treatment at a hospital and had remained in the vicinity of his home throughout the weekend of 26-28 March 1965. Defendant DeLoach's mother corroborated his testimony, and he denied ever having been in the place of business of Oldham & Worth, Inc., and also denied that he had stolen the calculating machine.

Expert witness for the defendants testified that the value of the Monroe calculating machine on 28 March 1965 was "about $125.00."

The jury returned the following verdict: "(T)hat each defendant is guilty of entering with the intent to commit a felony and larceny charged in the bill of indictment." From the judgment imposed, defendants appeal, assigning error.

Attorney General Bruton, Deputy Attorney General Harrison Lewis, Trial Attorney Claude W. Harris for the State.

John V. Hunter, III, for defendants.

DENNY, C.J. Defendants assign as error the action of the trial court in failing to declare a mistrial when Detective F. C. Gregory, witness for the State, testified with respect to a conversation between the officer and the State's witness Leonard Yates, as follows:

> "Q. State the nature of that conversation, if you will.
>
> "A. It was late in the afternoon that I talked with Mr. Yates down on South Street. He stated to me that he had been approached by John Earl Brown wanting to sell him an adding machine that came out of the Oldham & Worth place."

Objection and motion to strike. The motion was allowed and the jury instructed as follows:

> "Gentlemen of the jury, you will not consider that part of his statement to the effect that Mr. Yates told him that Brown approached him about selling him an adding machine that came out of any particular place of business. You may consider that Mr. Yates told him that Brown approached him about selling him an adding machine."

Defendants' counsel then moved for a mistrial on the ground that the evidence was highly prejudicial and was not cured by the court's instruction. The motion was denied.

"Ordinarily, when evidence is withdrawn by the court and the jury instructed not to consider it, any error in its admission is averted." Strong's North Carolina Index, Criminal Law, § 91, citing numerous cases, among them, *S. v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *S. v. Green,* 251 N.C. 40, 110 S.E. 2d 609; *S. v. Campo,* 233 N.C. 79, 62 S.E. 2d 500; and *S. v. Strickland* 229 N.C. 201, 49 S.E. 2d 469.

The power of the court to withdraw incompetent evidence and to instruct the jury not to consider it, has been recognized and approved scores of times by this Court. The exception to this method

of procedure is where it appears from the entire record that the prejudicial effect of the stricken evidence was not or probably could not be removed from the minds of the jury by the court's instruction. *Smith v. Perdue,* 258 N.C. 686, 129 S.E. 2d 293. In the instant case, the State offered ample evidence, exclusive of the evidence which was stricken, which, if believed, was sufficient for the jury to find that the adding machine sold to Yates by the defendants was taken from the place of business of Oldham & Worth, Inc.

On a trial for a felony below a capital offense, whether a judge will sustain a motion for a mistrial is ordinarily within his discretion. Therefore, this assignment of error is overruled.

The defendants also assign as error the admission in evidence, upon the cross-examination of defendant Brown by the Solicitor, the following:

"Q. Have you ever been charged with armed robbery or indicted for armed robbery?
"A. Yes.
"Q. When was that?
"A. That was in 1962.
"Q. How many times have you been indicted for breaking and entering?
"A. Once. * * *
"Q. Were you indicted in January of 1965 for breaking and entering?
"A. Yes, I was.
"Q. Were you indicted in 1953 for breaking and entering?
"A. No, I was not."

To each of the foregoing questions defendants' counsel objected. The objections were overruled and the defendants excepted.

When a defendant takes the stand as a witness in his own behalf, he "may be cross-examined with respect to previous convictions of crime, but his answers are conclusive, and the record of his convictions cannot be introduced to contradict him." Stansbury's North Carolina Evidence, 2nd Ed., § 112; *S. v. Cureton,* 215 N.C. 778, 3 S.E. 2d 343; *S. v. Howie,* 213 N.C. 782, 197 S.E. 611; *S. v. Maslin,* 195 N.C. 537, 143 S.E. 3. Likewise, he may be cross-examined with respect to indictments returned against him for similar or like offenses. *S. v. Maslin, supra.*

In the case of *S. v. Maslin, supra,* the State asked the defendant, who was on trial for embezzlement, if "he was then under indictment for abstracting and embezzling funds belonging to the Merchants Bank and Trust Company, for the embezzlement of trust

funds deposited in the same bank by the Snipes estate, and for receiving into the bank certain moneys for deposit when he knew the bank was insolvent." Defendant's objection to each question was overruled, and to each, reserving his exceptions, he gave an affirmative answer. This Court, speaking through Adams, J., said:

> "When the defendant took the stand his status was twofold — that of defendant and that of a witness. As a person accused of crime his character could not be evidenced by the State until he had put it in issue; but as a witness, his character was subject to impeachment.
>
> "* * * (A)n indictment duly returned as a true bill, while in a sense an accusation, is much more than a bare charge: it is an accusation based upon legal testimony and found by the inquest of a body of men, not less than twelve in number, selected according to law and sworn to inquire into matters of fact, to declare the truth, and as preliminary to the prosecution to find bills of indictment when satisfied by the evidence that a trial ought to be had. * * *."

In *S. v. Howie, supra,* the defendant was convicted of rape, and on appeal assigned as error the ruling of the trial court in permitting the State on cross-examination to ask him whether he and another had been indicted for raping another woman on a certain date. The court held the question was permissible under the decisions of this Court, citing *S. v. Maslin, supra.*

In the case of *S. v. Cureton, supra,* the defendant assigned as error the ruling of the trial court in permitting the State on cross-examination to ask the defendant whether he had been indicted as an accessory in another killing. This Court said: "The rule is. 'The party himself, when he goes upon the witness stand, can be asked questions as to particular acts impeaching his character, but as to other witnesses it is only competent to ask the witness if he knows the general character of the party.' *S. v. Sims,* 213 N.C. 590."

Among other decisions supporting the view set out in the above cases are, *S. v. King,* 224 N.C. 329, 30 S.E. 2d 230; *S. v. Neal,* 222 N.C. 546, 23 S.E. 2d 911; *S. v. Broom,* 222 N.C. 324, 22 S.E. 2d 926; *S. v. Griffin,* 201 N.C. 541, 160 S.E. 826; *S. v. Dalton,* 197 N.C. 125, 147 S.E. 731; *S. v. Jeffreys,* 192 N.C. 318, 135 S.E. 32; and *S. v. Spencer,* 185 N.C. 765, 117 S.E. 803.

We hold that the questions propounded to defendant Brown were within the scope of legitimate cross-examination under our decisions. This assignment of error is overruled.

Defendants assign as error the following excerpts of the charge:

"The burden is on the State to satisfy you, the jury, beyond a reasonable doubt that the defendants entered the building of the said corporation with the intent to commit the felony of larceny." Exception No. 10.

"If the State has satisfied you beyond a reasonable doubt that the defendant John Earl Brown either broke or entered the said building of Oldham & Worth, Incorporated, with the intent to commit the felony of larceny, with intent to steal, take, and carry away property from that building belonging to the said corporation, after the building was entered, then it would be your duty to return a verdict of guilty of entering the said building with the intent to commit a felony as to the defendant John Earl Brown, as charged in the bill; if the State has failed to so satisfy you of those facts beyond a reasonable doubt then it would be your duty to return a verdict of not guilty as to that charge against the defendant John Earl Brown." (A similar charge was given with respect to defendant James Van DeLoach.) Exception No. 11.

Defendants contend it was error to charge that the defendants would be guilty if they broke into or entered the premises of Oldham & Worth, Inc., with the intent to commit the felony of larceny; that such instruction deprived them of the benefit of G.S. 14-72, which provides that the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than $200.00, is only a misdemeanor. Consequently, defendants claim they are entitled to a new trial since the jury was not required to find the value of the adding machine involved.

The contentions of the defendants require an examination and consideration of the provisions of G.S. 14-54 and G.S. 14-72.

G.S. 14-54 reads as follows:

"If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking house, counting house or other building where any merchandise, chattel, money, valuable security or other personal property shall be; or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years. Where such breaking or entering shall be wrongfully done without intent to commit a felony or other infamous crime, he shall be guilty of a misdemeanor."

G.S. 14-72 provides as follows:

> "The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars, is hereby declared a misdemeanor, and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering, this section shall have no application: * * *. In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen."

In our opinion, and we so hold, the provisions of G.S. 14-72 apply to the crime of larceny where there is no charge of breaking and entering or breaking or entering involved. In such cases, it is incumbent upon the State to prove beyond a reasonable doubt that the property stolen had a value in excess of $200.00 in order for the punishment to be that provided for a felony. On the other hand, if the value of such property is found to be of the value of not more than $200.00, or less, such larceny is only a misdemeanor and punishable as such.

Under the provisions of G.S. 14-54, if any person breaks and enters or enters any storehouse, shop or other building where any merchandise, chattel, money, valuable security or other personal property shall be, with the intent to commit the felony of larceny, he shall be guilty of a felony. However, in order for the larceny of personal property of the value of $200.00, or less, to be a felony, it must be stolen from the person or from a building feloniously broken into or entered, and the indictment should so charge. In such a situation the provisions of G.S. 14-72 have no application.

As pointed out by Bobbitt, J., in the case of *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91, the General Assembly amended G.S. 14-72 by inserting after the word "dwelling" and before the words "by breaking and entering," these words: "or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be." 1959 Session Laws of North Carolina, Chapter 1285.

Justice Bobbitt further states in the above opinion:

> "* * * It seems probable the General Assembly enacted the 1959 amendment to obviate the question considered in *State v. Andrews, supra* (246 N.C. 561, 99 S.E. 2d 745); for,

under this amendment, larceny by breaking and entering any building referred to therein is a felony without regard to the value of stolen property."

In *S. v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201, the bill of indictment charged a nonburglarious breaking and entering of the residence of one J. N. Street. Barnhill, J., later C.J., traces the origin of the statute involved, points out the various amendments thereto, and then states:

"That section, now G.S. 14-54, is captioned 'Breaking into or entering houses otherwise than burglariously' and makes it a crime for any person, with intent to commit a felony therein, to break or enter the dwelling of another, otherwise than by a burglarious breaking; or any uninhabited house; or any storehouse or similar building where personal property shall be.

"Thus from the beginning, in respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by the Act. A breaking is not now and has never been a prerequisite of guilt and proof thereof is not required. *S. v. McBryde,* 97 N.C. 393; *S. v. Hughes,* 86 N.C. 662; *S. v. Chambers,* 218 N.C. 442, 11 S.E. 2d 280.

"Under the statute it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. Hence, evidence of a breaking, when available, is always relevant, but absence of such evidence does not constitute a fatal defect of proof."

The above opinion was followed and approved in *S. v. Best,* 232 N.C. 575, 61 S.E. 2d 612, and in *S. v. Vines,* 262 N.C. 747, 138 S.E. 2d 630.

To the extent this opinion conflicts with the opinion in *S. v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745, that opinion is modified.

The remaining assignments of error are overruled and the result of the trial below will be upheld.

No error.

BOBBITT, J., concurring: G.S. 14-72 provides, subject to exceptions set forth, that larceny is punishable as a misdemeanor where the value of the stolen goods is $200.00 or less. At common law, both grand larceny and petit larceny were felonies. *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. Under the common law, as amended by G.S. 14-72, larceny is punishable as a felony, notwithstanding the value of the goods stolen is $200.00 or less, if the larceny is

from the person or is accomplished by breaking *and* entering one of the buildings described in G.S. 14-72.

If an indictment charges the larceny of property of a value in excess of $200.00, but fails to charge the larceny was accomplished by breaking *and* entering one of the buildings described in G.S. 14-72, "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." *S. v. Cooper, supra; S. v. Holloway,* 265 N.C. 581, 583, 144 S.E. 2d 634.

On the other hand, if the larceny indictment charges that the larceny was accomplished by means of breaking *and* entering one of the buildings described in G.S. 14-72, and the jury so finds, the crime is punishable as a felony without reference to whether the indictment charges or the jury finds the value of the stolen goods was more than $200.00.

G.S. 14-72 relates solely to punishment for the separate crime of larceny. It relates to G.S. 14-54, if at all, only under very unusual circumstances. See *S. v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745. Under G.S. 14-54, if a person breaks *or* enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent or whether, if successful, the goods he succeeds in stealing have a value in excess of $200.00. In short, his criminal conduct is not determinable on the basis of the success of his felonious venture.

The doctrine of *S. v. Andrews, supra,* can have no application unless it appears affirmatively from the indictment and evidence that the breaking *or* entering was with intent to steal specific identifiable property of the value of $200.00 or less and no other property.

For the reasons indicated, I agree there was no error in relation to the first count. As to the second count, I think there was error in respect of the matter discussed below.

The second count charged larceny of a Monroe Calculating Machine valued at $400.00. It did not charge the larceny was accomplished by means of breaking *and* entering. The evidence was conflicting as to whether the value of the Monroe Calculating Machine exceeded $200.00. Under these circumstances, the court charged the jury that the value of the stolen goods was immaterial if the larceny was accomplished after *entering* the building with intent to commit a felony.

The instruction was erroneous in two respects: (1) The allegations of the second count did not warrant such an instruction; and (2) larceny of property valued at $200.00 or less is punishable as a felony only when accomplished by means of breaking *and* entering.

The jury returned a verdict of "guilty of entering with the intent to commit a felony and larceny charged in the bill of indictment." One judgment was pronounced, to wit, a judgment that each defendant "be imprisoned in the State's Prison for a term not less than five years nor more than seven years each."

It would seem that, under our decisions, see *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363, and *S. v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281, error relating solely to the second (larceny) count is considered immaterial because the judgment, when related solely to the verdict of guilty as to the first count, is well within the maximum permissible limits. Hence, with the foregoing explanation, I concur in the decision.

SHARP, J., joins in this concurring opinion.

WALLACE M. FINCHER v. ROBERT R. RHYNE, SR.

(Filed 15 December, 1965.)

1. Negligence § 22—

In an action for damages for negligent injury the existence of insurance covering defendant's liability is irrelevant to the question of negligence and to the question of the *quantum* of damages, and any reference in the evidence to liability insurance is ordinarily prejudicial and entitles movant to a new trial. The reasons for exclusion of such evidence are as valid under compulsory coverage as under voluntary insurance.

2. Trial § 16; Appeal and Error § 41—

Ordinarily, the admission of testimony to the effect that defendant in a negligence action is protected by liability insurance is prejudicial error and cannot be corrected by the withdrawal of such testimony, and in this case the admission of such testimony together with emphasis of the topic by extensive discussion by the court in withdrawing the evidence, including reiteration of the fact of common knowledge that a motorist is required in this State to prove financial responsibility, *held* prejudicial.

HIGGINS, J., dissenting.

SHARP, J., joins in dissent.

FINCHER *v.* RHYNE.

APPEAL by defendant from *Huskins, J.*, February 22, 1965, Regular "B" Session of MECKLENBURG.

Action to recover for personal injuries and property damage resulting from an automobile accident.

About 5:00 P.M. on 2 August 1963 plaintiff was driving his automobile northwardly on North Tryon Street in the City of Charlotte following a line of traffic. The vehicles ahead came to a halt and plaintiff stopped. While he was waiting for the traffic to move on, defendant, operating his car in the same direction, ran into the rear of plaintiff's automobile.

At the trial the parties stipulated "That said collision was due to the negligence of defendant" and only one issue (relating to damages) be submitted to the jury. The form of the issue was agreed upon and stipulated. The issue was submitted to and answered by the jury as follows:

"1. What amount of damages, if any, is plaintiff entitled to recover:

(a) For property damages?
Answer: 300.00
(b) For personal injuries?
Answer: 12,500.00."

Judgment was entered in accordance with the verdict.

Grier, Parker, Poe & Thompson and James Y. Preston for plaintiff.

Craighill, Rendleman & Clarkson and Hugh B. Campbell, Jr., for defendant.

MOORE, J. Defendant contends that the court erred in refusing to order a mistrial, upon motion made in apt time, when plaintiff testified with respect to defendant's liability insurance, and in commenting on the testimony and charging the jury with respect thereto.

Plaintiff was testifying, on cross-examination, with respect to the damage to his automobile. The following transpired:

"Q. Now, I believe you said something about the engine mounts on your car having been broken. I believe that was sometime after the accident, after you got out of the hospital that you observed that, I mean that you were told or observed that the engine mounts of your car seemed to have come loose?

"A. As I remember, I took my car to Courtesy Ford.

"Q. This was after you got out of the hospital?

"A. No. I think the insurance company, the defendant's insurance company . . .

"Q. (Defendant's counsel). Now, beg your pardon, if the Court please . . .

"A. I can't be sure of this. I was in the hospital, but they estimated and found out the damage themselves, and, in other words, I was told I think by the defense's insurance company that my motor mounts were broken.

(Whereupon Mr. Craighill had a bench conference with the Court.)

"COURT: Well, let the record show defendant moves for a mistrial, and the motion is denied. The defendant excepts.

"COURT: Ladies and gentlemen, this witness has mentioned something about the defendant's insurance company. It has been a rule of law in this State for a long time that, in trying cases such as this, that we don't mention anybody's insurance company, the holding of the Court being based on the idea that mention of insurance prejudices the minds of the jurors; that they get the idea that, 'well, anything we award in this case is going to be paid by some insurance company and so we don't have to be too careful about how much we give a man.' So, now, on that line of thinking, the Courts have held that, if insurance is mentioned, then the Judge should just make a mistrial, continue the case and start all over again at some future session of the Court before another jury; but, now, under the law of this State, everybody is required to carry insurance, who operates an automobile upon the public highways of this State, and every member of this jury knows that; and so am of the opinion that the jury knows that, whether it's mentioned or not, and I am instructing you, now, that the fact that everybody is required to carry insurance has nothing to do with your verdict in this case. Whether you have got insurance or not doesn't have anything to do with whether you are negligent or not in case you are involved in a collision, does it? It wouldn't have a thing in the world to do with the question of negligence. By the same token, it wouldn't have anything to do with how serious a person's injuries might be arising out of a collision. So insurance has got nothing to do with the question that is going to be submitted to you. The parties have agreed on everything in this case except the amount of damages, if any, that Mr. Fincher is entitled to recover. Now, each of you said, when you were accepted as a juror by both sides, that you would well and truly try the issues; that you were impartial, that you would be governed by the evidence and by

the law. Now, if there's any member of the jury there who now thinks that you wouldn't do that simply because this witness has inadvertently mentioned that some insurance company discussed or made some investigation of the extent of the damages to his automobile, if any member of the jury thinks that you cannot be just as fair and just as impartial, if you will let me know that, I will just end this lawsuit and we will go on and try something else, start it over at some later date, before another jury; but if all of you think that you can, that is not going to make a bit of difference with you, then we are going to continue and try this case. Just for the record here, I want some affirmative indication. All of you who feel that you can be just as impartial and that you will try this case just as fairly and impartially, notwithstanding the fact that the witnesses mentioned that an insurance company made some investigation about damages, the extent of the damages to his car, as you would have if that had never been mentioned, all of you who feel that you can and who say that you will do that, hold up your right hand. Let the record show that all twelve jurors so indicate; and, upon that showing with the explanation that the Court has made to the Jury, the defendant's motion for a mistrial is denied.

"COURT (to the attorneys IN THE PRESENCE OF THE JURY): Gentlemen, everybody knows that the law requires all of you to carry liability insurance, if we operate an automobile upon the public highways. Every member of that jury who drives a car has that insurance, because the law requires them to have it, and so there is no need of us pretending about that. And this jury says that that is not going to have anything to do with its verdict, and I don't think it will, myself. If I did, I wouldn't continue the trial, so let's proceed."

Thereafter, in the charge, the court instructed the jury:

"Now, ladies and gentlemen, in the course of the trial some mention was made about insurance. I instructed you fully at that time on that subject, but I will do so again at this time as part of the charge. The Court told you then, and tells you now, that, whether the defendant has insurance or whether he has none, has nothing to do with what your verdict should be in this case. You should not award the plaintiff any more damages, nor should you award him less damages by reason of this subject of insurance. That has nothing to do with your answer. You should be governed by the rules of law I have given you. Each of you by uplifted hand has assured me that

you would do that, and the Court has relied upon your statement to that effect. So just put out of your mind this question of insurance. Everybody is required to carry insurance in North Carolina, and that has nothing to do with whether or not I am negligent or not negligent in connection with some collision in which I may be involved. That has nothing to do with the extent of injury or the absence of injury by reason of any collision in which I may be involved. So put that out of your mind, as you have assured me you would, and arrive at a verdict here based upon the evidence and upon the law as I have given it to you."

"Ordinarily, in the absence of some special circumstance, it is not permissible under our decisions to introduce evidence of the existence of liability insurance or to make any reference thereto in the presence of the jury in the trial of . . . cases" where the relief sought is damages for injuries caused by negligence. *Taylor v. Green,* 242 N.C. 156, 87 S.E. 2d 11; *Jordan v. Maynard,* 231 N.C. 101, 57 S.E. 2d 26; *Duke v. Children's Com.,* 214 N.C. 570, 199 S.E. 918; *Luttrell v. Hardin,* 193 N.C. 266, 136 S.E. 726; *Stanley v. Lumber Co.,* 184 N.C. 302, 114 S.E. 385; *Lytton v. Manufacturing Co.,* 157 N.C. 331, 72 S.E. 1055. This rule is almost universal. 21 Appleman: Insurance Law and Practice, § 12832; Anno. — Informing Jury of Liability Insurance, 56 A.L.R. 1418; Anno. — Showing as to Liability Insurance, 4 A.L.R. 2d 761. Since the enactment of compulsory insurance statutes, it has been held in a few jurisdictions, including California, Georgia and South Carolina, that reference to liability insurance is not error. A.L.R. 2d Supplement Service (1960) p. 297. However, our decisions, since the enactment of the Vehicle Financial Responsibility Act of 1957 (G.S. 20-309 to 319), have adhered to the general rule above stated. *Whitman v. Whitman,* 258 N.C. 201, 128 S.E. 2d 249 (1962); *Greene v. Laboratories, Inc.* 254 N.C. 680, 120 S.E. 2d 82 (1961); *Hoover v. Gregory,* 253 N.C. 452, 117 S.E. 2d 395 (1960). From the opinion in *Hoover,* Stansbury finds "indications that a departure from the rule will not always be censured as severely in the future as it has in the past." Stansbury: North Carolina Evidence, 2d Ed. § 88.

The existence of insurance covering defendant's liability in a negligence case is irrelevant to the issues involved. It has no tendency to prove negligence or the *quantum* of damages. It suggests to the jury that the outcome of the case is immaterial to defendant and the insurer is the real defendant and will have to pay the judgment. It withdraws the real defendant from the case and leads the jury "to regard carelessly the legal rights" of the real defendant.

"No circumstance, a court has said, is more surely calculated to cause a jury to render a verdict against a defendant, without regard to the sufficiency (weight) of the evidence, than proof that the person against whom such verdict is sought is amply protected by indemnity insurance." 56 A.L.R. 1422. These reasons for exclusion are as valid under compulsory coverage as under voluntary insurance. But it is argued that it is unrealistic to attempt to conceal from juries a fact of common knowledge — the compulsory requirement that all vehicles be insured. Liability insurance coverage is required by law in this State, and such requirement is, of course, a matter of common knowledge, but there are many valid reasons for excluding evidence of, or reference to, such coverage in addition to those mentioned above. There are instances in which insurance exists but under the particular circumstances there is no coverage. The limits of coverage vary — the law requires $5000 coverage for injury to one person; all coverage in excess of this amount is voluntary. The jury might infer from the mention of insurance that there is coverage to the extent of the damages prayed for, or they might guess from some reference made that the coverage is only $5000 and be thereby influenced to award inadequate damages. Furthermore, the Vehicle Financial Responsibility Act of 1957 permits the possibility of time gaps in insurance coverage, that is, short periods in which vehicles are uninsured. *Faizan v. Insurance Co.*, 254 N.C. 47, 55, 118 S.E. 2d 303. If it is realistic to allow testimony and references to liability insurance, it would be more realistic to permit the introduction of the terms of the policy and all questions of coverage in the particular case. Such injection of irrelevant issues would be insupportable. The courts cannot, of course, control the deliberations of the jury when they have retired to make up their verdicts, and cannot "black out" segments of their thinking related to matters of common knowledge. But the courts can now, just as effectively as before the enactment of compulsory liability insurance laws, control the trial and exclude irrelevant facts and confine the evidence and the matters arising during the course of the trial to the issues involved.

Where testimony is given, or reference is made, indicating directly and as an independent fact that defendant has liability insurance, it is prejudicial, and the court should, upon motion therefor aptly made, withdraw a juror and order a mistrial. *Luttrell v. Hardin, supra; Allen v. Garibaldi*, 187 N.C. 798, 123 S.E. 66; *Stanley v. Lumber Co., supra; Lytton v. Manufacturing Co., supra.* But there are circumstances in which it is sufficient for the court, in its discretion, because of the incidental nature of the reference, to merely instruct the jury to disregard it. *Keller v. Furniture Co.*, 199

N.C. 413, 154 S.E. 674; *Lane v. Paschall,* 199 N.C. 364, 154 S.E. 626; *Fulcher v. Lumber Co.,* 191 N.C. 408, 132 S.E. 9; *Gilland v. Stone Co.,* 189 N.C. 783, 128 S.E. 158; *Bryant v. Furniture Co.,* 186 N.C. 441, 119 S.E. 823; *Norris v. Mills,* 154 N.C. 474, 70 S.E. 912.

Plaintiff was being cross-examined in regard to incidental items of damage to his automobile. He made reference to "defendant's insurance company". Defendant's counsel, in an unobtrusive manner so as not to emphasize the matter, attempted to interrupt. Plaintiff continued to testify until he had made his full statement, as follows: ". . . they estimated and found out the damage themselves, and, in other words, I was told I think by the defense's insurance company my motor mounts were broken." Thus plaintiff got before the jury that defendant had liability insurance, connected the defendant's and insurance company's interests, and disclosed the company's activity in behalf of the defense. When plaintiff finished his statement, counsel for defendant immediately moved for a mistrial. The court overruled the motion and by extended comment undertook to withdraw the statement from jury consideration. The jury was instructed that the reference to insurance was irrelevant and immaterial. The court obtained a pledge from the jury, by show of hands, that they would not consider it. The court twice announced that defendant had moved for a mistrial but the motion had been denied. He declared: ". . . everybody knows the law requires all of you to carry liability insurance . . . there is no need of us pretending about that." There was further comment in the course of the charge.

This case brings us to grips with the question whether our present rule has been rendered obsolete by the Financial Responsibility Act or, to state it another way, whether the goal of fair trial will be as well or better served by a relaxation of the rule. The destruction of landmarks for the mere sake of change is hardly progress toward a better administration of justice. All must agree that *evidence* of the existence of liability insurance at a trial is irrelevant and immaterial to the issues. When insurance is made a positive element of the trial the danger of injustice either to the plaintiff or defendant is real. Despite the Financial Responsibility Act, many vehicles and motorists are uninsured and if there is insurance the amount varies and the contract does not furnish coverage in many situations. To say or assume that all motorists have automobile liability insurance is a generalization subject to many qualifications. It is suggested that the effect of evidence or mention of insurance should be left to the sound discretion of the trial judge, that is, that the judge, in the exercise of discretion, might

order a mistrial or withdraw the matter of insurance from consideration of the jury by proper instructions and permit the trial to continue — reserving the right to set the verdict aside if it appears that an unfair result has been reached. Notwithstanding the neatness of the suggestion, it would create more problems than it would solve. What instructions would the court give the jury in withdrawing the matter from their consideration? Would an extensive discussion, as in the case at bar, not tend to impress the matter on the minds of the jury? Should there be a discussion of limits of liability? When true, should the judge state that, though insurance had been mentioned, there was in fact no coverage or disputed coverage? Despite its purpose, would not an instruction pledging the jury not to consider insurance introduce a new element in the trial? Would a mere instruction that the matter is immaterial to the issues suffice to offset the potential effect of the evidence? We are of the opinion that it is best to adhere to the present rule that evidence or mention of insurance is not to be permitted. It is simple to understand and administer. Relaxation of this rule will result in relaxation of the care and caution of attorneys and litigants in excluding this matter from the trials. Juries may indeed consider matters of common knowledge in arriving at verdicts, they have always done so, and it is a matter that the presiding judge cannot control. But the possibility that verdicts may be influenced by extraneous matters beyond the control of the judge is the very reason that the judge may in his discretion set verdicts aside to prevent injustices. When such action is necessary, the judge can take it with much better grace when he has not pledged the jury beforehand.

In the instant case the rule required a mistrial.

New trial.

HIGGINS, J., dissenting: In this case the defendant admitted his negligence, leaving only the amount of damages at issue. All pertinent facts are fully set forth in the Court's opinion. If it be conceded the mention of insurance was improper in the first instance, nevertheless, the trial judge took all necessary precautions to instruct and warn the jury against adding anything to the damages on that account. The plaintiff, a witness in his own behalf, said the defendant's insurance company had told him the engine mounts on his automobile were broken. At this juncture the defendant made a motion for a new trial.

Before ruling on the motion for a new trial, Judge Huskins charged the jury at great length that insurance had no bearing on the amount of damages, if any, which resulted from the accident.

Upon inquiry, each of the jurors stated affirmatively that insurance would not influence his answer to the issue of damages. Upon receiving this assurance the court denied the motion for a mistrial.

After the return of the verdict, the judge signed a judgment in accordance therewith. We may rest assured Judge Huskins would not have signed the judgment if he felt the jury had disregarded his instructions and violated its pledge. In order to justify a new trial it is necessary to assume the jurors failed to follow the instructions, failed to keep their individual pledges, and gained their first information the defendant had insurance from the plaintiff's inadvertent reference. May we not assume the jurors already had knowledge that the State law required a showing of financial responsibility? I think the verdict and judgment should stand.

SHARP, J., joins in this dissent.

FRED J. STANBACK, JR. v. VANITA B. STANBACK.

(Filed 15 December, 1965.)

1. Divorce and Alimony § 22—

In all actions for divorce, the children of the marriage become wards of the court and the court has jurisdiction over their custody, which continues even after divorce.

2. Same—

Order awarding custody of the children of the marriage is not final but is subject to modification upon change of condition, the controlling factor always being the welfare of the children.

3. Same; Courts § 9—

One Superior Court judge may not review an order of another, but while an order in a divorce action awarding the custody of the children of the marriage is subject to modification, it may be altered only upon a showing of change in the needs of the children or change in the fitness and capacity of the respective parties to care for them which warrants such modification in the interest of the children.

4. Same—

Some 16 days after the entry of an order awarding custody of the children of the marriage to the father, the mother made a motion for modification of the order for change of condition. At the second hearing the affidavits originally filed were again considered, together with additional affidavits supporting, respectively, the original contentions of the parties, but failing to disclose any change in their condition or the needs of the

children. *Held:* The evidence does not support the court's finding at the second hearing that there had been a change in condition in that the wife had ceased to indulge in intoxicants, and the court was without authority to modify the prior order.

APPEAL by plaintiff from *Gwyn, J.*, July, 1965 Session, ROWAN Superior Court.

On March 22, 1965, the plaintiff, Fred J. Stanback, Jr., instituted this civil action against Vanita B. Stanback for divorce from bed and board and for the exclusive custody of their children, Bradford G. Stanback, age six, and Lawrence C. Stanback, age four and one-half. On April 9, 1965, the defendant filed an answer and cross action denying the material allegations with respect to the cause for divorce and the fitness of the plaintiff and the unfitness of the defendant for the custody of the children. She demanded exclusive custody, together with alimony for herself, allowance for the support of the children, and for attorneys' fees.

On April 22, 1965, pursuant to notice and by consent of the parties, Judge Hal Hammer Walker conducted a hearing on plaintiff's motion for an order awarding to him exclusive custody of the children pending the hearing on the merits. Judge Walker considered the verified pleadings and the numerous affidavits bearing on the welfare of the children and the fitness of the respective parties for their custody.

At the conclusion of the hearing, the court, among others, made these findings:

"1. The plaintiff is a fit and proper person to have the custody of the two minor children, Bradford G. Stanback and Lawrence C. Stanback. The interest, welfare and health of the said children will best be served by awarding their custody to the plaintiff, Fred J. Stanback, Jr.

"2. The defendant, Vanita B. Stanback, has over a long period of time, commencing more than six months ago, consumed excessive amounts of alcohol and by her action and conduct has not been and is not now a proper or fit person to have the custody of her two minor children."

Judge Walker entered an order awarding the custody of the children to the plaintiff to continue until reversed or amended by the court. From the order awarding custody and requiring the plaintiff to pay alimony *pendente lite* and counsel fees, neither party appealed.

On May 8, 1965, the defendant served on the plaintiff and filed with the court this motion:

"Now comes Vanita B. Stanback, defendant, and moves the Court that the Court investigate and consider in this matter now pending before the Court the custody, control and tuition of Bradford G. Stanback and Lawrence C. Stanback, infant children of the plaintiff and defendant, and make such order with reference to the same as to the Court seems just, proper and for the best interest of the said infants of the plaintiff and the defendant and that the Court inquire into the needs, medical expenses and subsistence necessary for the maintenance of the defendant and make such order for additional allowance of alimony *pendente lite* as to the Court appears necessary and that an order be made providing for the payment by the plaintiff for additional attorney fees for the attorneys for the defendant."

On June 19, 1965, Judge Gwyn conducted a hearing at which "(T)he plaintiff and the defendant gave oral testimony. The pleadings and the affidavits (filed before Judge Walker, and many in addition thereto) were also considered." The court rendered judgment in part:

"It appearing to the Court that since the rendition of the order entered by Honorable Hal Walker, Judge of the Superior Court, the conditions have substantially and materially changed in that the defendant, Vanita B. Stanback, no longer indulges in the use of alcoholic beverages; that the earlier addiction to the use of alcohol seriously affected the defendant, leaving her in such condition from time to time to be unable to look after her children; it appearing that the defendant is now sober and is practicing sobriety and has regained her normal emotional equilibrium"; . . .

"IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the custody of the two minor children, Bradford G. Stanback and Lawrence C. Stanback, be awarded to both parents, the plaintiff, Fred J. Stanback, Jr., and defendant, Vanita B. Stanback, to be divided equally between the two. . . ."

From the order, the plaintiff appealed.

Kluttz and Hamlin by Clarence Kluttz; Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Norwood Robinson and Robert A. Melott for plaintiff appellant.

Kesler and Seay by Thomas W. Seay, Jr., Walser, Brinkley, Walser and McGirt by Walter F. Brinkley, George L. Burke, Jr., for defendant appellee.

HIGGINS, J. The only question now presented for decision is the validity of the order entered by Judge Gwyn on June 19, 1965, modifying Judge Walker's custody order of April 26, 1965. In divorce actions, whether for the dissolution of the marriage or from bed and board, the court in which the action is brought acquires jurisdiction over the custody of the unemancipated children of the parties. *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879. The jurisdiction continues even after divorce. *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641. The children of the marriage become the wards of the court and their welfare is the determining factor in custody proceedings. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133. As children develop their needs change; nevertheless, the needs must be supplied by the parent whose ability to supply them may change. For these reasons orders in custody proceedings are not final.

Ordinarily, there is no appeal from one Superior Court to another. *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153. In matters of law or legal inference the appeal must be from the Superior Court to the Supreme Court. However, because of the court's paramount regard for the welfare of children whose parents are separated, the court, for their benefit, and upon proper showing, may modify or change a custody award. *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871; *Smith v. Smith,* 241 N.C. 307, 84 S.E. 2d 891; *Cameron v. Cameron,* 232 N.C. 686, 61 S.E. 2d 913.

In this case Judge Walker, on April 22, 1965, entered his custody order based upon the verified pleadings and the affidavits submitted by both parties. In the complaint the plaintiff alleged his fitness and the defendant's unfitness for the children's custody. The plaintiff's affidavits — 43 in number — tended to support the allegations of his complaint. The defendant's answer alleged her fitness and the plaintiff's unfitness for custody. Her affidavits — four in number — tended to support her claim. Dr. Green, her personal physician since January, 1963, and Dr. Corpening, who had treated the children, made affidavit that they had never observed any signs of alcoholism or lack of proper care for the children. Judge Walker made the findings set out in the statement of facts and entered his order awarding custody to the plaintiff. In addition to custody, the court awarded the home to the defendant and required the plaintiff to pay $100.00 a week alimony and the expenses incident to keeping up the house. The court also awarded defendant's attorneys $2,000.00.

Sixteen days subsequent to Judge Walker's order the defendant made a motion in the cause before Judge Gwyn, "(T)hat the court investigate and consider in this matter . . . the custody (of the two children) and make such order as to the court seems just and

proper and for the best interest of the infants . . ." The plaintiff, by motion, challenged the jurisdiction of Judge Gwyn upon the ground that Judge Walker had decided the controversy and that a change in condition was not alleged and had not taken place.

Judge Gwyn conducted a hearing upon the basis of the pleadings, the affidavits before Judge Walker, and in addition 18 new affidavits filed by the plaintiff and 38 filed by the defendant. Among the new affidavits introduced by the defendant were three from New York doctors specializing in psychiatry. Drs. Sullivan, Rule, and Lipton examined the defendant on May 27 in New York. Each gave as his opinion on the basis of this examination that the defendant is well able to care for her children. Dr. Sullivan stated: "On the basis of facts made known to me I find her well able to look after her children." However, affiant also stated: "No specific psychiatric diagnosis can be derived at. There is certainly no clear cut indication of paranoid psychosis."

Dr. Rule stated: "There is, of course, no history suggestive of psychotic depressive process, although she had had two full time pregnancies and is at the present in the late stages of the third. There is no slowing nor any evidence of manic agitation. The behavior she describes, including the cutting of a pair of her husband's pants indicates no deep rooted psychotic trend."

Dr. Lipton said: "There is no indication of any severe neurotic or psychiatric process."

A fair analysis of the evidence before Judge Walker emphasizes its sharply conflicting character. The affidavits of the three doctors from New York, on the basis of their single examination, do not disclose that any change had taken place in the defendant's condition between April 22, 1965 and the date of their examination on May 27, 1965. The tenor of those affidavits follows that expressed by Dr. Green and Dr. Corpening which were considered by Judge Walker. There is no evidence the fitness or unfitness of either party had changed between the hearings. There is no evidence the needs of the boys had changed during that time, or that they were not properly cared for by the father.

A judgment awarding custody is based upon the conditions found to exist at the time it is entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when they occur. In a bitter controversy between separated parents over the custody of children, one is usually dissatisfied with the award. The aggrieved party, however, must appeal to the Supreme Court, or must wait for a more favorable factual background in which to demand another hearing by motion in the cause. "It may be well to note that on a hearing of this kind the judgment is not

intended to be a final determination of the rights of the parties touching the care and control of the child, but, on a change of conditions, properly established, . . . the question may be further heard and determined." *In Re Means,* 176 N.C. 307, 97 S.E. 39. The pleadings and the affidavits show the intense bitterness existing between the parents of the two boys whose custody is here involved. Whether the one or the other should be awarded exclusive custody, or whether in the light of the background the boys should be required to switch from one to the other each week, are matters of grave concern that the courts, both trial and appellate, may not view lightly.

This controversy illustrates the difficulty of determining disputed facts from *ex parte* affidavits. When this case is heard on the merits, where the witnesses are before the court and subject to cross-examination, the findings thus established will, or may, justify a change in the order. Judge Gwyn's finding of changed conditions is not supported by the evidence. Absent evidence of change he was without authority to modify Judge Walker's order. A famous Civil War Cavalry hero, asked to explain his successful battle tactics, replied, "Git thar fust." In this case Judge Walker "got thar fust."

Reversed.

ROBERT F. O'BERRY, PLAINTIFF v. LINNIE DONALD PERRY, DEFENDANT, AND THE GREAT AMERICAN INSURANCE COMPANY, ADDITIONAL DEFENDANT.

(Filed 15 December, 1965.)

1. Automobiles § 11—

The function of a headlight is to enable a motorist, under normal atmospheric conditions, to see an object 200 feet ahead; the function of a parking light is to render a vehicle visible under similar conditions for a distance of 500 feet.

2. Appeal and Error § 42—

Defendant testified to the effect that he did not have his son enter for him a plea of guilty in the recorder's court to a charge of failing to yield the right of way, but that he did not object to it. In recapitulating the evidence the court charged that defendant testified that his son pleaded him guilty before a justice of the peace for failing to yield the right of way. *Held:* If defendant deemed the court's statement to be inaccurate he should have called the matter to the court's attention in time for correc-

tion, and upon defendant's failure to do so he waives error, if any, therein.

3. Trial § 50—

Parties, counsel, witnesses, relatives and friends should refrain from any conduct which casts the slightest suspicion upon the integrity of the trial, and should scrupulously avoid any communication and social contact with jurors during the trial.

4. Same—

Defendant moved for a new trial on the ground that during the noon recess while the trial was in process a juror had walked with plaintiff and one of his witnesses from the courthouse to lunch. The evidence adduced at the court's inquiry tended to show that the encounter was accidental, that the parties thereto did not discuss the case, and that the incident in no way affected the outcome of the trial. *Held:* The court's denial of the motion to set aside the verdict will not be disturbed.

5. Same—

The granting or denial of a motion for a mistrial for alleged misconduct of a juror rests in the sound discretion of the trial judge, and his ruling thereon will be upheld on appeal unless it is clearly erroneous.

APPEAL by defendant Perry from *Bundy, J.*, May 1965 Session of BERTIE.

Action and counterclaim for personal injuries and property damage resulting from a collision between plaintiff's automobile and defendant's pickup truck.

On November 12, 1963, between 5:30 and 5:45 p.m., plaintiff, aged 38, was driving his new Ford automobile (it had 4-6 miles on it) south on highway #45, a two-lane, paved road. At a point about one mile south of Colerain, defendant, aged 78, drove his truck from a farm lane into the highway, and the collision resulted. Plaintiff's evidence tends to show: It was dark; his headlights were burning. His speed was between 40 and 50 MPH. Defendant drove his unlighted truck from a farm lane used by him and his tenants onto the highway directly in front of plaintiff, who was no more than one or two car-lengths away. The front of plaintiff's automobile struck the left side of defendant's truck. Debris, which extended all across the highway, was in plaintiff's lane at the entrance to the farm road. At this point the highway is straight in both directions, and visibility to the north is unobstructed for 4/10ths of a mile. In the impact, plaintiff's nose was broken, and he received disfiguring and permanent injuries which impair his breathing. His automobile was a total loss.

Defendant's evidence tends to show: He left his farm between sunset and dark. Only his parking lights were burning. When he came to the highway, he stopped and looked both ways. He saw

plaintiff approaching from the north "150 yards away to possibly 200 yards." Defendant, misjudging plaintiff's speed, started across the road. Plaintiff was driving 60-70 MPH — much faster than he had thought. Plaintiff's automobile struck defendant's truck between the rear wheel and the door when the front wheels were across the center line. In the collision, the truck was overturned and damaged. Defendant received a cut on his forehead and on his knee.

The jury answered the issues in plaintiff's favor, assessing his personal injuries at $12,500.00. The parties had stipulated his property damages. From the judgment entered upon the verdict, defendant appeals, assigning errors.

Cherry and Cherry by Thomas L. Cherry for plaintiff appellee.

Pritchett & Cooke by J. A. Pritchett and Stephen R. Burch for defendant appellant.

SHARP, J. Plaintiff alleged and offered evidence tending to show that, after dark, defendant drove a totally unlighted truck from a private drive onto the highway in front of his approaching automobile. Defendant's testimony was that at the time he entered the highway his parking lights were burning. After explaining to the jury the requirements of G.S. 20-129 that during the period from half an hour after sunset to half an hour before sunrise, and at any other time when there is not sufficient light to render clearly visible any person on the highway at a distance of 200 feet ahead, every vehicle upon a highway shall be equipped with lighted front and rear lamps as required by law, the court gave the following instruction, which defendant assigns as error: "I instruct you, gentlemen, that the parking light is not a headlight, and is not a front light, and it is not a rear light, and not a light adapted for the use of driving, but is for the use which its name indicates."

The function of a front light or headlight, defined by G.S. 20-129 and G.S. 20-131, is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator *to see* a person 200 feet ahead. The function of a parking light is to enable a vehicle parked or stopped upon the highway *to be seen* under similar conditions from a distance of 500 feet to the front of such vehicle.

The real cause of this collision, however, seems to have been the failure of defendant to yield the right of way to plaintiff as required by G.S. 20-156(a). Plaintiff's headlights were burning, and defendant saw him coming at the time he entered the highway. We perceive in the above instruction no prejudice to defendant.

Without objection, defendant testified on cross-examination as follows: "I did not go into the Justice's Court and enter a plea of guilty of failing to yield the right of way before entering the highway. I did not have my son, Norman Perry, to come into court and do this for me. I did not object to it." In recapitulating this evidence in the charge, the judge made the following statement, which defendant assigns as error: "On cross-examination he testified that with his knowledge his son pleaded him guilty before a Justice of the Peace for failing to yield the right of way." Defendant contends that "this is not supported by the record."

In context, and without explanation — and none was forthcoming — defendant's testimony that "he did not object to it" justifies the inference that defendant knew his son had entered a plea for him. If defendant, at that time, had deemed the judge's statement to be inaccurate, he should have called the error to his attention then and there in order to give the court opportunity to make correction. *Manufacturing Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32. This defendant did not do; and his failure waived whatever error, if any, there might have been. *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829.

Upon the coming in of the verdict, defendant moved to set it aside because, during the noon recess that day, a juror, G. H. Perry, had walked with plaintiff and his witness Askew from the courthouse to "the barbecue place" for lunch. The record does not show when defendant acquired this information, but plaintiff makes no contention that defendant waived his right to object by failing to make complaint to the court until after verdict. See 89 C.J.S., Trial §§ 455, 483 (1955); Annot., Juror — Contact with Party, 55 A.L.R. 750, 764-65; Supplemental, Annot., 62 A.L.R. 2d 300,330.

The court conducted an immediate inquiry which revealed the following: Juror Perry encountered plaintiff and his witness Askew at the door. Perry shook hands with both and jokingly asked Askew what office he was running for. Plaintiff offered the juror a ride which he declined. The three then walked to lunch together, talking about fishing and corned herring. At one point the juror said, "We have not said one word about the case." Several other jurors and the sheriff also ate lunch at the barbecue place at the same time. Juror Perry did not return to the courthouse with plaintiff and Askew. The juror, whom the sheriff described as a truthful man of good character and reputation, testified that "if (he) had not seen Mr. O'Berry when he left the courthouse (his) opinion would have been the same as it was in the jury box"; that he was "awful sorry anything like that happened"; and that at no time was the case men-

tioned. The judge found that the questioned encounter was casual, and that it had not affected the verdict. He denied the motion.

His Honor understated the matter when he said to the juror, "It would have been better if you had not gone." Not only the parties and their counsel, but also their witnesses, relatives, and friends should refrain from any conduct which casts the slightest suspicion upon the integrity of the trial. They should scrupulously avoid any communication and all social contacts with jurors. Nevertheless, "brief, public, and nonprejudicial conversations between jurors and parties or their relatives will not vitiate the verdict or require that the jury be discharged, and a mistrial is properly denied where the conversation was conceived in innocence and related to a matter entirely foreign to the case." 89 C.J.S., Trial § 457(b) (1955); 53 Am. Jur., Trial §§ 907, 968 (1945).

The impression here is that the encounter between the juror and plaintiff and his witness was accidental; that they were all self-conscious as a result of it; and that they thought the proprieties and the amenities were observed so long as they did not discuss the case. This seems to have been the general understanding for, during the inquiry, the trial judge noted that when he returned to the courtroom after lunch, he had observed one of plaintiff's counsel, the defendant, and four or five jurors sitting together "over there."

Trial judges routinely instruct jurors not to discuss with any person the case they are trying. At every term, however, there are on the panel jurors who have never served before, and, without more, they might not construe this instruction as an injunction to keep strictly aloof from all the participants in the trial. The situation here presented demonstrates the wisdom of an unequivocal instruction to jurors that, insofar as possible, they should refrain from any conversation, and avoid any contact, with all persons involved in the case they are hearing.

The granting or denial of a motion for a mistrial or a new trial because of the alleged misconduct of a juror rests in the sound discretion of the trial judge, and his ruling will be upheld on appeal unless it is clearly erroneous. *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363. In the judge's refusal to set this verdict aside there is no evidence or suggestion of an abuse of discretion. His ruling will not be disturbed.

In the trial we find

No error.

MRS. LUCILLE WILDER v. CARLTON H. HARRIS, MRS. JANE H. STEWART AND EDWIN STEWART.

AND

MRS. ESTELLE WILDER EDWARDS v. CARLTON H. HARRIS, MRS. JANE H. STEWART AND EDWIN STEWART.

(Filed 15 December, 1965.)

1. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiffs, giving them the benefit of the most liberal interpretation of which it is reasonably susceptible.

2. Automobiles § 17—

When two drivers approach at approximately the same time an intersection uncontrolled by traffic signs, it is the duty of the motorist on the left to yield the right of way, G.S. 20-155, and the motorist on the right has the right to assume he will be given the right of way and act on this assumption until he is given notice to the contrary.

3. Automobiles § 41g—

In this action by passengers in a car, the physical facts indicated that both vehicles entered an intersection at about the same time, plaintiffs' driver being on the right. The only eye-witness was one of plaintiffs who testified that plaintiffs' driver was driving at some 35 MPH in a normal manner with nothing to complain of about in her driving, and that immediately before the accident the witness saw the headlights of a car approaching the intersection from the witness' left. *Held:* There is no sufficient evidence that plaintiffs' driver was guilty of negligence constituting a proximate cause of the accident.

APPEAL by plaintiffs from *Hall, J.,* March, 1965 Session, VANCE Superior Court.

The plaintiffs instituted these civil actions to recover for the personal injuries they sustained as a result of a motor vehicle collision at the intersection of Wester Avenue and Montgomery Street in Henderson. Wester Avenue, built for north-south traffic, is 36 feet wide. Montgomery Street, built for east-west traffic, is also 36 feet wide. They intersect at right angles.

The plaintiffs brought separate actions which were consolidated and tried together. At the time of their injuries, both were passengers in a Volkswagon being driven north on Wester Avenue by its owner, Jane H. Stewart. The vehicle was in collision with the 1957 Chevrolet driven eastwardly on Montgomery Street by its owner, Carlton H. Harris. There were no traffic controls on either street at the intersection. The collision occurred about 8:30 p.m. on October 19, 1963.

The plaintiffs allege the defendant, Jane H. Stewart was guilty of these negligent acts:

"(a) In that the defendant Jane H. Stewart failed to use due care, caution and circumspection.

"(b) In that the defendant Jane H. Stewart drove the said Volkswagon Automobile into the said intersection when she saw or should have seen the automobile being operated by the defendant Carlton H. Harris, approaching the intersection at a high and unlawful rate of speed.

"(c) In that the defendant Jane H. Stewart entered the said intersection and continued to drive into the intersection without bringing her said motor vehicle to a stop, or without slowing the same to prevent a collision with the automobile being driven by the defendant Carlton H. Harris.

"(d) In that the defendant Jane H. Stewart entered the intersection without keeping a proper lookout and without exercising due caution."

The investigating officer testified the debris was located a few feet to the east of the center of the intersection. From that point skid marks extended westwardly on Montgomery Street in a continuous line for 30 feet. Twelve feet of these marks were west of the intersecting street line. Skid marks extended southwardly on Wester for 21 feet. Nine feet of the skidmarks were south of the intersecting line. The Volkswagon was damaged on the left side — the Chevrolet was damaged on the front.

Mrs. Estelle Wilder Edwards, one of the plaintiffs, testified she and her sister-in-law, Mrs. Wilder, the plaintiff in the companion case, were passengers in the Volkswagon being driven by the defendant, Mrs. Jane H. Stewart, north on Wester at a speed of about 35 miles per hour. ". . . I saw headlights on a car coming on Montgomery Street on my left as we approached the intersection. It was dark. The lights were on on Mrs. Stewart's car. I was right close to the intersection when I observed the lights coming on my left. . . . The lights were shining through the bushes (growing on the southwest corner lot at the intersection). . . . Mrs. Stewart was driving at a normal speed until she approached the intersection. . . . She continued to drive in a normal fashion. I never at any time complained about the manner in which she drove. There was nothing to complain about. . . . It is fair to say that I simply saw some lights and don't know exactly where I was in regard to the intersection."

Mrs. Edwards did not remember anything after seeing the lights approaching on Montgomery Street. Mrs. Wilder, the other plaintiff, does not recall anything after the Volkswagon entered Wester

Avenue until she regained consciousness in the hospital. Both passengers were injured in the collision.

At the conclusion of the plaintiff's evidence the court sustained a motion for judgment of involuntary nonsuit in the actions against Mrs. Stewart. Thereupon the plaintiffs took a voluntary nonsuit in their actions against the defendant Harris. The plaintiffs appealed.

Perry, Kittrell, Blackburn & Blackburn by Charles F. Blackburn for plaintiff appellants.

Dupree, Weaver, Horton, Cockman & Alvis by F. T. Dupree, Jr., J. C. Proctor for defendant appellee, Mrs. Jane H. Stewart.

HIGGINS, J. The appeal presents for review the question of law whether the evidence offered was sufficient to permit the jury to find from it that the defendant, Mrs. Jane H. Stewart, was guilty of any acts of negligence properly alleged which constituted a proximate cause of the injuries and damages sustained by the plaintiffs in the collision. The evidence must be considered in the light most favorable to the plaintiffs, giving them the benefit of the most liberal interpretation of which it is reasonably susceptible. *Kinlaw v. Willetts,* 259 N.C. 597, 131 S.E. 2d 351; *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598; *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743; *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686.

The plaintiff, Mrs. Edwards, gave the only eyewitness account of what occurred at the intersection. Her testimony is direct and unequivocal. It discloses that the defendant was driving her Volkswagon north on Wester Avenue at about 35 miles per hour and in attempting to cross Montgomery Street a collision occurred in which the front of the Chevrolet driven by the defendant Harris struck the left side of the defendant's Volkswagon in which the plaintiffs were riding as passengers. Skid marks of the Chevrolet extended westward 30 feet from the point of impact. The skid marks from the Volkswagon extended 21 feet southward on Wester. The intersection was not controlled by any traffic signs or signals. Mrs. Edwards at some time before entering the intersection (no other estimate) saw through the bushes on the corner lot the headlights of an approaching automobile, presumably the Chevrolet driven by Harris who admitted in his answer that he was the driver of the vehicle which collided with the Stewart Volkswagon. The skid marks and the point of collision indicated the two vehicles entered the intersection at approximately the same time. As the two drivers approached the intersection, uncontrolled by traffic signs, it was the duty of the defendant Harris to yield the right of way to the ve-

hicle on his right. G.S. 20-155; *Rhyne v. Bailey,* 254 N.C. 467, 119 S.E. 2d 385; *Mallette v. Cleaners, Inc.,* 245 N.C. 652, 97 S.E. 2d 245; *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544. The defendant, Mrs. Stewart, had the right to assume and act on the assumption until given notice to the contrary that the operator of any vehicle approaching the intersection to her left would obey the law and yield the right of way. *Rhyne v. Bailey, supra; Carr v. Lee, supra; Downs v. Odom,* 250 N.C. 81, 108 S.E. 2d 65.

The evidence of negligence on the part of Mrs. Jane H. Stewart was insufficient to support an issue of any of the acts of negligence charged, and the judgment of involuntary nonsuit as to her is

Affirmed.

JAMES C. GREENE COMPANY v. OSCAR ARNOLD.

(Filed 15 December, 1965.)

1. Contracts § 7—

Evidence permitting the inferences that the parties executed a new contract of employment giving the employee an advancement and providing that as a part of this contract the employee should not engage in business in competition with the employer within a specified area within a specified time after termination of the employment, is sufficient to support the jury's findings that the covenant was supported by a valuable consideration.

2. Same—

A covenant by an employee not to engage in business in competition with the employer after termination of the employment is in partial restraint of trade and to be enforceable must be in writing, be supported by a valuable consideration, and be reasonable as to time and territory.

3. Same—

A covenant by an insurance adjuster not to engage in business in competition with the employer within 75 miles of the office of the employer at which the employee was manager, for a period of four years after termination of the employment, *held* not void as being unreasonable as to time or territory.

APPEAL by defendant from *Carr, J.,* March, 1965 Regular Session, WAKE Superior Court.

The plaintiff instituted this civil action to restrain the defendant from violating the terms of his employment contract not to engage in the business of insurance claims adjusting within a radius of 75 miles of Elizabeth City.

The first trainee contract was signed in 1953. The fourth and last was executed March 1, 1958, and was introduced in evidence as plaintiff's Exhibit D. Among other things, it provided: "Upon termination of this contract of employment, the employee agrees that he will not engage in competitive employment, set up and maintain an office, residence, headquarters or mailing address for himself or for any individual, firm, corporation or bureau engaged in, or engage in the business of adjusting insurance claims and losses such as are now or may be at the termination of this employment the business of this employer within a radius of 75 miles of Elizabeth City, N. C., within a period of four years from termination of employment."

Prior to March, 1958, at a date not fixed with certainty in the record, defendant, after notice, terminated the employment. Upon his re-employment the parties executed a new contract dated March 1, 1958, under which the defendant became the manager of the plaintiff's office in Elizabeth City.

The defendant, by answer, admitted the execution of the various written contracts containing covenants not to compete. The defendant testified he actually took over the Elizabeth City office on March 3, 1958. He testified he did not actually sign the contract until after he began work. The defendant was careful not to say the covenant here involved was omitted from the writing, or was not intended as a part of the written contract. He alleges the restrictive covenant was "without consideration, unreasonable as to the time and territory, and null and void." He admits he gave the required notice and terminated his employment on December 15, 1964, and immediately thereafter began adjusting insurance claims for himself in Elizabeth City and in the surrounding territory within 75 miles thereof.

The plaintiff introduced evidence to the effect that its business territory extended over much of eastern North Carolina — well beyond a radius of 75 miles surrounding Elizabeth City; and that its business losses were very substantial after the defendant left its employment and began adjusting claims for himself. The plaintiff had advertised in the "Claims Service Guide" and other publications available to insurance companies and agencies, stating its Elizabeth City office was under the management of Oscar Arnold. This advertising and the defendant's many close contacts while he was plaintiff's agent had placed the defendant in touch with numerous insurers and insurance agencies, which contacts are to his advantage in taking over business which otherwise would have gone to

the plaintiff. The plaintiff contends these losses will continue unless the defendant is restrained.

The judgment entered fills in the further details pertinent to this review:

"This cause coming on to be heard and being heard before his Honor Leo Carr, Judge Presiding over the March 1, 1965 Regular Civil Term of Wake Superior Court and a jury and the court finding as a fact that the defendant admitted the execution of a written contract marked as Exhibit 'D' and the following issue having been submitted to the jury and answered by the jury as follows:

"(1) Was the contract executed and entered into between the plaintiff and the defendant and marked as Exhibit 'D' supported by a valid consideration:

"Answer: Yes.

"And the court being of the opinion and finding that there was no controversy as to the facts with respect to the restrictions as to time and territory in the contract marked as Exhibit 'D' and that the evidence was not in conflict with respect to such provisions;

"And it further appearing to the court and the court finding as a fact that the defendant admitted that since the termination of his employment with the plaintiff he has engaged in the business of an independent insurance adjuster adjusting insurance claims and losses which was the same business as the plaintiff all within Elizabeth City and the immediate environs;

"And the court being of the opinion and concluding as a matter of law that the restrictive covenant contained in the written contract marked Exhibit 'D' are reasonable both as to time and to territory;

"IT IS NOW, THEREFORE, ADJUDGED, ORDERED AND DECREED that the defendant be and he is hereby permanently restrained and enjoined from engaging and entering into the business of adjusting insurance claims and losses as an independent insurance adjuster in Elizabeth City, N. C. and the area within 75 miles thereof until December 15, 1968, with the exception of such modification as may be made in a separate order to be entered during this term of court by the undersigned Judge presiding.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this injunction and restraining order is given upon the condition that the plaintiff post a bond in the amount of $15,000.00 with good and sufficient surety or sureties justified before the clerk to

the effect that the plaintiff will pay to the defendant such damages not exceeding the amount of such bond as he sustains by reason of this injunction if it should be finally determined that the plaintiff was not entitled to it."

The defendant appealed.

Smith, Leach, Anderson & Dorsett by C. K. Brown, Jr., for plaintiff appellee.

Maupin, Taylor & Ellis by Frank W. Bullock, Jr., for defendant appellant.

HIGGINS, J. The distinction between the contract now before us and the contract reviewed in *Greene Co. v. Kelley,* 261 N.C. 166, 134 S.E. 2d 166, is this: Kelley's contract was without consideration. Arnold's contract was based on a valid consideration.

As in *Kelley,* "The defendant admitted he signed a paper writing containing a provision that he would not engage in competition in the manner alleged. He admitted he had not observed these restrictions. The admission made out a *prima facie* case. . . ." When either party appeals to the courts, each case must be decided on its own facts. "The Courts generally have held that restrictive covenants not to engage in competitive employment are in partial restraint of trade. And hence to be enforced they must be (1) in writing; (2) supported by valuable consideration; and (3) reasonable as to terms, time, and territory. Failure in either requirement is fatal." (Citing cases, to which may be added *Noe v. McDevitt,* 228 N.C. 242, 45 S.E. 2d 121; *Comfort Springs Corp. v. Burroughs,* 217 N.C. 658, 9 S.E. 2d 473).

"The general rule with respect to enforceable restrictions is stated in 9 A.L.R. 1468, 'It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . providing the covenant does not offend against the rule that as to time . . . or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer." *Asheville Associates v. Miller,* 255 N.C. 400, 121 S.E. 2d 593.

After reviewing the record in the light of the cases cited above and those referred to in other cases, we are of the opinion that the covenant not to compete which the parties wrote into and made a part of their written agreement should not be declared void by the Court as being unreasonable as to time or territory, or as unfair to the defendant, or as against public policy. The time fixed — four years — approaches the maximum which this Court is inclined to approve for the type of restriction here involved. The defendant laid the foundation for his success as an adjuster in and around Elizabeth City by virtue of his work in the field while he was plaintiff's employee. The jury having found the contract was based upon a valid consideration, we think the restrictions are valid and the contract should be enforced. The judgment entered in the Superior Court is

Affirmed.

HAYDEN K. NEAL v. ROBERT WHISNANT AND WIFE, RUTH M. WHISNANT; HELEN A. SENNETT AND HUSBAND, STUART L. SENNETT; THE FIDELITY CO., TRUSTEE; PIEDMONT FEDERAL SAVINGS AND LOAN ASSOCIATION.

(Filed 15 December, 1965.)

1. Laborers' and Materialmen's Liens § 3—

A contract to perform the brick work in connection with the construction of a house at a stipulated price per thousand brick and cinder block is a contract for part of the construction work and not one for a complete job for a fixed price, and claim of lien which does not set forth or have attached thereto detailed specifications of material furnished, labor performed, and the time thereof, G.S. 44-38, does not comply with the statutory requirements and is ineffectual.

2. Same; Laborers' and Materialmen's Liens § 5—

An incomplete and ineffectual claim of lien for labor and materials furnished may not be made valid by an amendment which is not filed until after the expiration of six months from the completion of the work.

APPEAL by defendants Helen A. Sennett and Stuart L. Sennett from *Latham, J.*, April 5, 1965 Small Claims Session, FORSYTH Superior Court.

The plaintiff, a masonry contractor, instituted this civil action on January 14, 1964, to perfect a laborer's and materialmen's lien for work done and material furnished in building a home for Robert Whisnant and wife in Rolling Green Village, Winston-Salem. The plaintiff alleged he entered into a parol contract with the Whis-

nants under which he agreed to perform labor, furnish materials, and do certain brick work in connection with the construction of the dwelling house on the Whisnant's land. The contract provided the plaintiff was to lay regular eight-inch brick for $45.00 per thousand, twelve-inch brick for $60.00 per thousand, cinder blocks for fifteen cents each, and build a fireplace for $35.00. Plaintiff alleged he began the work on October 31, 1962, and completed it on April 5, 1963; that the total amount due him under the contract was $939.95.

On April 10, 1963, the Whisnants sold their house and lot to the defendant Stuart L. Sennett and wife, Helen A. Sennett. The Deed was recorded on April 19, 1963. On that date the Sennetts executed, delivered, and had recorded a deed of trust on the house and lot to Fidelity Company, Trustee, to secure a loan advanced by Piedmont Federal Savings and Loan Association.

Upon failure of the Whisnants, after demand, to pay the plaintiff for labor performed and material furnished under the contract, on September 6, 1963, he filed with the Clerk Superior Court of Forsyth County a laborer's and material furnisher's lien which, in addition to the names of the parties, the description of the house and lot, and the amount of the claim, provided:

> "4. The labor and material on account of which this lien is claimed and filed were furnished and performed to and for the said Robert R. Whisnant and Ruth M. Whisnant by said claimant in Forsyth County, N. C., under and pursuant to the terms of an agreement, the same being an entire and indivisible contract made and entered into by the said claimant and said Robert R. Whisnant and wife, Ruth M. Whisnant on the 31st day of October, 1962, the said Robert R. Whisnant and wife, Ruth M. Whisnant being then the owner of the said property hereinbefore described, by the terms whereof the said claimant contracted and agreed to do all the brick and block work in the construction of a certain dwelling house on the above property and the said owner contracted and agreed to pay at the rate of $45 per thousand brick laid and fifteen cents each for all blocks laid.
>
> "A full and detailed statement and schedule of said labor and materials so furnished and performed, with the date and values thereof, is hereto attached, marked Exhibit 'A' and made a part hereof. And all said labor was performed upon, and all said materials were used in, the building of said dwelling house upon said land, pursuant to said contract and agreement. The said claimant began to perform said labor on the 31 day of Oc-

tober, 1962, and finished the same on the 5th day of April, 1963."

The plaintiff failed to file or attach to his claim any Exhibit "A" or any other statement or schedule of the labor done and the material furnished, or the values or dates thereof. However, having discovered his failure to attach Exhibit "A" or any other list or details, and none appearing otherwise in his claim of lien, the plaintiff, on October 4, 1963, filed Exhibit "A" in the Clerk's office, giving details of the work done and materials furnished. The plaintiff demanded judgment for $939.95 and that his claim be adjudged a first and prior lien on the house and lot described in Section II of his complaint.

The Whisnants failed to file answer. However, the other defendants, by answer, alleged the plaintiff completed both the work and the delivery of materials on March 25, 1963, and not on April 5, 1963, as he had alleged. The court (as judge and jury under the Small Claims Act) found the last materials were furnished and the last work done on March 25, 1963; that the plaintiff recover judgment against the Whisnants for $939.95, and that his lien for that amount filed September 6, 1963, as amended on October 4, 1963, constituted a valid and prior lien on the house and lot described in the complaint. The Sennetts excepted and appealed.

Roberts, Frye & Booth by Leslie G. Frye and Parks Roberts for plaintiff appellee.

William H. Boyer, Clyde C. Randolph, Jr., for defendants Helen A. Sennett and husband, Stuart L. Sennett, appellants.

HIGGINS, J. The appeal presents these questions of law: (1) Did the document the plaintiff filed on September 6, 1963, comply with the statutory requirement that the lien "shall be filed in detail, specifying the materials furnished or the labor performed, and the time thereof?" G.S. 44-38. (2) If the claim was invalid because of the failure to give the required details, did the amendment filed October 5, 1963, giving the details, cure the defect, amend and relate back to the September claim?

The questions of law raised in the preceding paragraph are material and arise on this record. The contract was for a part of the construction work — not for a complete job for a fixed price. *King v. Elliott*, 197 N.C. 93, 147 S.E. 701. Hence, to be valid the lien should give the details required by the statute. Without question the plaintiff did not supply these necessary details and did not file any Exhibit "A" in his claim of September 6, 1963. The claim was

incomplete and did not constitute a valid lien. *Saunders v. Woodhouse,* 243 N.C. 608, 91 S.E. 2d 701; *Assurance Society v. Basnight,* 234 N.C. 347, 67 S.E. 2d 390; *Jefferson v. Bryant,* 161 N.C. 404, 77 S.E. 341; *Cook v. Cobb,* 101 N.C. 68, 7 S.E. 700; *Wray v. Harris,* 77 N.C. 77.

The court found the last work was done and the last material furnished on March 25, 1963. Time for filing a valid lien expired six months thereafter. The claim filed on September 6, 1963, was in time but was ineffective as a lien for failure to give the required details. The attempt to cure the defect by the amendment of October 4, 1963, came too late. The six months filing period had expired. The amendment came after time had run out. Under the lien statute time is material. *Jefferson v. Bryant, supra.*

The court committed error in holding that the liens filed by the plaintiff on September 6 and October 4 constituted a valid claim or lien within the provisions of G.S. 44-1, and that the lien is superior to the Sennetts' title and to the lien held by the defendants Fidelity Company, Trustee, and Piedmont Savings and Loan Association. The court likewise committed error in adjudging that the Sennetts be taxed with any part of the costs in the Superior Court.

The judgment entered below, to the extent of its conflict with this opinion, is

Reversed.

IN RE CUSTODY OF WILLIAM ROBERT CRAIGO AND DEBORAH CRAIGO, INFANT CHILDREN.

(Filed 15 December, 1965.)

1. Divorce and Alimony § 24—

An order entered in a divorce action awarding custody of the children of the marriage to the father to preserve the *status quo* pending the determination of the matter upon the final hearing is an interlocutory order.

2. Divorce and Alimony § 25; Constitutional Law § 26—

Interlocutory order awarding the custody of the children of the marriage to the husband was entered in his action for divorce in the state of his residence. Thereafter the wife obtained an absolute divorce in another state. The husband recognized this divorce by remarrying, and no further proceedings were had in his action. *Held:* The courts of this State are not bound to give the foreign order of custody any greater effect than it has in the state in which rendered, and the interlocutory order does not pre-

clude our courts from awarding the custody of the children in a *habeas corpus* proceeding in which all of the parties appear.

3. Habeas Corpus § 3—

Our court has jurisdiction of a *habeas corpus* proceeding instituted here by grandparents in which the children, then residing in the county, are brought before the court, and in which the parents appear, even though the children were forcibly taken by their mother from their father's residence in another state.

4. Same—

In *habeas corpus* proceedings, the court's findings, supported by the evidence, that neither parent is a suitable person to have the custody of the children and that the petitioners, grandparents, are suitable persons, and that the best interest of the children require that their custody be awarded petitioners, support the court's order to this effect.

APPEAL from *Martin, S.J.*, June, 7, 14, and 21, 1965 Session, BUNCOMBE Superior Court.

This proceeding originated by verified petition of Robert M. Cloer and wife, Mary E. Cloer, filed December 28, 1964, praying that a writ of *habeas corpus* issue commanding the Sheriff to bring before the court William Robert Craigo, age 6, and Deborah Craigo, age 4, children of Carl Craigo and Pearl Cloer Craigo Hunter, (grandchildren and daughter of the petitioners) and have the court award custody of the infants to the petitioners; that the petitioners are able and willing to care for the children in an ample manner; that neither of the parents is a suitable person for custody or has a comfortable home for the infants. The petition recites, in detail, the facts showing the fitness of the petitioners and the unfitness of the parents for custody.

The writ issued and pursuant thereto the children were brought before the court. The inquiry was continued for hearing January 25, 1965; again continued and heard before Martin, S.J., at the June Session. Carl Craigo, father, intervened and demanded that the children be awarded to him as father upon the basis of a temporary custody order entered by the Superior Court of Gilmer County, Georgia, in his divorce proceeding against Pearl Craigo. Judge Martin found (1) the petitioners were proper custodians for the children, well able to care for them; (2) neither of the parents was a suitable custodian; (3) the welfare of the children required that their custody be awarded to the petitioners; (4) that the Superior Court of North Carolina is not bound by the Georgia decree. Carl Craigo appealed.

Gudger & Erwin by Lamar Gudger for petitioner appellees.
Uzzell & DuMont by Robert D. Lewis for respondent appellant.

HIGGINS, J. The evidence supports Judge Martin's findings (1) the petitioners are fit and suitable persons to have the custody of their grandchildren; (2) the father and mother of the children are unfit for such custody; (3) the welfare of the children will be best served by placing them in the custody of the petitioners. While the father apparently objects to the finding that he is not a suitable custodian, however he places his main reliance for reversal of the order on the ground that the Superior Court of Gilmer County, Georgia, where he resides, where he instituted a divorce proceeding on July 24, 1964, and where the children were domiciled, had entered an order giving him their custody.

The evidence upon which Judge Martin made his findings of fact and conclusions of law disclosed that both parents were unfit persons to have the custody of the infants. The appellant does not challenge the sufficiency of the evidence to support these findings of fact. We refrain, therefore, from discussing the details but record only a few essential and controlling findings. The parents separated in December, 1963. The mother and a man whom she later married took the children to Reno, Nevada. The father and the grandparents (petitioners herein) went to Reno for the children and returned with them to North Carolina where they resided with the grandparents from October 4, 1963 to July 4, 1964. The grandparents have provided much of the support for the children not only during that period, but at other times. However, the appellant took the children to Georgia where his parents live and where he instituted an action for divorce on July 24, 1964. In the divorce proceeding he asked for the custody of the children. The court entered this order: "It is further ordered that the temporary custody of the two minor children of the parties . . . be and is hereby awarded to the plaintiff pending trial of said case. This order being entered by the court . . . for the purpose of maintaining *status quo* between said parties as respects custody of said children, and is not an adjudication of said matter upon the merits . . ."

Within a short time after the entry of the foregoing order, Carl Craigo ascertained his wife had obtained an absolute divorce in Florida where she then resided. In reliance thereon Carl Craigo remarried and now lives on a farm near Ellijay, Georgia. The record fails to disclose any further order in his divorce action in Georgia. However, the evidence and the findings disclose that nine days after the father remarried, the mother of the children and her husband went to the home of the father, and in his absence forcibly took the children and brought them to North Carolina where the mother then lived. The petitioners thereupon instituted this proceeding.

The appellant challenges the authority of the Superior Court of Buncombe County to take jurisdiction of the children's custody, contending the Superior Court of Gilmer County, Georgia, first acquired jurisdiction in the appellant's divorce action and its custody order is binding on the North Carolina courts under the full faith and credit clause of the United States Constitution. The appellant was first sued for divorce by his wife who obtained an absolute divorce dissolving the bonds of marriage between the parties. The appellant recognized the validity of the divorce by his remarriage. Thereafter he did not proceed with his divorce action in Gilmer County, Georgia. The court in Florida did not make a custody award. The court in Georgia made a *status quo* award which states: "(I)s not an adjudication of said matter (custody) upon the merits." Such order prior to a final decree is interlocutory. *Graham v. Graham,* 219 Ga. 193, 132 S.E. 2d 66; *Kniepkamp v. Richards,* 192 Ga. 509, 16 S.E. 2d 24; *Hall v. Hall,* 185 Ga. 502, 195 S.E. 631; *Black v. Black,* 165 Ga. 243, 140 S.E. 364.

The courts of North Carolina are not required to give the custody decrees of other States any greater effect than they have in the State where entered. *In Re Alderman,* 157 N.C. 507, 73 S.E. 126; *In Re Biggers,* 228 N.C. 743, 47 S.E. 2d 32. "The constitutional provision, Article IV, Section 1, requiring full faith and credit to be given to judicial proceedings in sister States does not require North Carolina to treat as final and conclusive an order of a sister State awarding custody of a minor when the Courts of the State making the award can subsequently modify the order or decree." *Cleeland v. Cleeland,* 249 N.C. 16, 105 S.E. 2d 114; *New York v. Halvey,* 330 U.S. 610, 91 L. Ed. 1133; *Morris v. Jones,* 329 U.S. 545, 91 L. Ed. 488.

The Superior Court of Buncombe County, by its writ of *habeas corpus* issued pursuant to G.S. 17-39.1 required that William Robert Craigo and Deborah Craigo, age 6 and 4½, be brought before the Court for the adjudication of their custody. The grandparents, now the petitioners, are residents of the County. Notice was served on the mother who apparently had custody of the infants in North Carolina at the time the writ issued. The father, a resident of Georgia, intervened. In this setting the court had jurisdiction of the children and the parents. The award of custody to the grandparents was based upon abundant findings of fact and a sound conclusion of law. The judgment is

Affirmed.

FRANCES ANN NEAL v. ARCHIE LEE STEVENS.

(Filed 15 December, 1965.)

1. Automobiles § 17—

Where two vehicles approach at about the same time an intersection at which there are no traffic control signals, the driver on the left should yield the right of way to the driver on the right, and the driver on the right may assume and act upon the assumption that the driver on the left will yield the right of way to him.

2. Automobiles § 41g—

In this action to recover for a collision at an intersection, plaintiff's car being on the right, defendant's own testimony to the effect that the first time he saw plaintiff's car it was partly in the intersection and that defendant's car was then perhaps a half a car length from the intersection, requires nonsuit of defendant's counterclaim.

3. Automobiles § 46—

An instruction which, in effect, requires plaintiff to show by the greater weight of the evidence that defendant failed to yield the right of way to plaintiff as required by statute and failed to keep a proper lookout, must be held for error as requiring plaintiff to prove conjunctively both bases of negligence in order to recover, since an affirmative finding of negligence in either one of the aspects would be sufficient to support an affirmative answer to the issue.

APPEAL by plaintiff from *Crissman, J.*, 8 February 1965 Civil Session of FORSYTH.

This is a civil action to recover for personal injuries and property damage sustained in an automobile collision on 30 October 1963, which collision was caused by the alleged negligence of defendant.

Plaintiff's evidence tends to show that about 5:00 p.m. on 30 October 1963 plaintiff was operating her 1964 Ford automobile in a westerly direction on Pilot View Street in Winston-Salem, North Carolina. Summit Street runs north and south and intersects with Pilot View Street. Upon reaching the intersection of Pilot View Street and Summit Street, plaintiff stopped her car to let several cars pass going north on Summit Street. Cars were parked on both sides of Summit Street south of the intersection. The driver of a stopped car across the intersection, facing east on Pilot View Street, "motioned for * * * (plaintiff) to come on." Plaintiff looked again, saw nothing, started her car and began negotiating a left turn, and collided with defendant's car which was proceeding north on Summit Street. At this time there were no traffic controls of any kind at this intersection. Plaintiff did not see defendant's car until the collision occurred.

The investigating officer testified, "The grill, the radiator and the left front fender of the * * * (plaintiff's) car were damaged. The right front fender, the bumper and grill of the * * * (defendant's) car were damaged."

Defendant set up a cross action or counterclaim in his answer.

Defendant testified that he was traveling approximately twenty miles per hour in a northerly direction on Summit Street; that he was following behind other traffic moving in the same direction; and that as he "got started in the intersection, there was the * * * (plaintiff's) car to my right." Defendant further testified that as he approached the intersection he did not see plaintiff's car stopped "at the intersection waiting to come out."

On cross-examination, defendant testified that, "The first time I saw Miss Neal's car it was already partly in the intersection. I was back a little bit from the intersection when I first saw Miss Neal's car, I don't know exactly how far, a half a car length, something like that. * * * I saw her in the intersection the first time I saw her. * * *"

Plaintiff's motion for judgment as of involuntary nonsuit on defendant's counterclaim was denied, to which plaintiff took exception.

The jury answered the issue as to defendant's negligence causing plaintiff's injuries in the negative and gave judgment on defendant's counterclaim for $600.00 for damages to his car. Plaintiff appeals, assigning error.

Clyde C. Randolph, Jr., for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and J. Robert Elster for defendant appellee.

DENNY, C.J. The appellant assigns as error the refusal of the court below to sustain her motion for judgment as of nonsuit on defendant's counterclaim.

The defendant testified that, "The first time I saw Miss Neal's car it was already partly in the intersection. I was back a little bit from the intersection when I first saw Miss Neal's car, I don't know exactly how far, a half a car length, something like that."

G.S. 20-155(a) provides that when two automobiles approach an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. Moreover, a driver approaching an intersection from the right and a driver approaching an intersection from the left at approximately the same time, the driver approaching the intersection from

the right has the right to assume that the driver of the vehicle approaching from the left will yield the right of way and stop or slow down sufficiently to permit the driver approaching from the right to pass in safety. *Bennett v. Stephenson,* 237 N.C. 377, 75 S.E. 2d 147; *Finch v. Ward,* 238 N.C. 290, 77 S.E. 2d 661; *Benbow v. Telegraph Co.,* 261 N.C. 404, 134 S.E. 2d 652. According to the defendant's own testimony, the plaintiff, who approached the intersection from the right, was already in the intersection before the defendant entered it.

In our opinion, this assignment of error should be sustained and it is so ordered.

Plaintiff assigns as error that portion of the charge which reads as follows:

> "* * * (O)r if you are satisfied from this evidence and by its greater weight that the defendant failed to yield the right of way to the plaintiff as required by the statute when two motor vehicles approach an intersection at about the same time where there are no stop signs of any kind, and that he failed to keep the proper lookout and failed to yield as required by that statute, the court charges you that if you should find from this evidence and by its greater weight that that was true in this case, that that would be negligence of itself, that would be negligence *per se;* * * *."

Plaintiff contends there was error in charging in the conjunctive that plaintiff was required to prove that defendant (1) failed to yield the right of way; that (2) he failed to keep a proper lookout; and (3) that he failed to yield as required by statute.

In the case of *Andrews v. Sprott,* 249 N.C. 729, 107 S.E. 2d 560, a similar assignment of error was sustained. Higgins, J., speaking for the Court, said:

> "* * * (T)he court charged in the conjunctive as to all the specific allegations of negligence upon which the plaintiff relied. The effect was to require the jury to find the defendant guilty of all the acts of negligence detailed by the court in order to answer the first issue in favor of the plaintiff. The charge, in the manner given, placed upon the plaintiff the burden of showing speed, defective brakes, failure to keep a proper lookout, and failure to keep his car under control. The plaintiff was entitled to have the jury pass on the question whether the evidence showed the defendant, in any of the particulars alleged, had breached a legal duty which he owed to the plaintiff, and if so, whether such breach proximately caused

her injury and damage. *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383; *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431. For additional cases, see Strong's North Carolina Index, Vol. 1, p. 232, n. 49."

There are other assignments of error which are not without merit. Even so, we deem it unnecessary to discuss them since the errors complained of may not recur on another trial.

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

As to plaintiff — New trial.

As to defendant's counterclaim — Reversed.

STATE v. CHARLES ALBERT BOGAN.

(Filed 15 December, 1965.)

1. Criminal Law § 101—

If there is evidence, circumstantial, direct, or a combination of both, amounting to substantial evidence of each material aspect of the charge, motion to nonsuit should be denied, it being the province of the jury to determine whether the circumstantial evidence excludes every reasonable hypothesis of innocence.

2. Larceny § 7—

Evidence that defendant registered at a motel shortly after noon under an assumed name, that the next morning it was discovered that the air conditioner was missing from the room, together with testimony that a brownish stain, similar to the stain on the window of the motel room, was seen around an imprint on the floor of the trunk of defendant's car, and that around the imprint were splinters of wood and flakes of paint, with expert testimony that the splinters of wood and flakes of paint were similar to, and could have come from, the plywood from which the air conditioner had been taken, *held* sufficient to overrule nonsuit.

APPEAL by defendant from *Huskins, J.,* February 1, 1965 Regular Schedule "B" Criminal Session of MECKLENBURG.

Defendant was first tried in the Recorder's Court of Mecklenburg County upon a warrant which charged that on June 24, 1964, he feloniously stole and carried away one Coldspot air conditioner, the property of L. M. Thompson, which was valued at less than $200.00. He was found guilty and, from the judgment there imposed, he appealed to the Superior Court. Upon a trial *de novo* he was again convicted. The court pronounced a sentence of twelve months, and defendant appeals.

Attorney General T. W. Bruton, Charles D. Barham, Jr., Assistant Attorney General, and Wilson B. Partin, Jr., Staff Attorney for the State.

James B. Ledford for defendant appellant.

SHARP, J. Defendant's only assignment of error is to the refusal of the court to allow his motion for nonsuit at the close of the State's evidence, which tends to show:

L. M. Thompson owns and operates the Key Largo Motel. On June 24, 1964, around 12:20 p.m., defendant, Charles Albert Bogan, rented cottage #5 under the assumed name of Frank Godwin. James Jennings, an employee of the motel, registered him and the license number of his Ford, No. RR-411. When Jennings noticed that a lady accompanied defendant to the cottage, he added the words "and wife" to the registration card. There were two keys to cottage #5. Jennings gave one to defendant; the other remained in the motel office. In cottage #5 a Coldspot air conditioner, 12″ x 22″ x 22″ was installed in a window about 3′ x 5′ in size. Outside, it rested on a rusty iron frame on the sill. Plywood cut so as to "fit right down over it" framed the unit. This plywood frame had been painted often. The most recent coat had been brown or yellow. Jennings last saw the air conditioner in the room around 12:20 p.m. — before defendant checked into the motel. He last saw defendant between 4:00 and 5:00 p.m. when he observed him leave the motel premises. The woman, who came with him, left about 8:00 p.m. in a Chevrolet which came for her after she had made a phone call. She was later identified and was not his wife.

Around midnight on June 24th, the owner of the motel locked the office for the night. The office key to cottage #5 was still there. When he checked the cottages, he found the door to #5 unlocked. He looked in but he did not specifically notice the air conditioner. He "could have told if it was gone," however. On the assumption that defendant would return, Thompson did not look for the key. He locked the door and went to his quarters for the night. The next morning, the maid found the key on the television and observed that the air conditioner was missing from cottage #5.

Between 8:30 and 9:00 a.m., on June 25, 1964, Patrolman H. M. Price came to investigate the theft. He observed the opening in the window where the air conditioner had been mounted; that pieces of plywood were lying on the ground outside the motel window; and that the metal frame fastened to the bottom of the window was in a rusty condition. Patrolman Price picked up from the ground outside the window flakes of paint and some splinters

of plywood. The inside edges of the plywood frame which was still in the window were jagged and broken. Around the opening was yellow paint. At the top of the opening there was green and brown paint which had run down for a slight distance on some of the upper pieces of the frame.

Defendant's license number on the motel registration card revealed his true identity. When the police showed Jennings a photograph of defendant, he identified the man in the photograph as the man he had registered as Frank Godwin the preceding afternoon. They then went to defendant's home with a search warrant and a warrant charging him with "false registration in a motel." Defendant was there, and he readily gave the officers permission to examine his car. The search of the trunk of the car disclosed several tools: a chisel, two screwdrivers — one of which had been sharpened —, a pair of pliers, two "tire tools," and a crowbar. On the floor of the trunk, the officers found a rug which bore an imprint or impression "mashed into the rug." Although this imprint was not actually measured, it was, according to one patrolman, about 24 inches square, "or within three inches of that anyway." The rug imprint had a "brownish stain" on it similar to the stain on the sill of the window in cottage #5. Around the impression were splinters of wood and paint flakes, which the officers collected. The samples of paint chips and splinters collected at the motel and those taken from defendant's car were then forwarded in separate envelopes to the S. B. I. in Raleigh for comparison.

At the trial, an expert chemist of the State Bureau of Investigation testified that he made a chemical microscopic and spectrophotometric examination of the paint scrapings, and that those from the wood fragments in defendant's car were not in all respects identical with those collected at the motel. Some of the fragments from one sample showed the presence of gray, light brown, light brown, light green, and gray layers of paint which had been applied in that order. Some fragments from the other showed the presence of gray, white, gray, neutral, pink, neutral, white-gray, and charcoal black. In each envelope, however, there were yellow paint scrapings attached to a wood material; "it was on the surface." The "yellow paint scrapings or scales were similar in all respects tested." The wood was examined by Dr. A. C. Barefoot, an expert in the field of wood technology. He testified that all the wood samples were unmistakably Douglas Fir and that those from each envelope were "similar in all respects, in makeup and composition." Neither the chemist nor the wood technologist could say that either the paint scrapings or the wood splinters found in defendant's car

came from the motel. In the opinion of each, however, they could have come from the same source.

Defendant offered no evidence.

The State's evidence is circumstantial. The test of its sufficiency to withstand the motion for nonsuit, however, is the same whether the evidence is circumstantial, direct, or both. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. "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." *State v. Johnson,* 199 N.C. 429, 431, 154 S.E. 730, 731. This quotation, as Higgins, J. said in *State v. Stephens, supra,* is just "another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss." 244 N.C. at 383, 93 S.E. 2d at 433. It does not mean that the evidence, in the court's opinion, excludes every reasonable hypothesis of innocence. Should the court decide that the State has offered substantial evidence of defendant's guilt, it then becomes a question for the jury whether this evidence establishes beyond a reasonable doubt that defendant, and no other person, committed the crime charged. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728.

Considering the evidence in the light most favorable to the State, as we are required to do, we think the combination of facts here disclosed constitutes substantial evidence of defendant's guilt and not merely suspicious circumstances. It was, therefore, for the jury to say whether the evidence established defendant's guilt beyond a reasonable doubt. Presumably, the jury followed the trial judge's instruction that it should first determine what circumstances the evidence established beyond a reasonable doubt. Then, considering only those facts thus established, it would determine whether they were of such a nature and so related as to point unerringly to defendant's guilt and to exclude every rational hypothesis of innocence. The verdict of guilty will not be disturbed.

No error.

STATE v. CHARLES HILL.

(Filed 15 December, 1965.)

1. Assault and Battery § 1—

Whether the victim is "put in fear" is inapposite when there is an actual battery.

2. Criminal Law § 154—

Mere notation of an exception after the completion of the examination of the State's witness and again after completion of the cross-examination by counsel of another defendant is insufficient to support an assignment of error upon the asserted ground that the court refused to allow appealing defendant to cross-examine the witness.

3. Criminal Law § 162—

The asserted refusal of the court to permit one defendant to cross-examine the State's witness will not be held for prejudicial error when the record discloses that counsel for another defendant was allowed full cross-examination of the witness which enured to the benefit of each of defendants, and it appears that all witnesses were fully examined and cross-examined and all features of the case fully developed.

4. Criminal Law § 156—

An assignment of error to the failure of the court to charge upon a specified aspect of the case should be supported by a statement of the instructions which appellant considers appropriate in relation to the facts in evidence.

5. Assault and Battery § 2—

Evidence tending to show that appealing defendant struck the prosecuting witness with a brick after the co-defendants had assaulted the prosecuting witness and he had turned to leave the scene in a disabled condition, fails to raise the question of self-defense.

APPEAL by defendant Charles Hill from *McLaughlin, J.*, May 3, 1965, Criminal Session, GUILFORD Superior Court, High Point Division.

Criminal prosecution on a warrant charging that Charles Hill on February 13, 1965, "did willfully and unlawfully assault Jackie Hiatt with a deadly weapon, to wit: an ax handle, wood sticks, and brickbats, by striking him about the head with the said weapons, inflicting lacerations, requiring 14 stitches to close the wounds," etc., tried *de novo* in the superior court after appeal by Charles Hill from conviction and judgment in the Municipal Court of the City of High Point.

The trial judge, in beginning his charge, stated that "the defendants, Charles Hill, John Hill, and Danny Linthicum, are charged with assault with a deadly weapon, to wit: ax handle, wood sticks, bricks, on the person of one Jackie Hiatt, on or about the thirteenth

day of February, 1965." The three cases, based on separate warrants, had been consolidated for trial.

The evidential facts narrated below are sufficient for an understanding of the questions raised and decided on this appeal.

On Saturday, February 13, 1965, about 8:30 p.m., Jackie Hiatt was driving his automobile in a northerly direction on Main Street in the City of High Point. An automobile operated by defendant Danny Linthicum approached Hiatt's car from the rear. Defendants Charles Hill and John Hill, also Danny Hill, Betty Ann Gayle and Betty Armstrong, were passengers in the Linthicum car.

The Linthicum car had traveled close behind the Hiatt car for "about two blocks," when Hiatt pulled to the right and stopped. Linthicum stopped behind Hiatt. Hiatt got out of his car. Linthicum and John Hill got out of the Linthicum car. Hiatt accused Linthicum of taunting him by deliberately and frequently driving up to his rear bumper and then backing off. Linthicum and John Hill accused Hiatt of taunting them by unnecessarily and frequently applying his brakes in such manner as to require Linthicum to apply his brakes suddenly in order to avoid a collision. The conflicting contentions were stressed by cursings and other abusive language. Linthicum testified Hiatt wanted to start a fight; that he (Linthicum) told Hiatt "there wasn't going to be any fight on Main Street"; and that he told Hiatt he (Linthicum) was going to Moffitt Drive.

When the verbal exchange on Main Street ended, Linthicum pulled in front of Hiatt. As he passed, so Hiatt testified, Hiatt was challenged to come on and follow the Linthicum car. (Note: As to this, there was conflicting evidence.) Hiatt, who weighs 240 pounds and whose height is six feet, four inches, "was not afraid of these other fellows" and followed the Linthicum car until it stopped on Welch Drive in front of Charles Hill's "plumbing business place." While Charles Hill's place of business fronts on Welch Drive, his residence fronts on Moffitt Drive. One house is between Charles Hill's residence and his place of business.

John Hill and Danny Hill, two of Charles Hill's sons, were 17 and 14 respectively. Linthicum was 19. The record is silent as to Hiatt's age and as to Charles Hill's age.

Hiatt stopped his car behind the Linthicum car. Hiatt had "followed them for the purpose of getting into a fight with them if necessary . . . was going to show them that (he) was not afraid of them."

According to Hiatt: "Danny got out of the car first and jerked off his shoe, and John came out second, the same way threatening

with a shoe. . . . Danny Linthicum had a club or an ax handle of some sort. Charles had a brickbat, and John had something, . . . they got between me and the car . . . all four were threatening me, really going to tear me up, the smallest one, which I didn't pay too much attention to, sneaked up behind me and he had a piece of pipe and struck me from behind with a piece of pipe and I fell forward. His name was Danny Hill, . . . And as I fell forward, John and Danny both struck me. *As yet, Mr. Charles Hill hasn't touched me and I was stunned right much,* I wasn't knocked out, but as I stood back up to face them all, none of them would come back on me again, . . . *so I was losing right much blood from the wounds on my head, and as I turned myself from the yard out in the main road, Charles Hill threw a brick and hit me in the back of the leg with it.*" (Our italics.)

According to Danny Hill: ". . . my father said he wanted to get out at the shop, so we stopped and started to let him out at the shop and he went over to the door, then Jackie got out and he had his shirt off and everything, and we got out of the car and walked back, and then we started arguing . . . I was standing a little bit to the left of Jackie, and he turned around with a backhand and slapped my glasses off me. When he did that, I went over to the shop and got a piece of pipe and came back and hit him in the head with it, then when I hit him he kind of stumbled, he got out and started running, and I threw a piece of pipe after him, I don't know if it hit him or not. Then he stopped up in the road and my daddy walked up to him and he said he shouldn't have knocked my glasses off. My daddy told Jackie he shouldn't of knocked my glasses off. When he did that, he hit my daddy and then he started running up to Johnny Long's house."

As to each of the three defendants, the jury returned a verdict of "Guilty of Simple Assault." The record contains no reference to judgments pronounced in the John Hill and Danny Linthicum cases. The appeal does not relate to those cases.

As to defendant Charles Hill, referred to in the opinion as appellant, the court pronounced judgment "that the defendant be assigned to work under the supervision of the State Prison Department for a period of thirty (30) days."

The verdict was returned and the judgment was pronounced on May 4, 1965.

Defendant Charles Hill excepted and appealed.

Attorney General Bruton, Deputy Attorney General Lewis and Staff Attorney Hensey for the State.

Boyan & Wilson for defendant appellant.

BOBBITT, J. Appellant contends the court erred (1) by refusing to nonsuit, (2) by failing to allow appellant to cross-examine the State's witnesses, and (3) by the court's failure to charge the jury as to the law of self-defense.

There was plenary evidence that appellant intentionally hit Hiatt with a brick. Appellant's contention that there was no assault because Hiatt was not put "in fear" is without merit. *S. v. Allen,* 245 N.C. 185, 95 S.E. 2d 526, relates to an entirely different factual situation. The court properly overruled appellant's motion for judgment as of nonsuit.

Appellant assigned as error "(t)he Court's failure to allow defendant the right of Cross-Examination as appears of record and as shown by defendant's Exceptions Nos. 1 (R. p. 17), 2 (R. p. 17), 3 (R. p. 21), 4 (R. p. 21), 5 (R. p. 22), 7 (R. p. 27), 8 (R. p. 27), 9 (R. p. 28) and 10 (R. p. 30)." Appellant's exceptions are insufficient to support the quoted assignment of error. As typical of all, we refer to the record references relating to Exceptions Nos. 1 and 2. The solicitor completed his direct examination of Hiatt. Thereupon, Louis J. Fisher, Esq., Attorney for Linthicum, cross-examined Hiatt at considerable length. At the conclusion of said cross-examination, there appears, without explanation, the following: "DEFENDANT'S EXCEPTION No. 1." Thereupon the solicitor conducted a redirect examination of Hiatt. At the conclusion thereof, there appears, without explanation, the following: "DEFENDANT'S EXCEPTION No. 2." The record does not indicate whether appellant requested or was offered or was denied the right of cross-examination in respect of any witness.

It does not appear that appellant was prejudiced by his failure to cross-examine witnesses. As indicated, Linthicum was represented by counsel; and the full cross-examination of the State's witnesses conducted by Linthicum's counsel was of equal benefit to all defendants. Neither appellant nor John Hill was represented by counsel. Appellant was not an indigent. Evidence offered by Linthicum under direct examination by Linthicum's counsel inured to the benefit of appellant. Moreover, appellant, while he did not testify, offered evidence, to wit, the testimony of John Hill and of Danny Hill, his sons, and conducted personally the direct examination of these witnesses. While there was much conflict in the testimony, it appears clearly all witnesses were fully examined and cross-examined and that all features of the case were fully developed.

Finally, appellant assigns as error "(t)he Court's failure to charge the jury as to what constitutes the Law of Self-Defense as

shown by defendant's Exception No. 14." No exception designated "defendant's Exception No. 14" appears in the record. Nor does the record show that appellant excepted in any manner to the court's failure to charge the jury "as to what constitutes the Law of Self-Defense." Appellant does not advise us, either by his assignment of error or by his brief, as to what instruction relating to the law of self-defense he considers appropriate in relation to the facts in evidence.

Moreover, appellant fails to show he was prejudiced by the court's charge. The court charged as follows: "Now, the State's evidence tends to show that Charles Hill hit the prosecuting witness, Mr. Hiatt, on this occasion with a brick, and that John Hill hit the prosecuting witness with a wooden stick, and that Danny Linthicum hit the prosecuting witness with a wooden stick." As to appellant, it is clear that the theory of the State's case was that appellant hit Hiatt with a brick after Hiatt had been assaulted by Danny Hill, John Hill and Linthicum and when Hiatt was leaving the scene of such assaults in a disabled condition. While appellant did not testify, the evidence offered in behalf of Linthicum and in behalf of appellant was to the effect appellant did not hit Hiatt with a brick or otherwise assault him. There was no evidence appellant acted in self-defense "such as would require the court, without special prayer, to explain the law applicable to his right to do so." *S. v. Jackson,* 226 N.C. 760, 40 S.E. 2d 417; *S. v. Pettiford,* 239 N.C. 301, 79 S.E. 2d 517.

Appellant having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

STATE v. CHARLES E. HILL, JR.

(Filed 15 December, 1965.)

1. Criminal Law § 154—

An exception should indicate the subject and ground of defendant's objection.

2. Same—

An assignment of error to the judgment presents only the face of the record for review.

3. Criminal Law § 151—

The Supreme Court will take judicial notice that the party appealing from the execution of a suspended judgment is the same as the appellant in a companion criminal prosecution.

4. Criminal Law § 136—

Where the solicitor's bill of particulars in proceedings to activate a suspended sentence specifies the conviction of defendant in a criminal prosecution tried at that term in the Superior Court, the Court has judicial knowledge of its own proceedings and evidence of such conviction is not required to support order putting into execution the suspended sentence, and the fact that the court in activating the sentence admitted evidence and made findings with reference to other prior convictions of defendant in a municipal court is immaterial.

APPEAL by defendant from *McLaughlin, J.*, May 3, 1965 Criminal Session of GUILFORD Superior Court, High Point Division.

This appeal is from a judgment pronounced May 5, 1965 activating a suspended sentence.

At the same court session, before Judge McLaughlin and a jury, this defendant was tried on a warrant charging that on February 13, 1965 he assaulted one Jackie Hiatt with a deadly weapon; and, on May 4, 1965, in the Hiatt assault case, the jury returned a verdict of guilty of simple assault and judgment imposing a prison sentence of thirty days was pronounced. Upon defendant's appeal in the Hiatt assault case, this Court, in a decision filed simultaneously herewith, found "No error." See *S. v. Hill, ante* 103, 145 S.E. 2d 346.

Facts pertinent to decision on this appeal are as follows:

At January 6, 1964 Criminal Session of Guilford Superior Court, the grand jury returned a true bill of indictment charging this defendant with a felonious assault on one Albert R. Rice on October 5, 1963. During the February 10, 1964 Conflict Criminal Session of Guilford Superior Court, High Point Division, when called to plead to said indictment, defendant, through his counsel, L. J. Fisher, Esq., tendered, and the solicitor accepted, a plea of guilty of an assault with a deadly weapon. Thereupon, on February 13, 1964, judgment, imposing a prison sentence of eighteen months, was pronounced. This sentence was suspended, with defendant's consent, for two years on the condition, *inter alia*, "(t)hat defendant shall not violate any Federal or State penal laws during the said two year period."

On May 4, 1965, the solicitor served on defendant a "Bill of Particulars" in which he quoted said judgment pronounced February 13, 1964, asserted defendant had failed to comply with the terms thereof "in that he was convicted May 4, 1965 of the offense

of Assault," and moved "that final judgment be rendered in this case."

On May 5, 1965, Clarence Boyan, Esq., appearing before Judge McLaughlin, stated in open court he had been retained to represent defendant in connection with his appeal in the Hiatt assault case. Notice of appeal was given and appropriate appeal entries were made in the Hiatt assault case. Later, on May 5, 1965, defendant was brought from jail for a hearing on the solicitor's said motion to activate the eighteen months sentence imposed by the judgment of February 13, 1964 in the Rice assault case. While present during said hearing, Mr. Boyan stated to the court he had not been retained by the defendant to appear for him in *that* matter and did not participate in the hearing with reference thereto.

At said hearing on May 5, 1965, an official of the Municipal Court of the City of High Point testified to convictions of defendant in said court, according to the records thereof, subsequent to February 13, 1964. In reply to the court's inquiry, defendant stated he did not want to question the witness; and, when the court asked whether he had anything to say for himself, defendant gave no answer.

At the conclusion of said hearing, Judge McLaughlin entered a judgment which, after general recitals and recitals concerning the proceedings and judgment at said February 10, 1964 session relating to the Rice assault case, continued and concluded as follows: ". . . and it further appearing to the Court that on the 16th day of February, 1964 the defendant was convicted of being drunk, in the High Point Municipal Court, that the defendant was found guilty of being publicly drunk on the 22nd day of May, in the High Point Municipal Court, and the Solicitor, L. Herbin, Jr., Esquire, Solicitor of the Superior Court of Guilford County, having prayed the judgment imposed, the suspended judgment imposed in Number T. D. 17747 of the Superior Court of Guilford County, and the Court having found as a fact that the defendant had violated the terms of the suspension of the judgment imposed on February 13, 1964, by the Honorable Edward B. Clark, Judge Presiding at the Guilford County Superior Court, High Point Division, on this date, *and the Court finds as a fact that the defendant has violated the terms of the suspension of the foregoing judgment,* that commitment issue to put said prison sentence into effect, and IT IS SO ORDERED." (Our italics.)

The record does not show notice of appeal or appeal entries. The case is before us in response to our writ of *certiorari*, granted on petition therefor filed in defendant's behalf by Mr. Boyan. This Court

now considers the case as if before us on a timely appeal by defendant.

Attorney General Bruton, Deputy Attorney General Lewis and Trial Attorney Smith for the State.

Boyan & Wilson for defendant appellant.

BOBBITT, J. The only exceptions in the record and case on appeal are those referred to below.

After Judge McLaughlin asked defendant (1) if he wished to cross-examine the witness and (2) if he desired to make any statement, there appear, without comment, the words, "DEFENDANT'S EXCEPTION No. 1, DEFENDANT'S EXCEPTION No. 3." After the judgment activating the suspended sentence, there appear, without comment, the words, "DEFENDANT'S EXCEPTION No. 2." After the solicitor's examination of the witness (official of the municipal court), there appear, without comment, the words, "DEFENDANT'S EXCEPTION No. 4."

Since the solicitor agreed to the record and case on appeal, we treat these exceptions as having been entered in apt time. However, they are insufficient to support defendant's assignments of error. As to Exception No. 2, no error appears on the face of the judgment; and, as to Exceptions Nos. 1, 3 and 4, nothing appears to indicate the subject and ground of defendant's objection.

This appeal, and the appeal in the Hiatt assault case, are interrelated proceedings. Hence, we take judicial notice of what our own records disclose. *S. v. Patton,* 260 N.C. 359, 367, 132 S.E. 2d 891; *S. v. McMilliam,* 243 N.C. 775, 777, 92 S.E. 2d 205. While the records show variations in name, *e.g.,* Charles E. Hill, Jr., C. E. Hill, Jr., Charles Hill, it appears clearly from our own records and from the briefs that the defendant in this (the Rice assault) case and the defendant in the Hiatt assault case is one and the same person.

Notwithstanding the insufficiency of defendant's said exceptions, brief comment relevant to contentions made in defendant's brief seems appropriate.

Defendant is not an indigent. The record discloses affirmatively he can retain counsel when it suits his purpose to do so. He did not see fit to retain counsel to represent him at the hearing on May 5, 1965 in *this* (the Rice assault) case.

Defendant contends the judgment of May 5, 1965, activating the sentence of eighteen months imposed February 13, 1964, is based on convictions of defendant in the Municipal Court of the

City of High Point on February 16, 1964 and on May 22, 1964.

The solicitor's bill of particulars, served on defendant on May 4, 1965, this being one day prior to the day the solicitor prayed judgment placing the suspended sentence into effect, set forth in writing the specific ground upon which he prayed for revocation of suspension, to wit, defendant's conviction on May 4, 1965 for assault. G.S. 15-200.1; G.S. 15-200.2. There was no occasion for the solicitor to offer evidence as to what had transpired at the same session of court before the same presiding judge in the Hiatt assault case. Judge McLaughlin had actual knowledge as well as judicial notice of the trial, verdict and judgment in the Hiatt assault case. The verdict and judgment therein fully support the finding (italicized in our preliminary statement) in Judge McLaughlin's judgment of May 5, 1965, that the defendant had violated the conditions upon which the sentence of eighteen months imposed by the judgment of February 13, 1964 was suspended. This being the sole ground on which the solicitor had prayed for revocation of suspension, the only reasonable inference is that this was the primary ground on which the suspended sentence was ordered into effect.

While evidence was offered and findings were made with reference to convictions of defendant in the Municipal Court of the City of High Point, which are not referred to in the solicitor's bill of particulars, we need not consider whether these findings would have been sufficient to support said judgment of May 5, 1965. The conviction of defendant on May 4, 1965 in the Hiatt assault case and the judgment pronounced therein were sufficient to support said judgment of May 5, 1965, putting into effect the suspended sentence, unless on appeal the judgment in the Hiatt assault case was reversed or a new trial ordered. See *S. v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440; *S. v. Guffey,* 253 N.C. 43, 116 S.E. 2d 148; *S. v. Brown,* 253 N.C. 195, 116 S.E. 2d 349; *S. v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638, and *S. v. Sossamon,* 259 N.C. 378, 130 S.E. 2d 640.

By reason of our decision today in the Hiatt assault case, the judgment pronounced therein is now final. Hence, Judge McLaughlin's judgment of May 5, 1965 putting into effect the sentence of eighteen months pronounced in this (the Rice assault) case is affirmed.

Affirmed.

STATE v. TROY BENJAMIN SEAGRAVES.

(Filed 15 December, 1965.)

1. Criminal Law § 136—

The burden is upon the State to show by evidence reasonably satisfactory to the court that defendant has violated one of the conditions of his probation in order for the court to order the probation revoked and the sentence previously suspended to be activated.

2. Same—

Actions of a defendant which violate the instructions of his probation officer but which do not constitute a violation of the conditions of suspension, do not warrant order revoking probation and activating the prior suspended sentence, and breach of condition of good behavior is conduct which constitutes a violation of some criminal law.

APPEAL by defendant from *Shaw, J.*, 22 March 1965 Special Criminal Session of GUILFORD, Greensboro Division.

At the 9 November 1964 Session of the Superior Court of Guilford County the defendant entered a plea of guilty to each of four warrants charging, respectively, the crimes of assault with a deadly weapon, resisting arrest, disorderly conduct and simple assault, the cases being before the Superior Court on the defendant's appeals from the Municipal-County Court. The defendant was sentenced to 18 months in the county jail, to be assigned to work under the supervision of the State Prison Department, but execution of the sentence was suspended and the defendant was placed on probation for a period of four years. The conditions of probation were set forth in the judgment, each of them being authorized by the provisions of G.S. 15-199. Those most nearly pertinent to this appeal were: "(a) Avoid injurious and vicious habits: (b) Avoid persons or places of disreputable or harmful character: (c) Report to the Probation Officer as directed: * * * (m) Violate no penal law of any state or the Federal Government and be of general good behavior."

On 11 March 1965 the defendant was notified by the probation officer of his intention to submit to the court an attached report of alleged violations of the conditions of his probation, these being stated therein as follows:

> "A. On or about January 16, 1965 the defendant admitted removing a weapon from the automobile of [*sic*] which he was riding. He also admitted that he carried on his person a weapon and entered the dwelling house at 331 West Lee St., Greensboro, North Carolina on the above mentioned date. At the time the defendant was accepted for supervision by his probation officer, he was instructed orally not to have any weapons in his

possession outside of his established residence. His established residence on January 16, 1965 was 1705 Dodson St., Greensboro, N. C. This is a violation of the condition of Probation that he shall: follow the probation officer's instructions and advice.

"B. On or about January 23, 1965, the defendant was on the premises of Jim's Tavern, located on U. S. Highway #220, south of Greensboro, N. C. His conduct and activity resulted in two Peace Warrants being issued for him. At the time the defendant, Troy Seagraves was accepted for supervision by the probation officer he was instructed orally not to visit Taverns whose primary business is selling beer, Pool Room or Dance Halls. This is a violation of the condition of Probation that he shall: follow the Probation Officer's instruction and advice."

The matter came before the court for hearing on 22 March 1965, the defendant being present and represented by his counsel. He elected not to put on any evidence but his counsel made a statement to the court in his behalf. There was no evidence before the court other than the duly verified report of the probation officer. The court found as a fact that the defendant had wilfully violated the terms and conditions of the probation judgment as set forth in the above quoted portions of the report of the probation officer. The court thereupon ordered that the defendant's probation be revoked and that the sentence previously imposed and suspended be ordered into immediate effect, commitment to be issued by the Clerk. From this order the defendant appeals to this Court.

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

Max D. Ballinger for defendant appellant.

PER CURIAM. Upon a hearing to determine whether or not probation should be revoked, and a sentence previously suspended should be activated, all that is required is that the evidence be such as reasonably to satisfy the judge, in the exercise of his sound discretion, that the defendant has violated a valid condition upon which the sentence was so suspended. *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *State v. Robinson,* 248 N.C. 282, 103 S.E. 2d 376; *State v. Millner,* 240 N.C. 602, 83 S.E. 2d 546. However, the burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation. "Where a sentence in a criminal case is suspended upon certain valid conditions expressed in the

sentence imposed, the prisoner has a right to rely upon such conditions, and so long as he complies therewith the suspension should stand." *State v. Robinson, supra.* See also: *State v. McBride,* 240 N.C. 619, 83 S.E. 2d 488.

The probation judgment did not make it a condition of the defendant's probation that he "follow the probation officer's instructions and advice," or that he refrain from having any weapon in his possession outside of his established residence or that he not go upon the premises of a tavern selling beer.

The record does not show the nature or ownership of the weapon carried by the defendant, who owned the automobile from which he removed it or the dwelling house into which he carried it, or any circumstance in connection therewith. It is not shown that the weapon, whatever it was, was concealed by the defendant or that the occupant of the dwelling house objected to his taking it into the house.

Similarly, the record does not show any of the circumstances under which the defendant was upon the premises of the tavern in question or what was the outcome of the issuance of the two Peace Warrants. It is not shown that this tavern was a place "of disreputable or harmful character." There is nothing in the record to show that in either of these matters the defendant was engaged in an "injurious or vicious habit," or that his conduct fell short of "general good behavior." In *State v. Millner, supra,* we said: "Behavior such as will warrant a finding that a defendant has breached the condition of suspension on good behavior must be conduct which constitutes a violation of some criminal law of the State."

The findings of the Superior Court do not, therefore, constitute grounds for the revocation of the defendant's probation and the activation of the sentence previously imposed and suspended. Consequently, the order must be vacated without prejudice to the power of the court below to activate the suspended sentence if a violation of any condition thereof, during the period of probation, is reported to and found by the court.

Reversed.

STATE v. KENNETH A. BEAVER.

(Filed 15 December, 1965.)

1. Bills and Notes § 20—

A warrant charging that defendant did "issue" and "pass" a worthless check cannot be held defective in failing to aver that defendant delivered the check to another, since the words "issue" and "pass", in context, import delivery.

2. Indictment and Warrant § 9—

It is not necessary that a warrant use the exact words of a statute, it being sufficient if words of equivalent import are used.

3. Criminal Law § 99—

On motion for nonsuit, the evidence must be taken in the light most favorable to the State and it is entitled to the benefit of every reasonable inference to be drawn therefrom.

4. Bills and Notes § 20—

Evidence tending to show that defendant issued checks to a named payee, that the checks were not post dated, that there was no understanding that the payee would hold them at the time of delivery, but that a request was made the day thereafter that the payee hold them, which the payee did for a time and then presented them to the drawee bank, which refused payment, *is held* sufficient to overrule nonsuit in a prosecution under G.S. 14-107.

APPEAL by defendant from *McLaughlin, J.*, 10 May 1965 Criminal Session of GUILFORD (Greensboro Division).

The defendant was originally tried in the Municipal-County Court in Greensboro upon two warrants, which are identical except as to dates and amounts. Each warrant charges that the defendant "did unlawfully and wilfully make, utter, issue, draw and pass a worthless check" for a specified amount, knowing that he did not have sufficient funds on deposit or credit with the drawee bank for payment thereof, in violation of Chapter 14, § 107, of the General Statutes of North Carolina.

The defendant being found guilty and sentenced by the Municipal-County Court, appealed to the Superior Court where he was tried *de novo*, the two cases being consolidated for trial. Upon a verdict of guilty in each case, he was sentenced to confinement in the county jail for two years in one case and for 30 days in the other, the sentences to run consecutively. From these judgments he appeals to this Court, assigning as error the overruling of his motion for judgment of nonsuit and a directed verdict of not guilty, certain portions of the charge and certain alleged omissions therein.

In this Court he filed a motion in arrest of judgment in each case on the ground that neither warrant charges a violation of G.S.

14-107 since it is not charged that the defendant did "deliver to another" the check in question. In his brief he states, "This constitutes the defendant's most serious contention in this appeal."

The two checks were introduced in evidence as exhibits for the State. While these exhibits were not included, as such, in the record before us, each was quoted in full in the charge to the jury, no exception being taken to that portion of the charge. Each is in the usual form of a check. Each is payable to the order of Lee Stephenson. Each is drawn on the First-Citizens Bank and Trust Company at Greensboro.

Lee Stephenson testified as to each check that it was given to him by the defendant, it was not post dated, there was no understanding that the payee would hold it; the day after it was given to the payee the defendant requested the payee to hold the check, the payee did so for a time and then presented it to the drawee bank for payment, which was refused. Neither check was endorsed by the payee.

An employee of the drawee bank testified that the defendant opened an account at that bank on 11 January 1965, several months after the checks in question were given by the defendant to the payee. The defendant had no account in the drawee bank when either of the checks was so given to the payee.

Attorney General Bruton, Assistant Attorney General Icenhour and Staff Attorney O'Quinn for the State.

E. L. Alston, Jr. and Gerald A. Pell for defendant appellant.

PER CURIAM. G.S. 14-107 provides: "It shall be unlawful for any person * * * to draw, make, utter or issue and deliver to another, any check * * * on any bank * * * knowing at the time of the making, drawing, uttering, issuing and delivering such check * * * that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank * * * with which to pay the same upon presentation."

The defendant's contention that the warrants do not allege that he delivered the check has no merit. The word "pass" when used in connection with a negotiable instrument means to deliver, to circulate, to hand from one person to another. Black's Law Dictionary; The Century Dictionary; Webster's New International Dictionary. The Negotiable Instrument Law, G.S. 25-1, provides: " 'Issue' means the first delivery of the instrument * * *." Black's Law Dictionary states that the verb "issue" when used with reference to notes and similar papers, which would include a check, imports de-

livery to the proper person. The same authority defines "utter" as "to put or send (as a forged check) into circulation." It is not necessary that the warrant use the exact words of the statute, it being sufficient if words of equivalent import are used. *State v. Heaton,* 81 N.C. 542. Thus, in *State v. Levy,* 220 N.C. 812, 18 S.E. 2d 355, the defendant was convicted of violating G.S. 14-107 under a warrant charging that he "did wilfully, maliciously and unlawfully give" a worthless check. The motion in arrest of judgment is, therefore, denied.

Upon a motion for judgment of nonsuit, the evidence is taken in the light most favorable to the State and it is entitled to the benefit of every reasonable inference to be drawn therefrom. *State v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393. Here, the evidence offered by the State is clearly sufficient, if believed by the jury, as it was, to support the charge. The motion for judgment of nonsuit and for a directed verdict of not guilty was, therefore, properly overruled. We have examined the exceptions to the charge and find them to be without merit.

No error.

STATE v. BILLY JAMES POTTS.

(Filed 15 December, 1965.)

1. Criminal Law § 106—

The court is not required to define "reasonable doubt" in its charge to the jury.

2. Criminal Law § 148—

A defendant who has obtained a *certiorari* must perfect his appeal and file a proper case on appeal within the time required or the proceedings will be dismissed.

THIS case was tried at the July Criminal Session 1964 of MECKLENBURG. No appeal was perfected pursuant to the appeal entries. We allowed *certiorari* 22 September 1965.

The defendant was convicted of breaking and entering and the larceny of property of the value of less than $200.00, and of the larceny of six automobiles of the value of more than $200.00 each. The cases were consolidated for trial.

When we allowed *certiorari* we set the case for argument at the call of the Fourteenth and Seventeenth Districts. Cases to be argued

at the call of those districts were required, under our Rules, to be docketed in this Court on or before Tuesday, 2 November 1965. No case, in compliance with our Rules, has been docketed.

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

Charles V. Bell for defendant.

PER CURIAM. Defendant, through his counsel, instead of preparing a case on appeal in accord with the Rules of this Court, merely brings forward the charge of the court below.

Defendant undertakes to assign as error the failure of the court below to charge the jury as to the meaning of "reasonable doubt." Defendant made no request that the court below define the phrase "reasonable doubt." Therefore, if we had a valid case on appeal and an exception to the charge in this respect, it would be feckless. *S. v. Browder*, 252 N.C. 35, 112 S.E. 2d 728.

The defendant having failed to perfect his appeal within the time required, and having failed to file a proper case on appeal within the time required, on motion of the Attorney General that the judgments of the lower court be affirmed and the appeal dismissed, as provided by Rules 5, 17 and 19, Rules of Practice in the Supreme Court, 254 N.C. 786, *et seq.*, the judgments entered below are affirmed and the appeal is dismissed.

Appeal dismissed.

STATE v. C. E. KIZIAH.

(Filed 15 December, 1965.)

APPEAL by defendant from *McLaughlin, J.*, May 24, 1965 Criminal Session (High Point Division) GUILFORD Superior Court.

The defendant was charged in a warrant issued by the High Point Municipal Court with issuing and delivering to Bernard M. Gutterman, T/A Thaden Moulding Corporation, a check drawn on High Point Savings & Trust Company in the amount of $110.00 for merchandise, knowing at the time that he did not have sufficient funds on deposit nor arrangement with the bank to pay the check upon presentation. From a conviction and judgment in the Municipal Court, the defendant appealed to the Superior Court of

Guilford County where he entered a plea of not guilty. He was not represented by counsel but cross-examined the State's witnesses and testified in his own behalf. From a verdict of guilty and judgment thereon, he obtained counsel and appealed.

T. W. Bruton, Attorney General, Harrison Lewis, Deputy Attorney General, Millard R. Rich, Jr., Trial Attorney for the State.

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

PER CURIAM. The defendant's only assignment of error is the failure of the court to enter judgment of nonsuit or to direct a verdict of not guilty at the close of the evidence. The State's witness, Gutterman, testified that defendant purchased furniture, received a bill of lading therefor, and gave a check for $110.00 in payment. The check was returned by the bank on which it was drawn with the notation, "No account." The defendant testified in his own behalf and, on cross-examination, stated: "I signed that check. I knew at the time I signed it I didn't have any money in the bank and I told him (the prosecuting witness) so." He claimed that his partner promised to make a deposit in the bank. This was not done.

The evidence was sufficient to go to the jury and to sustain its verdict of guilty and the judgment thereon.

No error.

THERESA McDUFFIE KEITH v. UNITED CITIES GAS COMPANY, A CORPORATION, AND DUKE POWER COMPANY, A CORPORATION.

(Filed 14 January, 1966.)

1. Gas § 1—

Gas is an intrinsically dangerous substance and a supplier thereof is held to a high degree of care to prevent escape thereof into a building.

2. Trial § 21—

Upon motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to her, giving her the benefit of all reasonable inferences with all conflicts resolved in her favor, and defendant's evidence in conflict must be disregarded.

3. Appeal and Error § 51—

In passing upon the correctness of judgment of nonsuit, the Supreme Court must consider all the evidence favorable to plaintiff, both properly and improperly admitted.

4. Gas § 2—

Proof of an explosion in a building serviced by natural gas does not establish that gas had leaked from the pipes or fixtures, the doctrine of *res ipsa loquitur* not being applicable.

5. Same—

If a customer detects the odor of gas in his building after a fire therein had been extinguished, and the customer makes no effort to inform the gas company, does not attempt to turn off the gas at the valves of the individual units of the equipment or examine the main cut-off valve, such customer is guilty of contributory negligence as a matter of law barring recovery for a subsequent fire and explosion.

6. Same—

Even though gas is an inherently dangerous commodity, the liability of the supplier for damages resulting from escaping gas must be based upon its negligence.

7. Same— Evidence held insufficient to show that fire was caused by negligence of gas company.

The evidence favorable to plaintiff tended to show that, after a fire in her building causing minor damage, she detected the odor of gas in the building and advised the gas company of this fact. Plaintiff's evidence would support no inference except that the gas company thereupon shut off the supply of gas to the building, and at the time of a second fire and explosion gas was not in the building in any dangerous quantity. *Held:* The evidence is insufficient to be submitted to the jury on the issue of negligence of the gas company.

8. Trial § 21—

The rule that upon motion to nonsuit plaintiff's evidence must be taken as true does not extend to statements of witnesses which are contrary to established scientific truth of which the court may take judicial notice.

9. Same; Gas § 2—

Where plaintiff's evidence shows without contradiction that the fire in suit had been burning in the interior of her one-room building for some ten minutes before an explosion therein occurred, testimony to the effect that the fire and explosion were caused by a spark getting into the natural gas will not be taken as true, since it is contrary to scientific fact that gas would remain in any quantity for a period of ten minutes in the presence of fire without exploding.

10. Electricity § 4—

Electricity is an inherently dangerous agency, and power companies are held to the utmost diligence consistent with the operation of their business to prevent injury therefrom.

11. Electricity § 7—

A customer, in order to hold an electric company liable for a fire on his premises, must show that the fire was proximately caused by electricity supplied by the company and that the company in supplying the electricity was negligent.

12. Same—

Evidence that a power company employee at the request of a customer took out the meter at a building after a fire therein had burned off the insulation on wires in the building, and that the employee subsequently reinstalled the meter, the wires being still without insulation, *is held* sufficient to permit the inference that the reinstallation of the meter caused electricity to pass through the wiring inside the building, causing the subsequent fire, and is sufficient to be submitted to the jury on the issue of the power company's negligence.

13. Evidence § 42—

An expert may testify only to those conclusions which are based upon facts within his own knowledge or upon facts theretofore shown in evidence and narrated in a proper hypothetical question.

14. Evidence § 51—

A hypothetical question must include only facts which are already in evidence or those which a jury might logically infer therefrom.

15. Same—

An expert should testify as to whether upon a given state of facts a particular result might ensue and not that such result did in fact ensue.

16. Same—

Where plaintiff's evidence supports only the conclusion that the fire in suit had been in progress for a substantial period of time before there was an explosion in the building, a hypothetical question based upon the assumption that the explosion preceded the fire is improper.

APPEALS by defendants from *Clarkson, J.*, May-June 1965 Regular Session of HENDERSON.

This is a companion suit to the case of Zeb V. Swann and Wife against the same defendants, *post*, page 132. The cases were consolidated for trial and were argued together on appeal to this Court.

The plaintiff was the owner of a building just outside the city limits of Hendersonville. Mr. and Mrs. Swann were her tenants, operating in the building a laundromat for use by the public, and were the owners of various machines and other items of equipment located within the building. Duke Power Company supplied electric power to the tenants for use in the building for lights and other purposes. United Cities Gas Company supplied natural gas to the tenants for use in the building in the operation of furnaces, hot water heaters and laundromat equipment.

In the late afternoon of 8 May 1964, a fire (hereinafter called the first fire) occurred in the building, which did relatively minor

damage to it and to some of the equipment. Between 6 and 7 o'clock the next morning the building and equipment were completely destroyed by a fire (hereinafter called the second fire) and an explosion.

The plaintiff brought this action to recover for the damage to her building resulting from the second fire and explosion. The Swanns brought their action to recover for the damage to their equipment and loss of profits from the operation of the laundromat.

In each action it is contended by the plaintiff therein that the second fire and explosion resulted when an electric spark ignited gas which had escaped from the gas pipes into the building. In each action the complaint alleges that the Gas Company was negligent in failing to use reasonable care to shut off the flow of gas to the building when it knew, or should have known, that gas was escaping from the pipes or laundromat equipment therein. The Power Company is alleged to have been negligent in that, after first removing its electric meter, thus cutting off electricity from the building, following the outbreak of the first fire, it reinstalled the meter and so permitted electricity to enter the building without having made a proper inspection following the first fire, though it knew, or should have known, that natural gas was escaping into the building and that the first fire had burned insulation from the wires within the building. It is alleged that the negligence of each company was a proximate cause of the second fire, explosion and resulting damage and that the negligence of the two defendants concurred, making both liable for the loss sustained by the plaintiff.

In each case each defendant, in its answer, denies negligence by it and alleges contributory negligence by the plaintiffs.

In each case the jury found both defendants were negligent, the plaintiff was not contributorily negligent and the plaintiff sustained damage in an amount fixed by the verdict. From judgment in accordance with the verdict in each action both defendants appealed. The defendants make joint assignments of error, these being the same in each case. These are numerous and relate to the admission and exclusion of evidence, to the overruling of the motion of each defendant for judgment of nonsuit and to certain portions of the instructions to the jury. The cases were tried together and the evidence is the same in each except upon the question of damages, no question as to the amount of such damages being presented by the appeals.

The plaintiff's evidence tends to show:

The building was constructed of cement blocks, brick and glass. It consisted of one large room, in which the equipment was lo-

cated, and a rest room. Above the ceiling was an attic with louvered openings in each of the gable ends for ventilation, which louver slats in each gable were knocked out by water from the fire hoses at the time of the first fire, thus providing unobstructed cross ventilation through the attic. There was a wooden partition separating the hot water heaters from the portion of the room open to use by the customers but the hot water heaters were not in a separate room, closed off from the rest of the building.

The gas meter was located outside the building. The regular gas line ran through the meter. On each side of the meter was a cutoff valve. A bypass line left the regular gas line before it reached the first of these cutoff valves and rejoined it beyond the second one. The bypass line had upon it a cutoff valve of its own. The purpose of the bypass line was to make it possible, if need therefor arose, to close the two cutoff valves in the regular line, open the valve in the bypass line and thus permit the meter to be removed or serviced without interrupting the flow of gas to the operations in the building. The closing of either valve in the regular line would prevent any gas going into the building through that line and the closing of the valve in the bypass line would prevent any gas entering the building through it. The various units of equipment had their own individual cutoff valves.

The electric meter was plugged into a meter box on the outside of the building. From the meter box wires ran through the wall to a master switch box on the inside wall. From this switch box wires ran to other switch boxes on the same wall and thence to gas appliances and light fixtures.

The Gas Company installed the gas lines leading from the meter to the various units of equipment in the building. Prior to the fires the laundromat equipment was all in excellent condition. The tenant-operator had its own service man employed to look after it and make repairs as and when needed. If anything was observed requiring the attention of the Gas Company it was called. There is no indication of any such call to which it did not respond.

The first fire occurred between 4 and 5 o'clock in the afternoon. The Valley Hill Fire Department, a volunteer organization, responded to the call and the fire was soon extinguished. Only relatively minor damage to the building and to one of the gas heaters resulted from this fire. It originated in or near a gas hot water heater, spread up the woodwork on the wall, and burned insulation off of some of the electric wires upon the wall.

The plaintiff, her husband, Mr. and Mrs. Swann, two employees of the Gas Company, two employees of the Power Company and Tom Lyda, an independent, licensed electrician, who originally

wired the building for the plaintiff, came to the premises while the first fire, or the subsequent clean-up, was in progress.

During the first fire, upon instructions from a fireman, one of the employees of the Power Company pulled the electric meter out of the meter box, thus cutting off all electricity from the building. The employees of the Gas Company came to the building during the first fire and went around to the back of it but did not enter the building. They stayed only a short time and reported to the plaintiff's husband that they had cut the gas off.

During or immediately following the first fire, the plaintiff's husband stated to one of the employees of the Power Company that evidently gas had been escaping at the heater where the fire started and he did not want any electricity or gas in the building until it was repaired and rewired.

In the course of the fighting of the first fire the firemen cut a hole in the ceiling of the building about three feet in diameter. This hole in the ceiling and the ventilators in the gable ends of the roof remained open. Natural gas, being lighter than air, rises when it escapes.

When Mrs. Swann arrived at the first fire one of the firemen told her that the gas and electricity had been cut off. The plaintiff and her husband testified that after the first fire was extinguished they smelled gas in the building. Mrs. Swann testified that after the first fire was extinguished she smelled in the building some odor which she could not identify. None of them called this to the attention of the Gas Company, whose employees did not go into the building and were not present when the odors were so noticed. There is no indication that they closed the cutoff valves on the individual units of equipment within the building, or examined the cutoff valves at the meter.

After the first fire the plaintiff, her husband, Mrs. Swann and Lyda remained on the premises discussing the necessary repairs and rewiring. It was agreed that Lyda would begin this work at 7:30 o'clock the next morning. The employee of the Power Company who had taken out the electric meter stopped back by the building while their discussion was in progress. Lyda requested him to reinstall the electric meter so that he could have light when required for his work. Mrs. Swann heard this request and did not object to it. Neither she, the plaintiff, nor the plaintiff's husband authorized Lyda to have the meter reinstalled. Pursuant to Lyda's request, the employee of the Power Company reinserted the meter in the meter box. The building was then locked, Mrs. Swann having the only keys, and they all left. All were satisfied that the first fire was then out and the plaintiff's husband testified, "When I

left the building after the first fire I was satisfied in my own mind that the gas and electricity were off." Mrs. Swann testified, "I was satisfied that the building was secure to the extent that I had been assured by everyone that everything was off and was safe—Mr. Lyda and the firemen told me that it was all off."

Shortly before 7 o'clock the next morning, smoke was again observed coming out of the building by the plaintiff's witness Marlier. At the same time he heard the truck of the Fire Department en route to the fire, some undisclosed person having already turned in the alarm. Thereafter, he heard an explosion in the building and flames shot upward to a considerable height. As a result of this fire and explosion the building and the laundry equipment were destroyed.

After the second fire had been extinguished, the metal electric switch boxes on the interior wall of the building were examined and found to be rusted and smoked on the outside and burned on the inside of the boxes. These boxes contained charred particles of insulation and the wires inside the boxes were without insulation upon them.

A witness for the plaintiff, found by the court to be an expert, testified, over objection, that in his opinion an electric "spark ignited gas in this building and this is what caused the fire." This was in response to a hypothetical question containing numerous hypotheses, including, "that on the morning of the 9th of May 1964, * * * an explosion occurred * * * that the building and its contents caught fire and the blaze rose some 25 feet high." The same witness also testified that if the jury should find from the evidence and by its greater weight that the fire had been in progress in the laundromat for some ten minutes and then a loud noise was heard coming from that direction, this would not change his opinion that there was an explosion caused by an electric spark "getting in the natural gas." In response to the same hypothetical question, another witness for the plaintiff, found by the court to be an expert in the field of electrical wiring, testified that in his opinion there was gas present and an electric spark ignited the gas. He further testified that in his opinion the cause of the charred condition on the interior of the switch boxes was electric current.

Evidence offered by the Gas Company tends to show:

Upon arrival at the premises at the time of the first fire the Chief of the Fire Department went to the gas meter and shut off the gas supply by turning, with a pipe wrench, the cutoff valves upon the line which passed through the meter, the valve on the bypass line being already in an off position. When he returned to the premises the next morning, in response to the second fire alarm, he

again checked the valves and they were all still in the off position. He did not smell any gas on the premises after the first fire.

Albert Stepp, an employee of the Gas Company, went to the first fire and went to the gas meter which he found was cut off. He went inside the building, after the first fire was extinguished, and did not smell gas. He also went to the second fire and, at that time, examined the valves and found them in an off position, as they had been following the first fire.

Following the second fire the service manager of the Gas Company went to the building, checked the valves on the meter assembly and found them in the off position. He tested the meter and found no gas seepage through it when the valves were in such position.

Evidence offered by the Power Company tends to show:

Its employee, Young, who is also a member of the Volunteer Fire Department and went to the two fires in that capacity, removed the electric meter from the meter box at the time of the first fire. After the second fire was under control, he went to the meter box and found the electric meter had been reinstalled. He then reentered the burning building and found the main switch at the switch box on the interior wall was pulled into an off position so that current could not pass beyond this switch box to the other switch boxes or to the various light fixtures and machinery. He did not smell any gas in the building.

After the first fire was extinguished, the assistant Chief of the Fire Department inspected the building and found that all electric switches were in the off position. He went to the second fire and, after it was under control, entered the building and found the switches still in the off position. Following the first fire he remained in and around the building for approximately an hour and a half and did not smell any odor of gas, nor did he smell such odor on the occasion of the second fire.

Lyda testified that he went to the building following the first fire, inspected it, found insulation on some of the wires had been burned away, and conferred with Mrs. Swann and the plaintiff's husband concerning the necessary rewiring. It was agreed that he would commence this work the following morning at 7:30 o'clock. In the presence of the plaintiff's husband and Mrs. Swann, Lyda talked with Charles Stepp, an employee of the Power Company, who had stopped by the building following the first fire, and told him that he needed the electricity on so as to have light for his contemplated work. He requested Stepp to reinstall the meter, to which Mrs. Swann and the plaintiff's husband agreed. Lyda thereupon turned all switches to the off position so there would be no current going in the wire circuits within the building. He returned

the next day following the second fire, went into the building and found all switches still in the off position. It was his opinion that with the switches in that position no electric current could pass any switch. Lyda did not smell any gas during the approximately 20 minutes that he was on the premises following the first fire.

Charles Stepp, the Power Company's employee who reinstalled the meter, observed it at that time and saw no indication of any revolution of its discs, from which he concluded that no current was then passing through the meter into the building.

Prince, Jackson, Youngblood & Massagee for defendant appellant United Cities Gas Company.

William I. Ward, Jr., Whitmire & Whitmire, Carl Horn, Jr., and Harold D. Coley, Jr. for defendant appellant Duke Power Company.

Redden, Redden & Redden for plaintiff appellee.

LAKE, J.

THE APPEAL OF THE GAS COMPANY

In *Graham v. Gas Company,* 231 N.C. 680, 684, 58 S.E. 2d 757, this Court, speaking through Ervin, J., said: "It is a scientific fact 'that gas ordinarily used for fuel is so inflammable that the moment a flame is applied it will immediately ignite with an instant explosion, if it is present in any considerable volume.' This being true, such gas is a dangerous substance when it is not under control." The original quotation is from *Holmberg v. Jacobs,* 77 Or. 246, 150 P. 284. It was again quoted with approval by this Court in *Ashley v. Jones,* 246 N.C. 442, 98 S.E. 2d 667.

The plaintiff's evidence shows that before the explosion occurred the second fire had been burning in this one room building long enough for someone to discover it and turn in the fire alarm and for the Fire Department's truck to be en route to the fire. The plaintiff's evidence thus refutes her contention that gas was present in the building in substantial quantity when this fire began and its ignition by an electric spark started the fire. The plaintiff's evidence shows, furthermore, that natural gas, being lighter than air, rises when released into a room. Her evidence also shows that from the time of the first fire to the time of the second there was in the ceiling of this room an opening, three feet in diameter, leading immediately into an attic, at each end of which there was an unobstructed opening substantial in size.

The plaintiff's evidence is that following the first fire employees of the Gas Company, then present at the building, reported to her

husband that they had cut the gas off, and a fireman stated to Mrs. Swann that this had been done. Her husband testified that when he left the building, after the inspection and conferences which followed the first fire, he was satisfied in his own mind that the gas was off. This was after the time when he and the plaintiff say they detected an odor of gas in the building.

Upon the defendants' motions for judgment of nonsuit, the plaintiff's evidence is to be interpreted in the light most favorable to her, all reasonable inferences favorable to her must be drawn therefrom, conflicts therein are to be resolved in her favor and evidence of the defendant establishing a different factual situation must be disregarded. *Moss v. Tate,* 264 N.C. 544, 142 S.E. 2d 161; *Sugg v. Baker,* 261 N.C. 579, 135 S.E. 2d 565; *Coleman v. Colonial Stores, Inc.,* 259 N.C. 241, 130 S.E. 2d 338; *Ammons v. Britt,* 259 N.C. 740, 131 S.E. 2d 349.

There is nothing in the evidence to indicate that the gas was not completely shut off from the building following the first fire unless it be found in these circumstances: (1) Before leaving the premises, after the first fire, the plaintiff and her husband smelled an odor of gas in the building; (2) the next morning an explosion occurred in the building while it was burning; (3) each of two witnesses, who were not present in the interval between the fires, testified that, in his opinion, a spark ignited gas in the building, this opinion resting upon the hypothesis that "an explosion occurred * * * that the building and its contents caught fire." We do not regard these circumstances as being inconsistent with the evidence offered by the plaintiff to the effect that the gas supply had been cut off.

The hypothesis upon which her expert witnesses based their opinion as to the presence of gas in the building, namely, that the explosion preceded the fire, is not supported by any evidence. It is contrary to the testimony of the only observer called as a witness for the plaintiff. Upon a motion for judgment of nonsuit all evidence favorable to the plaintiff, including evidence improperly admitted, must be considered. *Langley v. Insurance Co.,* 261 N.C. 459, 135 S.E. 2d 38. Therefore, the opinions of these expert witnesses are, for this purpose, treated by us as if competent. So treated, they are merely opinions that an explosion, followed by a fire, indicates the presence of gas in the building.

An explosion in a building to which gas pipes are connected is not, standing alone, evidence that gas escaped from such pipes into the building. There are many possible causes of an explosion in a building which has been burning for a substantial but undetermined interval of time. The doctrine of *res ipsa loquitur* does not apply

so as to carry us, from proof of (1) natural gas service to a building plus (2) explosion, to the conclusion that gas had leaked from the pipes or fixtures. See Stansbury, North Carolina Evidence, § 227.

The testimony of the plaintiff and her husband that, following the first fire, they detected an odor of gas in the building is not inconsistent with her evidence showing that during the fire the supply of gas to the building was cut off. The odor may have continued for an interval after the closing of the valves prevented further escape of gas into the building. If, moreover, this could be regarded as evidence that gas was continuing to come into the building, it clearly establishes contributory negligence on the part of the plaintiff, for her evidence is that, knowing the representative of the Gas Company had left the premises, neither she nor her husband made any effort to inform the Gas Company of the continued presence of gas after its employee had supposedly shut off the supply, neither of them turned the cutoff valves on the individual units of equipment or examined the cutoff valves at the meter.

Although natural gas is so highly inflammable as to be an inherently dangerous commodity, so that the company supplying it must use a high degree of care to prevent its escape into a building, the company's liability for damage resulting from escaping gas is based upon its negligence. *Ashley v. Jones, supra; Graham v. Gas Co., supra.*

The plaintiff's evidence is that all of the gas burning equipment was in excellent condition before the first fire. It was maintained by her tenant's own service man. The Gas Company had no notice of any defect in any of the equipment prior to the first fire. When a gas company, engaged in supplying gas to a customer's building, becomes aware that gas is escaping from the fixtures into the building, it is the duty of the gas company to shut off the gas until further escape thereof can be prevented, even though the fixtures do not belong to the company and are not in its charge or custody. *Graham v. Gas Co., supra.* Interpreting the plaintiff's evidence in the light most favorable to her, it may be inferred that, at the time of the first fire, gas was escaping into the building from a water heater. Thus, the Gas Company, being advised of this fact, was under a duty to shut off the supply of gas to the building. However, the plaintiff's evidence is that it did so and it will support no other inference.

The rule that, in passing upon a motion for judgment of nonsuit, the plaintiff's evidence must be taken to be true does not extend to an opinion by a witness, not present at the event, to the effect that a condition existed which is contrary to scientific truth

so well established that the court will take judicial notice of it. As above noted, it is established scientific truth that natural gas present in quantity will explode immediately in the presence of fire. The statement by the plaintiff's expert witness, Cook, that notwithstanding a finding, supported by the greater weight of the evidence, that the second fire had been burning on the interior of the building for ten minutes before the explosion was heard, it would still be his opinion that the explosion was caused by an electric spark "getting in the natural gas" does not have to be taken, even upon motion for judgment of nonsuit, as establishing the fact that gas was in this building, in quantity, without exploding, in the presence of such fire. There is, furthermore, nothing in the record to show that the fire had not been burning more than ten minutes prior to the only explosion shown by the evidence.

There is, therefore, not sufficient evidence in the record to support a finding of negligence on the part of the Gas Company and its motion for judgment of nonsuit should have been granted.

THE APPEAL OF THE POWER COMPANY.

Electricity is also inherently dangerous. Consequently, a company supplying it to a customer's building must use a high degree of foresight and must exercise the utmost diligence consistent with the practical operation of its business. *Kiser v. Power Co.*, 216 N.C. 698, 6 S.E. 2d 713. Such company is not, however, liable for damages resulting from a fire, unless it be shown that the fire was proximately caused by the electricity supplied by the company to the building and that, in so supplying the electricity, the company was negligent. *Fleming v. Light Co.*, 232 N.C. 457, 61 S.E. 2d 364.

Plaintiff's evidence, considered as it must be upon a motion for judgment of nonsuit, must be deemed to establish that the first fire burned insulation upon the wires carrying electric current through the building, so that the metal wires were thereafter exposed. In this situation, the meter was taken out, cutting off all current from the building. The plaintiff's husband, who was her spokesman at the fire, she being present, instructed the Power Company's employee, who took out the meter, not to replace it until the building was rewired. Nevertheless, the Power Company's service man subsequently reinstalled the meter. To turn electric current into the wiring system of a building, with notice that the wires therein are bare of insulation, is not consistent with that high degree of care which must be used by an electric power company in the handling of its product.

There is evidence in the record from which it might be found that, before this meter was reinstalled, all switches inside the build-

ing had been pulled to an off position so that no current could pass through the master switch, that the switches remained in this position until after the second fire and that the reinstallation of the meter was done at the request of an electrician employed by the plaintiff and was consented to by the plaintiff's husband and by Mrs. Swann. However, all of this evidence was introduced by the defendant Power Company and may not be considered in passing upon its motion for judgment of nonsuit. Considering the plaintiff's evidence alone and drawing from it all reasonable inferences favorable to her, the jury could infer that the reinstallation of the meter caused electricity to pass through the wiring system inside the building, parts of which were bare of insulation and that this caused the second fire. Consequently, the Power Company's motion for judgment of nonsuit was properly overruled.

There was error, however, in permitting, over the Power Company's objection, plaintiff's witnesses Cook and Colb to testify, respectively: "My opinion is that a spark ignited gas in this building and this is what caused the fire"; and "There was gas present and an electrical spark ignited the gas."

Neither of these witnesses was present at the time of either fire. Each so testified in response to a question, to which the Power Company duly objected, which question was hypothetical in form and included, among its hypotheses, that "on the morning of the 9th of May, 1964, between 6:30 and 7 o'clock an explosion occurred in the Keith Building; * * * that the building and its contents caught fire and the blaze rose some 25 feet high and the building and contents were substantially damaged by the fire; * * *." The question was: "Under these circumstances, have you an opinion satisfactory to yourself as to the cause of the second fire on the morning of the 9th of May, 1964?"

The question is based on an hypothesis not supported by any evidence, namely, that the explosion preceded the fire and the building "caught fire" as a result of the explosion. The plaintiff's evidence is that the fire had been in progress for a substantial period of time before the explosion occurred. "To be competent, a hypothetical question may include only facts which are already in evidence or those which a jury might logically infer therefrom." *Ingram v. McCuiston,* 261 N.C. 392, 400, 134 S.E. 2d 705; *Jackson v. Stancil,* 253 N.C. 291, 303, 116 S.E. 2d 817; *Dameron v. Lumber Co.,* 161 N.C. 495, 77 S.E. 694; *State v. Holly,* 155 N.C. 485, 71 S.E. 450; *Burnett v. R. R.,* 120 N.C. 517, 26 S.E. 819; Stansbury, North Carolina Evidence, § 137.

Furthermore, the question was improper in form in that it calls for an opinion as to what was the cause of the second fire, rather

than an opinion as to whether the situation, propounded as an hypothesis which might be found by the jury to be a fact, could have caused the fire. See *Service Co. v. Sales Co.*, 259 N.C. 400, 414, 131 S.E. 2d 9; Stansbury, North Carolina Evidence, § 137. The function of expert opinion is to assist the jury in evaluating and applying facts shown by other evidence. This question called for, and in answering it, each witness stated, as a fact, the existence of a condition which the witness, not having been present, could not know, but as to which he could only conjecture, namely, that there was gas in the building. As was said by Devin, J., later C.J., speaking for the Court, in *Patrick v. Treadwell,* 222 N.C. 1, 4, 21 S.E. 2d 818, the rule permitting an expert witness to express his opinion "should not be relaxed to the extent of opening the door to the statement of an evidential fact in issue beyond the knowledge of the witness under the guise of an expert opinion."

The admission of this testimony in response to this hypothetical question was prejudicial to the Power Company and requires a new trial as to it. Since there must, for this reason, be a new trial as to the Power Company, it is not necessary to consider its other assignments of error. They relate to matters which may not arise upon another trial.

Reversed as to United Cities Gas Company.

New trial as to Duke Power Company.

ZEB V. SWANN AND WIFE, ELIZABETH SWANN v. UNITED CITIES GAS COMPANY, A CORPORATION, AND DUKE POWER COMPANY, A CORPORATION.

(Filed 14 January, 1966.)

APPEALS by defendants from *Clarkson, J.*, May-June 1965 Regular Session of HENDERSON.

Plaintiffs instituted this action to recover damages for the destruction, by fire and explosion, of certain laundromat equipment owned by them and located in a building which they rented, and for loss of profits during the period in which they were unable to operate their business as a result of such fire and explosion. They allege that the fire and explosion resulted when an electric spark ignited natural gas which had escaped into the building; that the defendant Gas Company was negligent in permitting such gas to escape into the building; that the defendant Power Company was

negligent in introducing electricity into the wiring system within the building when it knew, or should have known, that such wiring was not properly insulated so as to create a dangerous condition and that the electric spark which ignited the gas resulted from such negligence of the Power Company; that the negligence of the defendants concurred; and that the negligence of each was a proximate cause of the damage. Each defendant, in its answer, denies negligence by it and pleads contributory negligence by the plaintiffs. The jury found for the plaintiffs upon the issues of negligence and contributory negligence and found that their damages were $35,400 for destruction of their property and $3,350 for loss of profits. From a judgment in accordance with the verdict both defendants appeal.

Prince, Jackson, Youngblood & Massagee for defendant appellant United Cities Gas Company.

William I. Ward, Jr., Whitmire & Whitmire, Carl Horn, Jr., Harold D. Coley, Jr., for Duke Power Company.

Redden, Redden & Redden for plaintiff appellees.

LAKE, J. This is a companion suit to the case of *Keith v. Gas Company, et al,* 266 N.C. 119, 146 S.E. 2d 17. In all respects material to the appeals the pleadings in the two cases are identical. The cases were consolidated for trial. The evidence, except as to the amount of damages sustained by the respective plaintiffs, as to which there is no question raised by the appeals, is the same. In each case the defendant made joint assignments of error and these are the same in each case. Reference is, therefore, made to our opinion in the *Keith* case for a detailed discussion of the pleadings, the evidence, the assignments of error and the grounds upon which we rest our decision.

For the reasons there stated, the court below erred in denying the motion of the defendant Gas Company in this action for a judgment as of nonsuit and in permitting witnesses for the plaintiffs, found by the court to be experts, to testify in response to certain hypothetical questions, by reason of which error a new trial must be granted as to the defendant Power Company.

Reversed as to the defendant United Cities Gas Company.

New trial as to the defendant Duke Power Company.

FIREMEN'S MUTUAL INSURANCE COMPANY v. HIGH POINT SPRINKLER COMPANY.

(Filed 14 January, 1966.)

1. Insurance § 96.1—

Insurer in a property damage policy, upon paying a claim thereunder, is subrogated, both under standard statutory policy and under the common law, to the rights of insured against the third person tort-feasor causing the loss. G.S. 58-176.

2. Engineering § 2—

One who engages in a business, occupation or profession represents to those who deal with him in that capacity that he possesses the knowledge, skill and ability, with reference to matters relating to such calling, which others engaged therein ordinarily possess, and represents that he will exercise reasonable care in the use of his skill and in the application of his knowledge and will exercise his best judgment in the performance of the work for which his services are engaged.

3. Negligence § 1—

If a person undertakes an active course of conduct under circumstances from which an ordinary person may reasonably foresee injury to others if he does not use ordinary care and skill, the law imposes the duty upon him to use ordinary care and skill to avoid such danger, and he may be held liable for loss by any person to whom he owes the duty of such care.

4. Same—

Even though an action for negligence is distinct from one for breach of contract, where a party contracts to perform a certain act and injury is reasonably forseeable by a person of ordinary intelligence if the contract is not performed with ordinary care and skill, the contractor may be held liable for damages proximately caused by the failure to exercise such care and skill in the performance of the contract.

5. Engineering § 2—

The evidence tended to show that defendant, after inspection, contracted to change a sprinkler system in a building from a wet to a dry system, that one of the pipes of the system had a declination which prevented it from draining by gravity, and that defendant did not change its grade or insert an additional drain, so that during freezing weather ice formed in the pipe, bursting it and activating the system, which resulted in damage to goods stored in the building. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence in the performance of the contract.

6. Trial § 21—

Upon motion for nonsuit, plaintiff's evidence must be taken as true and all reasonable inferences favorable to plaintiff must be drawn therefrom.

7. Bill of Discovery § 2—

Motion for order to inspect writings under G.S. 8-89 is addressed to the discretion of the trial court and the court's ruling thereon will not be disturbed in the absence of a showing of abuse of discretion.

APPEAL by plaintiff from *Gambill, J.*, 24 May 1965 Civil Session of GUILFORD.

Plaintiff, claiming to be subrogated to the rights of Alma Desk Company, sues for damages alleged to have been sustained by the Desk Company as a result of negligence by the defendant in performing its contract with the Desk Company for the conversion of a sprinkler system in a warehouse of the Desk Company from a wet system to a dry system.

The complaint alleges, in substance:

The plaintiff issued its policy of insurance to the Desk Company insuring it against loss from damage to property stored in the warehouse, due to fire or the discharge of water from the automatic sprinkler system. The defendant contracted with the Desk Company to convert the wet sprinkler system which was in the warehouse to a dry sprinkler system. The defendant was negligent in the performance of the contract, and failed to perform it, in that the defendant permitted water to remain in one of the pipes comprising the system, which water froze and burst the pipe. This set the sprinkler system in operation and substantial damage was done to desks stored in the building before the water could be cut off. The plaintiff paid the claim of the Desk Company under its policy and now sues to recover its loss of the defendant.

The answer admits the contract as alleged but denies all of these allegations of negligence and failure to perform.

At the end of the plaintiff's evidence the court granted the defendant's motion for judgment as of nonsuit. The plaintiff appeals, assigning as error the granting of such motion, numerous rulings by the court upon objections to the introduction of evidence and the denial of its motion to require the defendant to produce certain records.

The evidence material to the motion for judgment as of nonsuit, taken in the light most favorable to the plaintiff, may be summarized as follows:

The plaintiff issued its policy of insurance to the Desk Company, insuring it against damage to the contents of the warehouse by water, fire and other causes. On 15 December 1962, the sprinkler system in the building became activated and before it could be shut off a great quantity of water poured out upon a number of desks and other properties of the Desk Company stored in the warehouse, damaging them substantially. The plaintiff paid the claim of the Desk Company under the policy and, thereby, succeeded to any right of action which the Desk Company might have against the defendant on account of such loss.

The Desk Company purchased the warehouse in February 1962. At that time the building was equipped with a wet sprinkler system. In a wet system, water, at city pressure, remains at all times in all parts of the system and sprays out into the building through the various sprinkler heads when the system is activated by a fire or other cause. Because water remains in a wet system at all times, it is necessary, during cold weather, to heat a building containing such a system, so as to prevent the freezing and bursting of the pipes which would, of course, set the sprinkler system in operation.

Having no need otherwise to heat the building, the Desk Company determined to replace the wet sprinkler system with a dry sprinkler system and entered into negotiations with the defendant for that purpose. In a dry system, all water is removed from the system, which is then filled with air, compressed to a pressure which will keep closed the main valves at the point where the system connects with the water supply. When by fire, or other cause, a break or opening in the system occurs, the air escapes through the opening. This lowers the pressure and permits the main valve to open so as to bring water into the system, and out into the building through such opening or openings. In the case of a fire, such openings would be brought about at the sprinkler heads by the heat. A break or opening in a pipe of the sprinkler system from any other cause would have the same effect and would set the sprinkler system in operation, the water escaping through the break in the pipe.

An officer of the Desk Company called a representative of the defendant and told him that the Desk Company wanted the wet sprinkler system in the building converted to a dry sprinkler system prior to cold weather and desired him to look at the building and give it a price for such work. The representative of the defendant went to the warehouse, looked at the existing system, telephoned the officer of the Desk Company, told him what was necessary to convert the system from wet to dry and thereupon wrote a letter to the Desk Company in which he said, "Following up our telephone conversation we proposed to do" thus and so, for which a price was quoted. This offer was accepted by the Desk Company and the defendant undertook to do the work.

No representative of the Desk Company went into the building with the representative of the defendant when he inspected the sprinkler system or while the conversion work was in progress. Being advised by the defendant that the work had been completed, the Desk Company did not turn on the heating system in the warehouse. Beginning with the night of 9 December and continuing into the afternoon of 15 December there was a period of intense and steady cold weather, the "free air" temperature at the Weather

Bureau Station dropping to 1 degree above zero on 13 December. In the afternoon of 15 December the weather moderated and the temperature rose to several degrees above the freezing point.

On the afternoon of 15 December the sprinkler system in the warehouse was set in operation and water poured out of a split or hole in one of the pipes. No one was then in the building. The activation of the sprinkler system caused an alarm bell to go into operation and in due time the situation was discovered and the sprinkler system was cut off.

There was no evidence of any fire in the building, or of any other cause of the activation of the sprinkler system except the break in the pipe. The break occurred in an elbow at the far end of a short length of pipe leading from one of the main lines of the system to a sprinkler head, and in the sprinkler head itself. This length of pipe sloped downward from the main line. Thus when the system was drained, the water in this pipe and in the elbow joint to which the sprinkler head was connected at the end furtherest removed from the main line, would not drain. The splits or breaks in the sprinkler head and in the elbow joint to which the sprinkler head was connected were due to the freezing of the water which remained therein when the entire system was supposedly drained in the conversion to a dry sprinkler system. With the freezing, and consequent expansion of this water and the ice into which it was converted, the pipe broke. With the subsequent moderation of the temperature on the afternoon of 15 December, the ice melted so that the compressed air in the system escaped through the holes in the pipe, the main valve of the sprinkler system was opened and the water rushed in and out through the holes into the building.

No other break occurred in the system. To have corrected the grade of the pipe in question, or put a drain at the end of it, as was done after the loss occurred, was a simple and inexpensive operation. It was apparent to the eye that the outer end of the line which broke was lower than the main into which it should have drained.

In the letter written by the defendant to the Desk Company, containing its proposal, nothing specific was said about regrading the existing lines of the sprinkler system. It was, of course, not contemplated that these lines would be replaced generally, but only that such work would be done as was necessary to convert the existing system to a dry system.

When the Desk Company requested the defendant to make the conversion, it did not give any instruction as to how the conversion was to be done but simply instructed that the system was to be con-

verted and a price quoted for the work. At that time the officer of the Desk Company who negotiated with the defendant did not know of this low point in the sprinkler system line. The defendant's representative did not inform the Desk Company's official of the existence of the low point in the line.

The representative of the defendant who made the inspection and quoted the price was called by the plaintiff as an adverse witness. He testified:

> "As to whether Mr. Wiley [the official of the Desk Company] told me that he wanted to convert a wet sprinkler system in the building, known as the Guilford Building, to a dry system, sir, I don't remember the conversation. That is the job we did, yes. * * * As to whether all that I remember is that he asked us to convert the wet system to a dry system, I don't recall that, sir, but apparently that's what it was."

He went to the building and walked over the entire sprinkler system, looking at all the pipes, including the branch lines. He was inspecting for low points. He further testified:

> "If I had found a low point in August, 1962, when I made an inspection I feel that I would have called it to Mr. Wiley's attention, yes sir. * * * As to whether I would not have suggested that something had to be done about it in order for it to be a satisfactory dry fire sprinkler system, I feel that I would have, sir. I would have done that because that was part of my duties, yes sir. I don't recall finding a low point in the line, sir."

The pipe in question was supported by a hanger suspended from the ceiling. No change in this hanger was made from the time the Desk Company purchased the building until after this loss occurred.

Representatives of other companies engaged in this business testified that in such conversion they habitually inspect the system to see that all pipes drain toward the main drain valve, the custom in the industry being to regrade pipes which do not so drain or to install separate drains in those pipes.

The foreman of the defendant's construction crew which performed this work was also called as an adverse witness for the plaintiff and testified:

> "I undertook to drain the system. I opened the drain valve. * * * I let the water run out of its own force, by force of gravity. I did not do anything else to get the water out of the

system. * * * I had nothing on my list or my blueprint about checking the system for low points. * * * I went on the third floor, on the northwest corner of the building. When I went up there I saw what appeared to be a low point."

This was the point at which the break occurred. This witness also testified:

"If I had seen a low point in the system * * * when I was doing the work out there, a low point which was not indicated on my plans and one which I could tell would retain water, I would have told my superior about that low point. I would consider that a part of my duties to my company. I wouldn't just ignore it. This is true because it is a custom of the industry. I would have told my superior about the low point so that they might * * * have something done about it for the reason that we have been discussing, holding water or not allowing it to drain. * * * because it could freeze. That is one of the reasons I would have told my superiors about it. I knew that if it would freeze it likely would split the pipe open. * * * I would have seen to it that someone knew of this condition."

Smith, Moore, Smith, Schell & Hunter; by Richmond G. Bernhardt, Jr., for plaintiff appellant.

Jordan, Wright, Henson & Nichols; by G. Marlin Evans for defendant appellee.

LAKE, J. The policy issued by the plaintiff to the Desk Company was in the standard form prescribed by the statute. G.S. 58-176. It provided: *"Subrogation.* This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company." Both by virtue of this provision in the policy and upon equitable principles the plaintiff, having paid the loss to the Desk Company pursuant to the policy, is subrogated to the right of the Desk Company, if any, against the defendant. *Casualty Co. v. Oil Co.*, 265 N.C. 121, 143 S.E. 2d 279; *Insurance Co. v. Faulkner*, 259 N.C. 317, 130 S.E. 2d 645; *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185; *Powell v. Water Co.*, 171 N.C. 290, 88 S.E. 426. The plaintiff offered evidence, which is uncontradicted, to the effect that it paid the full amount of the loss to the Desk Company. This evidence being taken as true in passing upon the motion for judgment as of nonsuit, the plaintiff now has the same right against the defendant which the Desk Company had immediately prior to such payment.

One who engages in a business, occupation or profession represents to those who deal with him in that capacity that he possesses the knowledge, skill and ability, with reference to matters relating to such calling, which others engaged therein ordinarily possess. He also represents that he will exercise reasonable care in the use of his skill and in the application of his knowledge and will exercise his best judgment in the performance of work for which his services are engaged, within the limits of such calling. *Service Co. v. Sales Co.,* 261 N.C. 660, 136 S.E. 2d 56 (industrial designer); *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762 (physician); *Jackson v. Central Torpedo Co.,* 117 Okla. 245, 246 P. 426, 46 A.L.R. 338 (oil well digger); *Flint Mfg. Co. v. Beckett,* 167 Ind. 491, 79 N.E. 503 (carpenter). It is alleged in the complaint and admitted in the answer that the defendant, at the time in question, was engaged in the business of installing fire sprinkler systems and held itself out to the public as qualified, competent and experienced in the installation of both wet and dry fire sprinkler systems.

This Court has said on numerous occasions, "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551. See also: *Toone v. Adams,* 262 N.C. 403, 137 S.E. 2d 132; *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727.

In 38 Am. Jur., Negligence, § 14, it is said:

> "[T]he law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully, will be dangerous to other persons or the property of other persons, the duty to exercise his senses and intelligence to avoid injury, and he may be held accountable at law for an injury to person or to property which is directly attributable to a breach of such duty."

However, an action to recover damages for an injury to person or property may not be sustained on the theory that such injury was caused by the negligence of the defendant unless there existed, at the time and place where the injury occurred, a duty on the part of the defendant to exercise care for the protection of the plaintiff or his property. 38 Am. Jur., Negligence, § 12.

Whether there is a duty owed by one person to another to use care, and, if so, the degree of care required, depends upon the relationship of the parties one to the other. The mere relation of one human being to another imposes some duty upon each. "Every man is in general bound to use care and skill in his conduct wher-

ever the reasonably prudent person in his shoes would recognize unreasonable risk to others from failure to use such care." Harper & James, Torts, § 28.1. Other duties arise by reason of special business or economic relations between the parties. For example, under the common law, an employer owes to his employee affirmative duties of care for his safety which he does not owe to the public generally. The relation of physician and patient imposes upon the physician a duty of care for the protection of the patient from injury which he does not owe to others. A bailee of goods, by virtue of the bailment relation, owes a special duty to the bailor to use care for the safety of the goods. An architect, in the preparation of plans and drawings for the construction of a building, owes to the person employing him a duty, not only to use his own best judgment, but also to exercise the ability, skill and care customarily used by architects upon such projects. 5 Am. Jur. 2d, Architects, § 8; 5 C.J., Architects, § 24; Anno: 25 A.L.R. 2d 1085. A carpenter who contracts to repair a house is liable in damages if he performs the repair so unskillfully as to damage other portions of the structure. See: *Flint Mfg. Co. v. Beckett, supra; Jackson v. Central Torpedo Co., supra;* 38 Am. Jur., Negligence, § 20.

The duty to use due care, the breach of which gives rise to a tort action for negligence in favor of one injured thereby in his person or property, may arise out of a contract. A breach of a contract, nothing else appearing, does not give rise to an action in tort. 38 Am. Jur., Negligence, § 20. However, the making of the contract may give rise to a relationship between the parties out of which arises the duty of one party to use due care so as not to injure the person or property of the other. In that event, the failure to use such care resulting in injury to the person or property of the other party gives him a right of action in tort for such negligent injury. *Toone v. Adams, supra; Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893; *Service Co. v. Sales Co., supra; Casualty Co. v. Oil Co., supra;* 38 Am. Jur., Negligence, § 14.

However, a complete, binding contract between the parties is not a prerequisite to a duty to use due care in one's actions in connection with an economic relationship. 38 Am. Jur., Negligence, §§ 14, 17. Barnhill, C.J., said in *Honeycutt v. Bryan,* 240 N.C. 238, 81 S.E. 2d 653:

> "Whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or

property of the other, duty arises to use ordinary care and skill to avoid such danger."

The defendant was engaged in the automatic fire sprinkler business. Its regular business included conversion of wet sprinkler systems to dry sprinkler systems. The Desk Company had a wet sprinkler system in its warehouse and informed the defendant of its desire to convert this system to a dry sprinkler system. Taking the plaintiff's evidence to be true and considering it in the light most favorable to the plaintiff, as we are required to do in passing upon the correctness of the judgment of nonsuit, it shows that the Desk Company requested the defendant to examine the system and submit to the Desk Company a proposal of a price for doing the work necessary to convert it to a dry system. The defendant's representative walked through the building, observing the system, unaccompanied by any representative of the Desk Company. One purpose of this inspection was to look for low points. Had he observed one, it would have been his duty to suggest that something be done about it because of the danger that if water was left in such a low point it might freeze and cause the pipe to break. Having completed his inspection, he submitted a proposal to the Desk Company specifying certain things to be done and stating a price for doing them. His proposal was accepted, and the specified things were done. In his inspection he did not find the low point, although it was obvious to an observer who looked at this particular length of pipe. There is nothing to indicate that the Desk Company knew the pipe in question was so connected that it would not drain. Since no other pipe in the system broke, it may reasonably be inferred from the plaintiff's evidence that there were no other low points in the system. The elimination of the hazard caused by this particular low point was a relatively simple, inexpensive matter.

As was said by Moore, J., in *Service Co. v. Sales Co., supra:*

> "When one undertakes a professional assignment, the engagement implies that he possesses the degree of professional learning, skill and ability which others of that profession ordinarily possess, he will exercise reasonable care in the use of his skill and application of his knowledge to the assignment undertaken, and will exercise his best judgment in the performance of the undertaking. * * * He may incur liability in tort by reason of negligent performance."

When one, engaged in the business of installing equipment, such as a sprinkler system, accepts an invitation to inspect an existing installation and submit a proposal for its conversion to one of a

different type, which he holds himself out as qualified to do, a relationship arises between him and the owner of the building such as to impose upon him the duty to use, in inspection of the property and the preparation of the specifications for the conversion work, that degree of care which is customarily used upon such assignments by others engaged in such business. In such a situation, knowing that the owner is relying upon him to determine what is necessary to do to the existing system in order to convert it into the system desired, if he, by failure to use due care, omits from his specifications an alteration necessary to avoid danger of damage to the owner's building or other property, he is not absolved from liability for such damage by the fact that the owner accepts his proposal for less than adequate changes in the existing system, the owner being unaware of the condition which makes the proposal inadequate. The duty to use due care to include within the specifications all that is necessary to make the converted system safe continues into and through the performance of the work.

In reviewing the judgment of nonsuit, the plaintiff's evidence must be taken as true and all reasonable inferences favorable to the plaintiff must be drawn therefrom. *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. So considered, the evidence is sufficient to support a finding that the defendant failed to use due care in preparing its specifications of the changes necessary to be made for the conversion of the sprinkler system and that such negligence was the proximate cause of the damage to the property of the Desk Company for which the plaintiff had paid in accordance with its policy. That being true, the motion for judgment of nonsuit should not have been allowed. Upon retrial of the action it will, of course, be for the jury to determine, in the light of all the evidence then introduced, whether the defendant was, in fact, negligent.

The plaintiff's pre-trial motion for an order directing the defendant to permit the plaintiff to inspect its files relating to this matter was addressed to the discretion of the court. G.S. 8-89. *Dunlap v. Guaranty Co.*, 202 N.C. 651, 163 S.E. 750. There is no showing of abuse of this discretion in the denial of the motion.

It is not necessary that we now pass upon the exceptions relating to the admissibility of evidence, since those questions may not recur when the matter is tried again.

Reversed.

MARGARET B. McLEOD v. W. L. McLEOD.

(Filed 14 January, 1966.)

1. Husband and Wife § 10; Judgments § 34—

A consent judgment embodying the separation agreement executed by the parties is *res judicata* as to all matters embraced therein except for the provisions for the custody and support of the minor children, and such judgment cannot be modified or set aside without the consent of the parties thereto except for fraud or mutual mistake.

2. Pleadings § 12—

A demurrer admits for its purposes the truth of the factual averments of the complaint well stated and relevant inferences of fact reasonably deducible therefrom, but not inferences or conclusions of law.

3. Same—

Upon demurrer, a complaint will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor.

4. Husband and Wife § 12; Judgments § 24—

Where, in the wife's action attacking a consent judgment of separation, she does not allege failure of the husband to deposit the initial amount specified in the separation agreement or his failure to pay the monthly payments provided therein, it will be assumed that the husband had paid these amounts in accordance with the agreement and that the wife had accepted those benefits.

5. Same—

The wife's allegation that the husband fraudulently represented that she would have to move from the municipality in which they had resided in order that he might continue to live there and practice his profession in order to earn the money to pay her the support stipulated in the separation agreement executed by the parties, *held* insufficient ground to attack the consent judgment for fraud, since an essential element of fraud is that the person deceived must have reasonably relied upon the misrepresentation and have acted upon it.

6. Same—

Where a separation agreement embodied in the consent judgment executed by the parties makes meticulous provision for the support and maintenance of the wife and children of the marriage, presumably complied with, the fact that the husband had not, in the short period of several months, complied with a further provision of the judgment that he deliver to the wife a paid-up policy of insurance on his life, is not ground for attacking the judgment for fraud.

7. Divorce and Alimony § 21—

Where the provisions of a separation agreement are embodied in a consent judgment, the wife has the remedy of a motion in the cause for contempt if the husband wilfully refuses to comply with its terms.

8. Lis Pendens—

An action seeking to set aside for fraud a consent judgment embodying the provisions of the separation agreement is not an action affecting title to real property within the meaning of G.S. 1-116, notwithstanding the fact that if the consent judgment is set aside the wife would have rights in the husband's real estate in the event she should survive him.

APPEAL by plaintiff from *Brock, S.J.*, in Chambers, in Wadesboro, North Carolina, on 10 July 1965. From STANLY.

This action was instituted by plaintiff on 24 June 1965. In her complaint, plaintiff alleges two causes of action. This is a summary of the allegations of fact of her first cause of action: Plaintiff and defendant are husband and wife. They were married on 15 July 1939. On 18 December 1964 defendant here instituted in the Superior Court of Stanly County an action for divorce from bed and board from plaintiff here, Summons Docket No. 4773, a copy of which complaint is attached hereto and made a part hereof as if fully set out herein. On 1 March 1965 plaintiff here filed an answer to defendant's cause of action for divorce from bed and board, in which she set up a cross-action or counterclaim for alimony without divorce. A copy of her answer and cross-action or counterclaim is attached hereto and made a part hereof as if fully set out herein. Immediately after the plaintiff here filed her answer and cross-action, defendant here proposed to plaintiff here that they settle all matters and things between them. Plaintiff here and defendant here entered into a consent judgment, which is attached hereto, marked Exhibit "C", and made a part hereof as if fully set out herein. This consent judgment is as follows:

"NORTH CAROLINA — IN THE SUPERIOR COURT
STANLY COUNTY

"W. L. McLEOD, Plaintiff,
v.
"MARGARET B. McLEOD, Defendant. } CONSENT JUDGMENT

"THIS CAUSE coming on to be heard and being heard before his Honor John D. McConnell, Resident Judge of the 20th Judicial District of North Carolina, in Chambers at Wadesboro, North Carolina, by consent of the parties, and it appearing to the Court that the parties and their counsel have agreed upon a settlement of all matters and things alleged in the complaint and answer; that the plaintiff and the defendant were married to each other on the 15th day of July, 1939; that there were three children born of the marriage: Marion M. Coble, born

the 24th day of December, 1940, age 24 years; Harriet McLeod, born the 9th day of November, 1947, age 17 years; Margaret Louis McLeod, born the 25th day of September, 1955, age 9 years; that the plaintiff and the defendant separated on the 29th day of August, 1964, and since said time have lived continuously separate and apart from each other.

"And it further appearing to the Court that both the plaintiff and the defendant are fit and proper persons to have the custody and control of the minor children born of said marriage;

"And it further appearing to the Court that the parties and their counsel have agreed upon a settlement of the property rights, maintenance, alimony and custody;

"IT IS THEREFORE, by consent, ORDERED, ADJUDGED AND DECREED:

"1. That the plaintiff and the defendant shall continue to live separate and apart from each other free of the marital control of the other and that they and each of them may engage in such occupation, work or employment as he or she may deem fit and desirable without the interference of the other.

"2. That Margaret B. McLeod, mother, be, and she is hereby awarded the sole custody and control of Margaret Louis McLeod so long as the said Margaret B. McLeod conducts and demeans herself as a fit and proper mother.

"3. That W. L. McLeod, father, be, and he is hereby awarded the sole custody and control of Harriet McLeod so long as said W. L. McLeod conducts and demeans himself as a fit and proper father.

"4. That W. L. McLeod, plaintiff, shall deposit simultaneously with the entry of this judgment the sum of $10,000.00 in the Home Savings and Loan Association at Albemarle, North Carolina, in the name of Margaret B. McLeod and Marion M. Coble for the use and benefit of Margaret B. McLeod provided that said money may be withdrawn for any purpose, including the purchase of a home for Margaret B. McLeod provided that each withdrawal shall be at the request of both Margaret B. McLeod and Marion M. Coble, and that W. L. McLeod shall on or before the 1st day of March, 1967, deposit an additional $5,000.00 in said account to be used and expended for the use and benefit of Margaret B. McLeod as hereinbefore set forth; provided, however, W. L. McLeod shall be the owner of the funds, if any, which may be remaining in said account upon the death of Margaret B. McLeod.

"5. That W. L. McLeod shall pay to Margaret B. McLeod the sum of $375.00 per month beginning with the 10th day of March, 1965, and a like sum of $375.00 on or before the 10th day of each calendar month thereafter for and during the natural life of Margaret B. McLeod or until she shall remarry, provided that in the event the plaintiff, W. L. McLeod, shall become disabled to practice his profession and to earn a living, the payment herein provided shall be adjusted upon mutual agreement between the parties according to the conditions existing at such time.

"6. That W. L. McLeod shall make provisions for the purchase of all clothes and formal education of his daughter Margaret Louis McLeod commensurate with her needs, in addition to the sums provided for in paragraph 5 above. Margaret B. McLeod shall have the right to purchase said clothes.

"7. That Margaret B. McLeod shall move from within the corporate limits of the Town of Norwood and turn over the possession of the residence of the parties now occupied by her in Norwood, North Carolina, to W. L. McLeod on or before the 1st day of June, 1965, provided that Margaret B. McLeod shall be the sole owner of and entitled to remove from said residence the following described property on or before the said 1st day of June, 1965; everything in the living room, her bedroom furniture, color television, portable television, dining-room furniture, den furniture, dinette suite, Margaret Louis' bedroom furniture, the red chair in the hall, all china, silver and crystal and any lamps which she may want, her personal books and pictures, the fire screen, fountain and bird bath in the back yard, the deep freeze, stove and all of her personal clothing and effects.

"8. That W. L. McLeod, plaintiff, shall within thirty days from the date of this instrument, deliver to Margaret B. McLeod a $20,000 paid-up life insurance policy on his life, payable to Margaret B. McLeod as the principal beneficiary and to Marion M. Coble, Harriet McLeod and Margaret Louis McLeod as contingent beneficiaries in the event of the death of said Margaret B. McLeod.

"9. That W. L. McLeod may visit with Margaret Louis McLeod and that Margaret B. McLeod may visit with Harriet McLeod at any time or any place where said children may be and further that said children may visit with their father and mother at any time that they may choose. It is intended that the visitation privileges and rights of each party shall be liberal and that the children may at such time as they choose

visit with their respective parents so long as it does not interfere with their school work. It is further provided that Margaret Louis McLeod may visit with her father at least one week-end each month and that Harriet McLeod may visit with her mother at least one week-end each month and at such other times as may be agreeable between the parties hereto.

"10. That W. L. McLeod shall provide for the formal education of both Margaret Louis McLeod and Harriet McLeod.

"11. That Margaret B. McLeod shall release W. L. McLeod from any and all rights that she may have the property or earnings of the said W. L. McLeod except as herein provided and that W. L. McLeod shall release Margaret B. McLeod from any rights he may have in the property or earnings of the said Margaret B. McLeod except as herein provided and that each party shall hold and convey property as if he or she were sole and unmarried.

"12. That the plaintiff pay the costs, if any, to be taxed by the Clerk.

"13. That this judgment is entered without prejudice to either W. L. McLeod or Margaret B. McLeod and that after two years' separation either of the parties may institute an action for absolute divorce from each other on said grounds.

"14. That either party shall execute, upon request of the other, any instrument which may be necessary to carry out the full intent and purpose of this judgment.

"15. That the parties to this action may withdraw their respective pleadings in this cause and remove the same from the court record.

"JOHN D. McCONNELL, Judge,
Twentieth Judicial District.
MARGARET B. McLEOD
Margaret B. McLeod, Defendant
HARTSELL, HARTSELL & MILLS
by: William L. Mills, Jr.
Attorneys for the Defendant.

WE CONSENT TO THE FOREGOING JUDGMENT:

W. L. McLEOD
W. L. McLeod, Plaintiff
MORGAN, WILLIAMS & DeBERRY
by: Robert B. Morgan
McLEOD AND McLEOD
by: Max E. McLeod
Attorneys for the Plaintiff."

This matter was never heard before Judge McConnell, who signed the consent judgment, and plaintiff's consent to this consent judgment was obtained by and as the result of fraudulent representations of the defendant here, as follows: Defendant fraudulently represented to plaintiff that she would have to move from within the corporate limits of the town of Norwood in order that he may continue the practice of his profession as a doctor in said town so as to make the monthly payments which he had agreed to pay to plaintiff for her support, that he intended to continue to live in the town of Norwood and practice his profession so as to comply fully with the provisions of said consent judgment. Such representations were false when made because he at that time was making plans to abandon the practice of medicine in Stanly County, North Carolina, and to sell all of his property holdings within the State of North Carolina and to leave the State of North Carolina, in order to avoid the jurisdiction of the courts of this State, and to avoid payments of any sums which he had agreed to pay under the provisions of said consent judgment; that said false representations were made by him with full knowledge of their falsity and with the fraudulent intent to deceive and defraud plaintiff; that he had no intention of complying with the provisions of this consent judgment when he entered into it; and that he has failed and refused to comply with all the provisions of said consent judgment. Plaintiff reasonably relied upon such false and fraudulent representations of defendant, and has been deceived thereby and caused to suffer loss. Defendant has given up the practice of medicine in Stanly County, North Carolina, and is in the process of disposing of all of his property and assets within the State of North Carolina, and is making plans to move his residence and all of his property holdings to the State of Kentucky. By reason of defendant's false and fraudulent representations, plaintiff did, under the terms of the consent judgment, relinquish all right, title, and interest which she might have in and to the property which defendant accumulated by and with her assistance during their married life. Defendant has failed and refused to deliver to plaintiff the $20,000 paid-up life insurance policy, and has otherwise breached and failed to comply with the terms and provisions of this consent judgment.

Plaintiff is 50 years of age, has a life expectancy of more than 23 years, and might reasonably expect to receive from defendant a sum in excess of $100,000 under the terms and provisions of this consent judgment, if defendant were to comply fully with its terms and provisions. If defendant is permitted to remove himself and all of his property from the jurisdiction of the State of North Carolina, plaintiff will be destitute and without legal remedy as against de-

fendant. By reason of the false and fraudulent representations of the defendant, the plaintiff released defendant from his obligation to support her, except to the extent set forth in the consent judgment, and has released all of her property rights, and has been damaged in the sum of $100,000. Plaintiff does not have an adequate remedy at law to prevent defendant from disposing of his property and leaving the State of North Carolina so as to avoid his legal marital obligations to plaintiff.

For a second cause of action plaintiff alleges a cause of action for alimony without divorce, for counsel fees, and for an order granting her the custody of the two minor children born of the marriage.

Plaintiff prays for relief as follows: (1) That the consent judgment entered in the action entitled *"W. L. McLeod, Plaintiff v. Margaret B. McLeod, Defendant,"* Summons Docket No. 4773, in the Superior Court for Stanly County, North Carolina, be vacated and stricken from the record; (2) that an order be entered granting plaintiff reasonable subsistence and counsel fees *pendente lite;* (3) that plaintiff be awarded permanent alimony without divorce in such amount as may be proper according to defendant's circumstances, and for counsel fees; (4) that an order be entered granting the plaintiff custody and control of the minor children born of the marriage; (5) that an order be entered by the court enjoining defendant from giving away, conveying, or otherwise disposing of any property which he may now own, real or personal, and from removing any property from the jurisdiction of the State of North Carolina, and from removing the minor children born of the marriage from the jurisdiction of the courts of the State of North Carolina; and (6) that plaintiff have and recover of defendant damages in the sum of $100,000.

On 24 June 1965 plaintiff filed in the office of the clerk of the Superior Court for Stanly County a notice of *lis pendens,* under the provisions of G.S. 1-116.

Defendant filed on 10 July 1965 with Judge Brock what he calls "Motion and Demurrer." He demurred to plaintiff's first cause of action on the following grounds:

1. The first cause of action set forth in the complaint does not state facts sufficient to constitute a cause of action against defendant for that: (a) The first cause of action is a collateral action seeking to set aside the consent judgment for fraud, and the only and proper remedy to attack the validity of said judgment is by a motion in the cause; (b) the allegations in the first cause of action "that the defendant fraudulently represented to the plaintiff that she would have to move from within the corporate limits of the

Town of Norwood in order that the defendant may continue the practice of his profession in said town so as to make the monthly payments which he had agreed to pay to the plaintiff for her support; that he, the defendant, intended to continue to live in the Town of Norwood, County of Stanly and practice his profession so as to fully comply with the provisions of said agreement" do not constitute fraud or factual misrepresentations; (c) plaintiff's first cause of action does not state a substantial violation of said consent judgment, even if true, for it appears from the face of the complaint that plaintiff has accepted partial benefits by reason of said consent judgment, and, therefore, plaintiff is not entitled to vacate said judgment for fraud; and further, it is not alleged that time was of the essence in the delivery of said policy of $20,000 paid-up life insurance; and (d) plaintiff has not alleged that she is in a position or is willing to restore defendant to the same position as he was in prior to the entering into of the consent judgment.

2. Defendant demurred to the second cause of action set forth in the complaint on the following grounds: At the time this action was instituted in Stanly County, North Carolina, there was pending and is now pending in said county another action begun prior to this action between the same parties for the same cause of action.

3. That an order be entered directing a cancellation of the *lis pendens* filed in this action because this statute is not applicable.

This cause came on to be heard in Chambers at Wadesboro, North Carolina, on 10 July 1964 before Judge Brock upon a motion by plaintiff to enjoin defendant from disposing of his real and personal property or removing it from the jurisdiction of the State, upon motion to grant custody of the minor children of the marriage to plaintiff, and upon defendant's "Motion and Demurrer." Judge Brock found the following facts: (1) The allegations contained in the complaint for a first cause of action failed to allege sufficient facts to set up a cause of action for fraud; (2) the allegations contained in the complaint for a second cause of action are the same as those contained in the counterclaim for relief in an action entitled *"W. L. McLeod, Plaintiff v. Margaret B. McLeod, Defendant,"* bearing Summons Docket No. 4773; (3) plaintiff has caused a notice of *lis pendens* to be filed in the office of the clerk of the Superior Court of Stanly County on 24 June 1965; and (4) this is an independent action to set aside a consent judgment heretofore entered in the said action entitled *"W. L. McLeod, Plaintiff v. Margaret B. McLeod, Defendant,"* and that it appears from the

face of the complaint that there are no material allegations of fraud.

The foregoing facts are based upon the verified complaint filed in this case, the summons, the notice of *lis pendens,* and the exhibits to the verified complaint which includes copies of verified pleadings filed in the separate action hereinabove referred to.

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

"1. That the Complaint fails to allege a cause of action.

"2. That the plaintiff has a remedy by motion in the cause in the original action hereinabove referred to.

"3. That there is no cause of action to support the filing of the *Lis Pendens* filed in this cause.

"4. That the defendant's demurrer and motion to dismiss should be allowed."

Whereupon, Judge Brock ordered and decreed as follows:

"1. That this action be dismissed with the costs charged by the Clerk of Stanly County against the plaintiff, if the plaintiff does not amend.

"2. That the notice of *Lis Pendens* be stricken from the record in the office of the Clerk of Stanly County.

"3. That the plaintiff be allowed 10 days within which to amend her complaint."

From Judge Brock's order, plaintiff appeals.

Hartsell, Hartsell & Mills by William L. Mills, Jr.; and K. Michael Koontz for plaintiff appellant.

Morgan and Williams by Charles R. Williams for defendant appellee.

PARKER, J. Plaintiff's first assignment of error is "The court erred in its finding of fact and conclusion that the complaint fails to allege a cause of action and the dismissal thereof."

Judge Brock's order adjudges and decrees that the action be dismissed, "if the plaintiff does not amend," and his order allows plaintiff ten days within which to amend her complaint.

Plaintiff does not challenge Judge Brock's finding of fact "that the allegations contained in the complaint for a second cause of action are the same as those contained in a counterclaim for relief in an action entitled '*W. L. McLeod, Plaintiff v. Margaret B. Mc-*

Leod, Defendant,' bearing Summons Docket No. 4773." According to this unchallenged finding of fact, plaintiff's second cause of action here has been adjudicated by the consent order signed by Judge McConnell, and this appears on the face of the complaint and the consent order and the pleadings in that action, which are attached to the complaint and made a part thereof, and can be considered on the demurrer. *Moore v. W. O. O. W., Inc.,* 253 N.C. 1, 116 S.E. 2d 186; *Coach Lines v. Brotherhood,* 254 N.C. 60, 118 S.E. 2d 37. Generally, a consent judgment is *res judicata* as between the parties upon all matters embraced therein. 3 Strong, N. C. Index, Judgments, § 34, and same section under judgments in his Supplement to Volume 3. To this general rule there appears to be an exception that neither agreements nor adjudications for the custody or support of a minor child are ever final. *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332.

Plaintiff's entire argument in her brief in reference to this assignment of error is in essence that a consent judgment can be vacated for fraud, and that to do this an independent action must be instituted, and that her complaint, liberally construed, alleges a cause of action to vacate the consent judgment signed by Judge McConnell for fraud; in her brief she does not discuss her second alleged cause of action.

In *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118, it is said: "It is a well-settled principle of law in this jurisdiction that ordinarily a consent judgment cannot be modified or set aside without the consent of the parties thereto, except for fraud or mutual mistake, and in order to vacate such order, an independent action must be instituted." 3 Strong, N. C. Index, Judgments, § 25, p. 38.

It is familiar learning that a demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of the factual averments well stated and the relevant inferences of fact reasonably deducible therefrom, but a demurrer does not admit inferences or conclusions of law. Upon a demurrer a pleading will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. 3 Strong, N. C. Index, Pleadings, § 12.

Margaret B. McLeod in the action in which the consent judgment was entered was represented by eminent and learned counsel. An examination of the consent judgment, which we have copied in full in our opinion, shows careful and meticulous provisions were made for the maintenance and support of plaintiff and the two minor children born of the marriage. The date when Judge McConnell and the parties and their counsel signed it is not shown. How-

ever, it does appear from the record that Margaret B. McLeod's answer, in the action in which the consent judgment was entered, was filed on 1 March 1965. The instant action was commenced by her on 24 June 1965. It would seem that according to the provisions of paragraph 4 of the court's order and decree in the consent judgment that W. L. McLeod has deposited the sum of $10,000 in the Home Savings and Loan Association at Albemarle, North Carolina, for the use and benefit of Margaret B. McLeod, that according to the provisions of paragraph 5 of the court's order and decree that he has made the payments of $375 a month to Margaret B. McLeod, because plaintiff in her complaint has not alleged those things have not been done.

In our opinion, and we so hold, considering all the provisions and terms of the separation agreement, that defendant's alleged fraudulent representations that plaintiff would have to move from within the corporate limits of the town of Norwood in order that the defendant may continue the practice of his profession in said town so as to make the monthly payments which he had agreed to pay to the plaintiff for her support, that he, the defendant, intended to continue to live in the town of Norwood and practice his profession so as to fully comply with the provisions of said agreement, do not permit the legitimate inference that defendant by such alleged fraudulent representations induced plaintiff to enter into the consent judgment with all its specific provisions, which but for these misrepresentations she would not have done. One of the essential elements of actionable fraud is "that plaintiff reasonably relied upon the representation, and acted upon it." *Cofield v. Griffin,* 238 N.C. 377, 78 S.E. 2d 131. Defendant's mere failure within 30 days from the date of the consent judgment to deliver to plaintiff a $20,000 paid-up life insurance policy on his life payable to Margaret B. McLeod as the principal beneficiary, etc., as set forth in paragraph 8 of the order and decree of the consent judgment does not constitute actionable fraud, particularly as so short a time has elapsed between the signing of the consent judgment and the institution of the instant action. This is said in *Joyner v. Joyner,* 264 N.C. 27, 140 S.E. 2d 714, and quoted with approval in *Van Every v. Van Every,* 265 N.C. 506, 144 S.E. 2d 603: " 'The courts will subject the wife's claim of fraud, duress, or undue influence to a far more searching scrutiny where she was represented by counsel in the making of the agreement and throughout the negotiations leading up to its execution.' Lindey, Separation Agreements § 28IX (1937 Ed.)." Judge Brock was correct in concluding that plaintiff's complaint fails to allege sufficient facts to constitute a cause of action.

Plaintiff's second assignment of error is: "The court erred in its conclusion that the plaintiff has a remedy by motion in the cause in the original action referred to in the pleadings. . . ." This assignment of error is overruled. The consent judgment here will support contempt proceedings, if W. L. McLeod wilfully refuses to comply with what Judge McConnell ordered and decreed that he should do. *Bunn v. Bunn, supra; Smith v. Smith,* 247 N.C. 223, 100 S.E. 2d 370; 2 Strong, N. C. Index, Divorce and Alimony, § 21, p. 113.

Plaintiff's third and last assignment of error is: "The court erred in its conclusion that there is no cause of action to support the filing of a *Lis Pendens* and by striking the *Lis Pendens* from the record." Plaintiff's argument in support of this assignment of error is thus stated in her brief:

> "'(1) Actions affecting title to real property.'
>
> "The plaintiff respectfully contends that if the defendant should die intestate while she and the defendant are still married, and if she is the lawful and legal spouse of the defendant on such occasion, she would be entitled to make an election as provided by G.S. 29-30, and that it is incumbent upon her with the Consent Judgment on file in the Office of the Clerk of the Superior Court for Stanly County to put all persons on notice, desiring to consummate any real property transactions with the defendant, as to her contentions relating to their marital status which may affect title to real property conveyances."

Her contention is that this is an action affecting title to real property. With that contention we do not agree. 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 of Judge Brock concluding that this is no cause of action to support the filing of the *lis pendens* filed in this case and striking it from the record in the office of the clerk of Stanly County was correct. For a clear and scholarly discussion of the doctrine of *lis pendens* by Lake, J., under the statute law of this State, see *Cutter v. Realty Co.,* 265 N.C. 664, 144 S.E. 2d 882.

The order of Judge Brock is

Affirmed.

PATRICIA S. JORDAN v. EASTERN TRANSIT & STORAGE COMPANY, INCORPORATED.

(Filed 14 January, 1966.)

1. Pleadings § 28—

Plaintiff can recover only on the theory of her complaint.

2. Warehousemen § 1—

Plaintiff's allegations and evidence were to the effect that defendant packed, transported and stored plaintiff's goods and that while the goods were in the exclusive possession of defendant some of them were lost and others damaged. Plaintiff alleged that the loss and damage occurred while the goods were in storage. *Held:* The burden was not upon plaintiff to show that the loss and damage occurred after the goods had been stored, but upon defendant, if it sought to escape liability on the ground that the loss and damage occurred prior to storage, to prove such circumstances as a defense to plaintiff's claim, the facts being peculiarly within the knowledge of defendant.

3. Trial § 38—

The court correctly refuses to give an instruction not supported by any view of the evidence in the case.

4. Warehousemen § 1—

Plaintiff's evidence to the effect that she delivered to defendant warehouseman articles of personalty in good condition and that defendant failed to redeliver some of the articles and delivered others in damaged condition is sufficient to support a finding by the jury that defendant through its negligence lost the missing articles and damaged those which were redelivered to plaintiff in damaged condition.

5. Same—

The provisions of a bill of lading issued by a carrier-warehouseman that it should not be liable for loss or damage to articles packed by other than its employees or breakage of articles not described as fragile, and that it should not be liable for the contents of any specific cartons unless the articles packed therein were specifically itemized in the receipt, *held* not applicable when the carrier-warehouseman itself packed the articles.

6. Same; Contracts § 10—

The rule that a common carrier or a public utility may not contract against its liability for negligence is applicable to warehousemen, G.S. 27-7, and such rule precludes also a stipulation limiting liability for loss or damage to an amount which the warehouseman knows, or in the exercise of ordinary judgment should know, is greatly less than the value of the articles received by it.

7. Same—

Where the warehouseman itself packs the household furnishings, china and silver delivered to it, it is charged with the knowledge that the value of a barrel or carton of such articles would exceed $50.00, and its stip-

ulation of limitation of liability for loss or damage to $50.00 to any one carton or barrel is void.

8. Same—

Where a warehouse receipt stipulates that the warehouseman received goods enumerated thereupon subject to the terms and conditions on the back thereof, the shipper, by signing an entirely different statement also appearing on the face of the receipt, is not bound by a stipulation on the back that the goods delivered were of a value not in excess of $50.00 per container.

APPEAL by defendant from *Huskins, J.*, 31 May 1965 Regular Schedule B Civil Session of MECKLENBURG.

The defendant is the owner and operator of a public warehouse in the City of Charlotte. The plaintiff stored in the warehouse her household furnishings. She alleges that when she called upon the defendant for the return of her properties some of the articles were not redelivered and others were redelivered in a damaged condition, due to the negligence of the defendant. She alleges that the lost articles were of the value of $5,897, and that the damage to the articles which were returned amounted to $1,175.50. She sued for the total of these sums.

The answer denies negligence, denies any failure to redeliver and denies that any of the property was damaged. It further denies the value of the properties as alleged by the plaintiff. As a further defense, the defendant pleads the following provisions of the warehouse receipt issued by it to the plaintiff:

"6. The Company shall not be liable for any loss, damage or injury to fragile articles that are not packed, or that have been packed or unpacked by others than the employees of the Company, or that are not known or described as fragile articles. Where the contents of any barrel, cask, box or other parcel are not specifically itemized in the receipt, the Company shall not be liable to account for the particular contents of any such piece or parcel.

"7. The above named Depositor declares that the value of any article, piece or package including the contents thereof, packed, handled, carted or stored in this lot, or later received for the account of same, Depositor, does not exceed the sum of Fifty Dollars ($50.00), upon which valuation the rate is based, and the liability of the Company for any causes which would make it liable in case of loss or damage, while goods are in its possession, shall not exceed the sum so declared unless the owner or representative fixes a greater value and agrees to pay an additional charge of 25 cents per One Hundred Dollars ($100.00) per month thereon."

The court instructed the jury that provisions 6 and 7 of the warehouse receipt were unenforceable in this action and must be given no consideration by the jury.

The verdict of the jury was that the defendant, through its negligence, failed to redeliver to the plaintiff her property or delivered it in a damaged condition, as alleged in the complaint, and that she was entitled to recover therefor $5,000. From a judgment in accordance with the verdict the defendant appealed, assigning as error the court's above mentioned instruction with reference to paragraphs 6 and 7 of the warehouse receipt, and the court's denial of the defendant's requests that the jury be instructed: (1) That the maximum amount of damages to be awarded could not exceed $50.00 for any one barrel or package of goods; (2) that any loss or damage which may have occurred before the plaintiff's property was received and stored in the warehouse in Charlotte could not be considered by the jury; and (3) that the jury should consider only such loss and damage as the plaintiff has, by the greater weight of the evidence, satisfied the jury occurred after the property was received and stored in the warehouse.

The facts material to this appeal, as to which there is no substantial conflict in the evidence, may be summarized as follows:

In February 1960, the plaintiff, then residing in New Jersey, decided to move to Charlotte where her parents reside. On her behalf, her father made arrangements with the defendant in Charlotte for it to transport her household furniture and belongings to Charlotte for storage in the defendant's warehouse until the plaintiff was ready for their redelivery to her at her new home.

In due time, a truck of the defendant, with two of its employees, arrived at the plaintiff's residence in New Jersey. They packed and loaded on the truck the plaintiff's household furniture, china, silver, glassware and other belongings. The plaintiff had no substantial part in such packing. The defendant's employees packed the plaintiff's silver, dishes, glassware and similar fragile articles in cartons or other containers designated by them as "barrels." These "barrels" are customarily used by such carriers and warehousemen for the packing of fragile articles. No inventory of these articles, or of the contents of any carton or "barrel," was prepared. All the articles were in "perfect condition" when so packed by the defendant's employees. The plaintiff signed the bill of lading in a "box" thereon containing a place for a declaration of the value of the property but no valuation was stated therein. In another portion of the bill of lading, it was stated that the rates for transportation were based upon a "release value of $ .30 per pound per article." The total weight being 7,190 pounds, this would have resulted in a

total "release value," according to the bill of lading, of $2,157. However, the bill of lading also shows that the plaintiff was charged a premium for $5,000 of transit insurance.

Upon its arrival in Charlotte, the plaintiff's property was placed by the defendant in its warehouse. It prepared a warehouse receipt in which it listed 209 items, including various articles of furniture and household appliances and numerous items listed simply as "barrel" or "carton." Nothing was stated thereon as to the contents of any such "barrel" or "carton."

The receipt stated above the list of the items that the properties so listed were "to be stored at warehouse * * * upon the terms and conditions on the back of this receipt." These terms included paragraphs 6 and 7 above quoted. These and a number of other terms and conditions were printed on the reverse side of the receipt in small but legible type, occupying only half the space available on the sheet. That is, these terms and conditions could have been printed in substantially larger type upon the reverse side of the receipt had the defendant desired to do so.

Upon the face of the receipt, near the bottom and below the list of items, the plaintiff signed her name under the statement, "I acknowledge that the condition of the goods at the time of the loading is as noted on this inventory and that I have received a copy of this inventory." The document contained no statement as to the condition of many of the barrels and cartons and, as to each of the others, stated only that the condition was unknown. The receipt and inventory was so signed by the plaintiff and a copy thereof delivered to her after her goods reached Charlotte and were in the defendant's warehouse.

The plaintiff paid the defendant for the storage of her property approximately $28.00 per month for many months, this being at the rate of 40 cents per hundred pounds. From time to time, she removed articles from storage. When she found some of these items had been damaged, she so advised the defendant's president. He suggested that she wait until she took all of the items out of storage and then submit a claim for whatever total damage was discovered. Having ultimately unpacked all of the containers, she prepared a list of the missing items and a list of those damaged, which lists were put in evidence with evidence as to the value of the missing articles and the amount of the damage to the others. The defendant offered no evidence in contradiction.

J. Donnell Lassiter; Kennedy, Covington, Lobdell & Hickman for defendant appellant.

Moore and Van Allen by John T. Allred for plaintiff appellee.

LAKE, J. There was no error in the court's refusal of the defendant's request for instructions 2 and 3. In effect, the defendant requested the court to instruct the jury that the plaintiff could not recover in this action for any loss or damage which occurred before her property reached Charlotte and was stored in the warehouse and that the burden was upon the plaintiff to show, by the greater weight of the evidence, how much of her loss and damage occurred after her goods were so stored.

The defendant was both the carrier and the warehouseman. As carrier, it packed the articles into the "barrels" and "cartons." Had it so desired, it could have prepared an inventory, item by item, showing the then condition of each item. It did not do so. The plaintiff testified that the items she alleges were lost were so packed by the defendant's employees and that all of the lost articles as well as all of those she alleges to have been damaged were, when so packed, in "perfect condition." There was no evidence to the contrary. From that time until the cartons and "barrels" were redelivered to the plaintiff they remained continuously in the possession and control of the defendant.

Of course, the plaintiff, having alleged in her complaint loss of and damage to her property while it was in the possession of the defendant in its warehouse in Charlotte, pursuant to its contract as warehouseman entered into on 24 February 1960, could not recover in this action for loss or damage which occurred prior to that time, at a different location and while the property was in the defendant's possession under a different contract creating a different relationship. The plaintiff can recover only on the theory of her complaint. *Hormel & Co. v. Winston-Salem,* 263 N.C. 666, 140 S.E. 2d 362; *Howell v. Smith,* 258 N.C. 150, 128 S.E. 2d 144; *Fox v. Hollar,* 257 N.C. 65, 125 S.E. 2d 334. Thus the proposition of law upon which these requests of the defendant were based is sound. However, it is not applicable to this action for there is no suggestion in either pleading, or in the evidence offered by either party, that any loss or damage occurred before the plaintiff's property reached Charlotte and was stored in the defendant's warehouse.

The plaintiff, having introduced evidence to show that her properties were lost and damaged while in the exclusive possession and control of the defendant, the burden was upon the defendant to show where and when the loss and damage occurred, if it relies upon those circumstances as a defense to the plaintiff's claim, the facts being peculiarly within the knowledge of the defendant. See: *Hosiery Co. v. Express Co.,* 184 N.C. 478, 114 S.E. 823; *Ange v. Woodmen,* 173 N.C. 33, 91 S.E. 586; *Furniture Co. v. Express Co.,*

144 N.C. 639, 57 S.E. 458; *Meredith v. R. R.*, 137 N.C. 478, 50 S.E. 1; Stansbury, North Carolina Evidence, § 208.

No such evidence having been offered by the defendant and no contention having been made by it, in its pleadings or otherwise, that it lost or damaged the plaintiff's articles while they were in its possession as carrier, it was not necessary for the court to instruct the jury as to the law which would have governed the case if such facts had been shown. On the contrary, it is error for the court to charge on abstract principles of law not supported by any view of the evidence. *Pressley v. Pressley*, 261 N.C. 326, 134 S.E. 2d 609; *Chappell v. Dean*, 258 N.C. 412, 128 S.E. 2d 830. It is clearly not error to refuse a request for such an instruction. *Edwards v. Telegraph Co.*, 147 N.C. 126, 60 S.E. 900.

There was also no error in the instruction to the jury that paragraphs 6 and 7 on the back of the warehouse receipt are "unenforceable in this law suit," and, therefore, the jury was to give no consideration to those provisions, or in the refusal of the court to give the instruction requested by the defendant to the effect that the amount recoverable by the plaintiff could not exceed $50.00 for the contents of any one "barrel" or "carton."

The evidence of the plaintiff is sufficient to show that all of the articles were delivered to and packed by its employees in New Jersey. They were transported by the defendant to its warehouse in Charlotte and stored there by it. All of the articles were in "perfect condition" when delivered to and packed by the defendant. Thereafter, the defendant failed to redeliver some of the articles and delivered others in a damaged condition. This was sufficient to support the jury's finding that the defendant, through its negligence, lost the missing articles and damaged those which were redelivered to the plaintiff in that condition. *Swain v. Motor Co.*, 207 N.C. 755, 178 S.E. 560; *Morgan v. Bank*, 190 N.C. 209, 129 S.E. 585; 42 A.L.R. 1299.

We need not determine the validity of paragraph 6 of the terms and conditions printed upon the back of the warehouse receipt for, by its terms, it is inapplicable to this transaction. The articles were packed by the defendant and so it knew they, or many of them, were fragile. It was the defendant, not the plaintiff, who knew what went into each "barrel" or carton. It could have made an inventory of the contents of each container had it so desired. Such a provision in a bill of lading must be construed against the carrier, who prepared it, in case of an ambiguity. 13 Am. Jur. 2d, Carriers, § 280.

Contracts exempting persons from liability for negligence are not favored by the law and are strictly construed against the party claiming such exemption. *Neece v. Greyhound Lines*, 246 N.C. 547,

99 S.E. 2d 756, 68 A.L.R. 2d 1341; *Hall v. Refining Co.*, 242 N.C. 707, 89 S.E. 2d 396; *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185; *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133; *Insurance Ass'n v. Parker*, 234 N.C. 20, 65 S.E. 2d 341. However, in the ordinary economic relationships, the law accords to contracting parties freedom to bind themselves as they see fit and such a contract, if clearly intended to have that effect, will be enforced, at least where the parties have relatively equal bargaining power. *Hall v. Refining Co., supra.* There are, however, other economic relationships in which, by reason of exceptional public interest in the services involved or because of the obvious inequality of the bargaining powers of the parties, it is held that such contracts are contrary to public policy and are void and unenforceable. On this ground, it has long been held that, in absence of statutory authorization, a common carrier or other public utility may not contract for its freedom from liability for injury caused by its negligence in the regular course of its business. *Hall v. Refining Co., supra; Insurance Ass'n v. Parker, supra; Hill v. Freight Carriers Corp., supra; Gardner v. R. R.*, 127 N.C. 293, 37 S.E. 328.

G.S. 27-7, which is part of the Uniform Warehouse Receipts Act, states that a warehouseman may insert in a receipt issued by him, in addition to those provisions required by the Act to be inserted, any other terms and conditions, provided that they are not contrary to the provisions of the Act and provided that such terms and conditions shall not "in anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own." Thus, a warehouseman, like a common carrier, may not, by contract with his customer, absolve himself from liability for loss of or damage to goods stored in his warehouse, which loss or damage is due to his negligence.

In *Gardner v. R. R., supra,* Douglas, J., speaking for the Court, said:

> "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence. * * * The measure of such liability is necessarily the amount of the loss; and if a common carrier is permitted to stipulate that it shall be liable only for an amount greatly less than the value of the property so lost—that is, for only a small part of the loss—it is thereby exempted *pro tanto* from the results of its own negligence. Such a course, if permitted, would practically evade

> the decisions of the courts, and nullify the settled policy of the law. We do not mean to say that there are no cases where a common carrier can make a valid agreement as to the value of the article shipped, but all such agreements must be reasonable, and based upon a valuable consideration."

An agreement limiting the warehouseman's liability for loss or damage to an amount which the warehouseman knows, or in the exercise of ordinary judgment should know, is but a small fraction of the real value of the goods delivered to him, cannot be deemed a reasonable agreement and, even though a smaller charge for storage is made because of the agreement, it cannot be held valid, since it is, by its necessary effect, an agreement limiting the liability of the warehouseman for damages due to his own negligence.

Here, the employees of the warehouseman packed the articles. Consequently, they knew the general nature of them. They were packed in containers which the defendant's president testified were used for breakable articles. The defendant is, therefore, not in the position of a warehouseman who has received containers, packed by another, with no knowledge of the nature and quality of the contents.

One in the business of storing household furnishings must be held to know that a "barrel" of antique silver, fine china and glassware has a value far in excess of $50.00. The so-called agreement between the parties, assuming the plaintiff entered into it, that the value of each such "barrel" or "carton" does not exceed the sum of $50.00, cannot, therefore, be deemed a reasonable effort of the parties to state the true value of the goods stored. On the contrary, it is an arbitrary limitation upon the liability of the defendant for loss or damage due to its negligence.

Furthermore, the plaintiff did not sign a statement that the goods were of a value not in excess of $50.00 per "barrel" or "carton." The statement she signed was: "I acknowledge that the condition of the goods at the time of the loading is as noted on this inventory and that I have received a copy of this inventory." That statement was printed on the front of the receipt, near the bottom, and below a partial list of the articles, cartons, barrels, and other designations of articles stored with the defendant. At the top of the page is a receipt, signed by the defendant, stating, in substance, that it has received the goods enumerated thereafter "upon the Terms and Conditions on the back of this Receipt." On the back of the receipt, in much smaller type than the available space made necessary, are 15 paragraphs of terms and conditions, including the agreement for limited liability. There is no evidence in the

record to show that these terms and conditions were called to the attention of the plaintiff when she signed the statement concerning the condition of her goods "at the time of the loading."

In the absence of any evidence that the plaintiff's attention was directed to the printed statement on the back of the document, concerning the valuation of the goods, her signing of an entirely different statement, upon the front of the paper, is not sufficient evidence to support a finding that she agreed to release the defendant, in whole or in part, from liability for loss or damage to her property caused by its negligence. See: *Insurance Ass'n v. Parker*, *supra*. The burden of proof is upon the defendant warehouseman to show that the plaintiff made the contract upon which it relies for the limitation of its liability for loss due to its own negligence. While the plaintiff may be held to knowledge and understanding of that which she signed, the statement she signed was so placed upon the document and so worded that it would not, of itself, put her on notice of the printed provision on the back of the paper concerning the valuation of her property.

No error.

MARGARET J. BENNETT, ADMINISTRATRIX OF THE ESTATE OF COMMODORE WILLIS JONES v. JAMES H. YOUNG, J. C. ANDERSON AND L. A. REYNOLDS COMPANY, JOINTLY AND SEVERALLY.

(Filed 14 January, 1966.)

1. Trial § 21—

On motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, giving her the benefit of all reasonable inferences therefrom, resolving all conflicts in her favor, and disregarding defendant's evidence tending to show a different state of facts.

2. Negligence § 24a—

If there is sufficient evidence of actionable negligence for which a defendant is responsible, and the evidence, considered in the light most favorable to plaintiff, does not disclose contributory negligence of plaintiff as the sole reasonable inference, nonsuit should be denied.

3. Negligence § 26—

Evidence tending to show that a construction worker was driving grading stakes on the construction site under the supervision of his superior and that on the occasion in question was doing so with his back to a dump truck, and had reason to believe that his superior was standing watching him do so, *held* not to disclose contributory negligence as a

matter of law on his part so as to bar an action for his wrongful death resulting when the waiting dump truck was backed without warning and struck him.

4. Automobiles § 12—

A driver backing a motor vehicle must use that degree of care which a reasonably prudent man would use under similar circumstances to avoid injuring another, and while the degree of care varies with the exigencies of the occasion, the requirement that before backing he must exercise due care to ascertain whether he can do so with safety to others obtains even on private property when he has reason to believe that a pedestrian or another vehicle may be in his intended path.

5. Automobiles § 41k—

Evidence tending to show that a dump truck on a construction site was standing waiting to back into place to be loaded, that its rear view mirrors did not disclose any object within twenty feet of its rear, and that the driver without warning or sounding his horn backed the truck into a workman who had been driving a stake with his back to the truck and in the area not shown in the mirrors, *held* sufficient to be submitted to the jury on the question of the truck driver's negligence.

6. Master and Servant § 20—

Where the subcontractor of the grading contractor merely operates dump trucks to carry away excavated dirt, such work is not intrinsically dangerous and the grading contractor is not liable for an injury inflicted on another as a result of the negligence of an employee of the subcontractor.

7. Same—

Evidence tending to show that the trucks of the grading contractor were the only vehicles entering upon the construction site, that there were two loading machines which could load a truck within from four to ten minutes, and that the employees of other contractors were pedestrians on the site, *held* not to show a sufficient volume of vehicular or pedestrian traffic as to constitute the failure of the grading contractor to provide a director of traffic negligence.

APPEAL by plaintiff from *Pless, J.*, 16 April 1965 Session of GUILFORD.

The plaintiff appeals from a judgment of nonsuit as to all defendants in an action for wrongful death.

It is alleged in the complaint and admitted in the answer of each defendant that:

On August 30, 1960, the plaintiff's intestate was killed, almost instantly, when a truck owned by the defendant Young, and operated by his employee, Laws, who was acting in the course of his employment, backed into and ran over him upon the premises of the Pilot Life Insurance Company near Greensboro. The deceased and all of the defendants were then engaged in certain construction

work upon these premises. The defendant L. A. Reynolds Company (hereinafter called Reynolds) was the subcontractor for the work of clearing, excavating and grading the construction site. The defendant Anderson was the employee of Reynolds and, at the time in question, was acting in the course of his employment. Young's truck, driven by Laws, was engaged in hauling dirt in the course of such excavation and grading of the construction site. The plaintiff's intestate was an employee of the general contractor who is not a party to this action. At the time of his death, the plaintiff's intestate was engaged in driving into the ground a grade stake pursuant to instructions from his foreman, another employee of the general contractor. To do so he had gone to the point where the stake was to be driven, this being directly behind Young's truck, which was then standing about 20 feet away, waiting for its turn to move backward to a position where it would be loaded by an excavating and loading machine. In driving the stake the plaintiff's intestate turned his back to the then stationary truck of Young. While he was in this position and engaged in the driving of the stake, the truck started to move backward and ran over him.

The complaint further alleges:

Laws was negligent in the operation of Young's truck by driving it backward without warning, without keeping a proper lookout and without seeing that it could be so moved in safety to others; Anderson was negligent in that he failed properly to supervise and direct the movement of the earth moving equipment and the trucks and failed to warn the plaintiff's intestate that the truck was moving and of the danger to him resulting therefrom; and such negligent acts and omissions concurred and were the proximate cause of the death of the plaintiff's intestate. The answer of each defendant denies negligence by such defendant and pleads contributory negligence by the plaintiff's intestate in that he proceeded to work in this dangerous location without maintaining a proper lookout for the movement of the trucks, turning his back to the direction from which such truck might and did back upon him.

The plaintiff offered evidence tending to show, in addition to the foregoing admitted facts and to matters relating to the life expectancy and earning capacity of her intestate, the following:

At the time of the accident, there was considerable activity and noise in the construction area. A large number of men were at work on the site. Seven dump trucks, including four owned by Young, were engaged in hauling the dirt away from the area. In a consistent pattern the trucks, one after another, entered the excavation area, stopped with the engine running, awaited their turns, then backed up to one of the two mechanical loaders, were loaded with

dirt and drove away. It required about three buckets of earth from the loader to load a truck. At the point of the accident the ground had been recently excavated and was reasonably smooth.

Anderson was the superintendent on the job for Reynolds. He and Young were both present on the site at the time of the accident. Each was some distance away and neither actually saw it happen.

The Young truck, operated by Laws, was a ton and a half dump truck. It had a horn and was equipped with mirrors on each side. A truck fully equipped with mirrors has a blind spot immediately behind it.

J. T. McManis was the general contractor's superintendent on the job. The plaintiff's intestate, an employee of the general contractor, was working directly with McManis, and under his instructions, at the time of his death, laying out the project and driving grade stakes. McManis designated the points where the stakes were to be placed and the plaintiff's intestate drove them into the ground. Usually they walked along together from point to point.

On this particular occasion, McManis located the point where the stake was to be driven, which was about 20 feet back of the Young truck, operated by Laws, which McManis then observed standing still and waiting its turn to move into position to be loaded. While the plaintiff's intestate was driving the stake, McManis walked on toward the next point. When he turned around he was surprised to find plaintiff's intestate was not with him. He looked back and saw the plaintiff's intestate back of the truck, bent over at the location McManis had designated for the driving of the stake. This was about 20 feet immediately back of the Young truck, operated by Laws. The truck had started backing straight and slowly toward the plaintiff's intestate. McManis shouted a warning but was not heard by either the plaintiff's intestate or the truck driver. He then ran and overtook the slowly moving truck and banged on the door. Laws stopped the truck immediately but it had already struck and run upon the plaintiff's intestate. At that time Anderson came up. McManis does not recall hearing the horn of this truck blow on this occasion. On previous occasions he had heard the trucks sound their horns.

McManis did not direct the work of Reynolds. He simply told Reynolds where to grade and how deep to cut. He gave no instructions as to the manner in which Reynolds was to perform the grading work, these being given by Anderson. The plaintiff's intestate had been in this area with McManis on the morning of the day when he was killed, doing similar work and the trucks were following the same routine pattern. He had worked with McManis for a

number of years on different jobs and was an experienced laborer in such work. McManis did not give the plaintiff's intestate any safety instructions because he felt that the danger at the location was obvious to anyone with experience. He did not feel that the operation of the trucks getting into position, waiting for the loader and going in and out was being carried on in a dangerous manner.

The defendant Young offered evidence tending to show:

The truck involved in the accident had a rear view mirror on each side of it, but immediately behind the truck there is a space of about 15 to 20 feet in depth into which the driver could not see by looking in either mirror. There is also a rear window in the cab of the truck but the body of the truck obstructs vision to the rear through that window. Young hired his own drivers for his trucks, renting the trucks and the drivers to Reynolds at a fixed sum per hour. He instructed the drivers how to drive the trucks. Anderson, superintendent for Reynolds, instructed them where to take the dirt.

The defendants Anderson and Reynolds introduced evidence tending to show:

Anderson gave no instructions to Laws as to the operation of the truck. At the time this accident happened Anderson was 50 to 60 feet away engaged in the making of certain markings upon a portion of the old building adjacent to the new construction. He did not see the accident occur, but went immediately to the scene.

The purpose of the grade stakes being driven by the plaintiff's intestate was to show the amount of cut or fill at the particular point. Anderson had requested McManis and the plaintiff's intestate to give him such direction during the lunch hour and was told, "We'll have them in before you get back." During the lunch hour McManis and the plaintiff's intestate put in some of the stakes and were continuing this work when the accident occurred.

It would take about four minutes for the loader to dig the dirt, lift it and complete the loading of a truck. Every four to ten minutes a truck would move into the area where the loader was operating. Frequently trucks were waiting to be loaded.

At the close of all the evidence the court granted the motion of each defendant for judgment as of nonsuit.

A. L. Meyland and H. H. Issacson for plaintiff appellant.

Of Counsel: Block, Meyland & Lloyd and Clarence C. Boyan for plaintiff appellant.

Booth, Osteen, Fish & Adams for defendant appellees J. C. Anderson and L. A. Reynolds Company.

Cooke & Cooke for defendant appellee James H. Young.

LAKE, J. In reviewing the rulings of the trial judge upon the separate motions of the defendants for judgment as of nonsuit, we are required, as was he, to consider the plaintiff's evidence in the light most favorable to her, resolving all conflicts therein in her favor, drawing therefrom all reasonable inferences favorable to her and disregarding all evidence by the defendants tending to show a situation or a course of action contrary to that shown by the plaintiff's evidence so interpreted. *Moss v. Tate,* 264 N.C. 544, 142 S.E. 2d 161; *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. If, when so considered, it is sufficient to support a finding by the jury that one of the defendants, or a person for whose negligent act or omission such defendant is responsible, was negligent and that such negligence was a proximate cause of the death of the plaintiff's intestate, the motion of that defendant for judgment of nonsuit should have been denied, unless the evidence, so interpreted, shows contributory negligence by the plaintiff's intestate so clearly that no other inference may be reasonably drawn therefrom. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292; Strong, N. C. Index, Negligence, § 26.

The plaintiff's evidence, if believed, as it must be upon this motion, tends to show that her intestate was directed by his employer's superintendent to drive a grade stake at the precise point where he was driving it when struck by the truck. He and the superintendent had been walking together from point to point, the superintendent directing him where to put the respective stakes and the plaintiff's intestate driving them pursuant to such instructions. As each stake was driven they had been walking together to the next location. On this occasion, the superintendent walked on toward the place where the next stake was to be driven before the plaintiff's intestate had finished the driving of the stake at the point behind the truck of the defendant Young. When the superintendent turned to look back he was surprised to find that the plaintiff's intestate was not walking with him. From this it may reasonably be inferred that the plaintiff's intestate was equally unaware of the fact that his superintendent was no longer standing nearby, observing the driving of the stake and the truck behind which he had instructed the plaintiff's intestate to go. Under these conditions we cannot say, as a matter of law, that the plaintiff's intestate was negligent in going behind the truck to drive the stake or in driving it with his back turned toward the truck, which was not moving when he stepped behind it. Whether his doing so under these circumstances was a failure by him to use reasonable care for his own safety, and one of

the proximate causes of his injury and death, is a question for the jury, if it reaches the issue of contributory negligence.

Laws, the driver of the truck, was originally made a party defendant to this action. However, he could not be found for the service of summons and the trial of the action proceeded as if he had not been made a party. He was not present at the trial, so the record does not contain any testimony by him as to what he did, or did not do, in the operation of the truck.

It being alleged in the complaint and admitted by Young in his answer that Laws was operating the truck in the course of his employment by Young, Young is responsible for the negligence of Laws, if any, in such operation.

The evidence of the plaintiff, interpreted as it must be upon Young's motion for judgment of nonsuit, tends to show that Laws backed the truck without blowing the horn or giving any other signal of his intent to do so and that the rear view mirrors on each side of the truck would not disclose to Laws what, if anything, was in the area immediately behind the truck, this being the area in which the plaintiff's intestate was driving the stake. Although there is nothing to indicate that Laws actually knew anyone was, or had been, behind the truck, there is evidence that a number of workers were on the construction site and it might be inferred that the presence of one of them at any part of the site could be anticipated from time to time.

In *Adams v. Service Co.*, 237 N.C. 136, 142, 74 S.E. 2d 332, after observing that it is not negligence *per se* to back an automobile on the highway, Winborne, J., later C.J., said for the Court:

> "And while the law does not forbid the backing of an automobile upon the streets and highways, and to do so does not constitute negligence, the driver of an automobile must exercise ordinary care in backing his machine so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured."

In *Wall v. Bain*, 222 N.C. 375, 379, 23 S.E. 2d 330, Seawell, J. observed that backing a motor vehicle upon the highway is "an operation which involved a greater danger than ordinary travel," and that no reasonable person would drive in that manner for any length of time. He then said, for the Court:

> "The requirements of prudent operation are not necessarily satisfied when the defendant 'looks' either preceding or during the operation of his car. It is the duty of the driver of a motor

vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen."

This rule has been quoted with approval many times by this Court. *Greene v. Meredith*, 264 N.C. 178, 141 S.E. 2d 287; *Sugg v. Baker*, 261 N.C. 579, 135 S.E. 2d 565; *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903.

While the foregoing decisions dealt with the operation of motor vehicles upon the public highways, the same principles apply to the operation of such a vehicle elsewhere, such as upon private property whereon a construction project is under way. In *Murray v. Wyatt*, 245 N.C. 123, 95 S.E. 2d 541, the facts were very similar to those in the record now before us. There, an employee of the general contractor was killed when the subcontractor's dump truck backed into him in process of dumping a load of materials at a site maintained for that purpose by the contractor. Motion for judgment of nonsuit was held to have been properly denied, the Court citing *Adams v. Service Co., supra*, and saying:

"In view of the evidence that both Murray and the [Jones] truck were in fact directly behind him, it was for the jury, upon all the evidence, to say whether Boyle failed to use due care in backing his truck without first exercising due care to ascertain whether he could do so without striking Murray or the Jones truck. * * * There is little difference between backing a truck when you cannot see what is behind you and in driving forward when blindfolded."

Whether the vehicle is being operated on a public highway or elsewhere, the driver must use the care which a reasonable man would use in like circumstances to avoid injury to another. As Parker, J., said in *Greene v. Meredith, supra*, "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."

Of course, one driving a motor vehicle in an open field, with no reason to suppose any other person is nearby, is not to be held to the same degree of vigilance in maintaining a lookout, whether proceeding forward or backward, as is one driving upon a heavily traveled highway. But where the motorist has reason to believe that any pedestrians or other vehicles may be in his intended path, he must exercise for their safety the care which a reasonable man would use under the same circumstances, even though he be driving upon private property.

Applying these standards of care and viewing the plaintiff's evidence as we are required to do upon this motion, we are unable to

hold, as a matter of law, that Laws used the care of a reasonable man. So considered, her evidence would support a finding that, having notice that some person might be standing or walking in his intended path, Laws put his vehicle in motion and backed it into an area he could not observe, without blowing his horn or giving any other signal. It is, of course, for the jury to determine, in the light of all the evidence, whether Laws actually did use the care which a reasonable man would use under the circumstances then, in fact, prevailing. It is for the jury to determine both what those conditions were and how Laws operated the truck. Its determination must be made in the light of all the evidence, free from the limitations which govern our consideration of it upon a motion for judgment of nonsuit, and in view of the rule that the burden is upon the plaintiff to prove negligence by Laws. The evidence of the plaintiff, if believed is, without more, sufficient to support a finding that Laws failed to use such care and his failure was a proximate cause of the death of the plaintiff's intestate. Therefore, the court erred in granting the motion for judgment of nonsuit in favor of Young, the employer of Laws.

As to the defendant Anderson and the defendant Reynolds a different situation exists. Anderson was the employee of Reynolds, so any negligence by him in the course of his employment would be imputed to Reynolds. However, there was no duty upon Anderson to station a watchman to direct the movement of the trucks unless such duty rested upon Reynolds and fell upon Anderson by virtue of his being Reynolds' superintendent.

Reynolds was the subcontractor performing the grading of the construction site. Laws, the driver of the truck, was not the employee of either Reynolds or Anderson. Laws was employed by Young, an independent contractor hauling the dirt for Reynolds. The work which Young and his employees were doing was not inherently dangerous. It consisted simply of driving a truck into a position where Reynolds could load it with dirt and then driving the truck away to a place designated by Reynolds and dumping the dirt there. It required no precaution other than those incident to any operation of a dump truck. Consequently, Reynolds, for whom this work was being done under the subcontract, would not be liable for the negligence of Laws in the operation of the truck. See: *Dockery v. Shows*, 264 N.C. 406, 142 S.E. 2d 29; *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 17 S.E. 2d 125; *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739. Anderson would not be liable for the negligence of Laws, there being no relation of any sort between them.

The plaintiff complains of these defendants on the theory that it was their duty to station a person at or near the excavating and loading machines to direct the movement of the trucks up to and away from this point. Her evidence fails to show that there was a sufficient volume of traffic, vehicular or pedestrian, to make such a director of traffic reasonably necessary. It shows that the trucks followed a regular routine which was apparent to anyone working about the project. A total of approximately seven trucks were engaged in the activity. There were two loading machines. From four to ten minutes were required to load a truck. Thus, assuming the two loading machines worked uniformly, a truck would arrive at the machine and depart approximately each three or four minutes. No other vehicles moved in the area. The public did not enter upon it. Under these circumstances, the plaintiff's evidence fails to show a duty upon Reynolds, the grading contractor, to provide a traffic director. Anderson's duty, in that respect, would be no greater than that of his employer.

The plaintiff's evidence, viewed most favorably to her, shows no breach of any duty owed to her intestate by Anderson or Reynolds. Therefore, the motions of these defendants for judgment of nonsuit were properly allowed.

Affirmed as to the defendants Anderson and L. A. Reynolds Company.

Reversed as to the defendant Young.

SHERMAN A. BINGHAM v. DAVID A. LEE, DEXTER ALLEN LEE AND WIFE, BERTTIE W. LEE.

(Filed 14 January, 1966.)

1. Trusts § 13—

A resulting trust arises in favor of a person furnishing a part of the purchase price for land for which title is placed in another under a prior express agreement that such other should hold the property for the benefit of those furnishing the purchase price, but in order to establish such trust plaintiff must prove that the consideration paid by him was actually used in the purchase of the property.

2. Trusts § 19—

Evidence that plaintiff and one defendant made an agreement to purchase property as a partnership, that plaintiff gave this defendant money to be used as a down payment, but the evidence is to the effect that the second defendant took title to the property and furnished the down pay-

ment, without any evidence that the first defendant turned over to the second defendant the money furnished by plaintiff, *held* insufficient to establish a resulting trust in plaintiff's favor.

3. Pleadings § 28; Trial § 26—

Where plaintiff's evidence is insufficient to establish the cause of action alleged in the complaint, nonsuit is proper.

APPEAL by defendants from *Crissman, J.*, April 26, 1965 Civil Session of FORSYTH.

Civil action to establish a resulting trust.

Plaintiff's allegations, summarized except when quoted, are set forth in the following numbered (our numbering) paragraphs.

1. Plaintiff and defendant David A. Lee (hereafter David Lee) entered into an oral partnership agreement on or about April 1, 1959, for the specific purpose of purchasing a described tract of land in Oldtown Township, Forsyth County, the said two partners agreeing "to contribute equally to the purchase . . . and to share equally in the profit or loss . . ."

2. On or about April 1, 1959, *"the plaintiff paid to the defendant, Dexter Allen Lee, the sum of $4,600.00* as the plaintiff's portion of the down payment on said property, which said sum actually represented the entire down payment made on the said property." (Our italics.)

3. Pursuant to their agreement, plaintiff and David Lee purchased said property on April 13, 1959, agreeing to pay therefor the sum of $19,750.00, which sum was paid to John Lee Cooper, *et ux.*, "by a payment of $4,600.00 in cash, by two notes and by borrowing $12,000.00 on security of the property purchased from Piedmont Federal Savings and Loan Association."

4. Pursuant to agreement of plaintiff and David Lee, the property was conveyed by the Coopers to defendant Dexter Allen Lee (hereafter Dexter Lee) and wife, defendant Berttie W. Lee (hereafter Berttie Lee), by (recorded) deed of April 13, 1959.

5. Dexter Lee and Berttie Lee "have no interest in the said property, did not pay any of the purchase price," and hold title thereto as trustees for plaintiff and David Lee.

6. David Lee has had actual possession of the property since April 13, 1959, residing in the dwelling house thereon and renting portions thereof. In addition to his receipt and application of rentals from the property, David Lee "has paid some additional sums by

way of discharging notes against the said property, but has paid less on the property than has the plaintiff . . ."

7. Plaintiff "is actually an owner of one-half of the said property and is entitled to an accounting of the rents and profits from his co-owner, David A. Lee." Notwithstanding plaintiff's demands therefor, Dexter Lee and Berttie Lee have refused to convey to plaintiff his interest in the property and David Lee has failed to account to plaintiff.

8. The property is now worth much more than the price at which it was purchased on or about April 13, 1959.

Plaintiff prays that it be adjudged that Dexter Lee and Berttie Lee hold the title to the property in trust for plaintiff and David Lee; that David Lee be required to account to plaintiff; that the property be sold and the partnership dissolved; and that defendants be taxed with the costs.

Defendants, in a joint answer, denied all of plaintiff's essential allegations. They alleged the property was purchased by Dexter Lee and wife, Berttie Lee, from the Coopers, and that plaintiff has no interest therein.

Evidence was offered by plaintiff and by defendants.

The documental evidence consists of the following:

Plaintiff offered in evidence the record (Deed Book 781, page 513, Forsyth Registry) of the deed *dated* April 13, 1959, by which the Coopers conveyed the property to Dexter Allen Lee and wife, Berttie W. Lee. (Note: This deed is not set out in the record. There was evidence the transaction was closed on April 17, 1959.)

Dexter Lee was the only witness for defendants. He identified and defendants offered in evidence three documents, *viz.:* (1) A letter dated March 23, 1959 from David Lee to Stuart Bondurant Realty Company containing an offer to buy the property, deed to be made to "David Allen Lee," at the price of $19,000.00 payable (a) $500.00 as a good faith deposit, (b) $3,500.00 upon delivery of a deed conveying marketable title, and (c) $15,000.00 to be financed from a local savings and loan association, the seller agreeing to carry the portion of the $15,000.00 in excess of the maximum amount of available loan; (2) a note dated April 17, 1959 for $2,100.00, payable one year after date, to John P. Cooper or order; and (3) a note dated April 17, 1959 for $1,100.00, payable two years after date to John P. Cooper or order. These notes were executed by "David A. Lee" and "D. A. Lee" as makers thereof.

A summary of the testimony is set forth in the opinion.

The court submitted and the jury answered the following issues:

"1. Did the plaintiff and the defendant, David A. Lee, enter into a partnership agreement to purchase a tract of land on Carter Circle in Oldtown Township, Forsyth County, North Carolina, by the terms of which each was to contribute equally to the purchase of said land and to share equally in the profit or loss of same, as alleged in the complaint? ANSWER: YES. 2. Are the defendants, Dexter Allen Lee and wife, Berttie W. Lee, holders of the said property on Carter Circle as trustees for the plaintiff, Sherman A. Bingham, and David A. Lee, as alleged in the complaint? ANSWER: YES."

Based upon said verdict, the court entered judgment that Dexter Lee and Berttie Lee held title to said property as trustees for plaintiff and David Lee; that plaintiff and David Lee are partners with respect to said property; that said partnership be dissolved; that the commissioner therein appointed sell said property at public auction in the manner specified; and that, after confirmation of the commissioner's sale, the net proceeds of the said sale, after defraying the cost of the said sale, "shall be divided and paid in equal portions to Sherman A. Bingham and David A. Lee."

Defendants excepted and appealed.

White, Crumpler, Powell, Pfefferkorn & Green for plaintiff appellee.

Deal, Hutchins & Minor and Richard Tyndall for defendant appellants.

BOBBITT, J. With reference to nonsuit, we consider only defendants' motion therefor made at the conclusion of all the evidence. G.S. 1-183; *Murray v. Wyatt,* 245 N.C. 123, 128, 95 S.E. 2d 541. Defendants excepted to and assign as error the denial of said motion.

David Lee is a son of Dexter Lee and wife, Berttie Lee. At the times referred to in the complaint, David Lee was the officer of Wachovia Bank and Trust Company in charge of Time Payment and FHA loans at its Stratford office. Dexter Lee was in the automobile business in Shelby.

Plaintiff's evidence tends to show:

In the spring of 1959, David Lee, in whom plaintiff had confidence, advised plaintiff "he had run across a real good buy on some property," and proposed that they purchase the property on a "50/50" basis. They inspected the property, decided "it was a good buy," and discussed plans for the development thereof.

Plaintiff testified: "As we left the property on the first day, Mr. Lee (David Lee) told me he did not have the money himself and

if I was interested, we'd start making plans to raise the money and proceed to buy it." Plaintiff was told the purchase price was $19,750.00.

Prior to the purchase of the property, plaintiff delivered to David Lee a total of $2,600.00 in cash, first $1,000.00 and later $1,600.00, for use in making the required down payment. David Lee advised plaintiff that the maximum loan that could be obtained from the Savings and Loan Association was $12,000.00 and that Mr. Cooper "was in agreement to accept notes for the balance of the down payment."

A day or so before the property was purchased, David Lee advised plaintiff the property could not be put in his (David Lee's) name, stating he wanted it put in the name of his father. Plaintiff agreed to this upon David Lee's assurance he would give plaintiff a paper showing plaintiff's interest in the property, including a statement showing how plaintiff's money had been used. Notwithstanding repeated demands therefor, plaintiff was unable to get such a paper from David Lee.

After the property was purchased, David Lee advised plaintiff it was necessary to raise money to pay a past due 60 or 90-day note to Mr. Cooper. Thereupon, plaintiff obtained and delivered $2,000.00 in cash to David Lee for use in payment of the note to Cooper.

From April 1959 David Lee had actual possession of the property. He resided therein, had complete charge thereof, and rented rooms. He received $10.00 a week from each of five renters. The amount of the monthly payment to the Savings and Loan Association was $96.00.

With reference to the failure of David Lee to give plaintiff the paper as promised, plaintiff testified: "After it stretched into weeks and months, he told me that he would reimburse me or give me back the money that I had put into it." Again: "(A)t that stage (no date given) of the game . . . I would be satisfied if he would just pay me the money . . . I had invested, and I felt it only fair that he would give me interest at the rate of six percent on the money that had been used." Thereafter, David Lee did give plaintiff $1,000.00, "ten one hundred dollar bills," and said "he thought that he could raise some more money within a week." Later, when advised by David Lee that he could not raise any more money, plaintiff "put the matter in the hands of (his) lawyer."

Plaintiff's only contact with Dexter Lee and Berttie Lee was on one occasion (no date given) when plaintiff, accompanied by his brother, George Bingham, went to Shelby to see them. Plaintiff first saw Berttie Lee and proceeded to tell her "about the business of the

property." She stated she knew nothing about it and did not discuss the matter with him. Thereafter, plaintiff and George Bingham located and talked with Dexter Lee.

Plaintiff's version of his conversation with Dexter Lee is as follows: "After I told Mr. Lee about putting the money into the property at 100 Carter Circle, he said he knew nothing about the transaction, . . . it was not to his knowledge that I had put anything in it, but he said that he was sure that if his son owed me the money that I would be paid for it. I told Mr. Dexter Lee . . . I didn't know how I would raise the money, but that if I had an opportunity to buy or sell it that I would give them what they had put in it, with interest, or either they would give me what I had invested, with interest, that I felt was the only fair way to settle it. Mr. Dexter Lee said he would talk to his son and would let me know. After that I did not hear anything further from either Mr. Dexter Lee or Mr. David Lee."

Mr. George Bingham testified plaintiff told him "he was going down there to see if he could either buy him out or get his money back out of the property." His testimony concerning the conversation with Dexter Lee was as follows: "I did hear Mr. Dexter Lee talk with my brother and well, he didn't seem to know all the transactions of the place. He said that the place was in his name and he felt that Dave would do what was right and that—he said he didn't feel that he was going to put any more money in the property himself, or have anything else to do with it. He just felt Dave —he said, 'If Dave owes you money I feel sure he'll pay you.' "

Plaintiff saw none of the documents referred to in our preliminary statement and did not participate in any of the transactions incident to the purchase from the Coopers. His information was based solely on what David Lee had told him.

There was evidence the property is now worth between $30,000.00 and $40,000.00.

Dexter Lee's testimony tends to show:

He did not know plaintiff claimed any interest in the property until the visit by plaintiff and his brother *in the fall of 1963 or 1964,* some five or six years after he had purchased the property. His testimony concerning the transaction in April 1959 was as follows: "I did buy that property. The terms and conditions under which I purchased this property, well, we bought it, my boy and myself. Well, he didn't buy it, but he pointed it out to me. I came up here and I didn't have quite enough money so I put up $4,000.00, and I taken—give Mr. Cooper two notes, one to be paid in twelve months and another to be paid in two years. Yes, these are the two notes that I gave him. Mr. Cooper kind of got in a hurry

for his money and we paid him both notes off in twelve months."

David Lee, who had contracted for the property, "couldn't buy it." He told Dexter Lee he did not have any money.

Dexter Lee and Berttie Lee signed the $12,000.00 deed of trust to the Savings and Loan Association. Berttie Lee did not sign either of the two notes to Mr. Cooper. Dexter Lee testified: "Cooper didn't care about her signing. All he wanted was my signature. I signed the note with David." He testified further that David Lee "gets money from (him) still when he hasn't got any renters."

Plaintiff's evidence contradicts rather than supports his allegation that on or about April 1, 1959, "the plaintiff paid to the defendant, Dexter Allen Lee, the sum of $4,600.00 as the plaintiff's portion of the down payment on said property . . ." Plaintiff's evidence is that he delivered $2,600.00 in cash to *David* Lee before the property was purchased and an additional $2,000 in cash to *David* Lee after the property was purchased.

In this jurisdiction, parol trusts may be enforced where the grantee takes title to property under an express agreement to hold the property for the benefit of another, other than the grantor. *McDaniel v. Fordham,* 261 N.C. 423, 135 S.E. 2d 22; *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418; *Taylor v. Addington,* 222 N.C. 393, 23 S.E. 2d 318.

"(A)n express trust is based upon a direct declaration or expression of intention, usually embodied in a contract; whereas a trust by operation of law is raised by rule or presumption of law based on acts or conduct, rather than on direct expression of intention." *Bowen v. Darden,* 241 N.C. 11, 13, 84 S.E. 2d 289.

The deed offered in evidence by plaintiff shows the Coopers conveyed the property to Dexter Lee and wife, Berttie Lee; and there is no allegation or evidence that plaintiff had any agreement with either of said grantees prior to said conveyance or thereafter. Plaintiff's action is to impose a resulting trust on the property on the ground he furnished at least one-half of the purchase price therefor.

"A resulting trust arises, if at all here, from the payment of the purchase money, and accordingly it is essential to the creation of such a trust that the money or assets furnished by or for the person claiming the benefit of the trust should enter into the purchase price of the property at or before the time of purchase." *Vinson v. Smith,* 259 N.C. 95, 98, 130 S.E. 2d 45, and cases cited; *Fulp v. Fulp,* 264 N.C. 20, 140 S.E. 2d 708. The quoted statement is applicable to the present case.

There is ample evidence that plaintiff delivered to David Lee $2,600.00 in cash for use in making the down payment; that plain-

tiff delivered to David Lee an additional $2,000.00 for use in paying a note to Cooper; and, in each instance, that David Lee represented the money *would be used* for such purposes. However, there is no evidence any part of the $4,600.00 was actually used in connection with the down payment or in connection with a note to Cooper. Plaintiff testified: "I don't know whether the money that I say I gave Mr. David Lee, don't know whether one dime of this money went into this property." Again: "I am telling this Court and the jury now that I don't know whether a dime of money that I gave to Mr. David Lee went into this property."

The evidence tends to show David Lee, in his separate dealings with plaintiff and with Dexter Lee, told each of them he (David Lee) had no money to invest in the property; and there is no evidence any funds of David Lee were invested in the property.

Dexter Lee testified *his* money paid the $4,000.00 down payment and the notes to Cooper. While this testimony cannot be accepted or considered in passing upon the motion for nonsuit, it is equally true that mere disbelief or skepticism with reference thereto is not evidence that any of plaintiff's money was actually invested in the property.

It is noteworthy that there is no evidence sufficient to show David Lee was in possession of the property *as a matter of right.*

Thompson v. Davis, 223 N.C. 792, 28 S.E. 2d 556, cited and relied on by appellee, as disclosed by the evidence reviewed in the opinion, is factually distinguishable.

Whether plaintiff is entitled to recover from David Lee $4,600.00 plus interest less a credit of $1,000.00 is not presented for decision. Such is not the cause of action plaintiff alleged.

A plaintiff must prove his case *secundum allegata. Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786, and cases cited. Here the evidence, when considered in the light most favorable to plaintiff, is insufficient to establish the cause of action alleged in the complaint. Hence, defendants' motion for judgment of nonsuit should have been granted. It is unnecessary to consider assignments of error directed to (1) provisions of the judgment, and (2) portions of the charge.

Reversed.

SARAH L. BEANBLOSSOM, ADMINISTRATRIX OF THE ESTATE OF BETTY LOUISE LEONARD, DEC'D. v. HAYWOOD THOMAS, ANDERSON TRUCK LINES, INC., AND CHARLIE WILSON ANDERSON.

DAVID O. TETTER, ADMINISTRATOR OF WANDA LOUISE TETTER, DECEASED v. HAYWOOD THOMAS, ANDERSON TRUCK LINE, INC., AND CHARLIE WILSON ANDERSON.

PATRICIA ANN BROWNING v. HAYWOOD THOMAS, ANDERSON TRUCK LINE, INC., AND CHARLIE WILSON ANDERSON.

AND

FLORENCE BROWNING v. HAYWOOD THOMAS, ANDERSON TRUCK LINE, INC., AND CHARLIE WILSON ANDERSON.

AND

ANNA CHRISTINE BROWNING, BY HER NEXT FRIEND, LAWRENCE BROWN v. HAYWOOD THOMAS, ANDERSON TRUCK LINE, INC., AND CHARLIE WILSON ANDERSON.

(Filed 14 January, 1966.)

1. Appeal and Error § 19—

An assignment of error not based on an exception appearing in the case on appeal will not be considered.

2. Evidence § 56—

Where the statement of a witness is not in contradiction of prior testimony given by him, such statement cannot be held competent as impeaching evidence.

3. Evidence § 35—

Opinions of a nonexpert witness on the issue are inadmissible when the material facts can be placed before the jury.

4. Evidence § 19; Automobiles § 37—

Testimony of an officer investigating the accident that he did not charge one of the drivers involved therein with any traffic violation, is incompetent.

5. Appeal and Error § 41—

The admission of incompetent evidence does not entitle appellant to a new trial when, under the peculiar circumstances of the case, there is no reasonable probability that the evidence affected the result of the trial.

6. Automobiles § 46—

In this action, one driver admitted negligence and the trial turned upon whether the other driver was guilty of concurring negligence. The court explained joint and concurring negligence and instructed the jury that if the negligence of both drivers concurred in proximately causing the accident to answer the issue in the affirmative, because in such event the contesting driver and his superior would be liable. *Held:* The correct instruction is not subject to objection that it required the jury to find the negligence of the contesting driver was solely responsible for the collision in order to render an affirmative verdict.

7. Automobiles § 10— Distance required to be maintained between vehicles traveling in same direction.

A motorist is required to maintain that distance behind the preceding motorist which is reasonable and prudent under the circumstances so as to enable him to avoid injury, taking into consideration conditions of the road and weather, other traffic on the highway, characteristics of the vehicle he is driving as well as the one ahead, the relative speed of the automobiles, and his ability to control and stop his vehicle should an emergency require it, G.S. 20-152(a), and while he is not required to anticipate negligence on the part of others, he is required to anticipate the usual exigencies of traffic under like circumstances.

8. Automobiles § 46—

The charge of the court in this case as to the following motorist's duty to maintain such distance behind the preceding vehicle as is reasonable and prudent under the circumstances *held* without prejudicial error when construed contextually.

9. Trial § 33—

Excerpts from a charge will not be held for error when the charge, construed in context, correctly states the applicable principles of law.

PARKER, J., dissents.

APPEAL by plaintiffs from *Armstrong, J.*, May 31, 1965 Civil Session of DAVIDSON.

These five actions arise out of a three-car collision. In three of the cases, plaintiffs seek to recover damages for personal injuries; in the other two, damages for the wrongful deaths of their intestates. They were consolidated for trial, argued together on appeal, and will, therefore, be treated as one case.

These facts are not disputed: At approximately 2:10 a.m., on March 21, 1964, Betty Louise Leonard, aged 27 (the intestate of plaintiff Sarah L. Beanblossom), was driving a 1961 Ford Falcon station wagon belonging to plaintiff Mrs. Florence Browning, aged 44, in a northerly direction on U. S. Highway No. 29 in the Rockingham County community of Ruffin. The posted speed limit was 45 MPH; the paved portion of the highway was 22 feet wide, with a 10-foot shoulder on the east side. Mrs. Browning occupied the front seat on the right. Her daughter, plaintiff Anna Christine Browning, aged 9, was asleep between her and the driver. In the back of the station wagon, plaintiff Patricia Ann Browning was asleep on the right immediately behind her mother. Wanda Louise Tetter, aged 16 (the intestate of plaintiff David O. Tetter), was sleeping on the left behind the driver. It was misting, and the road was wet. At this time, defendant Thomas, operating a 1953 Chevrolet, was traveling south, meeting the Falcon. Thomas was drunk.

Following the station wagon, also traveling north, was defendant Charlie Wilson Anderson, who was operating the tractor-trailer of defendant Anderson Truck Line, Inc. in the course and scope of his employment by that corporation.

Thomas drove his Chevrolet across the center line of the highway and collided with the station wagon, which was entirely to its right of the center. The impact knocked the Falcon athwart the northbound lane, and the front of the tractor-trailer collided with its left side. The Chevrolet struck the left side of the truck and came to rest, headed north, against the rear of the 50-foot trailer, which was damaged slightly. After the collision, the left front of the Chevrolet was completely demolished. The right wheels of the tractor were on the shoulder; the left front wheel of the tractor was pushed up into the left front door, and its bumper "was into the window," of the station wagon. The left side of the Falcon was smashed over on the driver, Betty Louise Leonard.

From the point of collision, the highway is level and straight for one-tenth of a mile to the north and three-tenths of a mile to the south.

Betty Louise Leonard was dead as a result of the collision when the highway patrolman arrived at the scene a very few minutes after the accident. Wanda Louise Tetter died the next day. The other three plaintiffs received serious injuries varying in degree and permanency.

Plaintiffs allege the joint and concurring negligence of Thomas and Anderson. Defendant Anderson and his employer, Anderson Truck Line, Inc., deny these allegations and aver that the collisions were caused solely by the negligence of Thomas. At the pretrial conference, defendant Thomas and his liability insurance carrier, Allstate Insurance Company, conceded his actionable negligence and stipulated that the issue of negligence might be answered against him in each case. Thomas is insolvent. The limits of his liability insurance are, for bodily injuries, $5,000.00 for each person and $10,000.00 for each accident; for property damage, $5,000.00 in any one accident. The application of this insurance, to be made after the jury had fixed the damages of each plaintiff, was also covered by the stipulation.

Upon the trial, the jury awarded plaintiffs damages totalling $69,450.00. The jury answered No to the second issue: "Were the plaintiffs' intestates, Betty Louise Leonard and Wanda Louise Tetter, injured and killed and plaintiffs Florence Browning, Patricia Ann Browning, and Anna Christine Browning, injured and damaged by the joint and concurrent negligence of Charlie Wilson Anderson, as alleged in the complaint?"

In brief summary, except when quoted, plaintiffs' evidence with reference to the second issue follows (evidence tending to establish facts previously stated not being repeated). G. S. Conrad, the investigating patrolman, testified: At the scene, defendant Anderson told him he was traveling north on Highway No. 29, at approximately 30 MPH, following the station wagon at a distance of 5-6 car lengths, or from 85-102 feet, when he saw the Thomas Chevrolet, traveling south "at a pretty good speed," cross the center line, strike the station wagon in its lane, and knock it into his tractor. On March 25, 1964, while she was still in the hospital, Mrs. Florence Browning told Conrad that she had not seen the truck prior to the accident. Later, during the criminal trial of defendant Thomas in the Superior Court, she told Conrad that she remembered seeing the truck immediately behind them.

Mrs. Florence Browning testified: Five minutes or so before the accident she observed the truck about one-car's length behind the station wagon.

> "At the time he (Thomas) cut over into our lane he was about 50 feet from us. At that time, I tried to protect my little girl and glanced around to see if there was any place for us to go. When I glanced around, I could see that the truck was still behind us. I would say that the truck was still behind us one car-length at that time. . . . I would say that just a second or two elapsed between the first collision with the defendant Thomas' automobile and the second collision with the truck owned by Anderson Truck Lines."

Defendant Thomas offered no evidence. Defendant Charlie Wilson Anderson testified: About half a mile south of Ruffin, he overtook the Falcon, which was being driven about 40 MPH. He reduced his speed and followed it at a distance of about 150 feet. Because the road was wet that night, at 30 MPH he required 150-160 feet in which to stop the truck. Six or seven hundred yards south of the place of collision, the Falcon slowed to about 30 MPH. He slowed down proportionately. He was still 150 feet behind the Falcon when he saw the Chevrolet, 30 or 40 feet from the station wagon, come across to its left side of the road and swerve right into the Falcon.

> "The Falcon came right back in front of me and I hit my brakes and cut to the right to dodge it, but it came right back into us. . . . I would say that I was practically stopped when I came into contact with the Falcon. When the Falcon came into contact with the truck I hardly felt it at all—it never jarred at all."

From the judgment entered in each case, that plaintiff recover the amount of his or her award against Thomas and nothing against the other two defendants, each plaintiff appeals.

Frank C. Ausband for Sarah L. Beanblossom, Administratrix of the Estate of Betty Louise Leonard, plaintiff appellant.

Ferree, Anderson, Bell & Ogburn for David O. Tetter, Administrator of Wanda Louise Tetter, plaintiff appellant.

Spry, Hamrick & Doughton for Patricia Ann Browning, Florence Browning, and Anna Christine Browning, plaintiff appellants.

Jordan, Wright, Henson & Nichols and Edward L. Murrelle for defendant appellees.

SHARP, J. Plaintiffs' first assignment of error relates to the form of the second issue. This assignment is not based on an exception appearing in the case on appeal and, for that reason, will not be considered. *Carpenter, Solicitor v. Boyles,* 213 N.C. 432, 196 S.E. 850. The second assignment is to the ruling of the court allowing Patrolman Conrad to answer the following question on cross-examination:

> "Q. Based upon your full and complete investigation of this accident, you didn't charge Charlie Wilson Anderson with any traffic violation did you?
> "A. No, Sir, I didn't."

The purpose of this question could only have been to impeach the officer, or to inform the jury that, in the opinion of the patrolman, the truck driver was not at fault. Under the facts in this case, it was not competent for the first purpose, and, in no case, could it be competent for the second. Opinions of a nonexpert witness on the issue of negligence are inadmissible where the material facts can be placed before the jury. *Mason v. Gillikin,* 256 N.C. 527, 124 S.E. 2d 537; *Wood v. Insurance Co.,* 243 N.C. 158, 90 S.E. 2d 310; *State v. Cuthrell,* 233 N.C. 274, 63 S.E. 2d 549; Stansbury, N. C. Evidence § 124 (2d Ed. 1963). It is also the rule with us that evidence of a defendant's conviction in a criminal prosecution for the very acts which constitute the basis of the liability sought to be established in a civil suit is not admissible unless such conviction is based on a plea of guilty. *Trust Co. v. Pollard,* 256 N.C. 77, 123 S.E. 2d 104; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1; *Swinson v. Nance,* 219 N.C. 772, 15 S.E. 2d 284; *Warren v. Insurance Co.,* 215 N.C. 402, 2 S.E. 2d 17; Stansbury, *op. cit. supra* § 143. *Cf. Taylor v. Taylor,* 257 N.C. 130, 125 S.E. 2d 373. Ordinarily, for the purpose of impeachment, a witness may be cross-examined with

respect to *his* previous conviction of crime, but it is thought that to admit such evidence in a damage action growing out of the same accident would cause the jury to give undue weight to the conviction. *Watters v. Parrish, supra. A fortiori,* the *patrolman's* testimony that defendant Anderson was *never charged with crime* in connection with the accident in suit was incompetent either to corroborate Anderson or to exonerate him of negligence in the civil action. The admission of the challenged evidence was, therefore, clearly erroneous.

It does not necessarily follow, however, that the error was prejudicial to these plaintiffs. The evidence at the trial showed that if defendant Anderson was guilty of a violation of the criminal law, it was in following the Falcon too closely. G.S. 20-152(a). It further discloses, however, that at the time the patrolman made his investigation of the wreck he had no evidence which would have justified such a charge against Anderson. Without objection, Conrad testified, "When there is a rear-end collision, I try to obtain evidence to ascertain whether one vehicle was following more closely to another one." According to all the evidence, *at no time* did Mrs. Browning ever tell Conrad that the truck was only a car's length behind the Falcon when the Chevrolet hit it. According to Conrad, it was during Thomas' criminal trial that she first told him she had seen the truck prior to the accident. At that time, she said the truck was "immediately behind the car." Mrs. Browning denied that she ever told Conrad she did not see the truck prior to the accident. "I don't remember telling him, not to my knowledge," she said. Anderson's statement to the patrolman at the scene certainly suggested no violation by him of the criminal law, nor did that of Mrs. Browning, whether we accept her version of it or that of Conrad. Obviously, the patrolman's decision not to charge Anderson with any violation of the law was based on the information he secured at the time he made his investigation, and the jury must have understood this. We see no "reasonable probability the result of the trial might have been materially more favorable" to plaintiffs had their objection to this evidence been sustained. *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222.

The other assignments of error argued by plaintiffs relate to the charge.

The court, after fully explaining joint and concurring negligence, instructed the jury that if the negligence of both Thomas and Anderson concurred in proximately causing the deaths and injuries in suit it would answer the second issue YES "because, upon such a finding, defendants Charlie Wilson Anderson and Anderson Truck

Lines, Inc. would be liable . . . exactly as if the defendant Charlie Wilson Anderson was solely responsible for the proximate cause of such deaths and alleged injuries." The exception to this portion of the charge, the subject of assignment of error No. 4, is overruled. Plaintiffs' contention that the quoted portion was tantamount to an instruction that, in order to answer the issue YES, the jury must find Anderson solely responsible for the collision, merits no discussion. It was a correct statement of the law, and could not have been expressed more favorably to plaintiffs.

Plaintiffs' other assignments of error relate to the charge as it attempted to apply the doctrine of foreseeability as an element of proximate cause to situations governed by G.S. 20-152(a).

Plaintiffs concede that the court "apparently correctly charged the jury" that a motorist is not bound to anticipate the negligent acts or omissions of another motorist. They contend, however, that the court erred when he instructed the jury that "if defendants Anderson . . . could reasonably foresee the intervening negligence and resulting deaths and alleged injuries produced by the admitted negligence of Haywood Thomas, then the sequence of events *is not* broken by the new and independent cause, and defendants remain liable if found guilty of actionable negligence from the evidence and by its greater weight." They also contend that he erred when he charged that in determining whether one driver was following another too closely all the evidence bearing upon his ability "to stop his vehicle if required to do so by a situation not produced by another's negligence which he could not, in the exercise of due care reasonably foresee, should be considered by the jury." The court continued by saying that "a following motorist must anticipate the usual and normal exigencies of traffic but . . . he is not bound to anticipate negligence on the part of others." These instructions cannot be held for error when the charge is considered as a whole, even though they might have been more aptly given in different form.

The crux of plaintiffs' case against defendant Anderson is their allegation and evidence tending to show that he was following the Falcon more closely than was reasonable and prudent under the circumstances. In the absence of anything which should alert him to the danger, the law does not require a motorist to anticipate specific acts of negligence on the part of another. *Hart v. Curry,* 238 N.C. 448, 78 S.E. 2d 170. It does, however, fix him with notice that the exigencies of traffic may, at any time, require a sudden stop by him or by the motor vehicle immediately in front of him. Constant vigilance is an indispensable requisite for survival on today's highways, and a motorist must take into account the prevalence of that

"occasional negligence which is one of the incidents of human life." Restatement (Second), Torts § 447, Comment *c* (1965). He must bear in mind that every operator of a motor vehicle on the highway is constantly confronted with the possibility of a collision with other vehicles, pedestrians, or animals; that blowouts and mechanical failures, highway and weather conditions, as well as innumerable other factors, can create sudden hazards. It follows, therefore, that the reasonably prudent operator will not put himself unnecessarily in a position which will absolutely preclude him from coping with an emergency. For this reason G.S. 20-152(a) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway." A violation of this statute, once it is established, is negligence *per se,* and, if injury proximately results therefrom, it is actionable. *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184, 85 A.L.R. 2d 609.

The statute fixes no specific distance at which one automobile may lawfully follow another. In determining the proper space to be maintained between his vehicle and the one preceding him, a motorist must take into consideration such variables as the locality, road and weather conditions, other traffic on the highway, the characteristics of the vehicle he is driving, as well as that of the one ahead, the relative speeds of the two, and his ability to control and stop his vehicle should an emergency require it. Thus, the space is determined according to the standard of reasonable care and should be sufficient to enable the operator of the car behind to avoid danger in case of a sudden stop or decrease in speed by the vehicle ahead under circumstances which should reasonably be anticipated by the following driver. 60 C.J.S., Motor Vehicles § 323(b) (1949); *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838. Unless the driver of the leading vehicle is himself guilty of negligence, or unless an emergency is created by some third person or other highway hazard, see *Soudelier v. Johnson,* 95 So. 2d 39 (La. App.), the mere fact of a collision with the vehicle ahead furnishes some evidence that the motorist in the rear was not keeping a proper lookout or that he was following too closely. *Burnett v. Corbett,* 264 N.C. 341, 141 S.E. 2d 468. The following driver is not, however, an insurer against rear-end collisions for, even when he follows at a distance reasonable under the existing conditions, the space may be too short to permit a stop under any and all eventualities.

In this case, if Anderson was operating the truck at a distance of only one car's length to the rear of the Falcon (as Mrs. Brown-

ing testified), he would have been guilty of negligence as a matter of law which was a concurring proximate cause of the collision, for he would have been in a position where he could not cope with *any* sudden change in the movement of the station wagon irrespective of its cause or whether it might have been reasonably anticipated. If, on the other hand, Anderson was 85-150 feet behind the Falcon, it was for the jury to say whether he was following too closely under all the circumstances.

When the charge is considered "contextually as a whole"—as every charge must be, 4 Strong, N. C. Index, Trial § 33 (1961)—, it correctly enunciates the principles of law which govern the application of G.S. 20-152(a) to the facts of this case. We find no prejudicial error in the portions to which specific exceptions are taken, *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143, and plaintiffs assign no error of omissions. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736.

The factual situation here was a simple one, and the issue clear cut: Was Thomas' gross and criminal negligence the sole proximate cause of this three-car smash-up, or was Anderson's alleged negligence in following too closely an operative factor in increasing it from a two-car to a three-car collision? The charge fully presented plaintiffs' contentions, and we find in it no reason to believe that the jury was misinformed or misled as to the applicable law. In the final analysis, it appears that the jury accepted Anderson's version of the accident. They were the "sole judges of the facts."

In the trial below we find

No error.

PARKER, J., dissents.

TALMADGE GRAY HINKLE v. OZELLE HODGES HINKLE.

(Filed 14 January, 1966.)

1. Husband and Wife §§ 2, 10—

The right of a married woman to support and maintenance is a property right which she may release by agreement executed in conformity with statute. G.S. 52-6.

2. Husband and Wife § 10— The court may not order allowances in excess of those set forth in valid separation agreement.

The parties to a valid separation agreement which makes complete and meticulous provision for the support and maintenance of the wife and

children of the marriage and for the custody of the children are remitted to the terms of the agreement with respect to the rights and liabilities to support and maintenance, although such agreement is not binding as to the custody of the minor children, and therefore when the agreement makes no provision therefor the court is without authority in a subsequent action for divorce to direct that the husband pay the cost of transporting the wife's goods to and from a municipality in another state to which she had intended to move prior to the order in the divorce action that she not take the children outside the jurisdiction of the court, notwithstanding G.S. 6-21.

3. Divorce and Alimony § 24—

Where the court finds upon supporting evidence that both the mother and father are fit and suitable persons to have the custody of the children of their marriage and that the best interests of the children require that their father have their custody, and awards custody to the father with visitation rights in the mother, such order will be upheld, the question of custody being addressed to the discretion of the trial court and its finding being conclusive when supported by evidence.

4. Estoppel § 3— Wife held estopped by record from asserting that custody of children could be determined only on motion in prior action.

While an action for divorce from bed and board was pending, the parties executed a separation agreement and contemplated that nonsuit be taken in the divorce action, but through inadvertence this was not done. Thereafter the husband instituted suit for divorce on the ground of separation and alleged that the custody of the children was not involved. The wife controverted the averment that custody was not involved and prayed that the court award the custody of the children to her, and did not assert that the court was without jurisdiction to award custody because of the pendency of the prior divorce action until after the court had awarded custody to the husband. *Held:* On the record the wife is estopped to assert the pendency of the prior action.

5. Divorce and Alimony § 24—

Where the children of the marriage are of the age of discretion, the court may consult their wishes in regard to their custody, but their wishes are only entitled to consideration and are not controlling, the controlling factor remaining the best interests of the children, and therefore the failure of the lower court to include a finding as to the preferences of the minor children is insufficient to upset its order of award.

APPEAL by plaintiff and defendant from *Lupton, J.*, in Chambers, 9 August 1965 Civil Session. From FORSYTH.

The chronology of events out of which these appeals arose is as follows:

The plaintiff and defendant were married on 12 April 1952. Of this union two children were born: Edna Melissa Hinkle on 16 February 1953, and Talmadge Gray Hinkle, Jr., on 17 September 1954. The family resided in Winston-Salem, North Carolina. On

7 December 1963, the father, the plaintiff herein, instituted an action in the Superior Court of Forsyth County for a divorce from bed and board and for the custody of the two children, to which an answer was filed. The case was never tried, but the parties thereto entered into a separation agreement on 5 April 1965. The plaintiff agreed to take a nonsuit in the divorce action but through oversight never did so. Under the terms of the separation agreement the custody of the two children was given to the defendant and a property settlement was provided for, pursuant to which agreement the plaintiff transferred to the defendant the home in Winston-Salem, where the family had lived, which, according to an affidavit filed by plaintiff, originally cost him $42,500, the family automobile, a Chrysler, and all the personal property in the home which the defendant wanted, plus the sum of $10,000 in cash. The plaintiff obligated himself in the separation agreement to pay the wife $200.00 per month for her support, and $250.00 per month for each child for the support, maintenance and education of such child until the respective children became 21 years of age. The agreement further provided that plaintiff should pay all medical expenses for the children in excess of $250.00 per year, and all outstanding debts of the wife at the time of the separation agreement in the approximate sum of $2,400. The wife agreed to convey all her right, title and interest in four lots which had been purchased and paid for by the plaintiff.

The separation agreement provided for certain visitation rights of the plaintiff and the right to have the children visit him. The agreement also contains the following provision:

> "As a part of this Agreement the parties do each for himself and herself and his and her legal representatives release and absolutely and forever discharge the other from all claims and demands whatsoever, and from all rights of alimony, support, nurture, maintenance and from all action and causes of action of every name, kind and nature which either of the parties hereto now has or may hereafter have by reason of their intermarriage, it being expressly understood and agreed that from and after this date neither of the parties shall have any claim on the other, directly or indirectly, except as herein provided for. From and after this date, insofar as it is possible for the parties hereto to stipulate, covenant and agree, the relation of each of said parties shall be to the other in all things as if the intermarriage between them had never taken place, subject to the provisions of this Agreement."

On 7 July 1965, plaintiff instituted this action and filed a complaint in the Superior Court of Forsyth County for an absolute divorce on the ground of one year's separation. The complaint alleged: "The custody of the minor children born of this marriage is not at issue in this proceeding." Defendant, in her answer, filed 4 August 1965, denied that custody of the two children was not in issue and prayed that the court award her custody of the children.

On 31 July 1965, Lupton, J., Resident Judge of the Twenty-First Judicial District, issued a writ of *habeas corpus* upon the plaintiff's application, restraining defendant from removing the two children from Forsyth County, North Carolina. The application alleged that defendant was preparing to remove the said children from the State of North Carolina to Houston, Texas, in order to defeat the applicant's visitation rights pursuant to the separation agreement, and prayed that he be awarded custody of the children.

On 5 August 1965, plaintiff filed a motion in the cause in the action for absolute divorce, requesting that he be granted custody of the children born of the marriage and that defendant be restrained from removing the two children from the State of North Carolina. This motion was verified on 4 August 1965 and was heard by Lupton, J. on the same day, and an order was entered and filed in the office of the Clerk of the Superior Court of Forsyth County, on 5 August 1965, in which order the defendant was directed to have the two children before him on 14 August 1965, at 9:30 a.m., at the Courthouse of Forsyth County. The defendant also was restrained from removing the children from North Carolina. The hearing, however, by consent of counsel, was changed to 7 August 1965 at the place originally designated. In the meantime, the *habeas corpus* proceeding was dismissed. The custody hearing was completed on 13 August 1965.

The court, after hearing testimony of plaintiff and defendant, reading the affidavits submitted by the parties, and after interviewing the two minor children, found that both the plaintiff and the defendant are suitable persons to have the custody and control of the children born of the marriage, but that it is "to the best interest of the children * * * that their custody be with the father."

It appears that sometime prior to these hearings with respect to custody, the defendant leased a home in Houston, Texas, signed a lease thereon for one year at a monthly rental of $189.00, and paid two months rent in advance. The defendant, although restrained from removing the two minor children from North Carolina, shipped her household and kitchen furniture to Houston, Texas, a few

days before the order was entered with respect to the custody of the children.

On 13 August 1965, the court entered an order awarding the custody of the children to the plaintiff, providing for certain visitation rights by the defendant.

The court in its judgment directed the plaintiff to pay to the defendant the costs of transporting the defendant's household and kitchen furniture from Winston-Salem to Houston, Texas, and from Houston back to Winston-Salem, in the sum of $2,490, and that plaintiff pay to defendant the rent advanced on the Houston home in the sum of $378.00, and also pay the defendant's attorneys a fee of $1,500.

The defendant gave notice of appeal on 16 August 1965 but withdrew the same on 19 August 1965 and filed a motion to modify the order entered on 13 August 1965 "by denying and dismissing the motion of the plaintiff * * *" asking for custody of the children. Defendant submitted findings of fact to be made a part of the order of 13 August 1965. The court denied the motion for detailed findings of fact and declined to dismiss the plaintiff's motion in the cause praying for custody of the children.

The plaintiff and the defendant appeal, assigning error.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Norwood Robinson and Robert Melott for plaintiff.

Craige, Brawley, Lucas & Horton, and William T. Graham for defendant.

DENNY, C.J. The plaintiff in his appeal assigns as error that portion of the order entered below which requires him to pay the defendant for moving costs, attorneys' fees, and rent, in the sum of $4,368.

It is provided in pertinent part in G.S. 6-21 as follows:

> "Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: * * *
>
> "(4) In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate, as may be just. * * *
>
> "The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees

in such amounts as the court shall in its discretion determine and allow."

The plaintiff concedes in his brief that the court was empowered by the above statute to tax the costs against him and to award defendant reasonable attorneys' fees in connection with the custody hearing in the court below. Therefore, on plaintiff's appeal, the question for determination is whether or not on the facts revealed by the record, should the court have allowed the defendant's motion for judgment against the plaintiff for the costs of transporting the defendant's household goods and personal effects from Winston-Salem to Houston, Texas, and from Houston, Texas, back to Winston-Salem, in the sum of $2,490, and for the rent advanced on the house in Houston in the sum of $378.00?

The defendant points out in her brief that at the time of the hearing below, the plaintiff and the defendant were living separate and apart under the terms of a separation agreement dated 5 April 1965; that by this voluntary agreement she was granted "the care and custody of the Children until they shall attain the age of 21 years * * *," and the right to "reside at such * * * places * * * as * * * she may desire, * * *" so long as she did not take "the Children out of the continental limits of the United States of America * * *."

The plaintiff alleged in his motion in the cause in the action for absolute divorce that he had complied with every financial requirement he assumed under the provisions of the separation agreement entered into by the parties. This allegation was not contraverted in the hearing below.

The question posed is not where the defendant may live, but can she require the plaintiff to pay the costs of transportation and the rental of a house or apartment when she leaves the house conveyed to her under the terms of the separation agreement? Under the terms of the separation agreement, the defendant cannot obligate the plaintiff to pay anything for any purpose other than as provided in the separation agreement. There is nothing in the separation agreement requiring the plaintiff to pay defendant's moving expenses or rental costs, whether she lives in Winston-Salem or elsewhere.

The right of a married woman to support and maintenance is held in this jurisdiction to be a property right. *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235, and cited cases. The right of support being a property right, the wife may release such right by contract in the manner set out in G.S. 52-12, now G.S. 52-6. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487.

The provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Such agreement, including consent judgments based on such agreements with respect to marital rights, however, are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. *Fuchs v. Fuchs, supra; Kiger v. Kiger, supra; Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Finley v. Sapp,* 238 N.C. 114, 76 S.E. 2d 350; *In re Albertson,* 205 N.C. 742, 172 S.E. 411. Otherwise, the parties to a valid separation agreement are remitted to the rights and liabilities under the agreement or the terms of the consent judgment entered thereon. *Lentz v. Lentz,* 193 N.C. 742, 138 S.E. 12; *Brown v. Brown,* 205 N.C. 64, 169 S.E. 818; *Turner v. Turner,* 205 N.C. 198, 170 S.E. 646; *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819; *Holden v. Holden, supra.*

We hold that, since the separation agreement is in full force and effect except as to the custody of the children, the defendant is not entitled to recover from the plaintiff the cost for transporting her household goods and personal effects from Winston-Salem to Houston, Texas, and return to Winston-Salem, or the rental costs incurred in Houston, Texas, and the order entered below is modified accordingly.

On the defendant's appeal, she assigns as error the finding of fact that the plaintiff was a fit and suitable person to have custody of the minor children born of the marriage, and that it was to the best interest of the children that plaintiff have their custody.

When the plaintiff filed his motion for an absolute divorce, he alleged the execution of the separation agreement between the plaintiff and the defendant, under the terms of which the defendant had been given the custody of the minor children born of the marriage with visitation privileges to the plaintiff, and which further provides for the support of the children by the plaintiff. Therefore, the plaintiff further alleged, the custody of the minor children born of the marriage was not at issue in the action. The question of custody of the children involved was first brought into the action for absolute divorce when the defendant filed answer to the complaint on 4 August 1965. The defendant admitted each and every allegation in the complaint except the allegation that the custody of the minor children born of the marriage was not at issue, and alleged she was a fit and proper person to have custody of said children and prayed for an order awarding her custody of the children. The motion in the cause filed by plaintiff on 5 August 1965, requesting the court to award him custody of the minor

children, and defendant's answer constituted the basis for the custody hearing.

The evidence is voluminous and sharply conflicting as to the habits and conduct of the parties with respect to their fitness to have custody of the children born of this marriage. The recital of this evidence would serve no useful purpose.

The question of custody is one addressed to the trial court. When the court finds that both parties are fit and proper persons to have custody of the children involved, as it did here, and then finds that it is to the best interest of the children for the father to have custody of said children, such holding will be upheld when it is supported by competent evidence. *Griffith v. Griffith,* 240 N.C. 271, 81 S.E. 2d 918; *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313; *McEachern v. McEachern,* 210 N.C. 98, 185 S.E. 684.

In the case of *Finley v. Sapp, supra,* the trial judge found as a fact that both the father and mother of the ten-year-old child were "fit and suitable" persons to have custody of the child, but that the "child's best interests, health and general welfare" would be better served by giving the mother custody of the child. Devin, C.J., in affirming the lower court, said:

> "The statute (G.S. 50-13) specifically provides that the court 'may commit their custody and tuition to the father or mother, as may be thought best.' And in *Walker v. Walker,* 224 N.C. 751, 32 S.E. 2d 318, Justice Winborne, speaking for the Court, used this language: 'Applying this statute, the decisions of this Court hold that the question of granting the custody and tuition of the child to the father or mother is discretionary with the court (citing authorities). The welfare of the child is the paramount consideration, or, as stated *In re Lewis,* 88 N.C. 31, "the polar star by which the discretion of the Courts is to be guided." ' (Citations omitted.)"

There is ample evidence to support the findings of the court below, and the judgment with respect to custody will be upheld. This assignment of error is overruled.

The defendant assigns as error the action of the court below in exercising jurisdiction with respect to custody and in refusing to dismiss the motion in the cause filed in this action on the ground that a prior action was pending in the Superior Court of Forsyth County between the parties in which custody was at issue.

The separation agreement, entered into by the parties after the complaint and answer were filed in the plaintiff's action for divorce from bed and board, settled all matters in controversy between the parties at that time. It was understood that the action would be

dismissed, but through oversight it was not. No custody or other hearing was ever had in the above action. Furthermore, it was the defendant who first requested the court in the present action to rule upon the question of custody. Moreover, the defendant never raised any question about the pendency of a prior action until after the custody hearing had been concluded and the judgment from which she now appeals had been entered. The question raised is a mere technicality, since both actions were pending in the Superior Court of Forsyth County and the proper action for disposition of the custody matter was in the action for absolute divorce, the action in which the plaintiff and the defendant requested the court to rule on the question of custody. If a prior action had been instituted in the superior court in another county, and the court had previously ruled on the question of the custody of the children involved herein, we would have had a different situation. *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857, but on the facts revealed on this record, this assignment of error is overruled.

The defendant further assigns as error the failure of the court below to include as a finding of fact the preferences of the minor children as to their custody. In Lee's North Carolina Family Law, 3rd Edition, Volume 3, Custody of Children, § 224, page 21, *et seq.,* it is said:

> "The welfare or best interest of the child, in the light of all the circumstances, is the paramount consideration which guides the court in awarding the custody of a minor child. It is 'the polar star by which the discretion of the court is guided.' * * *
>
> "When the child has reached the age of discretion the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. * * *"

In the case of *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759, Parker, J., speaking for the Court, said: "The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between the parents, but is not controlling. * * *"

This assignment of error is overruled.

In view of the conclusions heretofore reached, the remaining assignments of error are without sufficient merit to warrant a new

trial on defendant's appeal, and they are overruled.

On plaintiff's appeal—Modified and affirmed.

On defendant's appeal—Affirmed.

DELACY DRUMWRIGHT v. ELMER VERNON WOOD, ADMINISTRATOR OF THE ESTATE OF ZEB VANCE COLEY, DECEASED.

(Filed 14 January, 1966.)

1. Automobiles § 41p—

The identity of the driver of an automobile at the time of a collision may be established by circumstantial evidence.

2. Automobiles § 41a—

The doctrine of *res ipsa loquitur* does not apply to an automobile accident, and negligence will not be presumed from the mere fact of an accident and injury, and while negligence may be established by circumstantial evidence, an inference cannot rest upon mere conjecture.

3. Same—

The court may withdraw the issue of negligence from the jury only if the evidence is free from material conflict and the only reasonable inference to be drawn therefrom is either that there was no negligence on the part of defendant or that the negligence of defendant was not a proximate cause of the injury.

4. Automobiles § 41p—

Evidence that husband and wife were riding in an automobile, that she did not know how to drive, had never been seen driving, that shortly before the accident the husband was seen driving, together with physical evidence at the scene of the accident tending to establish that he was on the left and she was on the right at the time the accident occurred, *held* sufficient to be submitted to the jury on the question of the identity of the husband as the driver of the car.

5. Automobiles § 41a—

The accident in suit occurred when the car in question drove off the highway to its left at the end of a 400 foot curve to the right. The physical facts at the scene, including the fact of extensive damage to the car when it stopped in the ditch, the fact that it tore up several small pine trees, that it traveled 175 feet after leaving the road and dug up the bank of the road, that the tires were still inflated after the accident, etc., *held* sufficient to permit the inference that the accident was the result of excessive speed or reckless driving. G.S. 20-141(c), G.S. 20-141(b)(4), G.S. 20-140(b).

DRUMWRIGHT *v.* WOOD.

APPEAL by defendant from *Johnson, J.*, August 1965 Civil Session of ALAMANCE.

Civil action to recover damages for personal injuries allegedly proximately caused by the negligence of defendant's intestate Zeb Vance Coley, plaintiff's former husband, in the operation of his 1955 Chevrolet automobile, in which plaintiff was a passenger.

In her complaint she alleges Zeb Vance Coley was negligent in the operation of his automobile in the following respects: (1) He operated it in violation of G.S. 20-140, reckless driving; (2) he failed to decrease speed when approaching and going around a curve, in violation of G.S. 20-141(c); (3) he operated it at a speed in excess of 55 miles an hour, in violation of G.S. 20-141(b)(4); (4) he failed to keep a proper lookout; and (5) he failed to keep his automobile under proper control. That such negligence of Zeb Vance Coley was the proximate cause of the wrecking of his automobile and her injuries.

Defendant in his answer denies that his intestate was operating the automobile at the time it wrecked, and denies that his intestate was guilty of negligence.

The jury by its verdict found that plaintiff was injured by the negligence of defendant's intestate, as alleged in the complaint, and awarded her damages in the sum of $20,000.

From a judgment on the verdict, defendant appeals.

Long, Ridge, Harris & Walker for defendant appellant.
Ross, Wood & Dodge by Harold T. Dodge for plaintiff appellee.

PARKER, J. In the record defendant has 16 assignments of error. However, he has brought forward and discussed in his brief one assignment of error, and that is to the denial of his motion for judgment of compulsory nonsuit made at the close of plaintiff's case, and to a renewal of a similar motion when he said he had no evidence to offer. Defendant in his brief states he "has elected to rely upon the nonsuit motions for purposes of this appeal." Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810, provides: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him."

Plaintiff's evidence, considered in the light most favorable to her, shows the following facts:

On 29 February 1964 plaintiff and defendant's intestate Zeb Vance Coley were married to each other. Since the death of Zeb Vance Coley, plaintiff has remarried. On this date Zeb Vance Coley owned a 1955 Chevrolet station wagon. Plaintiff did not know how

to drive an automobile. Several witnesses testified that they had known her for a number of years and had never seen her drive an automobile. About 9 p.m. on 29 February 1964 Zeb Vance Coley driving his Chevrolet station wagon arrived at James Floyd Allen's store, which is 10 miles from Highway #54 and 16 miles from the town of Graham. Plaintiff was riding with him as a passenger on the front seat. They bought some groceries and gas, stayed 10 to 15 minutes, and Zeb Vance Coley drove away. About 9:15 or 9:20 p.m. on the same night Zeb Vance Coley, with plaintiff as a passenger, driving his automobile arrived at the home of Eldridge McDaniel, which is situate three-fourths of a mile east from the intersection of Highway #54 with Phillips Chapel Road. Zeb Vance Coley came from the direction of the town of Graham. About 5 or 10 minutes after 11 p.m. Zeb Vance Coley, with plaintiff as a passenger, drove his automobile away from Eldridge McDaniel's home, and when he reached the Highway #54, he turned and proceeded on the highway in the direction of Phillips Chapel Road. Shortly after they left, Eldridge McDaniel got his automobile to carry Lawrence Daniel O'Neal and his wife, who were at his home, to their home. McDaniel, with the O'Neals as passengers, drove his automobile on Highway #54 to the entrance of Phillips Chapel Road, then proceeded south on Phillips Chapel Road, and about 11:35 p.m. they saw the Chevrolet station wagon of Zeb Vance Coley off Phillips Chapel Road down an embankment. They did not stop.

On 29 February 1964 Earl Michael Thompson and his wife were living in a house trailer situate about 150 to 200 feet north of Phillips Chapel Road, and about 1200 to 1500 feet south of the intersection of Highway #54 and this road. On the night of this day they and their guests, Mr. and Mrs. Stafford Wayne Hart, were playing cards in their house trailer. Mrs. Thompson testified: "I heard a loud roar and a big thud or bump around 11:15 p.m. I also heard a car horn. I jumped up and looked out the door. We could see headlights. Mr. Hart and I jumped in the car and drove down there." Stafford Wayne Hart testified: "I went to the scene of an accident that night. I was prompted to go there by the sound of a car crash and horn blowing. I heard this about 11:15." Earl Michael Thompson also went to the scene.

Upon arrival at the scene, this is what they saw: Zeb Vance Coley's Chevrolet station wagon was off Phillips Chapel Road and down an embankment to the left of the road for a person entering this road from Highway #54 and passing south by the Thompson home. The rear bumper of the station wagon was about two feet from Phillips Chapel Road and the station wagon was headed down the embankment about 20 feet from a small stream or culvert. Its

motor was not running, its lights were on, and its horn was blowing. There was a large hole through the windshield on the right side of the front seat, and the head and upper part of plaintiff's body to her midsection protruded through this hole onto the hood of the station wagon. She was cut about the face and was bleeding profusely. She was conscious. The body of Zeb Vance Coley, according to one version of the evidence, was sitting on the floorboard of the station wagon; according to another version of the evidence, he was in a sitting position in the front of the station wagon with his head against the passenger door and his body was holding plaintiff through the windshield. One of his feet was on the front seat in the area of the light switch, and his other foot was down in the area of the brake pedal. The front seat of the station wagon had broken away from its fastenings on the floor, and had gone forward. A heavy chain saw was at its back against it. The front end of the station wagon was pushed in and wrecked. They disconnected the horn. The steering wheel of the station wagon was bent. The station wagon was on its wheels, and all the tires were up and full of air.

Shortly after the wreck plaintiff and Zeb Vance Coley were carried in an ambulance to Alamance County Hospital. Upon arrival Zeb Vance Coley was dead. The left side of his chest was crushed flat, and all the ribs on that side were broken. Plaintiff sustained serious injuries which have already caused her to incur substantial hospital and medical expenses.

The scene of the wreck is about 1582 feet from Highway #54 if one enters Phillips Chapel Road from this highway and proceeds south along it by the Thompson house trailer. Phillips Chapel Road is a paved highway with pavement 18 feet wide. The culvert beyond which Zeb Vance Coley's station wagon stopped is about 1581.5 feet from the center of Highway #54 to the left of Phillips Chapel Road as one travels on it in a southerly direction from Highway #54. Phillips Chapel Road is a gentle fall until one gets to within 500 feet of the culvert, and then it is progressively more of a fall. There is a curve to the right that is about 400 feet long terminating approximately at the culvert. The shoulder of the highway there is about 6½ feet wide.

Alfred Cheney, Jr., a State Highway Patrolman, arrived at the scene about 11:35 p.m. that night. He testified:

> "When I got there, there were no occupants in the automobile. I inspected the shoulders of the highway immediately north from where I found the Chevrolet automobile. I found nothing in the highway there. On the shoulder of the road there were tire marks that led up to the rear of the automobile for

approximately 150 to 175 feet from the left shoulder. These tire marks went off the road they led up to the highway approximately 150 to 175 feet from the automobile and went off on the shoulder down the embankment and hit the bottom of the embankment and hit a barbed wire fence on the left side and continued until it hit the culvert. The nature of the terrain on the left side of the road from where the car was, back north toward the highway, included a barbed wire fence leading up along the bottom of the embankment and there were some small trees, several of these trees were bent over.

"At or near the culvert at the locality where the automobile was situated the barbed wire fence was down and the posts holding the wire in that vicinity were down. I don't recall how many posts were down. The culvert that runs from the highway to the left had an impression in the southernmost side of it, the dirt was bare at that point, there was no brush or growth on it at that point.

"The automobile was located approximately 20 feet south from this point in the culvert. On the south side of the culvert, between the culvert and the automobile there were tire marks up the embankment leading to the rear wheels. The weather condition that night was dry, the road was dry. North of where I found the automobile there were no marks in the highway, the highway itself was intact, there were no holes in the road."

The maximum speed limit on Phillips Chapel Road at the place of the wreck was 55 miles an hour.

Charles L. Foster of Mebane drove his "wrecker" to the scene of the wreck about midnight that night to carry Zeb Vance Coley's Chevrolet station wagon away. He testified in substance, except when quoted: The Chevrolet station wagon was down an embankment on the left side of Phillips Chapel Road. The back end was sticking straight up and the front end was headed straight towards the woods. The chassis of the car was bent. The front bumper, the grille, the left and right front fenders, the hood, the radiator, the frame that comes out from the chassis that holds the bumper on were damaged. The steering wheel was bent. The dash on the right side of the automobile and the steering column were damaged, and there was a hole in the windshield on the passenger side. The front seat was tilted over the back rest. The tires were up and full of air. He testified: "There were small pine trees torn down, I would say 3 and 4 and 5 foot high. Then along the bank as it went off it was almost like a bulldozer, it dug up the bank, and it was a small

branch or culvert. I guess you would call it, and it had been recently shoveled out, I guess by the State, and it knocked this big bank over, then the car stopped on the opposite side of the culvert. . . . I had occasion to measure the marks which I saw that night from the shoulder of the road immediately north of where this car was to where the car came to rest with a tape measure. I measured them with a 100-foot tape measure. The measurement I found was 175 foot. I saw a driveway off the highway to a trailer. In my opinion the distance from the driveway to where the wrecked car—I'd say was approximately 200 ft. This 175 feet was from where I first found marks after the car left the pavement to where I found the car. From where that mark began all the way down to this branch, the marks were sort of sloping down an embankment. . . . The car had not been overturned or rolled over."

State Patrolman Cheney testified: "From Highway #54 Phillips Chapel Road goes downhill. Going around the curve, it is all downhill. Just beyond the sharpest part of the curve there is a culvert that runs away to the left from the highway. The car was approximately 20 feet past this culvert."

It is well-established law in this jurisdiction that the identity of the driver of an automobile at the time of a collision or wreck may be established by circumstantial evidence. *Yates v. Chappell,* 263 N.C. 461, 139 S.E. 2d 728; *McGinnis v. Robinson,* 252 N.C. 574, 114 S.E. 2d 365; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492.

The doctrine of *res ipsa loquitur* does not apply in the instant case, and negligence is not presumed from the mere fact that there has been an accident and an injury. *Yates v. Chappell, supra; Johns v. Day,* 257 N.C. 751, 127 S.E. 2d 543; *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33; *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821. An inference of fact cannot rest upon conjecture. *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670.

In *Yates v. Chappell, supra,* the Court said:

> "The mere fact that a vehicle veers off the highway is not enough to give rise to an inference of negligence. [Citing authority.] But what occurred immediately prior to and at the moment of the impact may be established by circumstantial evidence, either alone or in combination with direct evidence. [Citing authority.] The physical facts at the scene of an accident, the violence of the impact, and the extent of damage may be such as to support inferences of negligence as to speed, reckless driving, control and lookout. [Citing authority.]"

In passing upon the question as to whether plaintiff considering her evidence in the light most favorable to her, has sufficient evidence of actionable negligence on the part of defendant's intestate to carry her case to the jury, "we must be guided by the accepted rule that the question of the liability of a defendant in an action for negligence can be taken from the jury and determined by the court as a matter of law by an involuntary nonsuit only in case the evidence is free from material conflict, and the only reasonable inference to be drawn therefrom is either that there was no negligence on the part of the defendant, or that the negligence of the defendant was not the proximate cause of the plaintiff's injury." Ervin, J., for the Court in *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377.

About 5 or 10 minutes after 11 p.m. on 29 February 1964 Zeb Vance Coley, with plaintiff in his Chevrolet station wagon as a passenger, drove his station wagon away from Eldridge McDaniel's home, and when he reached Highway #54 he turned and proceeded on the highway in the direction of Phillips Chapel Road. When he drove away from the McDaniel home after a visit there of about two hours, there is no evidence that he was not well and in the full possession of his mental and physical faculties. The culvert beyond which Zeb Vance Coley's station wagon finally came to rest is about 1581.5 feet from the center of Highway #54 to the left of Phillips Chapel Road as one travels on it in a southerly direction from Highway #54. Plaintiff could not drive an automobile. The station wagon left Phillips Chapel Road to the left and went down the embankment about 11:15 p.m. on this night. Plaintiff's evidence and the position of Zeb Vance Coley and plaintiff in the station wagon when it stopped are sufficient to permit a jury to find that Zeb Vance Coley was driving his station wagon south on Phillips Chapel Road when the wreck occurred, and that plaintiff was a passenger in it.

Phillips Chapel Road was dry and there were no holes in it. There is no evidence of any other traffic on the road at the time. There is no evidence of any mechanical failure of the station wagon. The station wagon had not overturned, and it stopped with its tires up and full of air. Going south on this road there is a gentle fall until one gets to within 500 feet of the culvert, and then it is progressively more of a fall. On it is a curve to the right about 400 feet long terminating approximately at the culvert, about 20 feet beyond which the station wagon stopped. There were no tire or skid marks on the highway indicating the application of brakes. On the left shoulder of this road there were tire marks that lead 150 to

175 feet from the shoulder down the embankment to where the rear of the station wagon stopped, about 20 feet beyond the culvert. All this evidence, and the wire fence and its posts and pine trees 3 and 4 and 5 feet high knocked down, the big bank near the stream or culvert knocked over, the front seat torn loose from its fastenings, plaintiff's body thrown through the windshield to her midsection, the left part of Zeb Vance Coley's chest crushed flat and all the ribs on that side broken, the extensive damage to the station wagon, the "loud roar and big thud or bump" heard by persons in the Thompson house about 11:15 p.m., would permit inferences of fact by a jury that Zeb Vance Coley failed to decrease the speed of his station wagon when approaching and going around the curve in the road in violation of G.S. 20-141(c), was operating his station wagon at a speed in excess of 55 miles an hour in violation of G.S. 20-141(b)(4), was operating it in a reckless manner in violation of G.S. 20-140(b), that he failed to keep a proper lookout, and that all this caused him to lose control of his station wagon and to run off on the left shoulder of the curve and down the embankment, that this was negligence on his part in the operation of his station wagon, and proximately caused plaintiff's injuries. The court properly overruled defendant's motions for judgment of compulsory nonsuit.

The cases relied on by defendant are factually distinguishable. In *Ivey v. Rollins,* 250 N.C. 89, 108 S.E. 2d 63, the Court said: "The only established fact is that there was a collision when the automobile in which plaintiff's intestate was riding, traveling in its proper lane, 'suddenly swerved sharply' head-on into the bridge abutment." In *Fuller v. Fuller,* 253 N.C. 288, 116 S.E. 2d 776, eye witnesses estimated the speed of the truck, in which plaintiffs were riding, at 35 to 40 miles an hour. In *Crisp v. Medlin,* 264 N.C. 314, 141 S.E. 2d 609, no persons were in the wrecked automobile when a State patrolman saw it about 4:30 a.m. on the righthand shoulder of the highway. There was no evidence direct or circumstantial to show who was driving it at the time of the wreck. There was a left-hand curve on the highway near the scene of the wreck. The evidence did not disclose where the automobile was in respect to the curve in the highway when it wrecked. There was no evidence in the record as to whether the highway was wet, slick, or dry at the time of the wreck, or the condition of the highway.

The judgment of the trial court is

Affirmed.

GEORGE D. NANCE v. R. B. PARKS.

(Filed 14 January, 1966.)

1. Trial § 21—

On motion to nonsuit, plaintiff is entitled to have all of his evidence considered in the light most favorable to him, and contradictions, even in plaintiff's evidence, must be resolved in his favor.

2. Evidence § 3—

It is a matter of common knowledge that if the motor of an automobile equipped with automatic transmission is running and its transmission is in "drive", a jolt, vibrations of the motor, or slight pressure on the accelerator may start the car forward, and that absent warning devices an automobile can be driven for a considerable distance with the parking brakes set before the driver notices.

3. Negligence § 7—

Proximate cause is one which produces the event in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that injury was probable under the circumstances.

4. Negligence § 1—

A person must increase his watchfulness as the possibility of danger increases.

5. Negligence § 24a— Evidence held for jury on issue of negligence in leaving car with motor running and transmission in drive.

The evidence tended to show that defendant drove his car to a garage, that one mechanic looked under the hood, then another got on his back on the floorboard to check the wiring under the dashboard, that as the mechanic inched forward, defendant left the vehicle with the motor running, the automatic transmission in drive, and the handbrakes set, that in the process of his work the mechanic's shoulder hit the accelerator and the car lunged forward, injuring a workman who was standing in front of it. *Held:* Injury should have been reasonably foreseen from leaving the car, unattended for practical purposes, with its motor running and the automatic transmission in drive, and therefore nonsuit was improperly entered. Nor does the act of the mechanic in inadvertently pressing the accelerator with his shoulder constitute insulating negligence, since this was reasonably forseeable.

6. Negligence § 4—

One who puts a thing in charge of another which he knows to be dangerous or to have characteristics which, in the ordinary course of events, are likely to produce injury to others, owes a duty to give such person reasonable notice of the hazard.

7. Negligence § 27—

An intervening act which is reasonably foreseeable by the author of the primary negligence cannot insulate such negligence.

HIGGINS, J., dissenting.

NANCE *v.* PARKS.

APPEAL by plaintiff from *Walker, S.J.*, June 14, 1965 Schedule C Session of MECKLENBURG.

Action for personal injuries. Plaintiff appeals from a judgment of nonsuit entered at the close of his evidence.

W. Faison Barnes and Carl W. Howard for plaintiff appellant.
Boyle, Alexander and Carmichael for defendant appellee.

SHARP, J. Taken in the light most favorable to plaintiff, his evidence tends to establish these facts: On the morning of April 13, 1961, defendant drove a 1960 Chrysler New Yorker, an automobile his employer had purchased new approximately six months earlier, into the service garage of Headford Motors, Inc. in Charlotte. This automobile had a 360-horsepower engine and an automatic transmission, which was controlled by push buttons located at the extreme left of the instrument panel. There were buttons for "Drive," "Low," "Reverse," and "Neutral," but none for "Park." Defendant stopped the car inside the garage, a short distance from the rear of a Chrysler Imperial. He set the parking brake, and, leaving the motor running with the transmission in the "drive" position, he got out to report to the service manager that the left-turn signal was not working. At no time thereafter did defendant cut off the motor or change the push-button from "drive." Defendant then got back under the steering wheel and E. N. Buchanan, a mechanic, came to check the signal. At that time, plaintiff, also a mechanic employed by the garage, was leaning against the bumper of the Chrysler Imperial a few feet in front of defendant's car, talking to a third employee. Buchanan got in the car on the right side, lay down on the floorboard, and proceeded to check the wiring under the dashboard. When this endeavor brought him to the steering column, defendant got out and went to a telephone booth about 125 feet away. Although the motor was still running with the transmission in "drive," defendant said nothing to Buchanan about these conditions and Buchanan was unaware of them. He said he neither heard any noise nor felt any vibration from the engine. As he inched his way across the center of the floorboard on his back, his left shoulder hit the gas pedal. The car roared and lunged forward into the rear of the Chrysler Imperial. It, in turn, hit the back of a Plymouth, which then flattened a tar barrel against the wall of the garage. Plaintiff's left leg was crushed between the front bumper of the New Yorker and the rear bumper of the Imperial.

After these "impacts and thuds," the New Yorker came to a stop, and Buchanan "reached over and turned the ignition switch off." He then got out of the car and, observing that others were at-

tending plaintiff, he started the motor and backed the automobile away in order to examine it for damage. None was visible to him. After Buchanan had checked it, defendant came back to the car and drove it away.

On cross-examination, Buchanan testified as follows:

> "As to whether I normally work on cars without seeing whether the engine is running, I don't work on cars that I know the engine is running unless I purposely turn the car on. As to whether it is not a procedure of mine to look and see whether the engine is running, if I get under the steering wheel at any time and have other work to do to the car, I turn the car off, before I leave the car. I know that it is off when I leave it. On this occasion as to whether I made any effort to determine for myself, Mr. Park was in the driver's seat. I assumed that Mr. Park had turned the car off. No, sir, I made no effort myself to determine what conditions were with reference to the brake, the gear or to the engine. I might add that to check these turn signals the ignition has to be on in the accessory position or in the start position. . . ."

This appeal poses only the question whether the foregoing facts, taken as true, withstand defendant's motion for nonsuit. Testimony tending to contradict the preceding version of the accident—as, in some respects, did that of defendant, whom plaintiff called as an adverse witness—is not to be considered in passing upon the motion. Plaintiff is entitled to have all his evidence appraised in the light most favorable to him. *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767.

Any person who operates an automobile which is equipped with an automatic transmission knows that, if it is left in "drive" with the motor running, a jolt may cause it to move forward under its own power; that sometimes vibrations from within the motor itself will feed gas to the carburetor and set the vehicle in motion; and that slight pressure on the accelerator will start the car forward. An automobile left in gear with the motor running is "like a gun loaded and cocked, ready to go off." *Weiss et al v. King,* 151 So. 681 (La. App.). Furthermore, it is a matter of common knowledge that, absent warning devices installed for that purpose, any automobile can be driven for a considerable distance with the parking brake set before the driver notices that he has not released it.

When Buchanan began his examination of the left-turn signal, defendant did not relinquish possession of the automobile to him; defendant remained seated under the steering wheel. Buchanan did not take a seat next to defendant in order to begin his inspection.

On the contrary, he lay down on the floorboard on his back, his head toward the steering column. It was only after Buchanan had inched himself toward the steering column and into close propinquity to him that defendant left the car to make a telephone call. At that time, he knew its transmission was in "drive" and its motor running, yet he did not give this information to Buchanan. Presumably he saw plaintiff and another mechanic standing in between the front of his vehicle and the back of another, for they were in plain sight. Had he put the transmission in "neutral" or turned the motor off, this accident would not have occurred.

Proximate cause is "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Mattingly v. R. R.*, 253 N.C. 746, 750, 117 S.E. 2d 844, 847. Foreseeable injury is a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796.

Specifically, the decisive question is one of foreseeable injury, *i.e.*, whether, under the circumstances here disclosed, a reasonably prudent person should have foreseen that some portion of Buchanan's body was likely to come in contact with the accelerator and thus cause the car to move forward with probably injurious consequences to others. *Herring v. Humphrey*, 254 N.C. 741, 119 S.E. 2d 913. This poses a different, although similar, problem from that which would have been presented had the car moved forward "on its own" while defendant was in search of the service manager. In *Storey v. Parker*, 13 So. 2d 88 (La. App.), the defendant drove his Oldsmobile, which was equipped with automatic transmission, to a service station and stopped it at the gas pumps. After making arrangement for services which would require an hour, he got out, leaving the motor running and the transmission in "Hi." A minute or two later, without any outside stimulus, the car started moving. It went into the street, ran over the plaintiff, and finally stopped after colliding with another vehicle. In holding the defendant liable to plaintiff, the court said that had defendant "put the lever in neutral, or even more simply yet, had he turned his motor off, *either of which two things we feel that any reasonably prudent man would have done under the circumstances,* there would have been no accident." 13 So. 2d at 93. (Italics ours.)

Although there were several filling station employees in the immediate vicinity—and one tried unsuccessfully to stop it—the Oldsmobile in *Storey v. Parker, supra,* was "unattended" in the sense that there was no one in a position to control it when it started to

move forward. No one present was "competent to prevent any of the probable dangers" which might result when an automobile is left with its motor running and its transmission in gear. See *Pinyan v. Settle,* 263 N.C. 578, 585, 139 S.E. 2d 863, 869. Here, the Chrysler New Yorker, in the same sense, was equally "unattended," for, although Buchanan was partially inside the vehicle, he was lying on his back on the floorboard.

Today, automobile manufacturers have produced such remarkably quiet and smooth running engines that not infrequently a driver will step on the starter while his motor is running. It was not required that the motor be running for Buchanan to check the turn signal, only that the ignition be in the "accessory" position. But, conceding *arguendo* that defendant might reasonably have assumed that Buchanan knew the motor was running, there appears on this record no basis for defendant to have further assumed that Buchanan knew the car was in "drive." The closer the top of Buchanan's head inched toward the steering column, the greater the danger that the back of his arm or shoulder might hit the accelerator and cause the car to move forward, injuring himself, the two men in front, or all three. That he, a trained mechanic, continued the operation is a circumstance tending to show that he was unconscious of the lurking danger. During the interval defendant first left the car unattended while he sought out the service manager, the danger that it would be set in motion by some external contact or motor vibration was not so great as when he left a mechanic working in close proximity to the accelerator pedal. Buchanan's activity materially increased the risk that the car would move. " '(A) prudent man increases his watchfulness as the possibility of danger mounts.' " *Pinyan v. Settle, supra* at 582, 139 S.E. 2d at 867. We think it is a legitimate inference that, in the exercise of ordinary prudence, defendant could and should have foreseen that such a result was probable under the circumstances. That being so, he had a duty to guard against it.

One who puts a thing in charge of another when he knows it to be dangerous or to have characteristics which, in the ordinary course of events, are likely to produce injury to others, owes a duty to give such person reasonable notice of the hazard. *Stroud v. Transportation Co.,* 215 N.C. 726, 3 S.E. 2d 297. A customer of a garage is negligent if he brings in a motor vehicle and, knowingly and without warning, leaves it in a condition which is likely to cause injury to persons in the garage, and he is liable in damages for the injuries proximately caused thereby. 7A Blashfield, Cyclopedia of Automobile Law and Practice § 5079 (Perm. Ed. 1950).

We hold, therefore, that whether defendant failed to exercise ordinary care so as to make him liable under our laws of negligence is to be judged by the jury in the light of the attendant facts and circumstances. *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871, 162 A.L.R. 999.

Defendant's first line of defense was that plaintiff's evidence failed to show that essential element of actionable negligence, foreseeable injury. This perimeter breached, he next contends that his negligence was insulated by the active, intervening negligence of Buchanan "in lying down on the accelerator" without having determined whether the car was in gear or whether the engine was running. Such an argument is untenable. To exculpate a negligent defendant by insulating his negligence, the intervening cause must be one which breaks the connection between defendant's negligence and the injury alleged in such a manner that it itself becomes the proximate cause of the injury. *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197. As Denny, J. (now C.J.) said in *Bryant v. Woodlief,* 252 N.C. 488, 491-92, 114 S.E. 2d 241, 244:

> "The test of whether the negligent conduct of one tort feasor is to be insulated as a matter of law by the independent act of another, is well settled by our decisions. In *Harton v. Telephone Co.,* 141 N.C. 455, 54 S.E. 299, the Court said: '* * * the test * * * is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected * * *. We think it the more correct rule that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act. * * *'"

In this case defendant's primary negligence depends upon whether *he should reasonably have foreseen and expected that Buchanan might depress the accelerator,* thereby causing the car to leap forward with resulting injury to plaintiff or others. If he is negligent, it is because he should have reasonably foreseen this development and guarded against it. And, under the test, *supra,* if it was thus foreseeable it could not afford him insulation. It is entirely possible that defendant and Buchanan might be joint tortfeasors, but it is not possible under the facts of this case that Buchanan's alleged negligence could insulate defendant's conduct.

> "Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The

> courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility." Prosser, Torts § 51, p. 312. (3d Ed. 1964.)

To be actionable, of course, defendant's negligence need not be the sole proximate cause of the injury in suit. Ordinarily, an action may be brought against any one or all of joint tortfeasors. *Batts v. Faggart,* 260 N.C. 641, 133 S.E. 2d 504. Here, however, plaintiff, covered by Workmen's Compensation insurance, may not sue Buchanan, a fellow servant. G.S. 97-9.

For the reasons stated, the judgment of nonsuit entered in the court below is

Reversed.

HIGGINS, J., dissenting: I realize there are times and places in which it would be an act of negligence for the owner to stop his automobile in gear with the emergency brake set and the engine running—for example: in a children's playground. But if the vehicle is taken to a garage for repairs, left at the repair counter in the custody of the service superintendent who raises the hood for the purpose of ascertaining the cause of a shortage in the turn signal, such is neither the time nor the place to charge the owner with negligence.

The plaintiff called the defendant as an adverse witness and elicited from him the following testimony:

"I drove my car in the garage and talked to the service manager and advised him that the turn signal would not work. He came up to the car, opened the hood and looked under the hood and there was Mr. Buchanan, I believe it was, that was with him at the time, and they could not find the trouble under the hood. So then Mr. Buchanan said, 'I know where it is; it's under the dash.' So he goes around and gets in the car on the passenger's side and begins to check the wires under the dash and he continued to check them, and at that time it seemed that I might be in his way, so I got out of the car and let them have it."

The mechanic, Mr. Buchanan, testified. ". . . I was not there when the car came in. I came down . . . from working on a car on the second floor . . . Mr. Deason (service manager) called my attention to the car. . . . I did not look under the hood on this car. As to whether anyone else looked under the hood . . . not while I was there. . . . Mr. Parks was in the car before I got in. He got out before I slid across. . . . He got out and went off and then I slid further on over. Then I came across the tunnel and let myself down on top of the accelerator. At that time the car went forward." The

mechanic testified he didn't know, and made no effort to ascertain, whether the engine was running or the vehicle was in gear.

The only possible discrepancy between the plaintiff's evidence from the adverse witness Parks and the witness Buchanan, the mechanic, is whether Buchanan was the mechanic with the service manager, Deason, when the service manager "opened the hood." Mr. Buchanan testified that he came down from the second floor. The defendant and the vehicle were already there; that the service manager was there. He further testified the hood was not raised while he was present. Mr. Parks was positive that the hood was raised by the service manager and he believed Mr. Buchanan was there. Mr. Buchanan does not say, and no one else said, the manager did not raise the hood. The difference in the testimony of Parks, the adverse witness, and Buchanan is more apparent than real. It is not surprising that Mr. Parks could not be positive as to whether Mr. Buchanan was present when the service manager raised the hood. The accident happened on April 13, 1961. The suit was not brought until April 10, 1964, (three days before the action was barred) and the trial did not take place until June, 1965. It is of minor significance whether the mechanic present with Mr. Deason was Mr. Buchanan or some other. The manager did not testify.

I do not agree with the Court's opinion that the evidence of Mr. Parks, the defendant, may be disregarded on the question of nonsuit. He was a plaintiff's witness—adverse to be sure—hence his testimony possibly would not bind the plaintiff to the extent he could not show the facts to be otherwise. But to the extent Mr. Parks' evidence is not contradicted and the facts not shown to be otherwise, the plaintiff is bound by the testimony since he made it a part of his case. Whether the hood was up—and Mr. Parks says Deason raised it—and neither Deason nor anyone else says he didn't, is material only to show that the defendant knew when he delivered the car to the garage that its agents had knowledge the engine was running. Hence he had a right to assume and to act on the assumption that mechanics working on a vehicle would take all necessary precautions against the dangers incident to a running engine of 360 horsepower. The defendant could not reasonably foresee that (of all persons) a mechanic would lie down on the accelerator of an engine of such power.

The law places before the plaintiff two hurdles: (1) showing defendant was negligent in delivering to the garage his vehicle in gear with the engine running; (2) showing that the owner might reasonably foresee that an automobile mechanic would be so negligent (not to step on) but to lie down on the accelerator which

furnished gas to a running engine. "But it is generally held, that in order to warrant the finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Batts v. Faggart,* 260 N.C. 641, 133 S.E. 2d 504; *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; *R. R. v. Kellogg,* 94 U.S. 469.

Under the circumstances disclosed by this record, I think if the first hurdle does not stop the plaintiff, the second certainly does. I vote to affirm the nonsuit.

ANNIE BEN COULTER v. CAPITOL FINANCE COMPANY, ORIGINAL DEFENDANT, AND EASTERN FINANCE COMPANY, OF BURLINGTON, INC., AND CMC FINANCE GROUP, INC., ADDITIONAL DEFENDANTS.

(Filed 14 January, 1966.)

1. Landlord and Tenant § 11—

When a tenant holds over after the expiration of a term of years, nothing else appearing, the lessor may treat him as a trespasser and eject him, or he may continue to recognize him as a tenant under the terms of the expired lease, except that the tenancy is one from year to year and terminable by either party upon 30 days' notice prior to the end of the yearly term.

2. Landlord and Tenant § 10— Lessor may waive notice of exercise of option for extended term.

Where a lease for a term of years provides for an extension at an increased monthly rental upon notice to lessor 30 days prior to the end of the term, the provision for notice is for the benefit of lessor, and where the lessee remains in possession after the end of the term and pays the increased monthly rental, which is accepted by lessor, the provision for notice is waived and both parties are bound by the extension agreement. A subsequent provision that if lessee should remain in possession, resulting in a tenancy from month to month, the lease might be terminated by either party upon thirty days' notice, does not alter this result, since the subsequent provision was intended to apply only upon a holding over under the terms of the original lease.

3. Landlord and Tenant § 5—

Where a lease is prepared by lessee, ambiguous language must be construed in favor of lessor.

4. Landlord and Tenant § 8—

The assignment of a lease does not release lessee of its contractual obligation to pay rent, even though the lessor consents to the assignment and accepts rental payment from the assignee.

APPEAL by plaintiff from *Gambill, J.*, 29 March 1965 Civil Session of GUILFORD.

This is an action for damages for breach of a lease, which was heard by the court, without a jury, upon an agreed statement of facts. The facts material to this appeal are as follows:

The plaintiff, owner in fee simple of the leased premises, entered into a lease agreement with the defendant Eastern Finance Company of Burlington, Inc. (hereinafter called Eastern). The lease was prepared by the attorney for Eastern.

The lease was for an original term of 36 months, beginning 1 June 1959 and continuing through 31 May 1962, for which the lessee agreed to pay a total rent of $6,300, payable $175.00 per month, in advance, on the first day of each month. It stated that all notices required to be given must be in writing and sent by registered mail. It then provided:

> "V. It is further understood and agreed between the parties hereto that at the expiration of the original term of this lease, the Lessee shall have the option of extending this lease for an additional period of two years. The rental consideration for this additional period of two years to be TWO HUNDRED AND TWENTY-FIVE DOLLARS ($225.00) per month, payable in advance on the same day as the rent is due and payable under the terms of this original lease. The Lessee agrees to notify the Lessors as provided in Paragraph IV of this lease thirty (30) days before the termination of the original term of this lease of its intention to exercise the option herein granted.
>
> "VI. Should the Lessee remain in possession of the leased premises beyond the expiration of the original term or any renewal or extension of this lease, which shall result in a tenancy from month to month, this lease may be terminated by either party upon the giving of thirty (30) days' written notice to the other party."

Eastern entered into possession of the leased premises and paid the agreed rent of $175.00 per month throughout the original term of three years. Thereafter Eastern continued in possession of the premises and paid rent at the rate of $225.00 per month for the months of June and July 1962, these payments being accepted by the plaintiff-lessor.

On 3 July 1962, Eastern transferred all of its assets, including this lease, to its parent corporation, which is not a party to this suit. Rent at the rate of $225.00 per month was paid to and accepted by the plaintiff for the months of August and September 1962, it not appearing whether this payment was by Eastern or by its parent-assignee.

On or about 10 October 1962, the defendant CMC Finance Group, Inc. (hereinafter called CMC) purchased from the parent-assignee of Eastern certain properties, including this lease. This agreement, to which the plaintiff was not a party and to which it does not appear that she assented, stated that the parent of Eastern would transfer to CMC, among other things, "the seller's month to month leasehold of the business premises occupied by it in Burlington, North Carolina," these being the premises described in the plaintiff's lease to Eastern.

Capitol Finance Company (hereinafter called Capitol) is a wholly owned subsidiary of CMC. Following the agreement between the parent-assignee of Eastern and CMC, CMC and Capitol entered into possession of the leased premises and paid rent to the plaintiff-lessor at the rate of $225.00 per month for the months of October and November 1962.

The check for the November 1962 rent was transmitted to the plaintiff in a letter from CMC dated November 1, but mailed November 5, 1962, which letter stated:

> "Please be advised that we are giving 30 days' notice from date of this letter at which time we wish to terminate the rental of the above offices, and will vacate all of our office fixtures from the premises."

On 20 November 1962, the plaintiff, through her attorneys, wrote CMC and Capitol, acknowledging receipt of the above letter and stating, in reply, that the original lease had been renewed for a period of two years and denying the right of CMC and Capitol to terminate it. CMC and Capitol, nevertheless, vacated the premises and refused to pay any rent after November 1962.

The plaintiff thereafter used diligent effort to obtain another tenant for the premises, but except for temporary use, was unable to rent them. On 30 April 1964, plaintiff sold the premises. If plaintiff is entitled to recover, she is entitled to recover $3,979.50.

Upon the facts so stipulated the court reached conclusions of law, which may be summarized as follows:

1. Eastern by reason of its not having given notice of its intent to do so, in accordance with the provisions of the lease, did not exercise its option to extend the term for an additional two years.

2. By remaining in possession and paying rent at the rate of $225.00 per month for the months of June to October 1962, inclusive, Eastern, its parent-assignee, CMC, and Capitol were tenants from month to month so that the lease could be terminated by either party upon the giving of 30 days' written notice.

3. CMC and Capitol, by giving plaintiff notice by the letter dated 1 November 1962, of their intent to vacate the premises, terminated the lease and no rent became due the plaintiff after the month of November 1962.

4. CMC and Capitol were assignees of the rights of Eastern under the lease and were obligated to the same extent as Eastern thereunder.

The court accordingly entered judgment that the plaintiff recover nothing of the defendants and pay the costs of the action. From this judgment the plaintiff appeals, assigning as error the first three of the above conclusions by the court and its action in signing the judgment.

Wharton, Ivey & Wharton for plaintiff appellant.

Forman, Zuckerman & Scheer and Harry Rockwell for defendant appellees.

LAKE, J. Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy. *Kearney v. Hare,* 265 N.C. 570, 144 S.E. 2d 636; *Duke v. Davenport,* 240 N.C. 652, 83 S.E. 2d 668; *Murrill v. Palmer,* 164 N.C. 50, 80 S.E. 55; *Harty v. Harris,* 120 N.C. 408, 27 S.E. 90.

The parties to the lease may, of course, agree upon a different relationship. Here, they have done so. Paragraph V of the lease gives the lessee the option to extend the lease for an additional term of two years, the rent during such additional term to be $225.00 per month instead of the $175.00 payable during the original term. This paragraph also provides that the lessee agrees to notify the lessor, in writing by registered mail, 30 days before the end of the original term, of its intention to exercise such option. We construe this pro-

vision for notice to be a condition precedent to the right of the lessee so to extend the term. Otherwise, the so-called agreement would have no meaningful purpose.

Nothing else appearing, a holding over by the lessee, without giving such notice, would not prevent the lessor from treating the lessee as a trespasser following the expiration of the original term and suing immediately to evict. *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; *Holton v. Andrews,* 151 N.C. 340, 66 S.E. 212. However, this provision for notice is for the benefit of the lessor and may be waived by him. *Kearney v. Hare, supra;* 32 Am. Jur., Landlord and Tenant, § 980; 51 C.J.S., Landlord and Tenant, §§ 127, 145, 149. See also: *Oil Co. v. Mecklenburg County, supra; Holton v. Andrews, supra.* When a tenant, having the right to extend, holds over, he is presumed to do so with the intent of exercising the right to extend. *Kearney v. Hare, supra; Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367; 32 Am. Jur., Landlord and Tenant, § 982. When such a lessee remains in possession without giving the prescribed notice, the lessor has an election to treat him as a trespasser or to waive the notice and treat him as holding by virtue of an extension of the lease. Acceptance by the lessor of the rent which the lease provides shall be paid during the extended term is a waiver of such notice by the lessor, nothing else appearing. 32 Am. Jur., Landlord and Tenant, § 980; Anno: 27 A.L.R. 981, 993. This is especially true where, as here, the lease provides that, in event of an extension of the term, the rent shall be increased. *Long v. Stafford,* 103 N.Y. 274, 8 N.E. 522; Anno: 27 A.L.R. 981, 995.

In 32 Am. Jur., Landlord and Tenant, § 982, the rule is correctly stated as follows:

> "[I]f the lease provides for an additional term at an increased rental, and after the expiration of the lease the tenant holds over and pays the increased rental, this is affirmative evidence on his part that he has exercised the option to take the lease for an additional term; but where, under such a lease, the tenant holds over after the expiration of the original term and does not pay the increased rental as provided by the lease, but continues to pay the original rental, which is accepted by the lessor, this negatives the idea of the acceptance of the privilege of an additional term."

Here, the lease provided for an increase of the rent, from $175.00 per month to $225.00 per month, if the lessee exercised its right to extend the term for two additional years. The lessee held over. Rent, at the rate of $225.00 per month, was paid and accepted with-

out comment. This clearly indicates an intent on the part of the lessee to exercise its option to extend the term for two additional years and a similar intent on the part of the lessor to waive the notice to which she was entitled.

The defendants contend that Paragraph VI of the lease leads to a different conclusion. This paragraph provides:

> "Should the Lessee remain in possession of the leased premises beyond the expiration of the original term or any renewal or extension of this lease, which shall result in a tenancy from month to month, this lease may be terminated by either party upon the giving of thirty (30) days' written notice to the other party."

This provision is ambiguous. Construed literally, it would apply whenever the lessee remained in possession beyond the expiration of the original term, even though the lessee had given notice, pursuant to Paragraph V, of its intent to extend the term for two years. It does not seem likely that this is what the parties had in mind. Nor does it seem reasonable to construe this Paragraph VI to mean that the lessee, by remaining in possession beyond the expiration of the original term, without giving notice of any intent to exercise its option could thereby compel the lessor to recognize the continuance of the landlord-tenant relationship for at least another month. A reasonable construction of Paragraph VI would seem to be that it is intended to apply only where there is (1) no exercise of the option to extend under Paragraph V, (2) a holding over by the lessee and (3) an election by the lessor to treat the lessee otherwise than as a trespasser subject to immediate eviction.

Without Paragraph VI such a combination of circumstances would create a tenancy from year to year. *Williams v. King,* 247 N.C. 581, 101 S.E. 2d 308; *Murrill v. Palmer, supra; Harty v. Harris, supra.* The purpose of Paragraph VI seems to have been to provide that in such circumstances the tenancy would be from month to month, and so terminable by either party at the end of any month, but only upon 30 days' notice rather than upon the seven days' notice, which would otherwise be sufficient to terminate a month to month tenancy under G.S. 42-14.

In the event of a month to month tenancy, pursuant to Paragraph VI, the rent would be $175.00 per month, not $225.00 per month, since the only provision for the increased rental is in Paragraph V and relates to the extension for two years. The payment and acceptance of the higher rent is consistent only with the establishment of an extended term of two years beginning with the expiration of the original term.

Ordinarily, an ambiguous clause in a lease is construed in favor of the lessee. *Kearney v. Hare, supra; Trust Co. v. Frazelle, supra;* 32 Am. Jur., Landlord and Tenant, §§ 128, 962. However, "It is also a rule of construction that an ambiguity in a written contract is to be inclined against the party who prepared the writing." *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744; *Jones v. Realty Co.,* 226 N.C. 303, 37 S.E. 2d 906; *Wilkie v. Insurance Co.,* 146 N.C. 513, 60 S.E. 427. Here, the lease was prepared by the attorney for the lessee. Consequently, the ambiguous language in Paragraph VI should be construed in favor of the lessor.

When Eastern, the original lessee, held over after the expiration of its three year term, paying rent at the rate which was to apply only if it exercised its option to extend the term for two additional years, and the lessor accepted this payment, the extension of the lease was effected and the conditions to which Paragraph VI was to apply never came into being. Both lessor and lessee were then bound for the two year term.

Thereafter, Eastern assigned the lease to its parent corporation which reassigned it to CMC. CMC and Capitol, the wholly owned subsidiary of CMC, entered into possession of the leased premises and paid the agreed rent to the lessor. The assignment of a lease does not release the lessee from its contractual obligation to pay rent even though the lessor consents to the assignment and accepts rental payments from the assignee. *Williams v. King, supra; Bank v. Bloomfield,* 246 N.C. 492, 98 S.E. 2d 865; 32 Am. Jur., Landlord and Tenant, §§ 356, 358, 360. The assignee is also liable for rent accruing after the assignment takes effect. The lessor may sue either the lessee or the assignee, or both, although he can, of course, have but one satisfaction. 32 Am. Jur., Landlord and Tenant, § 374. The abandonment of the lease by the assignee does not relieve the assignee from liability for rent for the remainder of the term. 32 Am. Jur., Landlord and Tenant, § 380.

The lease having been extended for two additional years, as provided in Paragraph V, the lessor is entitled to recover from all of the defendants her damages resulting from their breach of the lease agreement, the amount of which damages is stipulated to be $3,979.50.

The court below erred in its conclusions of law Nos. 1, 2 and 3. Its judgment must, therefore, be reversed and the cause remanded to the superior court for the entry of a judgment in favor of the plaintiff in accordance with this opinion.

Reversed and remanded.

LILLIAN S. MORGAN v. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY.

(Filed 14 January, 1966.)

1. Trial § 21—

On motion to nonsuit, defendant's evidence which is favorable to plaintiff or tends to clarify or explain plaintiff's evidence is properly considered, but defendant's evidence which is inconsistent with plaintiff's evidence or tends to establish a different state of facts must be ignored.

2. Negligence § 37a—

A customer entering a supermarket during business hours to make purchases is an invitee.

3. Negligence § 37b—

The proprietor is not an insurer of the safety of its customers and may be held liable for injury to a customer in a fall only upon a showing of negligence, there being no inference of negligence from the mere fact of a fall and the doctrine of *res ipsa loquitur* not being applicable.

4. Same—

The proprietor of a supermarket is under legal duty to exercise ordinary care to keep its aisles and passageways where customers are expected to go in a reasonably safe condition and to give warning of hidden dangers or unsafe conditions of which it has knowledge or of which, by the exercise of reasonable supervision and inspection, it should be cognizant.

5. Negligence § 37f— Evidence held for jury in this action by patron to recover for fall on floor.

Evidence tending to show that the proprietor of a supermarket maintained a weighing scale some 20 to 30 feet from the bins for fresh vegetables, that customers habitually carried the vegetables from the bins to the weighing scale for weighing and, as they walked, part of the leafy vegetables fell onto the floor in the aisle, that plaintiff fell in the aisle when her foot slipped on a piece of leafy vegetable, and that debris of vegetables, onion husks, lint and dirt covered an area of some three feet square in the aisle, that the market served numerous customers, and that the floor had not been swept for 45 minutes prior to the injury, *held* sufficient to be submitted to the jury on the issue of negligence.

6. Negligence § 37g—

Evidence that plaintiff was looking at the floor in the direction she was walking, that she could not see the floor "real good," that the tiles of the floor were gray and green, and that the vegetable leafs thereon were green, *held* not to disclose contributory negligence as a matter of law on her part in her action to recover for a fall resulting when she stepped upon a piece of leafy vegetable on the floor.

7. 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.

HIGGINS, J., dissents.

APPEAL by defendant from *Hobgood, J.*, 29 March 1965 Civil Session of CUMBERLAND.

Civil action by plaintiff, a business visitor, to recover damages for personal injuries allegedly caused by a fall in defendant's store. Plaintiff alleges in her complaint that on 27 July 1962 she entered defendant's store to purchase food therein, and was injured when she stepped on a piece of leafy vegetable in the aisle of defendant's supermarket in front of its frozen food and produce counters and fell, and that her injuries were proximately caused by defendant's negligence in that it installed its produce and vegetable counters in such a position that it was necessary for customers to gather up and carry by "hand-full" the vegetables or produce for a considerable distance to the scales for weighing it, so that it could be priced and sacked, thereby making it likely that produce and vegetables would fall upon the floor and create a dangerous condition, and that in fact particles or portions of such articles frequently dropped upon the aisle, that it allowed a slippery and dangerous substance in the form of a vegetable leaf to remain in the aisle for customers in front of the produce, vegetables and frozen foods counters, when it had either actual or constructive notice of such fact, and no warning of the dangerous condition was given her.

Defendant in its answer denies that it was negligent, and conditionally pleads contributory negligence of plaintiff as a bar to any recovery by her.

Evidence was offered by plaintiff and by defendant. The jury found by its verdict that plaintiff was injured by the negligence of defendant as alleged in the complaint, that plaintiff did not by her negligence contribute to her injuries, and that she was entitled to recover $10,000 from defendant.

From judgment on the verdict, defendant appeals to the Supreme Court.

Butler, High & Baer by Sneed High for defendant appellant.

James R. Nance and Rudolph G. Singleton, Jr., for plaintiff appellee.

PARKER, J. Defendant has brought forward and discussed in its brief only two assignments of error: first, the denial of its motion for judgment of compulsory nonsuit made at the close of plaintiff's evidence, and second, the denial of a similar motion made at the close of all the evidence.

It is well-established law in this jurisdiction that in ruling upon a motion for a compulsory judgment of nonsuit, after all the evidence of plaintiff and defendant is in, the court may consider so

much of defendant's evidence as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. Otherwise, consideration would not be in the light most favorable to plaintiff. *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1.

Plaintiff's evidence taken as true and considered in the light most favorable to her, and defendant's evidence favorable to her, show the following facts, which we summarize except when quoted:

On 27 July 1962 defendant operated a large self-service supermarket in the city of Fayetteville. The supermarket had four shopping aisles running from the front of the store toward the rear between tall display merchandise shelves, and one aisle at the rear horizontal to the other aisles where the meat department is. It had eight check-out counters in the front and three in the back. The westernmost aisle of the four aisles of the supermarket was about 75 to 80 feet long and 8 to 10 feet wide. A large part of the west wall of the store was occupied by a deepfreeze display for frozen foods, and an open slanted counter display for potatoes and an open slanted counter display for produce, including leafy vegetables. In going down the westernmost aisle from the front of the store there is first the counter display for produce, including vegetables, then the counter display for potatoes, and then towards the rear the frozen foods display. In this aisle are the weighing scales situate at the end of the produce counter. John Butler, a witness for defendant, operates these scales, weighing items brought to him and putting them in bags. Among his duties are to arrange the displays in his aisle in a neat manner, and to keep the floor clean.

Plaintiff, aged 52, entered the supermarket with her daughter, Mrs. Blanche Davis, about 8 p.m. on 27 July 1962 for the purpose of buying groceries and other produce. At that time there were about 35 or 40 people in the store. She went first to the shirt counter, looked at some shirts, and then went to the produce bin situate beside the westernmost aisle of the supermarket. Her daughter had selected a grocery cart and had moved on down the westernmost aisle of the store some 10 or 12 feet south of the weighing scales. Her daughter had placed red Irish potatoes in the cart. She took the red potatoes from the cart, carried them back, and exchanged them for white potatoes. The white potatoes which she had selected were some 12 or 15 or 20 feet from the weighing scales. The cabbages were some 25 or 30 feet from the weighing scales. After she selected the potatoes, she carried them to the weighing scales where Mr. Butler was. She had been trading in this store for 6 or 7 years,

knew Mr. Butler, and had a conversation with him about her preference for small white potatoes. Mr. Butler weighed the potatoes and she started with them to where her daughter was with the cart. As she moved from the weighing scales to the cart, her right foot started slipping and she fell to the floor with her left knee up under her. She testified:

". . . her daughter got her up; that when she got up she saw an onion husk and lint, dirt, vegetables, pieces of vegetable leaves, all around; that she saw a vegetable leaf under her foot, which leaf had slipped; that it was about half as big as her hand; that Mr. Butler picked up the vegetable leaf and took it with him; that she saw it on the floor and saw it as he picked it up; that the vegetable leaf was old, wilted, and dirty; that it was mashed, all bruised up; that there were skid marks on the floor; that the marks were damp looking and they extended over an area of 6 to 8 inches; she slipped on the vegetable leaf and Mr. Butler took it away. . . .

". . . that she observed pieces of vegetable leaves, onion husks, and lint on her hands; that she brushed off her hands; that she observed pieces of vegetable leaves and onion husks and dust and lint; that the pieces of onion husk and pieces of vegetables covered an area of about 3 or 4 feet square, probably; that she had a good bit of debris and trash on her hands; that her hands were covered, the palms were covered; that the onion husks were 9 or 12 feet from the weighing scales and 10 or 12 feet from the onion bins; that the vegetables which she saw on the floor were anywhere from 24 to 30 to 50 feet from the bins . . . that she had on low heeled shoes, wedge type and that they were the same wedge type heels that were being worn generally by people in Fayetteville. . . .

* * *

". . . she looked around while she was sitting on the floor; she saw lint, the lint was gray looking, and she saw leafy vegetables; she did not know whether they were cabbage, and could not tell exactly what kind of vegetables they were, but they were particles of vegetables, particles anywhere from an inch square to two or three inches square, and they were spread over an area of some three feet.

". . . that the debris of leafy vegetable matter were both on the gray and the grayish-white part of the floor; the color of the tiles on the floor were gray and green; that it was a kind of dark gray, medium gray; that part of the onion husks were

on the gray part of the floor, and that part of the onion husks were on the green part of the floor; that the onion husks were yellow or brown, not spring onions; she saw leafy vegetables while she was on the floor; she did not pick it up but examined it closely; that it was green and yellow; the leaf she fell on was a green leaf, a green wilted leaf, 'dirty, greenish, withered leaf is what I slipped on'; that it was about two-thirds as big as her hand and was three or four inches square; she did not know what kind of leaf it was; she did not know whether there were collards or spring onions or rutabagas in the produce bins; she could not see the stuff on the floor that she had described until after Mr. Butler came up; until that time she had seen nothing on the floor; she was looking at the floor in the direction which she was traveling, she was looking at the grocery cart and glancing across toward the frozen vegetables; she was looking where she was walking; she was looking where she was going.

"Q. Well, the matter which you have described as being on the floor was right in the path that you were taking toward the vegetable cart, was it not?

"A. Yes sir.

"Q. And the store at that point is and was well lighted, is it not?

"A. Not as well as it is now.

"Q. Could you see the floor?

"A. No, I couldn't see it good. The way the light shone there, you could not see the floor real good. . . .

* * *

"She was looking where she was going; her daughter was right across the aisle to the left when she fell; she was only three or four steps away; she came to her while she was on the floor and assisted her to her feet. . . ."

John Butler, a witness for defendant who operates the weighing scales in the westernmost aisle of the store, testified on cross-examination:

". . . on Friday afternoons, up until 7:00 o'clock, he has three on his aisles besides himself; after 7:00 there is one more besides himself; part-time there was someone in the aisle with him; the second man was in the back room straightening up; he had control of the aisle by himself from 7:30 to 8:00; it was his responsibility to keep the floor; he sweeps the floor if

the part-time boys are not there; it is the duty of the part-time boy to sweep if he is there; it is his duty to see that the counters are filled, to keep the area clean, and to supervise the area being kept clean.

"The leafy vegetables are some 20 to 30 feet away from the weighing scales; some are brought by hand and some in bags; cabbages are brought from the bin to the weighing scales in the buggy, some people do not use the buggy, some bring the produce to him in hand; they bring it by hand and walk up and down the aisle, and as they walk up and down the aisle particles fall off; they fall in the same aisle people walk in; when he is busy at the scales he can't sweep; the boy he had on duty with him at the time was in the back; he identified the broom in the photograph marked Plaintiff's Exhibit #1, as the same type broom he was using on the night of July 27; it is a push broom; it pushes the trash and debris in front of it; when he picks up the broom the trash is left in a pile about 3 feet square; he picks it up; the broom is 2½ to 3 feet wide. . . ."

He testified on redirect examination as follows:

"He used a broom similar to the one he had described in the picture to sweep the floor; that he did not pick up the broom and shake it from the time he left the front and got to the back; he moved down the aisle three times with the broom; he did this at 7:15, and after he swept it the floor was clean."

By reason of her fall plaintiff sustained a fracture of her left kneecap.

Plaintiff's evidence shows that in entering defendant's supermarket during business hours to purchase food therein she had invitee status. *Long v. Food Stores,* 262 N.C. 57, 136 S.E. 2d 275; Annot., 62 A.L.R. 2d p. 16.

However, defendant was not an insurer of her safety on its premises, and the doctrine of *res ipsa loquitur* is not applicable, and liability for injury to her attaches only for injuries resulting from actionable negligence on its part. *Long v. Food Stores, supra; Pratt v. Tea Co.,* 218 N.C. 732, 12 S.E. 2d 242.

Under the circumstances shown by plaintiff's evidence, the law imposed upon defendant the legal duty to exercise ordinary care to keep its aisles and passageways where she and other customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose her and them to danger, and to give warning of hidden dangers or unsafe conditions of which it knows or in the exercise of reasonable supervision and inspection should know. *Raper v.*

McCrory-McLellan Corp., 259 N.C. 199, 130 S.E. 2d 281; *Powell v. Deifells, Inc.*, 251 N.C. 596, 112 S.E. 2d 56; *Lee v. Green & Co.*, 236 N.C. 83, 72 S.E. 2d 33.

In *Raper v. McCrory-McLellan Corp., supra,* it is said

> "The standard 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. *Bemont v. Isenhour,* 249 N.C. 106, 105 S.E. 2d 431; *Diamond v. Service Stores,* 211 N.C. 632, 191 S.E. 358. For instance, what would constitute such care in a country non-service store would seem not to be adequate in a city self-service store through which passes a steady flow of customers who, because of the nature of the business, are constantly handling the merchandise."

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. *Raper v. McCrory-McLellan Corp., supra; Waters v. Harris, supra* [250 N.C. 701, 110 S.E. 2d 283]; *Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577; 65 C.J.S., Negligence, § 51, Knowledge of Defect or Danger, p. 545. 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. *Waters v. Harris, supra; Hughes v. Enterprises, supra, Fox v. Tea Co.*, 209 N.C. 115, 182 S.E. 662."

No inference of negligence on defendant's part arises *merely* from a showing that plaintiff, a customer in defendant's store during business hours, fell and sustained an injury in the store. *Skipper v. Cheatham,* 249 N.C. 706, 107 S.E. 2d 625; Annot., 61 A.L.R. 2d p. 56.

Plaintiff's evidence and defendant's evidence favorable to her would permit a jury to find the following facts: Defendant operates

a self-service supermarket, and Butler, its employee at the weighing scales, had knowledge of the fact that the leafy vegetables in the store are some 20 to 30 feet away from the weighing scales; that some customers select and bring leafy vegetables by hand to the weighing scales, and as they walk up and down the aisle some particles of the leafy vegetables fall in the same aisle people walk in. This condition was created and maintained knowingly by defendant, and defendant could have foreseen in the exercise of ordinary care for the safety of its customers that such vegetable leaves on its floor would create an unsafe passageway, if not promptly removed. Defendant's employee Butler is charged with the duty of keeping this aisle clear, and it had not been swept according to his testimony after 7:15 p.m. Plaintiff about 8 p.m., after having some white potatoes weighed at the weighing scales, started to where her daughter was with a cart, and in walking down the aisle she stepped on a vegetable leaf in the aisle about half as large as her hand, her foot slipped, and she fell to the floor with her left knee under her; that this vegetable leaf was mashed, "all bruised up," and that there were skid marks on the floor; that all around this vegetable leaf were onion husks, lint, dirt, and pieces of vegetable leaves, and that this debris covered an area about 3 or 4 feet square. Considering the fact that defendant was operating a self-service supermarket serving many people, that particles of vegetables frequently fell off in being carried by hand to the weighing scales to the knowledge of defendant's employee Butler, and the other circumstances, the jury reasonably could find that there was required a higher degree of care by defendant in keeping the premises adjacent to the vegetable counter and weighing scales free from slippery rubbish than would be imposed upon one engaged in a business from which such perils are not reasonably expected to result; and that under the circumstances showing that the vegetable leaf on which plaintiff slipped and fell was mashed and bruised and that other debris was there, the jury could reasonably find that such a dangerous condition had existed for a sufficient length of time for defendant in the exercise of ordinary care for the safety of its customers to have discovered it and removed it before plaintiff's fall, and that defendant's failure to do so was negligence and was a proximate cause of plaintiff's injuries. In our opinion, and we so hold, plaintiff's evidence and defendant's evidence favorable to her make out a *prima facie* case of actionable negligence on defendant's part.

Defendant's contention that, even if defendant was guilty of actionable negligence, plaintiff was guilty of contributory negligence as a matter of law thereby barring any recovery by her necessitates an appraisal of her evidence in the light most favorable to her.

Short v. Chapman, 261 N.C. 674, 136 S.E. 2d 40; *Beasley v. Williams,* 260 N.C. 561, 133 S.E. 2d 227; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Measuring her evidence by this standard it is our opinion, and we so hold, that plaintiff's testimony that she was looking at the floor in the direction she was walking, that the way the light shone on the floor she could not see the floor "real good," that the tiles of the floor were gray and green, that the vegetable leaves were green, and that she could not see the debris on the floor until after she fell and Mr. Butler came up, does not show so clearly that no other conclusion can be reasonably drawn therefrom that this unsafe and dangerous condition on the floor of the aisle where she fell was a patent and obvious danger which plaintiff in the exercise of reasonable care for her safety should have seen and avoided. Plaintiff has not proved herself out of court. *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601.

The trial court properly submitted the case to the jury.

The only assignments of error in the record other than formal ones are two assignments of error in respect to the evidence as to plaintiff's injuries. These assignments of error as to the evidence are deemed to be abandoned for the reason that defendant has not brought them forward and discussed them in its brief. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

The judgment below is

Affirmed.

HIGGINS, J., dissents.

GUILFORD REALTY AND INSURANCE COMPANY v. BLYTHE BROTHERS COMPANY, A CORPORATION, AND HOWARD CONSTRUCTION COMPANY, A CORPORATION, INDIVIDUALLY AND JOINTLY, DOING BUSINESS AS BLYTHE-HOWARD COMPANIES.

(Filed 14 January, 1966.)

1. Appeal and Error § 60—

The decision on appeal overruling demurrer to the complaint and striking a defense set up in the answer as being inapposite, becomes the law of the case and is binding upon the second trial with regard to the sufficiency of the complaint and the impertinency of the defense.

2. Pleadings § 29—

Nonsuit on the ground that plaintiff had failed to establish that defend-

ants were engaged in a joint venture is properly denied when defendants' answer alleges facts compelling the conclusion of joint venture.

3. Municipal Corporations § 10; Negligence § 4— Nonsuit held properly denied in this action for damages resulting from dynamiting.

Where plaintiff alleges and offers evidence tending to show damage to his property as a result of the use of explosives in constructing a sewer line by defendants, it having been established on former appeal that defendants could not rely upon the defense of governmental immunity, plaintiff makes out a *prima facie* case and nonsuit is correctly denied, notwithstanding the amended answer sets up the valid defense that defendants acted under a contract with the city and under the supervision and direction of the city engineer and were not charged with negligence in the manner in which they performed the work, the defendants having offered no evidence in support of this defense.

4. Trial § 27—

Nonsuit may not ordinarily be allowed upon an affirmative defense, and certainly not where defendant fails to introduce any evidence in support of such defense.

APPEAL by defendants from *McLean, J.*, June 14, 1965 Civil Session, GUILFORD Superior Court, High Point Division.

The plaintiff instituted this civil action on October 15, 1962, to recover from the defendants the damages to its house and lot in High Point as a result of the defendants' use of explosives while excavating for a sewer outfall line for the City of High Point. The pleadings were analyzed by this Court when the cause was here in 1963 on a writ to review a Superior Court order overruling the demurrer and striking the further defense. *Insurance Co. v. Blythe Bros. Company,* 260 N.C. 69, 131 S.E. 2d 900. Since the review, the companion case of Coggins and wife against the same defendants has been eliminated.

After the case went back to the Superior Court the defendants filed a new further defense based on a construction contract with the City of High Point:

> "The contract provided for the construction of a sewage system in accordance with plans and specifications furnished by the City of High Point and the performance of the contract by the defendants was expressly conditioned upon the exercise of authority by an engineer who represented the City of High Point. The authority of the engineer was defined, in part, as follows:
>
> " 'Engineer shall have general supervision and direction of work; has authority to stop work whenever such stoppage may be necessary to insure proper execution of Contract; shall determine points at which the Contractor begins work, and order

of prosecuting work; shall direct application of forces to any portion of work, in his judgment, required, and order the force increased or diminished, and decide questions arising in execution of work; shall decide all questions arising as to quality or acceptability of materials and equipment, work performed, manner of performance and rate of progress of work; shall make all explanations as to meaning and intent of plans and specifications where discrepancies occur or misunderstandings arise as to interpretation. His decision shall be conclusive and binding.' * * *

"The defendants aver that they undertook and performed their contract with the City of High Point without being negligent and in accordance with its terms and provisions. They were at all times acting under its direction and supervision in accordance with the right reserved to the City by the written contract. . . .

"The defendants plead their freedom from negligence, the performance of their contract in accordance with the terms and provisions thereof, and the exercise, for and on behalf of the City of High Point, of its governmental function and the immunity imposed upon the City and these defendants by law as a bar to the plaintiff's recovery or further proceeding herein. . . .

"That the plaintiff, defendants are informed and believe and therefore allege, has failed to make claim against the City of High Point for any damages resulting from the taking of its property by the non-negligent use of the explosives as alleged in the complaint. That, having failed to make a claim against the City of High Point, it has by its conduct waived any right it had or now has to recover any damages from the City of High Point or from the defendants upon the doctrine of responsibility to the plaintiff for the taking of property."

At the close of the plaintiff's evidence the defendants' motion for nonsuit was overruled. The refusal of the court to sustain the motion is the subject of Exceptions Nos. 689 and 690, Assignment of Error No. 9.

The court submitted the issues which the jury answered as indicated:

"1. Is the plaintiff the owner of the property, and subject of this action, described in the complaint?

Answer: Yes.

"2. Was the property of the plaintiff damaged by the blasting operations of the defendants, as alleged in the Complaint?

Answer: Yes.

"3. What amount, if any, is the plaintiff entitled to recover?
Answer: $23,500.00."

From the judgment entered on the verdict, the defendants appealed.

Schoch, Schoch & Schoch by Arch K. Schoch for plaintiff appellee.

Seymour, Rollins and Rollins, Sapp and Sapp by Armistead W. Sapp, Jr., for defendant appellants.

HIGGINS, J. Our former opinion affirmed the judgment of the Superior Court which overruled the demurrer and struck the further defense. That decision is the law of the case to this extent: (1) The complaint states a cause of action in favor of the plaintiff against the defendants; (2) the further defense of governmental immunity from suit was not available to the defendants and was properly stricken. The complaint is still in its original form—not changed in any particular. It alleged in substance the defendants, as a joint venture, engaged in constructing for High Point a sewer outfall line in which they used explosives in such manner as caused detailed damages to the plaintiff's property. Nothing else is alleged involving the City of High Point.

Following our decision the defendants filed an amended answer in which they set up the new further defense quoted in part in the statement of facts. In short summary, the defendants alleged they entered into a contract to construct, and pursuant thereto constructed, for the City of High Point, a sewer outfall line in accordance with its plans and specifications; that the work so done was in accordance with the contract and under the supervision and direction of the city engineer. The defendants alleged the City—not the defendants—is liable for the damages claimed; that the defendants, acting under and according to a contract to do for the City the public work which it was authorized to have done could be liable only for such damages as were proximately caused by their negligence in the manner in which they did the work; and that such negligence is not alleged. As authority for their position the defendants cite *Tidewater Construction Corp. v. Manly*, 75 S.E. 2d 500 (Va.); *Yearsly v. W. A. Ross Construction Co.*, 309 U.S. 18. The authorities make a distinction between the act of performance and the manner of the performance. McQuillin, Municipal Corporations, 3rd Ed., Vol. 18, § 53-76(c) pp. 325, 326.

The complaint presented clear-cut issues of injury to plaintiff's

property and the extent of the damages thereto sustained as a result of the use of explosives in constructing the sewer line. The further defense presents the issues: (1) Did the defendants have a contract with the City of High Point to construct the outfall sewer line in accordance with its plans and specifications and under the direction of its engineer? (2) Did the defendants perform the contract according to its terms? (3) Were the defendants guilty of negligence in the manner in which they did the work?

The parties went to trial upon the issues raised by the pleadings. The plaintiff offered its evidence which was sufficient to go to the jury on the issues submitted. At the close of the plaintiff's evidence the defendants moved for nonsuit upon the ground the plaintiff had alleged and failed to prove a joint venture between the defendants or any joint agency between them. The defendants' joint answer and joint further defense contained the following averments: "At all times referred to in the complaint Blythe Brothers Company and Howard Construction Company were engaged in constructing a sewer line for and under the supervision and direction of the City of High Point. . . . In answer to allegations in Article VII . . . the defendants aver that during the month of May, 1961, they were engaged in excavating for construction of a sewer outfall line for the City of High Point . . . They aver that any explosives which were used by them near the properties of the plaintiff were used under the direction, supervision, and control of the City of High Point in the performance of its express agreement." In view of the foregoing allegations in the answer, the motion for nonsuit on the ground the plaintiff failed to prove joint venture or agency between the defendants was properly overruled.

The plaintiff had made out its case and was entitled to go to the jury. The defendants did not offer evidence. They failed to establish the defense that they acted under a contract with the City. They failed to introduce the contract which they alleged was in writing, or to introduce evidence of its terms. They offered nothing to relieve themselves from liability for the results of their blasting operations.

We have reviewed this record which contains 470 pages. We have examined the 727 exceptions noted and have carefully considered the 85-page brief which discusses them in detail. Any seriatim discussion of these exceptions would be out of the question because of their number. Defendants' counsel, during the argument, was requested to point out any exceptions or assignments upon which the defendants especially relied. He stated the defendants relied on them all. Although the defendants' attorney declined to emphasize one over another, we have discussed those which seemed to us to be

deserving of notice. We have been unable to find anything in the record which would justify sending the case back for another hearing.

No error.

STATE OF NORTH CAROLINA, RESPONDENT v. CLIFTON A. PEARCE, PETITIONER.

(Filed 14 January, 1966.)

1. Constitutional Law § 30; Criminal Law § 71—

Where more than two months transpires between defendant's incarceration on a capital charge and the appointment of counsel, admissions or confessions obtained from defendant during this interval after repeated questioning must be held incompetent. G.S. 15-4.1.

2. Criminal Law § 139—

The Supreme Court will grant defendant a new trial when it appears upon the face of the record that defendant has been deprived of a constitutional right in the admission of an involuntary confession, notwithstanding no objection to the evidence appears in the record.

3. Criminal Law § 26—

Statement of the solicitor that the State would not ask for conviction of the capital offense charged, but only for a less degree of the crime, is tantamount to a verdict of not guilty of the capital offense and, upon the granting of a new trial, the State may prosecute only for less degrees of the crime.

ON *certiorari* to review an order of *Johnson, J.*, entered at the May 10, 1965 Criminal Session, DURHAM Superior Court.

After a hearing under the Post Conviction Review Statute invoked by the petitioner, Clifton A. Pearce, the court concluded the petitioner's constitutional rights had not been violated in his trial at the May Term, 1961, upon the charge of rape. The court entered an order denying relief. This Court granted *certiorari* to review the order.

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

Wade H. Penny, Jr., for petitioner appellant.

HIGGINS, J. The petitioner challenges the legality of his trial on three grounds: (1) He was not represented by counsel selected

and appointed by the court as required by law. (2) The trial court committed error in permitting Detective Morris to relate to the jury certain admissions the defendant made to the investigating officers after the indictment was returned and while he was being held in custody charged with a capital felony. (3) The attorney who represented him at the trial failed to follow his request that an appeal be taken to the State Supreme Court.

At the Post Conviction Hearing the petitioner was represented by his present counsel. The Assistant Solicitor, Thomas H. Lee, represented the State. The petitioner and Mr. C. Horton Poe, his trial counsel, testified. The court had before it in narrative form the evidence at the trial in which the defendant was convicted of an assault with intent to commit rape. We give here what appear to be the material parts of the records, the evidence, and the stipulations:

The alleged victim, Betty Louise Honeycutt, age 12 years, eight months, after returning with the defendant from the grocery store at about 9:40 on the night of February 18, 1961, told a member of her family a story which, if true, would raise at least an issue of the defendant's guilt of assault with intent to commit rape, if not of the completed offense. The defendant was called into the room where the girl repeated the story in his presence. This story the defendant denied. The victim's brother thereafter assaulted the defendant, inflicting injuries which required his hospitalization. The officers were notified and on the morning of February 19 questioned the defendant in the hospital. The defendant denied guilt. On February 21, 1961, the grand jury returned an indictment charging the defendant with the capital felony of rape. He was removed from the hospital to the jail where the officers questioned him—on how many occasions does not appear. However, at the second trial in May, 1961, Officer Morris testified: "I understand he was indicted for the capital crime of rape during February term. I do not remember whether it was March or February that I talked to him in jail. . . . It was in the day time when we talked to him in jail. There was no discussion in my presence either by me or the other detective to Mr. Pearce that it would be a lesser charge if he would tell it. I don't recall that any charge at all was discussed. We didn't compel him to make another statement. We didn't ask him to make another statement. We just asked him in the jail if he had anything else to say about it, if he still wanted to deny it. And, of course, he eventually came around and alleged that he had tried to have intercourse with her. This statement was made in the interrogation room of the detective bureau."

At all times during the questioning the prisoner was without counsel. However, some time in April, Solicitor Murdock requested

two members of the Durham Bar to confer with the defendant and ascertain if either would be satisfactory to him as his attorney. He was not satisfied with either. Then Mr. Murdock requested Mr. C. Horton Poe to confer with the prisoner who, after the conference, consented for Mr. Poe to represent him. Mr. Poe, during the latter part of April began preparations for the trial. He drew an order of appointment as counsel which Judge Williams signed on May 10, 1961.

Upon arraignment the Solicitor announced the State would not insist on a verdict of the capital felony, but only on a verdict of guilty of assault with intent to commit rape. The victim testified and a member of her family corroborated her story. Dr. Stokes, who examined her within a few hours after the alleged assault, testified in such manner as to raise serious doubt whether there was physical evidence of one of the essential elements necessary to make out a case of rape. The evidence warranted the Solicitor in refusing to try for the capital felony. At the conclusion of the first trial, at which Officer Morris did not testify, the jury was unable to agree. Judge Williams entered a mistrial and set the case for hearing the following week.

At the second trial Detective Morris testified as heretofore recited. The jury, after deliberating for a considerable time, returned a verdict of guilty of an assault with intent to commit rape. Judge Williams imposed judgment immediately that the defendant serve not less than 12 nor more than 15 years in the State's prison. The prisoner was remanded to jail immediately. Later that day he was transferred to Central Prison in Raleigh. Neither the defendant nor his counsel gave notice of appeal.

In passing on the critical question of law here presented, Mr. Poe's good faith and his diligent representation are not challenged. The difficulty we have with the case is that Mr. Poe was appointed only after such long delay as constituted a denial of the prisoner's statutory and constitutional right to the benefit of counsel as contemplated by the State Constitution and G.S. 15-4.1 in effect at the date of the trial:

> "When any person is bound over to the Superior Court to await trial for an offense for which the punishment may be death, the clerk of the superior court in the county shall, if he believes the accused may be unable to employ counsel, within five days notify the resident judge of the district, or any superior court judge holding the courts of the district, and request immediate appointment of counsel to represent the accused. If the judge is satisfied that the accused is unable to employ coun-

sel he shall appoint counsel to represent the accused as soon as practicable." G.S. 15-4.1 before amended by Chapter 1080, Session Laws of 1963.

In *State v. Simpson,* 243 N.C. 436, 90 S.E. 2d 708, this Court held the prompt appointment of counsel in a capital case was mandatory and required by the statute, by the State Constitution, and by the Due Process Clause of the 14th Amendment to the Constitution of the United States, citing *S. v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563; *In re Taylor,* 230 N.C. 566, 53 S.E. 2d 857; *S. v. Cruse,* 238 N.C. 53, 76 S.E. 2d 320; *S. v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778; *S. v. Collins,* 70 N.C. 241; 27 N. C. Law Review 422; Fourteenth Amendment to the Constitution of the United States; *Hedgebeth v. North Carolina,* 334 U.S. 806 (affirming *S. v. Hedgebeth, supra*); *Powell v. Alabama,* 287 U.S. 45; *Rice v. Olson,* 324 U.S. 786; *Wade v. Mayo,* 334 U.S. 672; *Palmer v. Ashe,* 342 U.S. 134.

By reason of the Superior Court's failure for two months to appoint counsel as it was its duty to do promptly, the prisoner was deprived of the protection from the pressure of questioning which an alert attorney could have vouchsafed him. In the absence of such protection at a time when he was under a charge which could cost his life, the officers continued their questioning which obviously was for the sole purpose of extracting damaging admissions. The defendant was in the county jail under Superior Court indictment. Nevertheless, the admission testified to by Mr. Morris was obtained in the interrogation room of the detective bureau where perhaps the surroundings were even less reassuring than his cell in the county jail. We hold the admissions to the officer finally obtained from him in this setting were so lacking in voluntary character as to make them inadmissible as evidence against him. True, the record fails to show objection to the officer's testimony. However, the court, of its own motion, should have excluded the statement as involuntary. Under the peculiar circumstances here disclosed, we hold the court's failure so to do was prejudicial error.

Since the case is to be heard again, we call attention to an intimation in the record that in the event of a new trial the State may elect to prosecute for the capital offense. When the State, acting through its constitutional officer, the solicitor, made the announcement that the State would not ask the jury to convict of the capital felony but only for the lesser offense of assault with intent to commit rape, the announcement was tantamount to a verdict of not guilty of the capital offense and prevents the State thereafter from prosecuting the prisoner for his life. The State may only prosecute

under the bill for an assault with intent to commit rape or any lesser offense embraced therein.

For the reasons assigned, we order a new trial because of the wrongful admission of the testimony of Officer Morris.

New trial.

STATE OF NORTH CAROLINA v. LOUIS ANTHONY LOGNER.

(Filed 14 January, 1966.)

1. Criminal Law § 71—

Intoxication does not render a confession inadmissible unless at the time defendant is so drunk as to be unconscious of the meaning of his words, and intoxication to a degree less than mania relates to the credibility of the statement, and the trial court correctly so instructs the jury.

2. Same—

The competency of an extra-judicial confession is a preliminary question to be determined by the trial court upon the *voir dire*.

3. Same—

Where the trial court finds upon the *voir dire* from conflicting evidence that the confession in question was freely and voluntarily made after defendant had been advised of his right not to speak and his right to have counsel, and that defendant was at that time not so intoxicated as to amount to mania, the findings, being supported by evidence, are conclusive on appeal.

APPEAL by defendant from *Bickett, J.*, July 28, 1965 Special Criminal Session of DURHAM.

Criminal prosecution upon a bill of indictment which charges defendant with safecracking and safe robbery growing out of the facts hereinafter detailed. On the night of November 16-17, 1964, thieves broke into the office of McCracken Oil Company in Oxford, North Carolina. They removed the door from the walk-in vault, dissevered the hardened steel money chest from the concrete in which it was encased, and carried it away. The chest contained about $1,300.00 in cash and $8,700.00 in checks. In consequence of information given them by defendant, law enforcement officers located the rifled safe in a rural area of Orange County and charged defendant with a violation of G.S. 14-89.1. Upon the trial, when the State offered in evidence the statements which defendant had allegedly made to the officers, defendant objected for that at the time

the detectives talked to him (1) he was not warned of his constitutional rights to remain silent and to be represented by counsel; and (2) he was so intoxicated that all his statements were involuntary.

In the absence of the jury, the judge heard evidence offered by both the State and defendant bearing upon the nature of the confession. The evidence for the State tended to show these facts:

About 11:30 a.m. on November 18, 1964, Detectives Hartley and Morris of the police force of the City of Durham observed defendant, who "wasn't walking like a sober man." When he got into his car the officers followed him, "trying to get him before he had a wreck." Defendant, however, collided with two cars when the detectives were practically behind him. At that time, they had no notion that he was connected with the Oxford safe robbery although (they said) he would have been a "natural" suspect in "any safe job." They arrested defendant for drunken driving. Detective Morris testified:

> "Louis (defendant) said something pertaining about he would pay the other people's damages and that I knew where the money came from, and I knew where he got the money. He said 'I will pay the damage, I have got the money, you know where the money came from,' and I told him right then, I said 'Louis, now, I want to warn you that anything you tell me, that can be used against you in a court of law. You have got a right to an attorney, you don't have to tell me anything.' "

At police headquarters defendant kept talking about paying the damage. He was again warned of his right to remain silent and to have counsel. His reply was, "I can tell you anything I want to, you have to prove it." The officers then talked to defendant briefly about "where he got the money." He went into detail about "Mr. George Johnson's safe on Indian Trail in Durham" and offered to show the officers where it was. They had heard nothing of the Johnson safe job which had been reported to the County Sheriff, and, although they had read about the Oxford robbery in the newspaper, they were not particularly interested in the McCracken Oil Company safe because Oxford was not in their jurisdiction. Defendant, however, volunteered the information that he had something to do with the McCracken safe job; that he went over there in his car with Claiborne McKee and Benjamin Edward Ranson; that, while Ranson watched from across the street with a shotgun, they cut a hole in the fence with a pair of bolt cutters, went in the building, and "busted open the vault—ripped it from the top down—and went in and got the nigger-head safe out and brought it back to Durham." According to the officers, although defendant was under

the influence of intoxicants, he knew what he was saying, and they listened while he did most of the talking.

Between 2:30 and 3:00 p.m., the detectives again talked to defendant for about thirty minutes. He had been given no liquor in the meantime. "He didn't need any liquor to loosen him up. He was already gone." That afternoon defendant and the officers went to Orange County looking for the Oxford safe. After a brief and fruitless search in the vicinity of Murphy School, defendant said, "Lets go back to town." On the way back, defendant brought up the Johnson safe again and said "I will show you where that is." He then directed them to a bank in the woods where, about 4:00 p.m., they found a safe "which turned out to be the Johnson safe."

About 7:30 that night, defendant was questioned by Morris, S. B. I. Agent Harton, and Chief of Police White of Oxford. According to their testimony, defendant obviously had been drinking intoxicants, but he was not then drunk. At the beginning of this interrogation, Harton identified himself and introduced Chief White to defendant. He said,

> "I told him that he didn't have to talk with us, that anything he said could be used against him, that he was entitled to a lawyer if he wanted one and we would be glad to call him one if he wanted us to. He said he didn't need a lawyer."

Harton, who had not talked with defendant previously, asked him to go back over the story of the "deal in Oxford." He spoke freely and voluntarily. While giving his statement he asked for a drink, but it was refused.

> "He (defendant) said he was there Monday night at the McCracken Oil Co., getting the safe . . . (H)e and two more men were there. They went in on his car which was a 1958 DeSoto and parked on a dirt street near the McCracken Oil Co. . . . He said they cut the fence on the outskirts of the place near a used car lot with a pair of bolt cutters. He said a fellow by the name of Claiborne McKee and an escaped convict by the name of Ranson were there. They had a long prize bar with a fork on one end and hook on the other, a sledge hammer and a chisel and bolt cutters. He said that he and McKee were on the inside and that Ranson was across the street at a lumber company with a shotgun. . . . He was very cooperative. He said there was approximately $1,800 in it, in cash, that the checks were burned up and that he got approximately $390 for his share."

Defendant's criminal record was well known to Harton, who re-

garded him as a professional safecracker. At no time did the officers themselves, or any other person to their knowledge, give defendant any intoxicants, or offer him any other inducement to talk. Defendant never asked to call his mother or any other person.

The next morning (November 19th) defendant was interviewed by the same officers and a deputy sheriff from Goldsboro about a safe robbery there. He was again told that he had a right to remain silent and that he could have an attorney if he wanted one. Later in the day defendant and the officers went once more to the vicinity of the Murphy School where, after some searching, defendant finally pointed out a high bank on top of which they found the Oxford safe. Defendant then stated that after the safe was removed from the office in Oxford, he and his confederates brought it back to his house in Durham, where it remained until about 12:30 or 1:00 the next day. He then took it to a garage in Durham, and the owner cut it open with a torch. After rifling the safe, he dumped it in Orange County. He declined to give the officers the address of the garage or the name of the operator. He said the officers would be surprised if they knew.

Defendant's evidence on the *voir dire* tended to show: He began drinking early on the morning of November 18, 1964, as well as taking "green hornet" (amphetamine) pills. He had been on a binge for four or five weeks. He started drinking in the first grade and has had a drinking problem all of his adult life—drinking anything from shaving lotion and canned heat to shellac. When the officers arrested him for drunken driving, he was so drunk and "pilled up" he could not get out of his car. Immediately after he was taken to the police station, the officers gave him four two-ounce cups of whiskey which he drank "as fast as possible." Thereafter, his mind was a complete blank; he remembers nothing until the morning of the 19th, when he was told he had made a statement. He then told the officers, including the one from Goldsboro, that he would plead guilty to anything if they would let him lie down. Instead, they continued to question him. He was so sick he was unable to eat that day. He told Morris that he was drinking and riding around with "some Georgia boys" when they dumped out a safe from the trunk of the car in Orange County. He had met these "Georgia boys" several months before but he did not know their names. To the best of his memory, defendant never told anybody he was involved in the McCracken Oil Company safe robbery. The "Georgia boys" had picked him up about 3:00 a.m. On the night of November 16-17, he had been at Am. Vet's Post No. 1 until about 2:00 a.m., when he drove himself home. On the morning of the 17th, he went to his mother's home at 8:30, then down town. That after-

noon, he got drunk and went home where he stayed until evening, when he went to the Morgan Street Am. Vet's Club where he stayed until he took two girls (whose names he did not know) shopping and spent $30.00 on clothes for them. He returned to the Club and eventually went home drunk. About 6:30 a.m. on the 18th, he went to Young's place where he stayed until noon. He left there drunk and was arrested by Detective Morris for drunken driving shortly thereafter.

Defendant's cell mate at the City jail testified that defendant was drunk on the 18th when he was brought in, and that on the 19th defendant brought in two pints of liquor in a candy box. The two of them drank the liquor "right quick." Defendant's mother and his former wife corroborated defendant's testimony that he was drunk on November 17th and 18th.

Upon the foregoing evidence the judge made detailed and specific findings of fact. *Inter alia,* he found that at the time of his arrest and thereafter, defendant was informed that he had a right to remain silent and to make no statement to the officers; that he had a right to counsel; that defendant, although under the influence of intoxicating liquor, was aware of his constitutional right to have counsel and to remain absolutely silent. The judge further found that defendant was not furnished any intoxicants by any police officers or by anyone else who could be identified in court; that when defendant was advised of his right to counsel, he replied that he did not need one; that defendant's intoxication did not amount to mania and that he was aware of the statements which he made to the officers. The court concluded

> ". . . that none of the Constitutional rights pled by the defendant were or have been violated and that his admission and confessions to officers Detective R. G. Morris and L. M. Harton were given freely, voluntarily, without reward or hope of reward, or any other inducement and that said statement should be admitted into evidence to be given weight by the jury to which the jury finds they are entitled."

The evidence which the judge heard on the preliminary examination to determine the admissibility of the defendant's purported admissions was repeated in more detail before the jury. In addition, both the State and defendant offered the testimony which, for the State, tended to corroborate defendant's statements to the officers and which, for defendant, mainly tended to corroborate his evidence of extreme intoxication.

The jury returned a verdict of guilty as charged in the bill of indictment. From a sentence of imprisonment, defendant appeals,

assigning errors, all of which, in effect, relate to the competency of his alleged confession.

Attorney General T. W. Bruton and Andrew A. Vanore, Jr., Staff Attorney, for the State.

Nicholas Galifianakis for defendant appellant.

SHARP, J. Defendant contends (1) that his intoxication on November 18th and 19th rendered any statements he may have made to the officers involuntary; and (2) that, if the officers advised him of his constitutional rights, his intoxicated condition made such advice entirely ineffectual.

This Court has considered a defendant's plea of drunkenness as a bar to the admissibility of his confession in the following cases: *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6; *State v. Stephens,* 262 N.C. 45, 136 S.E. 2d 209; *State v. Isom,* 243 N.C. 164, 90 S.E. 2d 237, 69 A.L.R. 2d 358. From them this rule emerges: Unless a defendant's intoxication amounts to mania—that is, unless he is so drunk as to be unconscious of the meaning of his words—his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, a question exclusively for the jury's determination.

In his charge, the judge made it crystal clear to the jurors that they were sole judges of the credibility of all witnesses who had testified and that, if they were satisfied beyond a reasonable doubt that defendant had made the challenged statements to the officers, they should consider the condition of the defendant at the time he made the statements. This was a substantial compliance with the requirement laid down in *State v. Isom, supra.*

It is settled law in this jurisdiction that the competency of an extra-judicial confession of guilt is a preliminary question to be determined by the trial judge in the manner set out in *State v. Whitener,* 191 N.C. 659, 132 S.E. 603 and *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. A finding that the confession was voluntarily made will not be disturbed on appeal "unless accompanied by some imputed error of law or legal inference." *State v. Grass,* 223 N.C. 31, 25 S.E. 2d 193. Ordinarily the rule is stated to be that if the court's finding is supported by any competent evidence it will be sustained, *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847; if not, it will be set aside. *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620. Much of the evidence which the trial judge heard was conflicting, but "where the evidence is merely in conflict on the question as to whether or not a confession was voluntary, the ruling of the court is conclusive

on appeal." *State v. Hammond,* 229 N.C. 108, 47 S.E. 2d 704. The evidence fully supports Judge Bickett's findings. Defendant had and was accorded the right to a preliminary hearing on the competency of his alleged confession. The judge, however, was not required either to believe or to accept his testimony as if it were true.

Upon the argument, defendant's counsel complained that the trial judge "wanted to relate defendant's confession to the truth" instead of to the question whether he had exercised an "enlightened choice" in making it. In defendant's brief, he says:

> "The reason for excluding involuntary confessions is not because they might be unreliable, but rather that admission of such confession violates one's constitutional rights. So the issue really boils down to the simple question which right is to take priority under the law, the right of society to be free from crime or the individual rights of the accused?"

We indulge the hope that these two rights are not on a collision course. In any event, we do not have to fix a priority in this case. The law of this State does not require its enforcement officers to turn a deaf ear to a liquor head who wants to talk lest he give them some information which would solve a crime, or lest his tongue, loosened by alcohol, utter an incriminating statement he might later regret. Defendant here is not an inexperienced juvenile delinquent. He testified that he had "been before the court in a large number of cases" and knew "a thousand or more (of) prisoners in the penal system by face." The officers were not required to give him a head start as if they were playing the childish game of cops and robbers. On the contrary, having advised him of all his constitutional rights, it was their duty to pursue his lead and to obtain from him any information he would voluntarily give.

Here, as in *State v. Outing, supra,* the trial judge "with patience, care and discrimination, conducted the preliminary inquiry, saw and heard the witnesses (and) thereupon found the defendant's statements were voluntary. Substantial evidence supports the finding. It is binding on appeal." *Id.* at 473, 121 S.E. 2d at 850.

All of defendant's assignments of error are overruled. In the trial we find

No error.

LAURA GENE GALLOWAY, BY HER NEXT FRIEND DANIEL J. PARKS v. BENJAMIN J. LAWRENCE, JR.

AND

LOIS GALLOWAY v. BENJAMIN J. LAWRENCE, JR.

(Filed 14 January, 1966.)

1. Physicians and Surgeons § 11—

The fact that a physician or surgeon possesses the requisite professional knowledge and skill is not alone sufficient to preclude liability to his patient, since he may be held liable for injuries resulting from his failure to exercise reasonable diligence in the application of his knowledge and skill to the patient's case, or for his failure to give the patient such attention as the case requires.

2. Trial § 10— Remark of the court in the presence of the jury held prejudicial as expression of opinion on evidence.

In this action for malpractice, defendant's own evidence was to the effect that defendant would have been remiss if he had failed to call at the hospital to see his patient after having been advised by telephone of a serious turn for the worse in her condition. The sole evidence that defendant made such call was his own statement. Upon the interrogation of another witness as to whether the failure to make such visit would constitute neglect, the court stated that the evidence with reference to the matter was that defendant went to the hospital, that there was no evidence he did not go there, and that the burden of proving neglect was on plaintiff. *Held:* The occurrence amounted to an expression of opinion by the court on the evidence, and constituted prejudicial error.

3. Same—

Defendant surgeon, in a malpractice suit, was offered as an expert witness. The court, in the presence of the jury, stated that the court found defendant to be an expert physician in surgery, qualifying the witness to testify. *Held:* The remark of the court in the presence of the jury constituted prejudicial error.

4. Same—

The statutory proscription against the trial judge expressing an opinion upon the evidence, G.S. 1-180, applies not only to the charge alone, but prohibits the trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion to what has or has not been shown by the testimony of a witness.

APPEALS by plaintiffs from *Johnston, J.*, 22 March 1965 Session of SURRY.

These are two cases which were consolidated for trial. In the first, Laura Gene Galloway, a minor child, sues the defendant, a physician and surgeon, for damages which she alleges she sustained as a result of the negligence of the defendant in treating her as his patient. In the second, Lois Galloway, mother of Laura, sues the defendant for loss of her daughter's services and for expenses in-

curred and to be incurred by her for medical treatment of Laura, alleged to be the result of the defendant's negligence in his treatment of the child.

The cases were here upon the former appeal of the defendant from an order striking a further defense from his answer to each complaint. That order was affirmed. *Galloway v. Lawrence,* 263 N.C. 433, 139 S.E. 2d 761.

The cases then came on for trial and three issues were submitted to the jury. The first was, "Was the plaintiff, Laura Gene Galloway, injured by the negligence of the defendant, Benjamin J. Lawrence, Jr., as alleged in the complaint?" The other two issues related to the amount of damages each plaintiff was entitled to recover from the defendant. The jury answered the first issue in favor of the defendant and, therefore, did not answer the other two issues.

From a judgment in accordance with the verdict the plaintiffs have appealed, making the same assignments of error. These relate to the sustaining of objections by the defendant to various questions propounded by the plaintiffs to witnesses, the overruling of the plaintiffs' objections to various questions, both hypothetical and otherwise, propounded by the defendant to witnesses, the refusal to declare a mistrial, the making of certain comments by the court in the presence of the jury, the inclusion of certain instructions in the charge and the way in which the court, in its charge to the jury, stated the contentions of the parties, reviewed the evidence and explained the law applicable thereto.

The complaint of Laura Galloway alleges in substance: On 8 February 1962, she, being then four years of age, was struck by an automobile and sustained thereby a simple fracture of her left leg above the knee and certain bruises and abrasions which were not of a serious nature. She was admitted to the hospital for treatment of her injuries by the defendant, who was and is practicing as a general physician and surgeon. She was otherwise in good health and had sustained no injury to her right leg. The defendant treated her fractured left leg by applying Bryant's traction to both legs. The defendant was negligent in that he failed to use proper and accepted methods in his treatment of the child's injury, failed to give her proper attention after putting her in traction, failed to use proper methods of treatment to arrest conditions which developed from the use of traction, and was otherwise negligent in treating and attending her. Such negligence of the defendant was the proximate cause of serious injuries to the child, including permanent and serious disabilities in both legs. The evidence shows the child's right leg has now been amputated below the knee.

The complaint of the mother contains substantially the same

allegations with reference to negligence by the defendant and resulting injuries to the child.

In his answers the defendant denies any negligence by him in his treatment and care of the little girl.

The evidence is voluminous, including the testimony of numerous expert witnesses for each party. It is not necessary for the purposes of this appeal that it be summarized.

White, Crumpler, Powell, Pfefferkorn and Green for plaintiff appellants.

Woltz & Faw; Womble, Carlyle, Sandridge & Rice by I. E. Carlyle and Grady Barnhill, Jr., for defendant appellee.

LAKE, J. The duty which a physician or surgeon owes his patient is determined by the contract by which his services are engaged. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356. Ordinarily, he is not an insurer of the success of his treatment of or operation upon the patient and, in the absence of proof of his negligence in the treatment of the patient, or of his failure to possess that degree of professional knowledge and skill ordinarily had by those who practice that branch of the medical art and science which he holds himself out to practice, he is not liable in damages even though the patient does not survive the treatment or emerges from it in worse condition than before. *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762; *Jackson v. Sanitarium,* 234 N.C. 222, 67 S.E. 2d 57; *Wilson v. Hospital,* 232 N.C. 362, 61 S.E. 2d 102; *Hardy v. Dahl,* 210 N.C. 530, 187 S.E. 788; *Nash v. Royster, supra.*

In *Hunt v. Bradshaw, supra,* this Court, speaking through Higgins, J., said:

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. [Authorities cited.] If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

Thus, it is not enough to absolve a physician or surgeon from liability that he possess the requisite professional knowledge and skill. He must exercise reasonable diligence in the application of

that knowledge and skill to the particular patient's case and give to that patient such attention as his case requires from time to time. *Wilson v. Hospital, supra; Groce v. Myers,* 224 N.C. 165, 29 S.E. 2d 553; *Nash v. Royster, supra.* In the case last cited, Stacy, C.J., said, for the Court:

> "As a general rule, in the absence of any special agreement limiting the service, or reasonable notice to the patient, when a surgeon is employed to perform an operation, he must not only use reasonable and ordinary care, skill and diligence in its performance, but, in the subsequent treatment of the case, he must also give, or see that the patient is given, such attention as the necessity of the case demands."

The plaintiffs allege that in the treatment of this little girl the defendant did not use a proper and accepted method of treating such a fracture in so small a child and that, having placed her in Bryant's traction, he failed to give her proper care and attention, especially after he was informed by the nurses in charge that alarming symptoms, indicating serious complications, had appeared.

There was conflicting expert testimony as to whether the treatment used by the defendant in the case of this child was an accepted and approved method of treating such fracture.

The plaintiffs called as their witnesses the nurse, who, upon the night of 11-12 February 1962, was on duty and in charge of the hall of the hospital upon which the child's room was located, and the supervisor of nurses then on duty and in charge of nursing service throughout the hospital. They testified that at approximately 2 a.m. on 12 February 1962, at which time the child had been in traction four days, the hall nurse discovered that the child's feet were cool, discolored and swollen, these being indications of serious circulatory complications in a patient in Bryant's traction. Following a consultation between the hall nurse and the supervisor, the latter telephoned the defendant and reported these circumstances to him. The defendant, in the telephone conversation, instructed the supervisor to let the child's legs down and to start certain treatment. Neither the supervisor nor the hall nurse saw or had any further communication with the defendant during the remainder of the night. During the remainder of the night, the supervisor's duties required her to be in various places throughout the hospital and the hall nurse, with a number of patients under her care, had her station at some distance down the hall from this child's room and around a corner so that she could not see the door of the room. The child's room was at the head of a stairway, leading to the lower floor and thence to the emergency entrance to the hospital. The defendant testified

that, after receiving the telephone call from the nurses, he went to the hospital, entered by the emergency entrance, went up the stairway and into the child's room, observed what had been done pursuant to his instructions given over the telephone, determined that there was nothing else to be done for the present but to await developments and then left the hospital without seeing either the hall nurse or the supervisor since he had nothing further to tell them. He saw no one else in the hospital, which is a relatively small one. The patient, being a four year old child, would not be a source of either corroboration or contradiction.

Dr. Howard H. Bradshaw, called as a witness by the defendant and qualified as an expert, testified, "I believe the child had standard treatment." This was in response to a hypothetical question by defendant's counsel, which question included, as one of the hypotheses, "that immediately after the telephone conversation Dr. Lawrence went to the Northern Hospital of Surry County, entered the hospital through the emergency room door and went to Room 236; that he entered the child's room and began examining the child," and decided upon a certain course of action. Upon cross-examination Dr. Bradshaw stated, "My opinion certainly would not have been the same if that visit had not been made."

Thus, by the defendant's own evidence, it is apparent that whether the defendant did or did not go to the hospital and see the child, after the telephone conversation with the nurses, was a material element in determining whether or not he gave to the child the attention and care which it was his duty to give her as her physician.

Dr. Seth M. Beal, also called as a witness by the defendant and also qualified as an expert, stated in response to the same hypothetical question put to Dr. Bradshaw that he also was of the opinion that the defendant "was correct in his procedures all the way through." Upon cross-examination the plaintiffs then asked Dr. Beal: "And, if no visit at all had been made to the hospital by the doctor in response to this call, that would very definitely have affected your opinion, wouldn't it?" Objection having been interposed to the question, the court entered into a discussion with counsel in the presence of the jury and, in the course of that discussion, stated: "Well, of course, now, the evidence with reference to the doctor going to the hospital is that he went there. * * * There is no evidence that he did not go there, and the burden of proof is on you."

The only evidence upon this point, other than the defendant's testimony that he did go to the child's room following the telephone call from the nurses, is that he did not communicate with either of them or make any effort to do so. Whether he did or did not go to

the hospital on this occasion is a question for the jury to determine in the light of all of this evidence. It was error for the court to express an opinion upon that matter in the presence of the jury.

The defendant testified as a witness in his own behalf. His counsel tendered him "as a medical expert." Plaintiffs' counsel stated that he did not wish to ask the defendant any questions; that is, he did not wish to question the defendant's qualifications to express opinions as an expert witness. The court, in the presence of the jury, said: "Let the record show that the Court finds as a fact that Dr. Lawrence is a medical expert, to wit: an expert physician in surgery."

While the plaintiffs in their complaints do not allege the defendant is lacking in professional knowledge and ability, and while their counsel disclaimed any desire to question him upon his qualifications to testify as an expert witness, we think that the court inadvertently erred in making, in the presence of the jury, a statement that the court found as a fact that the defendant is "an expert physician in surgery." The ruling should have been put into the record in the absence of the jury for it was an expression of opinion by the court with reference to the professional qualifications of the defendant. It might well have affected the jury in reaching its decision that the child was not injured by the negligence of the defendant. There was no error in permitting the defendant to testify as an expert witness, for there was ample evidence to support the finding of his qualifications as such and his being a party does not disqualify him. *Dickinson v. Inhabitants of Fitchburg,* 79 Mass. 546; *Fetzer v. Clinic,* 48 S.D. 308, 204 N.W. 364, 39 A.L.R. 1423; Jones on Evidence, 4th Ed., §§ 378, 730. The court's finding should not, however, have been stated in the presence of the jury. Moore, J., speaking for the Court, said, in *Upchurch v. Funeral Home,* 263 N.C. 560, 140 S.E. 2d 17, "The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

G.S. 1-180 provides: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case."

We have said many times that this statute does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by

the testimony of a witness. *Upchurch v. Funeral Home, supra; Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912; *In Re Will of Holcomb,* 244 N.C. 391, 93 S.E. 2d 454; *Hyder v. Battery Co., Inc.,* 242 N.C. 553, 89 S.E. 2d 124; *In Re Will of Bartlett,* 235 N.C. 489, 70 S.E. 2d 482; See also: McIntosh, N. C. Practice and Procedure, 2d Ed., § 1514; Strong, N. C. Index, Trial, § 10.

The above comments by the able and learned trial judge were inadvertently made in the presence of the jury in the course of discussions with counsel concerning the admissibility of evidence. However, they dealt with the very questions which the jury was called upon to decide and were clearly prejudicial to the plaintiffs. The professional ability and skill of the defendant and whether or not he visited his patient following the telephone call from the nurses are questions for the jury, not for this Court or for the judge presiding at the trial. We express no opinion as to these matters and the trial judge is forbidden to do so by the statute. Since there must be a new trial because of these inadvertent departures from the sound rule declared by this statute, it is not necessary for us to discuss the other assignments of error since none of them may arise on the new trial of the actions.

New trial.

UNIVERSITY MOTORS, INC. v. DURHAM COCA-COLA BOTTLING COMPANY AND ROY GORDON MOSS.

(Filed 14 January, 1966.)

1. Trial § 21—

On motion to nonsuit a counterclaim, the evidence must be taken in the light most favorable to defendant, and plaintiff's evidence in conflict therewith must be disregarded.

2. Automobiles § 41g— Evidence held not to show that driver should have seen in time to avoid injury that other driver was not going to obey traffic signal.

Evidence favorable to defendant that he entered the intersection traveling east while faced with a green traffic signal, that the southwest corner of the intersection was obstructed, and that his vehicle was struck on its right side, back of the cab, after it had traversed some two-thirds of the intersection, by defendant's car which entered the intersection from the south, *held* not to show contributory negligence as a matter of law on the part of defendant driver in failing to see, at a time when he could have avoided the collision by the exercise of due care, that plaintiff driver

could not or would not stop in obedience to the red light, and nonsuit of defendant's counterclaim was properly denied.

3. Insurance § 66.1; Parties § 2; Pleadings § 34—

Allegations that an insurer had paid plaintiff the entire loss sued for constitute a complete defense to plaintiff's right to maintain the action, and plaintiff's assertion that payments made by insurer covered only a portion of the loss raises an issue of fact but cannot entitle plaintiff to have defendant's defense stricken from the answer.

4. Pleadings § 33—

A motion to strike an entire defense is in substance, if not in form, a demurrer thereto, and therefore in passing upon such motion allegations of the answer must be deemed admitted and the truth of the allegations cannot be attacked upon such motion.

APPEAL by plaintiff from *Johnson, J.*, March 29, 1965 Session of DURHAM.

Plaintiff's action and corporate defendant's counterclaim, both relating solely to property damage, grow out of a collision that occurred May 13, 1963, about 4:00 p.m., in Durham, N. C., within the intersection of Duke Street, which runs north-south, and Trinity Avenue, which runs east-west, between plaintiff's Chrysler car, operated by Bruce B. Goodwin, plaintiff's Assistant Service Manager, and corporate defendant's truck, operated by Roy Gordon Moss, corporate defendant's employee-driver. The agency of the drivers is admitted by the respective owners.

At said intersection, traffic is regulated by an electrically operated traffic control signal light erected by the City of Durham pursuant to a duly enacted city ordinance.

Goodwin, approaching the intersection, was traveling north on Duke Street. Duke is a one-way street, exclusively for northbound traffic. It is about 35 feet wide and is divided "almost equally" into three traffic lanes. The west lane is for left turn traffic. The center lane is for straight through traffic. The east lane is for straight through and right turn traffic.

Moss, approaching the intersection, was traveling east on Trinity Avenue. Trinity is a two-way street. It is about 35 feet wide and has three traffic lanes, two for eastbound traffic and one for westbound traffic. The north lane is for westbound traffic. The center lane is for eastbound traffic preparing to turn left and go north on Duke. The south lane is for straight through eastbound traffic.

On the southwest corner of said intersection, there is "a big two-story house" which "sits a few feet back from the sidewalk" on Trinity and "is situate a few feet west of the west curb line of Duke." "There are some trees planted in this vicinity along the

street on the south side of Trinity Avenue west of the intersection with Duke Street. There are trees on the west side of Duke . . . south of Trinity Avenue."

Plaintiff alleges the collision and the damage to its Chrysler were caused by the negligence of Moss in that he (a) operated the Coca-Cola truck at an unlawful speed in violation of G.S. 20-141(2) and (b) attempted to cross said intersection when the signal light facing him was red. Plaintiff prayed that it recover $1,965.00 for the damage to its Chrysler.

Answering, defendants denied negligence, and, as further defenses in bar of plaintiff's right to recover, pleaded (1) that plaintiff is not the real party in interest and (2) contributory negligence on the part of Goodwin in the operation of the Chrysler.

In addition, based on substantially the same allegations set forth in said plea of contributory negligence, the corporate defendant alleged as a counterclaim that said collision and the damage to its truck were caused solely by the negligence of Goodwin in several respects, namely, (1) excessive speed, (2) failure to decrease speed in approaching an intersection, (3) failure to keep a proper lookout, (4) failure to keep the Chrysler under proper control, (5) failure "to stop in obedience to the red traffic light facing him as he approached and entered the intersection and to yield the right of way" to the corporate defendant's truck, and (6) failure "to apply brakes, stop, turn aside or take any other precaution in time to avoid the collision." The corporate defendant prayed that it recover $465.92 for the damage to its truck.

Plaintiff, by reply, denied the material allegations of the corporate defendant's counterclaim.

Defendants' first further answer and defense was in these words: "For a First Further Answer and Defense, the defendants allege upon information and belief that damage to the vehicle of the plaintiff was covered in a policy of automobile collision insurance issued to the plaintiff by Glens Falls Insurance Company; that the entire loss has been paid to the plaintiff by said Insurance Company; and that Glens Falls Insurance Company and not University Motors, Inc., is the real party in interest in this action."

After the pleadings had been filed, plaintiff moved to strike said first further answer and defense in its entirety. It asserted in said motion that, while the damages to its Chrysler amounted to $1,965.00, it had received only $950.00 from its collision insurance carrier.

Plaintiff's said motion to strike, after hearing thereon before Judge Latham, was denied. Plaintiff's Exception No. 1 is directed to this ruling.

Evidence was offered by plaintiff and by defendants.

During the trial, plaintiff's secretary and treasurer had testified with reference to the reasonable market value of the Chrysler before and after the collision. On cross-examination, he had testified that the cost of repairs to the Chrysler was $1,217.00. Thereafter, the following occurred:

"Q. Now you have been paid this $1,217.00, have you not?
"A. The insurance company paid for repairing the car, yes sir.

"MOTION TO STRIKE BY THE PLAINTIFF. MOTION DENIED.
"PLAINTIFF'S EXCEPTION NO. 3."

Upon redirect examination, the witness testified: "The insurance company did not pay all of our loss but we received $950.00 from them."

At the close of all the evidence, plaintiff moved for judgment of nonsuit as to the counterclaim of the corporate defendant. The motion was denied. Plaintiff's Exception No. 7 is directed to this ruling.

The issues submitted and the jury's answers thereto were as follows: "1. Was the plaintiff's property injured and damaged by the negligence of the defendants, as alleged in the complaint? Answer: No. 2. If so, did the plaintiff by its own negligence contribute to such injury and damage? Answer ..... 3. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer ..... 4. Was the property of the defendant Durham Coca-Cola Bottling Company injured and damaged by the negligence of the plaintiff as alleged in the defendant's Counterclaim? Answer: Yes. 5. What amount, if any, is the defendant Coca-Cola Bottling Company entitled to recover of the plaintiff as damages? Answer: $450.00."

In accordance with the verdict, the court entered judgment that the corporate defendant have and recover of plaintiff the sum of $450.00 with interest and costs. Plaintiff excepted and appealed.

Newsom, Graham, Strayhorn & Hedrick and Josiah S. Murray, III, for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis and Brooks & Brooks for defendant appellees.

BOBBITT, J. Plaintiff's appeal presents these questions: (1) Did the court err in denying plaintiff's motion to nonsuit corporate defendant's counterclaim? (2) Did the court err in denying plaintiff's motion to strike defendants' first further answer and defense?

(3) Did the court err in denying plaintiff's motion to strike the testimony quoted in our preliminary statement relating to payments made to plaintiff by its collision insurance carrier?

There is ample evidence that the collision and resulting damage were proximately caused by Goodwin's negligence. Plaintiff contends that defendants' evidence establishes *as a matter of law* that Moss was contributorily negligent. With reference to the counterclaim, the corporate defendant's status is that of a plaintiff. Hence, in passing upon whether the court should have nonsuited the counterclaim, the evidence must be considered in the light most favorable to the corporate defendant. Evidence favorable to plaintiff must be disregarded. *Gillikin v. Mason,* 256 N.C. 533, 124 S.E. 2d 541; *Robinette v. Wike,* 265 N.C. 551, 144 S.E. 2d 594.

While the evidence was in sharp conflict, there was evidence sufficient to permit the jury to make the factual findings narrated below.

Goodwin approached and entered the intersection, traveling in the east lane of Duke, when the signal light facing him was red. The collision occurred in the east lane of Duke, approximately 10 feet north of the south curb line of Trinity and 20-25 feet east of the west curb of Duke. The front of the Chrysler collided with the right side of the Coca-Cola truck "right behind the cab." The Chrysler made skid marks 36 feet long. They began 26 feet south of the south curb of Trinity.

Physical conditions at the southwest corner of said intersection obstructed to an undefined extent Goodwin's view of eastbound traffic on Trinity and Moss' view of northbound traffic on Duke. Goodwin first saw the Coca-Cola truck when it was coming into the intersection from his left. Moss did not see the Chrysler prior to the collision.

As Moss approached the intersection at a speed of 20-25 miles an hour, the signal light facing him was green. When 45 feet away, a Volkswagen, traveling north on Duke, crossed the intersection although faced by the red light. Moss glanced to his right, saw no other vehicle on Duke Street, reduced his speed slightly, looked ahead to make sure and found that the green light was still facing him, and had proceeded at least two-thirds across the intersection when the collision occurred. Moss "heard tires squealing as (he) was going under the light."

When the evidence is considered in the light most favorable to the corporate defendant, and applying legal principles discussed fully in *Stathopoulos v. Shook,* 251 N.C. 33, 110 S.E. 2d 452, and cases cited therein, we cannot say that the only reasonable inference or conclusion that may be drawn therefrom is that Moss was

put on notice that Goodwin could not or would not stop in obedience to the red light at a time when Moss could have avoided the collision by the exercise of due care. We conclude it was proper to submit to the jury the issues arising on the corporate defendant's counterclaim and that plaintiff's motion to nonsuit said counterclaim was properly denied.

Judge Latham properly overruled plaintiff's motion to strike defendants' first further answer and defense. *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Jewell v. Price,* 259 N.C. 345, 130 S.E. 2d 668.

Nothing else appearing, plaintiff would be entitled to the recovery, if any, for damages to its Chrysler. Defendants' first further answer and defense is a plea in bar. If, as defendants alleged, the entire loss had been paid by plaintiff's collision insurance carrier, plaintiff was not the real party in interest and could not maintain the action. Whether in the circumstances of the particular case a plea in bar is to be disposed of prior to trial on the merits is for the court, in the exercise of its discretion, to determine. *Gillikin v. Gillikin,* 248 N.C. 710, 104 S.E. 2d 861; *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E. 2d 382.

Plaintiff's motion to strike defendants' first further answer and defense in its entirety was in substance, if not in form, a demurrer thereto. In passing upon said motion, the factual allegations of defendants' first further answer and defense are deemed admitted. Hence, defendants' allegation that plaintiff's collision insurance carrier had paid plaintiff the full amount of its loss may not be challenged by demurrer. As to a "speaking demurrer," see *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 488-9, 98 S.E. 2d 852, and cases cited. If it be considered that defendants' said factual allegation was properly traversed by the allegations in plaintiff's said motion, the factual issue so raised, absent waiver, would be for determination by a jury. G.S. 1-172; *Hershey Corp. v. R. R.,* 207 N.C. 122, 176 S.E. 265; *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410; *Jewell v. Price, supra.*

Plaintiff could have moved that the court, in the exercise of its discretion, determine the factual issue raised by defendants' said plea in bar prior to trial of the action on the merits. It did not do so. When the cause came to trial, evidence bearing upon the issue raised by defendants' first further answer and defense, including the testimony of plaintiff's secretary and treasurer, was relevant. The fact the testimony elicited by defendants, particularly when clarified on redirect examination, did not support defendants' first further answer and defense is not determinative as to its relevance.

Defendants having introduced the subject of plaintiff's collision

insurance by their pleading and by cross-examination of plaintiff's secretary and treasurer with reference thereto, no reason appears why plaintiff could not have shown the full facts concerning its collision coverage, including the fact that the plaintiff itself would not benefit by a recovery unless the recovery exceeded the amount to which its insurance carrier would be entitled as subrogee. Plaintiff did not see fit to develop these facts. It is noteworthy that, under the evidence, plaintiff's collision insurance carrier, while not a necessary party, would have been a proper party to the action. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231; *Smith v. Pate, supra; Insurance Co. v. Moore,* 250 N.C. 351, 108 S.E. 2d 618.

It is noted that plaintiff did not object to the question asked by defendants' counsel. Its exception is to the denial of its motion to strike the answer. "When there is no objection to the testimony, a motion to strike is addressed to the discretion of the trial court, and its ruling thereon is not subject to review in the absence of abuse." 4 Strong, N. C. Index, Trial § 15, p. 303.

For the reasons stated, the conclusion reached is that plaintiff has failed to show prejudicial error.

No error.

LEROY DULIN, BY HIS GENERAL GUARDIAN THOMAS L. DULIN v. BYNUM W. FAIRES AND WIFE, MARTHA S. FAIRES; WILLIAM HOWARD FAIRES, SR. AND WIFE, LOUISE K. FAIRES; RALPH L. FAIRES AND WIFE, RUTH E. FAIRES; E. RHYNE FAIRES, SR. AND WIFE, LOUISE C. FAIRES; WILMA F. BRAWLEY; DARRELL F. McKINLEY, SR. AND WIFE, MARY F. McKINLEY; FRANK W. FAIRES AND WIFE, VIOLA P. FAIRES; MAX HAMILTON, SR. AND WIFE, LILLIAN F. HAMILTON; MADELYN F. PHIPPS; AND EDITH F. McKINNEY AND HUSBAND, WESLEY R. McKINNEY.

(Filed 14 January, 1966.)

1. Adverse Possession § 2—

The use of a right of way across another's land must be under claim of right and be open and hostile and under definite boundaries in order to establish a right by prescription, but hostile use is simply use under such circumstances as to manifest and give notice that the use is being made under claim of right.

2. Trial § 31—

If defendant's evidence is insufficient to be submitted to the jury on an affirmative defense, the court may correctly direct a verdict against defendant on the issue, since defendant has the burden of proof thereon.

3. Adverse Possession § 23—

The evidence in this case *held* sufficient to permit the jury to find that defendants had used the road in question substantially in the same location for any and all purposes incident to the use and enjoyment of their contiguous properties as the only means of access from their properties to a public road, and had done so for more than 20 years preceding the institution of the action, and that such use was adverse and under claim of right, and therefore a directed verdict based on the assumption that the evidence was insufficient to establish their right must be reversed.

APPEAL by defendants from *Brock, Special Judge,* January 4, 1965, Schedule "C" Civil Session of MECKLENBURG.

This action was instituted June 15, 1964, in behalf of Leroy Dulin by his son and general guardian, Thomas L. Dulin.

Leroy Dulin, referred to herein as plaintiff, suffered an incapacitating stroke on March 1, 1964 and thereafter was unconscious and unable to manage his affairs. Although living at the time of the trial, Leroy Dulin was unable to testify or attend.

Plaintiff alleged he owned a described tract of land in Crab Orchard Township, Mecklenburg County; that defendants claimed an interest therein adverse to plaintiff, namely, "a right to use, and to permit others to use, a private road or driveway across the aforesaid land from Plaza Road to the property of the defendants"; and that the asserted claim of defendants is and should be adjudged invalid and a cloud on plaintiff's title.

Defendants, in their joint answer, claimed "a right to use and permit others to use a road across the said land to and through the property of the defendants to the same extent as said road has been used for many years and up to the present time."

Defendants, by way of further answer and defense, asserted the right to use the road (1) because of adverse user by them and their predecessors in title for more than twenty years next preceding the institution of the action, or (2) on the ground that the road is a neighborhood public road.

Evidence was offered by plaintiff and by defendants.

The court submitted, and the jury answered under peremptory instructions in favor of plaintiff, the following issues: "I. Have the defendants and their predecessors in interest used the roadway over the plaintiff's land openly, notoriously and adversely for a continuous period of 20 years? ANSWER: No. II. Is the road mentioned and described in the pleadings a neighborhood public road? ANSWER: No."

The court entered judgment in which it was ordered, adjudged

and decreed "that the defendants have acquired no rights in and to the property of the plaintiff described in the Complaint by reason of the existence and use of the roadway across the plaintiff's property as described in the complaint," and in which the costs of the action were taxed against defendants.

Defendants excepted and appealed.

Leroy Dulin having died subsequent to the filing of the record on appeal, the First Union National Bank of North Carolina, as executor and trustee under the will of Leroy Dulin, deceased, in accordance with its motion, has been substituted by order of this Court as party plaintiff in the place and stead of Leroy Dulin.

Fleming, Robinson & Bradshaw for plaintiff appellee.

Grier, Parker, Poe & Thompson and James Y. Preston for defendant appellants.

BOBBITT, J. It was stipulated at trial that Leroy Dulin owned in fee simple the tract of land described in the complaint and shown on Tax Map 63 of Crab Orchard Township as Lots 15 and 16, being the acreage shown on said map as within superimposed red lines and identified by superimposed red numeral "1." The record does not disclose when or from whom he acquired title. There was testimony his four maiden sisters lived on the property for many years and had a life interest therein; that the last of these sisters died in 1957; and that during the lifetime of his sisters and thereafter Leroy Dulin had control thereof.

Defendants allege they own various tracts of land adjoining Leroy Dulin's said land, having acquired title thereto by *mesne* conveyances from F. W. Faires; and that F. W. Faires had acquired title thereto by recorded deed dated October 31, 1930, from H. W. Johnston. There is no stipulation or record evidence as to what lands, if any, the defendants, individually or collectively, own. The said Tax Map 63, identified as plaintiff's Exhibit 2 and offered in evidence by plaintiff "for illustrative purposes only," shows an acreage within superimposed red lines and identified by superimposed red numeral "2." The acreage constituting Tract "2" is shown on said Tax Map 63 as ten separate parcels. The name(s) of one or more of the defendants, written in pencil by an unidentified person, appears on each parcel. Four of these parcels adjoin said Leroy Dulin land.

It was stipulated that said Tax Map 63 is "a reasonably accurate portrayal of the area within which the property in question lies." The area shown, which is near the Mecklenburg-Cabarrus line, is bounded on the south and east by Plaza Road Extension, on the

west by Hood Road and on the north by Rocky River Road. Tract "1," plaintiff's property, fronts on the north side of Plaza Road Extension. Tract "2," referred to in the evidence as the Miller, later the Faires property, is northeast of Tract "1." The property referred to in the evidence as the Smith property adjoins and is east of Tract "1" and adjoins and is south of Tract "2." The Hood Road is west and northwest of Tract "1" and of Tract "2."

There is no evidence, such as a map, survey or description as to the precise location of the road here involved. However, the evidence indicates there is no controversy as to where it is located on the surface of the earth. Two pencil lines, superimposed on said map by an unidentified person, indicate the general location thereof. These lines indicate a roadway extending from Plaza Road Extension across Tract "1" to a point on a line dividing Tract "1" and Tract "2."

It having been stipulated that Leroy Dulin owned in fee simple the property shown as Tract "1," the burden of proof was on defendants to establish their alleged legal right(s) to use the road across said land. The issues submitted to the jury were raised by defendants' further answers; and, as to each, the burden of proof was on defendants.

Pertinent legal principles, stated below, are well settled.

"The party claiming a right of way by prescription has the burden of proving the several elements essential to its acquisition. (Citations). Thus he must show, among other things, not only that a way over another's land was used for the requisite period, but also that such use was adverse or under a claim of right. (Citations). A mere permissive use of a way over another's land, however long it may be continued, cannot ripen into an easement by prescription. (Citations)." *Williams v. Foreman,* 238 N.C. 301, 77 S.E. 2d 499; *Henry v. Farlow,* 238 N.C. 542, 78 S.E. 2d 244, and cases cited.

"There must, then, be some evidence accompanying the user, giving it a hostile character and repelling the inference that it is permissive and with the owner's consent, to create the easement by prescription and impose the burden upon the land." *Boyden v. Achenbach,* 86 N.C. 397.

"The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim; *and this may be proven by circumstances* as well as by direct evidence." (Our italics.) *Snowden v. Bell,* 159 N.C. 497, 75 S.E. 721.

To establish that the use is "hostile" rather than permissive, "it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an

enemy of the owner of the servient estate." 17A Am. Jur., Easements § 76, p. 691. A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.

The court instructed the jury to answer the issues, "No," if they found the facts to be as all the evidence tended to show. In so doing, the court held the evidence, when considered in the light most favorable to defendants, was insufficient to support a verdict in their favor. If this were true, the court should have directed a verdict against defendants, who had the burden of proof. See "Directed Verdict and Peremptory Instruction," 2 McIntosh, North Carolina Practice and Procedure, Second Edition, § 1516, 1964 Supplement. Decision turns on the sufficiency of the evidence for jury consideration with reference to defendants' alleged prescriptive right, the subject of the first issue.

The evidence, when considered in the light most favorable to defendants, tends to show the facts narrated below.

The subject road extends from what is now Plaza Road Extension, to and beyond the Dulin homeplace and into the property now owned by defendants and referred to as the Faires property. This road, a single lane, unpaved road, was in existence substantially as now located prior to 1903 and has been in existence and use since then.

The property now referred to as the Faires property was formerly known as the Miller property. Miller, who lived there and operated a store near his home, died about 1919. The public traded at the Miller store. Another road to the Miller homeplace and store from what is now Plaza Road Extension crossed the Smith property. There were other ways of access to and from the Miller homeplace-store area from other directions, including what was the Pine Hill School site near the Hood Road.

The subject road was not maintained by the State, county or other public authority. Miller did some work on the subject road.

There is no evidence as to the ownership, occupancy and use of what is now called the Faires property from Miller's death in 1919 until 1930.

The Faires family, father (presumably F. W. Faires), mother and ten children, went into possession in November 1930. The parents lived in the home on this property until death. In the latter part of 1959 or the early part of 1960, the father "was quite ill." The mother died in 1962. At some unidentified time the Faires property was divided into the ten 10-acre tracts now owned by defendants.

When the Faires family went into possession in 1930, the subject

road stopped at the Faires homeplace. It was the only road then providing access to the Faires property from a public road. This was true until 1959 when a new (alternative) means of access from the Plaza Road Extension to the Faires property was acquired.

From 1930, the subject road, which passed in front of the Dulin homeplace, was used continuously by the Faires family and persons with whom they had dealings. Members of the Faires family, father and sons, worked and maintained the subject road during this period by dragging it, cleaning out the ditches, and by hauling and placing dirt and gravel on it, and generally keeping it in usable condition.

From 1942 to 1947 E. Rhyne Faires, one of the sons, operated a dairy on the Faires homeplace. Trucks from dairy companies used the subject road to pick up the milk produced at the Faires dairy.

In 1959, a lake was constructed on the Faires property. Later, it was opened to the public for fishing. A sign reading, "Fishing $1.00 per day, except Sunday," was erected on Plaza Road Extension at or near the entrance to the subject road. The Faires parents received fees amounting to about $300.00 per year from this enterprise. Patrons used the subject road as a means of access to the lake on the Faires property.

On one occasion (no date given), the father and William Howard Faires, Sr., one of the sons, were working on the subject road near the Dulin barn, that is, between Plaza Road Extension and the Dulin homeplace. Leroy Dulin parked his car on Plaza Road Extension and walked to where the work was in progress. Leroy Dulin, when asked to assist the Faires in maintaining the subject road, answered: "The road belongs to you; you keep it up."

Until May, 1963, permission to use the subject road was not requested by the Faires family. The Dulins did not protest or interfere with the various uses and actions of the Faires family in connection with the subject road. Relations between the Faires and Dulin families were friendly and cordial. In May, 1963, or shortly before, one of the Faires sons requested permission *to enlarge the entrance* from Plaza Road Extension into the subject road to facilitate the movement of mobile homes to a trailer park on the Faires property. Leroy Dulin refused this request, caused the subject road to be obstructed and denied defendants' right to the use thereof.

All the evidence tends to show the Faires family actually used the subject road substantially as now located, and for any and all purposes incident to their use and enjoyment of the Faires property, continuously, as their only means of access from their property to

the Plaza Road Extension, for more than twenty years next preceding the institution of this action. Moreover, the evidence, when considered in the light most favorable to defendants, was sufficient *to permit,* although not compel, a jury finding that such use was adverse and under claim of right. Hence, the first issue was for jury determination under appropriate instructions; and the court's instruction with reference thereto was prejudicial error.

We deem it unnecessary to discuss whether the evidence in the present record was sufficient to justify the submission of an issue as to whether the subject road is a neighborhood public road.

The verdict and judgment, in their entirety, are set aside and a new trial is awarded in respect of all issues raised by the pleadings and having support in the evidence.

New trial.

STATE v. LABURN LEON KEITH.

(Filed 14 January, 1966.)

1. Criminal Law § 71—

The competency of a confession is a preliminary question for the trial court upon the *voir dire,* and the court's ruling thereon will not be disturbed if supported by any competent evidence.

2. Same—

A confession is voluntary only if, in fact, it is voluntarily made.

3. Same—

Upon the *voir dire* the court heard evidence that defendant voluntarily made the confession, later admitted in evidence, without force, fear or favor. Defendant elected not to introduce any evidence upon the *voir dire,* but contended that he had never made any confession. *Held:* The admission of the confession in evidence was proper.

4. Same—

Objection that the court did not find the facts upon which it concluded that the confession offered in evidence was voluntary *held* inapposite when defendant contends that he had made no confession and does not contest the State's evidence supporting the conclusion of voluntariness.

5. Criminal Law § 21—

The evidence in this case shows that the warrant was read to and served upon defendant, and defendant's contention to the contrary *held* precluded by waiver in failing to make objection until after verdict.

STATE *v.* KEITH.

APPEAL by defendant from *Bickett, J.*, 1 March 1965 Criminal Session of WAKE.

The defendant was indicted with another, Lewis Arthur Penland, for safecracking, and the two were tried together. During the course of the trial, Penland changed his plea of not guilty to guilty as charged in the bill of indictment. Defendant Keith maintained his plea of not guilty and the trial continued as to him.

The State's evidence adduced in the trial below tends to show that between 5:30 p.m., 20 January 1965, and 7:30 a.m., 21 January 1965, The Auto Parts Company, Inc., in Raleigh, North Carolina, was broken into and a safe, weighing some 200 pounds, containing checks, cash money, and charge and cash tickets, was taken from the building occupied by said Auto Parts Company, Inc.

Upon investigation at the scene, police officers of the City of Raleigh proceeded to the home of defendant Penland in the City of Raleigh. Defendants Penland and Keith were asleep at Penland's home. This was about 9:00 a.m. on 21 January 1965. The officers asked Penland and Keith to go with them to the Police Department to answer some questions; they consented. Penland gave the officers permission to search his car. The search was made and the officers found "a sledge hammer, a crowbar and a screw driver."

Sometime after these defendants had been taken to City Hall and questioned in separate rooms, Penland agreed to take the officers to where they would find the safe. Penland then directed them to where the safe was found, off the Holly Springs Road approximately a quarter of a mile on a dirt road. The safe was identified as the safe taken from the Auto Parts Company, Inc. About 2:30 p.m. on 21 January 1965, while the officers were returning to Raleigh with Penland, they were informed over the police radio that Keith had told the officers at the Police Department where he had thrown certain papers taken from the safe. The papers were found where Keith said he had thrown them. Penland then took the officers to his home and turned over to them $63.97 which he said was taken from the safe. This money was wrapped in masking tape and was taken from a trash can in the room where Keith and Penland were sleeping when the officers arrived that morning.

Sergeant Stephenson of the Raleigh Police Department testified: "* * * I went into the * * * interrogation room where Leon Keith was seated. I told Leon that he was not under arrest, he was free to leave any time he so desired, the door was not locked, that I wanted to talk to him in regards to a safe job at Auto Parts Co., that anything he told me could be used either for or against him, that if he wished to call his attorney he could or any friend or any relatives, that the phone was outside, he was welcome to use it."

At this point the jury was excused and Sergeant Stephenson continued his testimony. He testified that Keith was not detained and could have left the Police Station at any time; that he asked Keith if his mother would not help him get an attorney, and defendant replied, "his mother was fed up with him"; that "he did not want to call anybody"; that "no threats whatsoever" were made to defendant Keith. Defendant's counsel cross-examined the witness but Keith did not take the stand at the hearing in the absence of the jury. The court then stated: "Let the record show the statement made was voluntary."

The jury returned and Sergeant Stephenson testified as follows with respect to details of the "safe robbery of Auto Parts, Inc.," as told to him by defendant Keith: That he and Penland had "been riding around and drinking quite heavily"; that they went to Auto Parts Company, Inc., and he, Keith, kicked the door open and went inside and located the safe; that he began rolling it to the door but "the wheels froze up," so he lifted it and carried it outside; that he and Penland put it in Penland's car; that they proceeded to a point outside Raleigh where Keith "beat the safe open (with a sledge hammer and crowbar) and removed the contents" therefrom while Penland drove up and down the road as a "lookout"; that on the return trip to Raleigh, Keith discarded some of the contents on the roadside; that they returned to Auto Parts Company, Inc., to replace the rear seat to Penland's car which had been removed to accommodate the safe; that upon doing this they returned to Penland's home where they slept until awakened by the police.

Defendant Keith testified in his own behalf and admitted that he had been drinking with defendant Penland on the night of 20 January 1965, but denied any participation in the robbery and denied that he had made any confession whatever to the officers.

The jury returned a verdict of guilty as charged in the bill of indictment. From the judgment imposed, defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harrison Lewis, Trial Attorney Henry T. Rosser for the State.

Charles O'H. Grimes for defendant.

DENNY, C.J. The appellant assigns as error the ruling of the court below that the confession allegedly made by defendant Keith to Sergeant Stephenson of the Raleigh Police Department, was voluntary.

This is an unusual case in some respects. Defendant Keith does not contend that his confession was coerced or otherwise improperly

obtained; on the contrary, he contends he made no confession, and so testified in his own behalf in the trial below; he further contends that he was detained for six hours and was never informed of any charge against him.

The State's evidence, however, is to the effect that Sergeant Stephenson informed Keith that he was not under arrest; that he was free to leave any time he so desired but that he (Stephenson) wanted to talk to him about a safe job at Auto Parts; that anything he told him could be used either for or against him; that if he wanted to do so he could call his attorney or any friend or relative; that he did not have to tell him anything; that no threats of bodily harm would be made against him if he did not talk. In response to the suggestion that he might call his attorney or a friend or relative, defendant stated that he did not want to call anyone.

There was ample evidence to support the ruling of the court below that the statements made by Keith were voluntary.

In *S. v. Fain,* 216 N.C. 157, 4 S.E. 2d 319, Stacy, C.J., said: "It is the established procedure with us that the competency of a confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N.C. 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603, and that the court's ruling thereon will not be disturbed, if supported by any competent evidence. *S. v. Moore,* 210 N.C. 686, 188 S.E. 421. * * *"

A confession is voluntary only if in fact it was voluntarily made. When a defendant objects to the introduction of a purported confession, it is the duty of the trial judge to hear the evidence bearing on the voluntariness of such purported confession in the absence of the jury. This was done in the instant case. The defendant did not testify on the *voir dire* or offer any evidence tending to show the purported confession was involuntary or improperly obtained. Defendant's counsel, however, did cross-examine Sergeant Stephenson at length.

In *S. v. Elam,* 263 N.C. 273, 139 S.E. 2d 601, Parker, J., speaking for the Court, said:

> "Defendant's contention that Elam's extrajudicial confessions were admitted without a proper preliminary inquiry is overruled. When sergeant Bunn was asked by the prosecuting officer for the State what conversation he had with Elam, Elam's lawyer objected and the trial judge sent the jury to their room. Whereupon, Elam's lawyer, Mr. Purser, cross-examined and recross-examined Bunn at length in respect to the circumstances surrounding the making of the extrajudicial confessions of guilt by Elam. After this was finished, there is nothing in the record to indicate that defendant desired to offer any

evidence in rebuttal of Bunn's testimony. Certainly, there is nothing to indicate that the trial judge refused to hear any evidence by defendant in rebuttal. 'It was not the duty of the court to call upon the defendant to offer evidence.' *S. v. Smith,* 213 N.C. 299, 195 S.E. 819. * * *"

No error has been made to appear in the admission of the defendant's confession. *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *S. v. Elam, supra.*

The defendant relies on the case of *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, and contends that the court below failed to find the facts in regard to the circumstances surrounding the making of the incriminating statements in order that the conclusion as to whether the confession was free and voluntary might be reviewed on appeal.

In the instant case, there was no conflicting testimony offered on the *voir dire* as there was in such hearing in the *Barnes* case. Defendant's contention is without merit on the record before us and we so hold.

The defendant assigns as error the trial court's denial of his motion to dismiss the action on the ground there is no evidence that the warrant issued by the City Court of Raleigh was ever read to or served on him.

The State's evidence tends to show that the warrant was issued on 21 January 1965, read to and served on the defendant Keith sometime after 1:00 p.m. on the day it was issued, and that later that same afternoon Keith waived a preliminary hearing in the City Court of Raleigh. Defendant testified that he did not recall whether or not he had a preliminary hearing.

The record further tends to show that the Judge of the City Court of Raleigh found probable cause and fixed bond in the sum of $1.000 on 21 January 1965. The bill of indictment was returned at the February 1965 Special Session of the Superior Court of Wake County. Judge Bickett appointed counsel to represent the defendant on 12 February 1965. Defendant was not tried until 1 March 1965 Conflict Criminal Session of the Superior Court of Wake County.

In 22 C.J.S., Criminal Law, § 327, page 838, it is said:

"Objections to irregularities or defects in the issuance, form, or execution of a warrant of arrest, which do not go to the jurisdiction, should be taken on the preliminary examination before the magistrate, and if accused fails to object at that time, enters a general appearance, and makes a plea to the charge, such irregularities will be held to be cured or the objections thereto will be held to be waived."

The record herein discloses that the defendant did not move to dismiss on the ground specified in his motion until after the verdict of the jury had been returned.

In the case of *S. v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642, it is said:

> "Any defect in the process by which a defendant is brought into court may be waived by him by appearing before the court having jurisdiction of the case. *S. v. Turner, supra* (170 N.C. 701, 86 S.E. 1019); *S. v. Cale, supra* (150 N.C. 805, 63 S.E. 958). The defendant may waive a constitutional right relating to a mere matter of practice or procedure. *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. If the law were otherwise, a defendant could take his chance of acquittal on a trial on the merits and, if convicted, contend that he was not in court."

In *S. v. Sutton,* 244 N.C. 679, 94 S.E. 2d 797, the defendant challenged the right of the State to put him on trial in the Superior Court on warrants for speeding and reckless driving, on the ground that he had been arrested outside the corporate limits of the City of Kinston by a policeman of the City of Kinston, citing *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907. This Court said:

> "We concur in what was said in the above case. Even so, we know of no authority that prohibits or bars a prosecution because the arrest was unlawful.
>
> "In 15 Am. Jur., Criminal Law, § 317, page 15, *et seq.*, it is said: 'As a general rule, the mere fact that the arrest of an accused person is unlawful is of itself no bar to a prosecution on a subsequent indictment or information, by which the court acquries jurisdiction over the person of the defendant.' *Kerr v. Illinois,* 119 U.S. 436, 30 L. Ed. 421; *S. v. May,* 57 Kan. 428, 46 P. 709; *Commonwealth v. Tay,* 170 Mass. 192, 48 N.E. 1086; *People v. Miller,* 235 Mich. 340, 209 N.W. 81; *People v. Ostrosky,* 95 Misc. 104, 34 N.Y. Crim. Rep. 396, 160 N.Y.S. 493; *S. v. McClung,* 104 W. Va. 330, 140 S.E. 55, 56 A.L.R. 257. For additional authorities in support of the above view, see Anno. 56 A.L.R. 260.
>
> "It is likewise said in 22 C.J.S., Criminal Law, § 144, page 236, *et seq.*: 'The illegal arrest of one charged with crime is no bar to his prosecution if all other elements necessary to give a court jurisdiction to try accused are present, a conviction in such a case being unaffected by such unlawful arrest.'"

The defendant herein makes no attack upon the warrant upon

which he was bound over to the Superior Court, or to the validity of the bill of indictment upon which he was tried.

The defendant expressly abandons all other assignments of error.

In our opinion, the defendant has had a fair trial, free from prejudicial error, and we so hold.

No error.

STATE v. HERBERT B. WALKER.

(Filed 14 January, 1966.)

1. Criminal Law § 168—

In reviewing the trial court's denial of motion to nonsuit, all the evidence, including any incompetent evidence admitted, must be considered in the light most favorable to the State.

2. Criminal Law § 94—

G.S. 1-180 governs not only the charge but prohibits the trial court from expressing an opinion on the evidence in the hearing of the jury at any time during the trial.

3. Criminal Law § 71—

The voluntariness of a confession is to be determined by the trial court upon the *voir dire* in the absence of the jury, and the evidence and findings in regard to voluntariness are not for the consideration of the jury and should not be referred to in the jury's presence.

4. Criminal Law § 154—

No objection or exception need be taken in any trial or hearing with reference to questions propounded to a witness by the court. G.S. 1-206(4).

5. Criminal Law §§ 71, 94—

The court, in the presence of the jury, interrogated an officer in regard to the voluntariness of a defendant's confession which incriminated defendant, and then ruled in the presence of the jury that the defendant's confession was voluntary and competent. *Held:* The occurrence entitles defendant to a new trial for prejudicial error of the court in expressing an opinion on the evidence.

APPEAL by defendant from *Walker, Special Judge,* May 24, 1965 Criminal Session of GUILFORD Superior Court, Greensboro Division.

Herbert B. Walker, the appellant, and also James Lee Lawston and Henry Lee Moore, were indicted in separate bills, each of which charged the defendant named therein on March 30, 1965, "unlaw-

fully, willfully and feloniously, having in possession and with the threatened use of certain firearms or other dangerous weapon, implement or means, to wit: 32 caliber revolver, the life of Charles W. Fine and Jean Fine was endangered and threatened, did unlawfully take personal property, to wit: Four Hundred Fifty-five & 00/100 Dollars ($455.00) in good and lawful money of the value of $455.00, from Fine's Loan Company, at Greensboro, North Carolina, where the said Charles W. Fine and Jean Fine was in attendance, . . ."

The case on appeal indicates Charles Roberts was also indicted in a bill charging the same criminal offense.

The *Walker, Lawston* and *Moore* cases were consolidated for the purpose of trial. In the trial thereof, Roberts testified as a State's witness.

Upon arraignment and at trial Walker, Lawston and Moore, indigents, were represented by separate court-appointed counsel. Walker was represented by James E. Exum, Esq.

The only evidence was that offered by the State.

Evidence admitted without objection tends to show: Roberts, Moore, Lawston and Walker, en route in "a '62 Olds convertible" from Miami, Florida, to New York City, arrived in Greensboro, North Carolina on Tuesday, March 30, 1965. That afternoon, "a little after 5:00," Roberts, Moore and Lawston entered the place of business of Charles Fine and his wife, Jean Fine, at 332 S. Elm Street, and committed the crime charged in the indictment.

The Fines' store is about 200 feet from the corner of S. Elm and McGee Streets. The car was parked on McGee Street. During the perpetration of said robbery, Walker was the sole occupant thereof.

After the robbery, Fine and a police officer pursued Roberts, Moore and Lawston, who were overtaken and arrested. Walker was in the car, where it had been parked, when arrested.

Roberts testified that he, Moore and Lawston first left the car, after it had been parked on McGee Street and while occupied by Walker, to carry out their plan to rob a jewelry store but that this plan was abandoned and they returned to the car. Roberts testified: "The second time when me and Lawston and Moore left the car, there were no plans between us to make a robbery of any kind. It was Walker's suggestion that the robbery be called off and we went along with his advice." Roberts testified they left the car the second time for the stated purpose of attempting to raise some money by pawning Moore's ring; and that, immediately preceding the robbery, Moore had approached the Fines with reference to pawning his (exhibited) ring for a loan.

Over objection by Walker, through his said court-appointed

counsel, the court admitted testimony of a Greensboro detective as to statements made by Walker on March 30, 1965 about 6:30 p.m., at the Police Station. This witness, on direct examination by the solicitor, stated he "advised (Walker) that (he) wanted to talk to him in regard to this robbery, and that he didn't have to say anything; he could get a lawyer; that if he did decide to say anything about it, that it may be used for or against him in court." Thereafter, according to the record, the following occurred.

"Q. What was his response?

"MR. EXUM: Objection.

"COURT: Overruled.

"A. He stated that—

"COURT: Did you threaten him in any way, Mr. Melton, or did anyone in your presence threaten the defendant Walker?

"WITNESS: No, sir.

"COURT: Did you abuse him in any way, or was he abused by anyone in your presence in any way?

"WITNESS: No, sir, he was not abused.

"COURT: Was he offered any hope of reward to make any statement?

"WITNESS: No, sir.

"COURT: Was he under the influence of intoxicants when you talked to him?

"WITNESS: Not that I could tell.

"COURT: Was the statement, insofar as you know, if a statement was in fact made by him, made freely and voluntarily?

"WITNESS: Yes, it was.

"COURT: Without any force, coercion or hope of reward being extended to him, or any force being exerted upon him by you or any other person?

"WITNESS: No, sir.

"COURT: How long did you talk to him before he made a statement, if he did make a statement?

"WITNESS: I would say approximately 15 minutes.

"COURT: Did he ask to have a lawyer there when he made the statement to you, if he made a statement?

"WITNESS: No, sir.

"COURT: Did you tell him he had a right to have one?

"WITNESS: Yes, sir.

"COURT: The objection is overruled.

The Court finds the statement was made, if a statement were made, freely and voluntarily. Go ahead with your question.

"The defendant objects and excepts to the above questions—EXCEPTION #1."

After the court had completed the foregoing examination of the witness and had made said finding, Mr. Exum requested and obtained permission to cross-examine this witness concerning the circumstances under which Walker made statements to the witness. At the conclusion thereof, Mr. Exum objected to the admission of the detective's testimony concerning any statements Walker may have made to the detective on said occasion. This objection was overruled, defendant excepted and the testimony of the detective as to statements made by defendant was received in evidence. This testimony was highly prejudicial to defendant.

Lawston and Moore are not involved in this appeal.

As to Walker, the appellant, the jury returned a verdict of "GUILTY as charged in the Bill of Indictment." Judgment imposing a prison sentence of not less than ten nor more than twelve years was pronounced. Walker excepted and appealed.

Upon Walker's petition and appropriate findings, the court ordered that Guilford County "pay all the necessary costs and expenses incident to the defendant's appeal to the Supreme Court of North Carolina," and appointed E. L. Alston, Jr., Esq., as counsel to represent defendant in connection with his appeal to this Court.

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

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

BOBBITT, J. In passing on a motion under G.S. 15-173 for judgment as in case of nonsuit, (1) admitted evidence, whether competent or incompetent, must be considered, *S. v. Virgil,* 263 N.C. 73, 75, 138 S.E. 2d 777, and (2) "the evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom." *S. v. Corl,* 250 N.C. 252, 257, 108 S.E. 2d 608. Considered in the light of these legal principles, the evidence was sufficient to require submission to the jury. Hence, the assignment of error with reference to nonsuit is without merit.

Defendant assigns as error what occurred during the trial in the presence of the jury with reference to the proffered testimony of the detective as to statements made to him by defendant. This assignment requires consideration of (1) the practice and principles applicable in determining the admissibility, over objection, of testimony as to confessions, Stansbury, North Carolina Evidence, Second Edition, § 187, and (2) the prohibition in G.S. 1-180 that

"(n)o judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, . . ." As stated in *S. v. Williamson,* 250 N.C. 204, 108 S.E. 2d 443: "This section (G.S. 1-180) applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. *State v. Cook,* 162 N.C. 586, 77 S.E. 759."

"When a confession is offered in evidence and challenged by objection, the court, *in the absence of the jury,* should determine whether the confession was free and voluntary." (Our italics.) *S. v. Barnes,* 264 N.C. 517, 520, 142 S.E. 2d 344. In *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, Higgins, J., in accordance with decisions cited in the quotation from *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, said: "According to our practice the question whether a confession is voluntary is determined in a preliminary inquiry before the trial judge." After such preliminary inquiry has been conducted, the approved practice is for the judge, in the absence of the jury, to make findings of fact. These findings are made only for one purpose, namely, to show the basis for the judge's decision as to the admissibility of the proffered testimony. *They are not for consideration by the jury and should not be referred to in the jury's presence.*

If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.

Here, the preliminary inquiry was conducted in the presence of the jury by the presiding judge. Since it is not the basis of decision, the fact that the questions propounded to the detective were in the nature of leading questions need not be discussed. However, it is noted that no objection or exception need be taken in any trial or hearing with reference to a question propounded to a witness by the court. G.S. 1-206(4).

At the conclusion of said preliminary inquiry, the judge, in the presence of the jury, made this finding: "The Court finds the state-

ment was made, if a statement were made, freely and voluntarily." Obviously, unless the statement was made, it could not be made freely and voluntarily.

The judge having made said finding of fact in the jury's presence, the effect thereof was to advise the jury that the judge was of the opinion and had determined as a fact (1) that defendant had made the statements attributed to him by the detective, and (2) that defendant had made such statements freely and voluntarily. Conceding the judge did not so intend, it is manifest that said finding of fact constituted a positive expression of opinion and invaded the province of the jury in violation of G.S. 1-180. Upon admission of the proffered testimony, credibility of the witness and the weight, if any, to be given his testimony, were exclusively for determination by the jury free from any expression of opinion by the court with reference thereto.

While not referred to in the briefs, we have considered *S. v. Davis,* 63 N.C. 578, and *S. v. Fain,* 216 N.C. 157, 4 S.E. 2d 319. Suffice to say, those decisions, to the extent in conflict herewith, are overruled.

For error in the admission of the detective's testimony under the circumstances set forth, defendant is entitled to and is awarded a new trial.

New trial.

STATE v. DARRELL GRAY STUBBS.

(Filed 14 January, 1966.)

1. Criminal Law § 71—

A confession is presumed voluntary and competent, and if defendant does not object to the admission in evidence of testimony of incriminating statements made by him, there is no occasion for findings upon a *voir dire* to determine voluntariness.

2. Burglary and Unlawful Breakings and Enterings § 5—

In charging the law applicable to breaking and entering or entering with intent to commit a felony, it is not required that the court charge that the breaking and entering must be unlawful, since a breaking and entering with intent to commit a felony is perforce unlawful.

3. Larceny § 8—

Where defendant is tried for breaking and entering and larceny, it is not required that the court charge that the value of the goods must ex-

ceed $200 in order to convict defendant of the felony, since larceny by breaking and entering a building is a felony without regard to the value of the property stolen.

BOBBITT, J., dissenting in part.

APPEAL by defendant from *Bickett, J.*, June 1965 Mixed Session of COLUMBUS.

The defendant was represented in the trial below by his court-appointed counsel, Richard E. Weaver. The court appointed his present counsel to perfect this appeal.

The defendant was tried upon a bill of indictment charging, in the first count, that "Darrell Gray Stubbs * * * on the 26th day of November, A.D. 1963 with force and arms at and in the County aforesaid, a certain storehouse, * * * occupied by one Leder Brothers, Inc., wherein merchandise, chattels, money, valuable securities were and were being well kept, unlawfully, wilfully and feloniously did break and enter with intent to steal, take, and carry away the merchandise, chattels, money * * * of the said Leder Brothers, Inc." *et cetera.* The second count in the bill charged that the defendant "on the 26th day of November * * * 1963, * * * did unlawfully, wilfully, and feloniously steal, take, and carry away * * * (certain enumerated items of clothing) and $24.45 in money of the value of $359.19, of the goods, chattels and moneys of one Leder Brothers, Inc., then and there being found feloniously did steal, take and carry away," *et cetera.*

There was a third count in the bill of indictment charging receiving, but the count with respect to receiving was not submitted to the jury.

The State's evidence tends to show that on the morning of 26 November 1963, Stanley E. Shearin, an employee of Leder Brothers, Inc., of Whiteville, North Carolina, arrived at work and found certain merchandise in disorder. Upon making an inventory, certain items of merchandise and $25.45 in cash were found to be missing. Mr. Shearin testified that the value of the property taken was $648.00 at retail price.

Mr. Wade L. White, Chief of Police of the Town of Whiteville, investigated the breaking and entering and secured a list of the merchandise missing from Leder Brothers, Inc. Upon an examination of the building, he found the skylight on the roof had "been pulled away and left open"; there was a hole in the lowered ceiling of the second floor of the store, and "scuff marks down the length of the wall," under the hole. On the following Sunday, Mr. White learned that the defendant and a companion had been apprehended in Dillon, South Carolina. Mr. White, Mr. Shearin, and

Mr. Horace Shaw of the Columbus County Bureau of Identification, went to the Dillon County Sheriff's Department where they talked with the defendant. Mr. White testified that defendant Darrell Gray Stubbs told them that, as planned, he and Jerry Kelly Russ went to Leder Brothers Department Store and that Jerry Kelly Russ climbed the back of the building and got on top of the roof and went into Leder Brothers Department Store, and that he waited outside the building; that Jerry Kelly Russ opened a firewall door from the inside at the back of the building and handed the merchandise out to him; that they got some money and divided the money and spent it; that they divided the clothing and went to Dillon, South Carolina, where a Highway Patrolman stopped them and they ran. Mr. White testified further that defendant said the clothes he was wearing, including a pair of Florsheim shoes, a sweater, and a sport coat, all came from the store of Leder Brothers; that he would show them where the rest of the merchandise was hidden in North Carolina, or at least the remainder of his part of the merchandise. Defendant said that he wanted to return to North Carolina with them and that he would show them where the merchandise was; that he directed them to a place about a mile from Clarkton, North Carolina, near his brother's home, and the defendant located the merchandise under some pine straw in a thicket, which merchandise was in a plastic bag. Defendant told them this was the balance of his part of the merchandise that came from Leder Brothers Store in Whiteville. This testimony was corroborated by several other State's witnesses.

Defendant was not placed under arrest until after his return to North Carolina.

Defendant did not testify but called as a witness Jerry Kelly Russ who testified that he committed the crime of breaking and entering the Leder Brothers Store on the occasion involved and that Stubbs was not present but that he gave Stubbs the clothing he had but that Stubbs did not know the clothing had been stolen.

The State offered evidence tending to impeach the testimony of the witness Russ. The State's witness testified that Russ had previously told him that on the occasion involved he forcibly entered the store of Leder Brothers through the skylight while Darrell Gray Stubbs was there present and watching, as planned.

The jury returned "a verdict of guilty as charged in the first count for the offense of breaking and entering; as to the second count of larceny, the jury returned a verdict of guilty as charged."

From the judgments imposed, the defendant appeals, assigning error.

John A. Dwyer for defendant.

Attorney General Bruton, Staff Attorney Andrew A. Vanore, Jr., for the State.

DENNY, C.J. The appellant sets out eighteen assignments of error in his case on appeal. However, none of these assignments are brought forward in his brief and argued, or authority cited in support thereof, as required by Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. 810.

The defendant concedes that if the statements made by him to the State's witnesses were properly admitted, the evidence was sufficient to withstand the defendant's motion for judgment as of nonsuit, interposed at the close of the State's evidence and renewed at the close of all the evidence.

The defendant contends, however, that the court below committed error in allowing witnesses to testify as to the statements made by the defendant in the absence of a showing that such statements were made voluntarily. The evidence with respect to the statements made by the defendant were admitted without objection.

As a general rule, a confession is presumed to be voluntary, and the burden is on the accused to show to the contrary. *S. v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193; *S. v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *S. v. Richardson,* 216 N.C. 304, 4 S.E. 2d 852. Likewise, in 20 Am. Jur., Evidence, § 536, page 456, it is said: "In a majority of the jurisdictions a confession is presumed to be, or is regarded as *prima facie,* voluntary and, hence, if not objected to by the defendant, should be admitted in evidence by the court, unless there is something in the confession which indicates its inadmissibility. * * *"

The defendant's contention is without merit.

The appellant further argues and contends in his brief that the court committed error in its charge to the jury in defining "breaking and entering." However, the appellant does not set out any part of the charge with an exception entered thereto, as required by the Rules of this Court, in challenging the correctness of the charge. Even so, the alleged error argued in the brief is that, in charging on breaking and entering, the court failed to charge that the breaking had to be "unlawful" or "wrongful." The court, after reading the pertinent provisions of G.S. 14-54, and charging with respect thereto on breaking and entering, then stated:

> "So, on the first count contained in the Bill of Indictment, that is the count of breaking and entering, if the State has satisfied you from the evidence and beyond a reasonable doubt

that on or about the 26th day of November, 1963, the defendant Darrell Gray Stubbs broke and entered or aided and abetted and assisted in the breaking and entering of Leder Brothers, Inc., building here, and further satisfied you from the evidence and beyond a reasonable doubt that valuable securities were in said building, and that he * * * intentionally broke and entered with the intent to commit the felony of larceny, that is to take, steal, and carry away the personal property of Leder Brothers kept in said building, and further, with the felonious intent to permanently deprive Leder Brothers of its personal property and convert it to his, that is Mr. Stubbs' own use or the use of some other person not entitled thereto, then it will be your duty to return a verdict of guilty as charged in the first count in the Bill of Indictment."

If one breaks and enters or enters with intent to commit a felony, he does so unlawfully, and the contentions of the defendant are without merit.

The appellant states in his brief that the bill of indictment charges defendant in the second count with the stealing of merchandise in excess of the value of $200.00; that the indictment does not charge defendant with larceny by breaking and entering, although, he states, "it is agreed, that the evidence tended to show, that if any act of larceny was committed at all by the defendant, that it was committed by breaking and entering." Even so, he contends it was error not to charge the jury that it must find the value of the merchandise taken to be in excess of $200.00 before the jury could convict the defendant of a felony on the second count. We do not agree with this contention under the facts disclosed by the record. Larceny by breaking and entering a building, referred to in the bill of indictment, is a felony without regard to the value of the stolen property. *S. v. Brown*, 266 N.C. 55, 145 S.E. 2d 297; *S. v. Wilson*, 264 N.C. 595, 142 S.E. 2d 180; *S. v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91. The bill of indictment charged that the defendant stole property from Leder Brothers, Inc., of the value of $359.19. The jury returned a verdict of guilty as charged on both counts in the bill of indictment.

In our opinion, the defendant has had a fair trial, free from prejudicial error, and the verdict and judgments entered below will be upheld.

No error.

BOBBITT, J., dissenting in part: There was a separate judgment on each count. As to the first count, the judgment imposed a

prison sentence of not less than seven nor more than ten years. As to the second count, the judgment imposed a prison sentence of not less than three nor more than five years, this sentence to begin upon expiration of the sentence on the first count.

My dissent relates solely to the second count.

If an indictment charges the larceny of property of a value in excess of $200.00 but fails to charge the larceny was accomplished by breaking *and* entering one of the buildings described in G.S. 14-72, "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." *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

My views are more fully stated in the concurring opinion in *S. v. Brown,* 266 N.C. 55, 62, 145 S.E. 2d 297, and cases cited therein.

Here, as to the second (larceny) count, the judge did not so instruct the jury; and, for error in failing to so charge, defendant, in my opinion, is entitled to a new trial as to the second (larceny) count.

WACHOVIA BANK & TRUST COMPANY v. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA.

(Filed 14 January, 1966.)

1. Bills and Notes § 10—

Ordinarily, a draft must be accepted by the drawee in order to bind him, but where the drawee is also the drawer, or the draft is issued by the drawee's duly authorized agent, the draft becomes in effect a promissory note, and acceptance is not required.

2. Same—

In this case it was stipulated that the general agent of defendant insurer was authorized to draw the draft in question and that he issued its draft payable to the insured and insured's mortgagee, and that plaintiff bank cashed the draft upon their endorsement. *Held:* Acceptance was not required, and insurer is liable to the bank on the draft.

APPEAL by defendant from *Mintz, J.,* May 1965 Civil Session of WAYNE.

This is a civil action instituted by plaintiff to recover on a draft given to Walter E. Bell and Federal Credit Union and cashed for them by plaintiff bank. The case was tried on a stipulation of facts,

the substance of which is as follows:

On 24 November 1959, defendant issued its fire insurance policy No. 11707 to Walter E. Bell and his mortgagee, Federal Credit Union, covering his mobile home as described in said policy. On 15 November 1963, while the coverage on said insurance policy was in full force and effect, Walter E. Bell suffered a fire loss to the property described in said policy. On 11 December 1963, defendant, through its agent, J. D. Murphy of Cincinnati, Ohio, who had authority to draw the drafts referred to herein, issued its draft to Walter E. Bell and Federal Credit Union in the amount of $2,400, representing the fire loss on the mobile home, and said draft was endorsed by them and cashed by plaintiff Wachovia Bank & Trust Company. On 9 December 1963, two days before the issuance of said draft and after due investigation of the fire, defendant's adjuster or agent prepared a proof of loss for certain personal property for the said Walter E. Bell, as shown on "Exhibit B," and on 20 December 1963, J. D. Murphy, general agent of defendant, issued another draft to Walter E. Bell and Federal Credit Union in the amount of $884.00, for the purpose of satisfying the claim evidenced by the proof of loss of the personal property of the insured destroyed in the aforesaid fire. Said draft was also duly endorsed by Walter E. Bell and Federal Credit Union and cashed for them by plaintiff. Payment of the latter draft was stopped by defendant and it has refused to pay said draft. Suit for recovery thereon was then instituted by plaintiff.

A jury trial was waived and the trial judge empowered to hear this cause upon the pleadings and the stipulations of facts. The court below adopted as its findings of fact the stipulation of facts and concluded that the plaintiff is entitled to recover and entered judgment accordingly. The defendant appeals, assigning error.

Taylor, Allen & Warren for plaintiff appellee.
Dees, Dees & Smith for defendant appellant.

DENNY, C.J. The only assignment of error and the only exception entered by appellant is to the entry of the judgment appearing in the record, which judgment it contends is erroneous because of error made by the court below in interpreting the effect of the facts as set forth in the stipulation of facts.

The plaintiff and the defendant agree that the draft involved herein was non-negotiable. It was issued in Cincinnati, Ohio, on 20 December 1963, and contains the following language: "Pay only to Walter E. Bell and Federal Credit Union—Eight Hundred Eighty-Four and 00/100 — Dollars in full settlement, satisfaction, com-

promise and discharge of all claims and demands for loss and damage as herein described, to property covered in the policy named below, which is hereby reduced by said amount subject to policy provisions." The draft recites upon its face that it is "Collectible through The First National Bank of Miami, Miami, Florida, upon acceptance by American Bankers Insurance Co. of Florida."

Defendant, in its further answer and defense, alleged that the policy issued to Walter E. Bell "did not cover any personal effects that said insured had in said trailer."

It appears from the pleadings and the stipulation of facts that the draft in the sum of $884.00 was issued to cover loss of certain personal property burned in the mobile home of Walter E. Bell on 15 November 1963, and that the proof of loss filed with defendant was prepared by an adjuster or other agent of defendant.

In light of the stipulation of facts, the findings of the court below and the conclusion reached, we think the determinative question involved herein is whether or not the draft, having been drawn by a duly authorized agent of defendant, to cover a proof of loss prepared by defendant's authorized adjuster or other agent, was subject to acceptance before payment could be demanded.

In the case of *Cable & Wireless v. Yokohama Specie Bank,* 79 N.Y.S. 2d 597, defendant bank, a Japanese corporation, had an agency in New York. It drew a bill of exchange whereby it directed its New York agency to pay to the order of the plaintiff on demand. Before the draft was presented or any demand made for payment, the Superintendent of Banks of the State of New York took possession of the business and property of the Yokohama Specie Bank in New York for the purpose of liquidating the same. Plaintiff filed its proof of claim with the Superintendent. The Superintendent rejected the claim and the action was commenced. The Court said:

> "That a draft drawn by one person upon himself or itself is in effect a promissory note or an accepted bill, accepted by the very act of issuing it, and that presentment and acceptance are not necessary to make the draft a liability of the drawer to the payee or holder, has been decided so many times and has been so widely recognized, both before and since the enactment of the Negotiable Instruments Law, that I would not have thought that any one could or would deny or question it. *Fairchild v. Ogdensburg, Clayton & Rome R. R. Co.,* 15 N.Y. 337, 69 Am. Dec. 606; *Pavenstedt v. New York Life Insurance Co.,* 203 N.Y. 91, 95, 96, 96 N.E. 104, 105, 106, Ann. Cas. 1913A, 805; *Shaw v. Stone,* 1 Cush. 228, 256, 55 Mass. 228, 256; *First National Bank & Trust Co. of Lexington, Ky. v. First National*

Bank in Hazard's Receiver, 260 Ky. 581, 584, 585, 86 S.W. 2d 325; *Wataugh County Bank v. McQueen,* 130 Tenn. 382, 385, 170 S.W. 1025; *Walker v. Sellers,* 201 Ala. 189, 77 So. 715; *First National Bank of Huttig v. Rhode Island Ins. Co.,* 184 Ark. 812, 815, 816, 43 S.W. 2d 535; *Clemens v. E. H. Stanton Co.,* 61 Wash. 419, 112 P. 494; *First Nat. Bank of Artesia v. Home Ins. Co. of New York,* 16 N.M. 66, 70, 113 P. 815; *Drinkall v. Movius State Bank,* 11 N.D. 10, 88 N.W. 724, 57 L.R.A. 341, 95 Am. St. Rep. 693; *Causey v. Eiland,* 175 Ark. 929, 1 S.W. 2d 1008, 56 A.L.R. 529, 532, note; *Kramer v. Mid-City Trust & Savings Bank,* 225 Ill. App. 575, 578, 579; *Alex Woldert Co. v. Citizens' Bank of Ft. Valley, Ga.,* Tex. Civ. App., 234 S.W. 124; *Furness, Withy & Co. v. Rothe,* 4 Cir., 286 F. 870, 873, 27 A.L.R. 1185; *Pennsylvania R. Co. v. Brown,* 6 Cir., 111 F. 2d 983; 8 Am. Juris. 514, Bills and Notes, § 871; Neg. Inst. Law, Sec. 214."

In *First National Bank of Huttig v. Rhode Island Ins. Co.,* 184 Ark. 812, 43 S.W. 2d 535, the president of defendant insurance company drew a draft as follows:

" 'Upon acceptance, Pay to the order of Spencer Mercantile Company, D. R. Spencer, Sole Owner, First National Bank of Huttig, Ark. Four Hundred Thirty Nine and 03 Dollars ($439.03) in full satisfaction and discharge of all claims for loss and damage by fire to property insured under Policy No. 155472, issued at El Dorado, Ark. Agency of said Company and occurring on the 9th day of May, 1930. In consideration of said payment, said policy is hereby cancelled and surrendered.

'To Rhode Island Insurance Company,
'31 Canal St.,
'Providence, R. I.
'E. G. Peiper, President.' "

The Court said:

"In the first place, under our Negotiable Instruments Act, section 7896 of Crawford & Moses' Digest, where, in a bill of exchange, the drawer and the drawee are the same person, the holder may treat the instrument at his election either as a bill of exchange or as a promissory note. This was the law prior to the passage of the act in question. A bill of exchange drawn by the maker upon himself is in legal effect a promissory note, and cannot be countermanded. Where a bill of exchange is drawn by a corporation upon itself, the instrument may be treated as an accepted bill or as a promissory note at the elec-

tion of the holder. (Citations omitted.)

"In the present case, the instrument which is the basis of the suit was in form a bill of exchange. It was drawn by the corporation, Rhode Island Insurance Company, under the signature of its president upon itself. In other words, it was a bill of exchange drawn by the corporation through its proper officer upon itself, and was not therefore subject to countermand.

"It is claimed, however, that it was conditional because of the words 'upon acceptance' in it. Under our statute, and under the principles of law above announced, these words had no legal effect on the instrument. They were in the instrument when it was signed by the president of the corporation, and the very act of drawing the bill is deemed an acceptance of it, and the holder may treat it as an accepted bill of exchange or as a promissory note. * * *

"Here the draft was signed by the president of the company, who had authority to sign it; and the contract became binding and complete when he did sign it because he had authority to make the contract, and no approval or ratification of his act was necessary."

In the case of *Creditors' Claim & Adjustment Co. v. Larson,* 171 Wash. 575, 18 P. 2d 844, in discussing a draft similar in form to that set out in the case of *First National Bank of Huttig v. Rhode Island Ins. Co., supra,* the draft contained the words "upon acceptance" and was signed "Harry Howes, General Adjuster." In discussing the legal principles involved, the Court said: "Our present problem is then reduced to this, Did the drawing of the draft here in question, signed by Harry Howes as general adjuster, constitute, in legal effect, a draft drawn by the insurance company upon itself?" The Court held that it did, and directed that judgment be entered against the insurance company, stating:

"We do not lose sight of the apparently wide scope of the general agency of Peiper, suggested by the word 'president' following his signed name to the draft, and that the agency of the general adjuster Howes who signed the draft here in question is apparently of a more limited character. But the proof in this case shows that Howes was at the time of issuing this draft the general adjuster of the insurance company as a salaried agent, and that he had 'charge of adjusting all of garnishee defendant's losses on the Pacific Coast,' warranting the conclusion that he had the authority to finally bind the insurance company for the payment of losses under its policies, and issue or approve the issuing of drafts upon the insurance com-

pany in final settlement thereof. This, we think, evidences as wide and complete an agency power in adjusting and finally fixing loss obligations upon the insurance company as is suggested by the signature 'E. G. Peiper, president,' in the issuance of the draft involved in the *Rhode Island Insurance Company* Case. The decision of the Supreme Court of New Mexico in *First Nat. Bank v. Insurance Co.*, 16 N.M. 66, 113 P. 815, lends support to this view. See, also, 8 C.J. 297, and authorities there cited."

Ordinarily, a bill of exchange must be accepted by the drawee named therein. However, there is an exception to this rule stated in 10 C.J.S., Bills and Notes, § 171, page 646, as follows:

"Acceptance is not necessary where no drawee is named in the bill; nor is it necessary to make the drawee liable where the drawee is himself the drawer—such bill being in effect the note of the drawer. The same effect is given a draft by an agent on his principal by authority of the principal, but such is not true of a draft drawn by an agent on his principal without authority, or a draft drawn on a principal by an agent who exceeds an express written authority."

In *Berenson v. London & Lancashire Fire Ins. Co.*, 201 Mass. 172, 87 N.E. 687, relied upon by the defendant, a fire had damaged property insured by defendant insurance company. The loss had been tentatively adjusted between the insured and a special agent of the insurance company, whose authority to make payment or sign an instrument fixing its liability was limited to the extent of requiring approval or ratification by the Hartford Agency of defendant insurance company. The Court held that since the special agent's power was limited and subject to the approval of the defendant company, the company was within its right in refusing to accept the draft.

In the instant case, it was stipulated that J. D. Murphy was the general agent of the defendant, with authority to draw the draft involved herein.

It will be noted that the drafts involved in each of the cases discussed herein were negotiable instruments. Even so, there is nothing in the opinions to indicate that recovery was denied or allowed on the theory of being or not being a holder in due course. Each case turned upon the authority or lack of authority of the maker of the respective drafts.

If there was a mistake in issuing the draft involved in the instant case, there is certainly no evidence of bad faith on the part

of the insured or of the plaintiff. The proof of claim was prepared and caused to be executed by an agent or adjuster of defendant company. Moreover, the defendant company will be charged with knowledge of the contents of its own policy.

The judgment of the court below will be upheld.

Affirmed.

I. A. SCHAFER v. SOUTHERN RAILWAY COMPANY.

(Filed 14 January, 1966.)

1. Trespass § 7—

Undisputed evidence that defendant trespassed upon plaintiff's land entitles plaintiff to a peremptory instruction upon the issue of trespass and to nominal damages. While the court may also submit an issue as to whether plaintiff's property was damaged as well as an issue as to the amount the plaintiff is entitled to recover, the failure of the court to instruct the jury that the trespass itself would entitle plaintiff to nominal damages must be held for prejudicial error on appeal from judgment for defendant upon a negative answer to the issue of damage, since a verdict for nominal damages would carry with it liability for costs.

2. Evidence § 42—

The conclusions of an expert witness must be based upon facts within his own knowledge testified to before the jury or upon a statement of hypothetical facts supported by evidence, since the premise upon which his opinion rests must be made known to the jury in order that the jury may properly evaluate his opinion.

3. Evidence § 51—

Defendant's expert witness was permitted to testify as to his opinion of the cause of the cracks in the walls of plaintiff's building upon a question which, in narrating hypothetical facts in evidence, stated that some of the evidence indicated the cracks did not appear until after the trespass and other evidence tended to show that the cracks existed before the trespass. *Held:* Objection to the question and answer should have been sustained, since it cannot be ascertained whether the opinion was based upon the premise that the cracks appeared before or after the trespass.

4. Same—

An expert witness, after testifying to having an opinion based upon hypothetical facts stated, should be asked whether the facts assumed could have caused the condition in question rather than what actually did cause it.

5. Evidence § 43—

The evidence disclosed that the witness casually observed the cracks in the walls of plaintiff's building while standing outside. *Held:* The evi-

dence does not disclose such an inspection of the building as would qualify him to give an expert opinion as to the cause of the cracks in the wall of the building.

APPEAL by plaintiff from *Johnston, J.,* 15 February 1965 Session of SURRY.

The plaintiff alleges: He is the owner of a tract of land and a building situated thereon; the defendant's railroad track runs immediately back of this building; the defendant trespassed upon the plaintiff's property and dug a ditch thereon between the track and the building, the ditch being within a few inches of the foundation of the building; the ditch was dug so that it did not drain the water, falling upon the surrounding properties, away from the plaintiff's building, but collected such water beside the building so that the water seeped under its foundations, undermining them and causing them to crack and give way so that the building was damaged. The answer denies all of the material allegations of the complaint.

The jury found that the plaintiff's property was not damaged by the defendant. From a judgment that the plaintiff have and recover nothing of the defendant and dismissing the action, the plaintiff appeals.

White, Crumpler, Powell, Pfefferkorn & Green for plaintiff appellant.

W. T. Joyner; Womble, Carlyle, Sandridge & Rice for defendant appellee.

LAKE, J. The undisputed evidence is that the defendant, without permission, entered upon land in possession of the plaintiff and dug a ditch thereon. This being denied in the answer, the court should have submitted to the jury the issue: Did the defendant trespass upon the land of the plaintiff, as alleged in the complaint? The jury should have been instructed to answer the issue in the affirmative if they believed the evidence on this point to be true. No such issue was submitted.

The plaintiff was entitled to nominal damages, at least, if the jury found the defendant so entered on the plaintiff's land and dug the ditch. *Matthews v. Forrest,* 235 N.C. 281, 69 S.E. 2d 553; *Hutton v. Cook,* 173 N.C. 496, 92 S.E. 355. A verdict for even nominal damages would carry with it liability for the costs of the action.

There was no error in submitting the issue: "Was the plaintiff's property damaged by the defendant, as alleged in the complaint?" The only controversy which developed upon the evidence was as to

whether the digging of the ditch was the cause of the damage to the plaintiff's building, there being no conflict in the evidence as to the condition of the building at the time the suit was instituted. It was not error to submit this as a separate issue from the issue as to the amount, if any, which the plaintiff is entitled to recover, nor was there error in the instructions to the jury concerning this issue. However, upon the issue as to the amount the plaintiff was entitled to recover, the court should have instructed the jury concerning his right to recover nominal damages, as above mentioned. This the court failed to do. On the contrary, the jury was instructed that if it answered the issue as to whether the plaintiff's property was damaged by the defendant "No," it would not consider at all the issue as to the amount which the plaintiff was entitled to recover. Accordingly, the jury did not answer that issue.

Upon the question of the cause of certain cracking and breaking of the plaintiff's building, the defendant's witness Greenwood, found by the court to be an expert in construction engineering, was permitted, over objection by the plaintiff, to answer a long hypothetical question, the material portions of which were as follows:

> "[I]f the jury should find from the evidence that in 1946 Mr. Schafer constructed a warehouse building * * *; that the building was in a low area which used to be a marshy area, but the area had been filled in; that the building was constructed with cinder blocks * * *; that the foundation was made of cinder blocks filled in with dirt; that is, the footings were constructed and then the dirt was filled in inside the footings; that the walls were built on a cement floor which was laid on top of fill dirt; * * * that in the Fall of 1960 a ditch was dug from two to four feet wide between the spur track and the building * * *; that the ditch was two to three feet deep, and water stood there in the ditch most of the time; that a horizontal crack appeared in the east wall of the building and that crack extended lengthwise down the building, with the cinder block bulging out or separated at the crack; *that some evidence indicated that the crack did not appear until a year or so after the ditch was dug, and other evidence tended to show that the crack existed before the ditch was dug;* that water stood on the spur track and the ditch was dug to drain the water off the spur track; that the ditch was filled in 1962, but the building continued to crack and the long horizontal crack separated more in the last few years; that the natural drain of the water on the west side of the building *may have been* from south to north, but the water in the ditch did not *appear to* drain, do you have

an opinion satisfactory to yourself as to what could have caused the long horizontal crack in the building and the walls to bulge out?" (Emphasis ours.)

The witness answered that it was his opinion:

"That the building settling, or the cracks along that wall, were created or attributed to inward forces pushing out, along with a portion of the roof structure, creating cracks, but mainly the inward pressure of the dirt kicking the wall out. That is the dirt below the cement floor."

The witness was then asked to explain his answer and, again over objection, included in the explanation the following:

"*To explain exactly what happened,* it is like this: The dirt is inside the building, inside the wall, and * * * my opinion is that the inside dirt, the dirt inside of the building, pushed the wall out. The dirt did settle, and the dirt did let the floor down, and the floor went down and kicked the wall out at the bottom. These two things are the two things that happen when we have a dirt settlement inside the retaining wall. *That railroad didn't cause it.* The railroad is four feet out, anyway. As the floor sagged and a portion of it went down and the dirt beneath it gave away, or settled, it rotated. *That is what this did.* (Emphasis ours.)

* * * *

"In my opinion, the ditch did not have anything to do with the horizontal crack in the wall. I have seen similar cracks in buildings where there were no ditches."

The witness, Greenwood, inspected this building shortly before the trial, which was some five years after the digging of the ditch and the appearance of the cracks in question.

When, as here, an expert witness is called upon to assist the jury by giving his opinion as to the inference or conclusion to be drawn as to the cause of an event, the premise or premises upon which his opinion rests must be made known to the jury, in order that the jury may properly evaluate his opinion as a guide to them in reaching their own conclusion. Wigmore on Evidence (3d Ed.) § 672; Rogers on Expert Testimony (3d Ed.) § 54. As was said by Moore, J., speaking for the Court in *Service Co. v. Sales Co.,* 259 N.C. 400, 414, 131 S.E. 2d 9:

"The facts upon which an expert grounds his opinion 'must be brought before the jury in accordance with the recognized rules of evidence. When these facts are all within the expert's

> own knowledge, he may relate them himself and then give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross examination.' "

Here, the witness, Greenwood, inspected the building and stated certain conditions which he observed five years after the digging of the ditch and the appearance of the crack. However, counsel for the defendant did not ask Greenwood to give his opinion as to the cause of the cracking of the wall on the basis of Greenwood's own observation. He asked for this opinion on the basis of the several hypotheses stated in his question to the witness. These hypotheses leave suspended in uncertainty the very material question of whether the crack appeared before or after the ditch was dug. The question was so worded that the jury could not determine whether the witness reached his opinion, "The ditch did not have anything to do with the horizontal crack in the wall," on the premise that the crack was in existence before the ditch was dug, or on the premise that it first appeared after the ditch was dug. Again, the jury could not determine, from the hypotheses stated in the question, whether the expert's opinion was based upon the premise that the ditch disturbed the nautral drainage or upon the opposite premise. Since the question called for an opinion upon the basis of premises not clearly stated therein, it would be impossible for the jury to correctly evaluate the opinion given in the light of the jury's own ultimate determination of the disputed fact as to whether the crack appeared before or after the ditch was dug. The objection to the question should, therefore, have been sustained and the witness should not have been permitted to state his opinion as to the cause of the crack until the precise basis for his opinion was before the jury.

It was also error to permit the witness, in the form of an explanation of the reasoning which led him to his opinion, to state "exactly what happened," since this witness did not observe the event in question but inspected the building for the first time five years after it occurred. In *Patrick v. Treadwell,* 222 N.C. 1, 21 S.E. 2d 818, Devin, J., later C.J., speaking for the Court, said:

> "However, while the tendency is to liberalize the rule as to this class of opinion evidence, and to hold it admissible when it tends to aid the jury in the search for truth, * * * even when the opinion of the expert based upon peculiar knowledge, skill and experience is given as to the ultimate question in issue, this rule should not be relaxed to the extent of opening the door to the statement of an evidential fact in issue beyond the knowledge of the witness under the guise of an expert opinion."

When an expert is testifying as to his opinion, concerning the cause of an event which he did not observe, the proper form of question is one which states, hypothetically, premises as to which there is evidence already in the record. The question should then call for the opinion of the expert as to whether the facts so supposed could have caused the condition in question, rather than calling for the witness' conclusion as to what actually did cause it. *Service Co. v. Sales Co., supra; Patrick v. Treadwell, supra; Summerlin v. R. R.*, 133 N.C. 550, 45 S.E. 898; Stansbury, North Carolina Evidence, § 137.

No doubt, the witness' introductory remark, "to explain exactly what happened," was an unfortunate choice of words and he meant simply to state the operation and sequence of certain forces and movements of the building rather than the cause of those movements. However, these are the words with which he introduced his statement, "That railroad didn't cause it." Again, in this statement, he may have meant the railroad track or the operation of the trains upon it did not cause the crack in the building wall, but his words are equally susceptible to the interpretation that the defendant (the railroad) did not cause the crack by digging the ditch. We think that the answer, which was given over objection following the witness' announcement that he was going to state "exactly what happened," amounted to "the statement of an evidential fact in issue beyond the knowledge of the witness under the guise of an expert opinion," such as was warned against in *Patrick v. Treadwell, supra.*

Upon cross examination of the plaintiff's witness, Smith, who actually dug the ditch for the railroad, the defendant was permitted, over objection, to ask: "Now, Mr. Smith, based upon your examination of the building in 1960, do you have an opinion as to what caused the walls to bulge out?" The only examination made by this witness in 1960, which was when he was engaged in the digging of this ditch, was described by the witness as follows:

> "I will tell you what investigation I made when I was out there in 1960. I just observed that the building was cracked across the end and across the back. I went up to the cracks; I was right there by them. I was right touching it and standing there. I had my hand on the building, leaning on the building, as far as that goes."

This is not an inspection of the building such as would qualify an expert to give an opinion as to the cause of the crack in the wall. Of course, this was competent evidence upon the question of whether the crack in question existed before the ditch was dug, but

this witness did not stop there. He was asked, on the basis of this observation, to express an expert opinion as to the cause of the crack. Regardless of the qualification of the witness, if his testimony shows that his proposed opinion is based on inadequate data his opinion should be excluded. *Service Co. v. Sales Co., supra;* Stansbury, North Carolina Evidence, § 136. The mere casual observation of a crack in a building wall by one who is present for an entirely different purpose is not a sufficient basis upon which he may be allowed to express an opinion as to the cause of the crack.

The admission of these opinions as to the cause of the cracking of the building wall was clearly prejudicial to the plaintiff.

New trial.

STATE v. JIMMIE WELCH.

(Filed 14 January, 1966.)

1. Criminal Law § 162—

In this prosecution for forgery, in which the State introduced evidence of defendant's guilt of forging and uttering four checks, the introduction in evidence of two other checks which had been forged, but which were not referred to in the indictment and which were not connected with them by evidence, and which the court thereafter instructed the jury not to consider, *held* not prejudicial.

2. Forgery § 2—

Evidence tending to show that the name of the maker of a check was forged, that defendant forged an endorsement, and obtained value therefor, is sufficient to overrule defendant's motion for nonsuit, and the fact that there was no evidence that the name of the payee was forged is immaterial.

APPEAL by defendant from *Copeland, S.J.,* 14 June 1965 Special Criminal Session of MECKLENBURG.

Defendant was charged in four separate bills of indictment, in Cases Nos. 44-597, 44-598, 44-599 and 44-601, each indictment reading as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Jimmie Welch, late of the County of Mecklenburg, on the 23rd day of April, A.D. 1965, at and in the County aforesaid, unlawfully and feloniously, of his own head and imagination, did wittingly and falsely make, forge and counterfeit,

and did wittingly assent to the falsely making, forging and counterfeiting a certain check, which said forged check is as follows, that is to say: (a facsimile of which check is attached to and contained in the Indictment included in the Record Proper) with intent to defraud, against the form of statute in such case made and provided, and against the peace and dignity of the State.

"AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT, That the said Jimmie Welch afterward, to wit, on the day and year aforesaid, at and in the County aforesaid, wittingly and unlawfully and feloniously did utter and publish as true a certain false, forged and counterfeited check is *(sic)* as follows, that is to say: (A facsimile of which check is attached to and contained in the Indictment included in the Record Proper) with the intent to defraud—he, the said Jimmie Welch at the time he so uttered and published the said false, forged and counterfeited check then and there well knowing the same to be false, forged and counterfeited—against the form of the statute in such case made and provided, and against the peace and dignity of the State."

All four checks were dated 23 April 1965 and were drawn for the same amount, to wit, $84.62, payable to Edwin Calvert Baucom. Each check was drawn on the printed check of A B C Auto Parts and Body Shop, 321 Summit Avenue, Charlotte, North Carolina, and purportedly signed by W. C. Newland, owner of said establishment.

The State's evidence tends to show that check No. 575, State's Exhibit No. 1, was cashed at Norman's Market, in Charlotte, on 26 April 1965. Defendant presented this check in payment of groceries amounting to fifteen or twenty dollars. For identification, defendant presented a driver's license, No. 2105283, issued in the name of Edwin Calvert Baucom.

Check No. 561, State's Exhibit No. 2, was cashed at Benson Sedgefield Drugs, Inc., in Charlotte, on 26 April 1965, by defendant, who had purchased merchandise, mostly cosmetics, in the approximate amount of fifteen dollars. This check was already endorsed when presented, and for identification the defendant presented a driver's license, No. 2105283, issued in the name of Edwin Calvert Baucom.

Check No. 577, State's Exhibit No. 3, was cashed on 26 April 1965 at an Esso Station, owned and operated by William Gray McArver, on West Boulevard and Remount Road, in Charlotte. Defendant purchased a tire and tendered the check in payment. He en-

dorsed the check by signing the name Edwin Calvert Baucom on the back thereof in the presence of the employee who cashed it.

Check No. 573, State's Exhibit No. 4, was cashed at Harris-Teeter Super Markets, in Charlotte, on 26 April 1965. This check was presented to the cashier by defendant who presented for identification a driver's license, No. 2105283.

Each of the foregoing checks was duly deposited and returned unpaid by the Bank of Charlotte, Charlotte, North Carolina.

The four cases were consolidated for trial.

The State's evidence further tends to show that sometime during April 1965, forty-two of the printed blank checks of the A B C Auto Parts and Body Shop were removed from its check book, being checks Nos. 551 through 592 inclusive; that W. C. Newland, the owner of said establishment and whose name purported to be signed as the maker of each of the foregoing checks set out in the respective bills of indictment, testified that he did not sign any of the four checks described and did not authorize the defendant or any other person to do so.

Lawrence A. Kelley, a witness for the State, who was found to be an expert in handwriting, testified that he examined the signature of W. C. Newland appearing on the State's exhibits and also made a comparison of the endorsement of Edwin Calvert Baucom, and, in his opinion, both names were written by the same person. The defendant wrote the names W. C. Newland and Edwin Calvert Baucom several times on a paper which was introduced in evidence as State's Exhibit No. 15. The handwriting expert testified that he made a comparison of defendant's handwriting appearing on State's Exhibit No. 15 with the names W. C. Newland and Edwin Calvert Baucom appearing on the four checks involved herein, and, in his opinion, the names on such checks were written by the same person who wrote the names on State's Exhibit No. 15.

The jury returned a verdict of guilty in each case as charged in the bills of indictment, and from the judgments imposed thereon the defendant appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harry W. McGalliard for the State.

W. Herbert Brown, Jr., for defendant.

DENNY, C.J. The defendant assigns as error the State's testimony with respect to checks Nos. 560 and 578, which were not the subject of any of the indictments involved in the trial. Over the objection of the defendant, the testimony was admitted on the assurance of the solicitor that such evidence would be connected with

the indictments. The jury was instructed that the evidence was admitted only on such condition. No such evidence was offered, and the court instructed the jury to disregard the evidence as to these extra checks. When the court charged the jury, the jury was again instructed to disregard the evidence with respect to such checks.

Checks Nos. 560 and 578 were two of the printed checks of the A B C Auto Parts and Body Shop that had been stolen from the office of such establishment. The only evidence elicited from the witness W. C. Newland was whether or not the name W. C. Newland, appearing on these respective checks as the purported maker thereof, was his signature, and he testified that it was not. These checks were not admitted in evidence, and no evidence was admitted disclosing to whom such checks were made payable or whether or not the checks had been endorsed and negotiated.

It is a little difficult to understand why the solicitor felt it necessary to introduce evidence with respect to these two checks. However, in our opinion, under the facts and circumstances disclosed by the record on this appeal, this evidence was not sufficiently prejudicial to warrant a new trial and we so hold. This assignment of error is overruled.

The defendant assigns as error the ruling of the court below in denying his motion for judgment as of nonsuit at the close of the State's evidence. Defendant rested at the close of the State's evidence and renewed his motion for judgment as of nonsuit which was again denied.

The appellant contends that the State's evidence is insufficient to withstand his motion for judgment as of nonsuit in that the State did not show Edwin Calvert Baucom, the purported payee, had not authorized him to endorse these checks. This contention is without merit. The defendant is charged in the bills of indictment with the forgery of these checks and with uttering them. When the State offered evidence to the effect that W. C. Newland never signed any of these checks and never authorized the defendant or any other person to do so, and further offered evidence to the effect that the defendant forged, endorsed and passed these checks and received the face value of $84.62 on each check, the State's evidence was sufficient to carry the case to the jury.

The State's evidence also tended to show the essential elements required to establish forgery as laid down in *S. v. Phillips*, 256 N.C. 445, 124 S.E. 2d 146, and *S. v. Dixon*, 185 N.C. 727, 117 S.E. 170, as follows: "(1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud."

In the cases of *S. v. Peterson*, 129 N.C. 556, 40 S.E. 9, 85 Am. St. Rep. 756, and *S. v. Jestes*, 185 N.C. 735, 117 S.E. 385, this Court upheld a charge to the effect that "(w)hen one is found in the possession of a forged instrument and is endeavoring to obtain money or advances upon it, this raises a presumption that defendant either forged or consented to the forging such instrument, and nothing else appearing the person would be presumed to be guilty." 164 A.L.R. Anno. — Possession or Uttering of Forged Paper, page 625.

The remaining assignments of error are without sufficient merit to justify disturbing the verdict below, and they are overruled.

No error.

STATE v. JOSEPH STUBBS.

(Filed 14 January, 1966.)

1. Crime Against Nature § 2—

The indictment in this case *held* sufficient to charge defendant with committing the crime against nature with another male. G.S. 14-177.

2. Constitutional Law § 36—

Punishment which does not exceed the limits fixed by statute cannot be cruel or unusual in the constitutional sense.

3. Crime Against Nature § 1; Criminal Law § 1—

The intent and purpose of G.S. 14-177, both prior and subsequent to the 1965 amendment, is to punish persons who commit perverted sexual acts which constitute offenses against public decency and morality, and the contention that homosexuality is a disease, and therefore not an offense to public decency and morality, is untenable.

4. Criminal Law § 159—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant Stubbs from *Huskins, J.*, 5 October 1964 Regular "A" Criminal Session of MECKLENBURG.

At this Session two indictments, one charging Joseph Stubbs on 1 August 1964 with committing the crime against nature with Lester Emmett Carter, a violation of G.S. 14-177, and the other charging Lester Emmett Carter on 1 August 1964 with committing the crime against nature with Joseph Stubbs, a violation of G.S. 14-177, were consolidated for trial.

Stubbs and Carter each pleaded not guilty. Verdict: "Joseph Stubbs and Lester Emmett Carter are guilty of crime against nature with the recommendation of medical help."

From a judgment of imprisonment of not less than seven years nor more than ten years, Stubbs appealed to the Supreme Court. The court recommended that defendant be given medical and psychiatric examination and afforded such treatment as such examination may indicate. There is nothing in the record before us to indicate the judgment against Carter or to show whether he appealed or not. By order of the trial court Stubbs was allowed to appeal *in forma pauperis.*

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

A. A. Coutras for defendant appellant.

PARKER, J. After the trial in the superior court the indictment against defendant Stubbs, upon which he was tried, convicted, and sentenced, was lost. On 10 June 1965 defendant Stubbs filed in this Court a petition for a writ of *certiorari* alleging, *inter alia,* that in preparing his statement of case on appeal no indictment against him could be found in the records of Mecklenburg County Superior Court, and he could not proceed with his appeal, and praying this Court to allow his writ in order that the entire record be reviewed. This Court in conference on 23 July 1965 allowed his petition for a writ of *certiorari.* On 10 September 1965 there was filed in the office of the clerk of this Court a case on appeal settled and agreed to by counsel for defendant Stubbs and the solicitor for the State. It is manifest from this record that counsel for the State and defendant Stubbs disagree as to the indictment upon which Stubbs was tried. All of the foregoing is set forth in detail in our decision in this case filed 13 October 1965 and reported in 265 N.C. 420, 144 S.E. 2d 262, which it would be supererogatory to repeat here, for it can be read in that opinion. This opinion concluded in the following language:

> "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."

Pursuant to this opinion, defendant Stubbs made a motion in the Superior Court of Mecklenburg County on 24 November 1965 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, upon which he was tried, convicted, and sentenced in this case. Counsel for the State and for the defendant were present, offered evidence, and made arguments. Judge Huskins entered an order finding the following facts: That at the 7 September 1964 Criminal Session of the Superior Court of Mecklenburg County the duly constituted grand jury for that county returned a true bill of indictment against the defendant Joseph Stubbs, charging that Joseph Stubbs on 1 August 1964 with force and arms at and in Mecklenburg County "did unlawfully, wilfully, maliciously, and feloniously commit the abominable and detestable crime against nature with mankind, to wit, the act of fellatio with Lester Emmett Carter, a male person over the age of 16 years." In the interest of decency we have omitted the indictment's description of the act of fellatio. That upon this indictment at the 5 October 1964 Regular "A" Criminal Session of Mecklenburg County Superior Court the defendant Stubbs was tried, convicted, and sentenced. Judge Huskins ordered that the case on appeal be corrected to speak the truth by inserting therein a true copy of the true indictment as returned by the grand jury and on which defendant Stubbs was tried, convicted, and sentenced, as above set forth, and that his order be certified to the Supreme Court with a copy of the true bill of indictment attached, to the end that his order and a copy of the indictment be attached to and become a part of the record on appeal in the instant case. This certification has been properly done under the signature and seal of the clerk of the Superior Court of Mecklenburg County and sent to this Court, where it has become a part of the record in this case.

The indictment upon which defendant Stubbs was tried, convicted, and sentenced as found by Judge Huskins sufficiently charges a violation of G.S. 14-177, Crime against Nature, and is a valid indictment. *S. v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767; *S. v. Fenner*, 166 N.C. 247, 80 S.E. 970.

Carter testified in his own behalf; Stubbs did not. The State's evidence was amply sufficient to carry the case to the jury against

both Carter and Stubbs and to support the judgment against Stubbs, and also against Carter. It would serve no useful purpose to soil the pages of our Reports with its sordid details.

Defendant contends that his prison sentence of not less than seven years nor more than ten years constitutes "cruel and unusual punishment" within the prohibition of the Eighth Amendment to the Federal Constitution which applies to the states through the due process clause of the Fourteenth Amendment. This contention is not tenable. The sentence imposed by Judge Huskins is within the limits authorized by G.S. 14-177 in force at the time of the commission of the offense and at the time of the trial, and is also within the limits authorized by G.S. 14-177 as amended by the 1965 General Assembly. When punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense. *S. v. Whaley*, 263 N.C. 824, 140 S.E. 2d 305; *S. v. Welch*, 232 N.C. 77, 59 S.E. 2d 199; *S. v. Stansbury*, 230 N.C. 589, 55 S.E. 2d 185.

Defendant contends G.S. 14-177 prior to the 1965 amendment is unconstitutional on its face "because the act of a crime against nature does not serve and comply with the legislative intent and purpose of the statute." His argument in essence is that the legislative intent of this statute is to punish offenses against public morality and decency, and if homosexuality is an illness, it cannot in any way be offensive to public morality and decency, and it should naturally follow that if the intent of the statute is not served then the statute on its face is unconstitutional. Prior to the 1965 amendment to G.S. 14-177, the punishment by that statute was fixed at imprisonment in the State's prison for not less than five nor more than sixty years. The 1965 amendment provided that if any person shall commit the crime against nature with mankind or beast he shall be guilty of a felony, and shall be fined or imprisoned, in the discretion of the court. Defendant's contention is overruled. It is manifest that the legislative intent and purpose of G.S. 14-177 prior to the 1965 amendment and since is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality. In speaking of indictments for sodomy, the Court said in *S. v. O'Keefe, supra:* "According to Blackstone, the English law treated the offense in its indictments as unfit 'to be named among Christians.' IV Blackstone's Commentaries, p. 215. Our courts are no less sensitive than their English predecessors."

We have examined carefully the one assignment of error to the charge of the court in respect to intoxication. Reading the charge

of the court contextually it fairly presented the applicable law and is without error.

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

We have carefully considered all defendant's assignments of error and the contentions made in his brief and no reason appears sufficient to disturb the verdict and judgment below. In the trial we find

No error.

ELSIE JOHNSON WRIGHT, JULIA DAVIS WRIGHT CHANEY, DAVID WILSON WRIGHT, JR. AND HUGH COBB WRIGHT v. WILLIAM A. VADEN, TRUSTEE FOR THE BENEFICIARIES UNDER THE WILL OF THE LATE W. W. DAVIS, DECEASED, AND CHARLES W. CAMPBELL, GUARDIAN *ad litem* FOR JEAN JOHNSON WRIGHT, AND DAVID WILSON WRIGHT, III, MINOR CHILDREN OF DAVID W. WRIGHT, JR., AND WILLIAM DAVID CHANEY AND HARVEY LESTER CHANEY, III, MINOR CHILDREN OF JULIA DAVIS WRIGHT CHANEY, SALLY LYNN WRIGHT AND HUGH COBB WRIGHT, JR., MINOR CHILDREN OF HUGH COBB WRIGHT, AND ALL OTHER LINEAL DESCENDANTS OF ELSIE MAY JOHNSON, WHO IS ALSO KNOWN AS ELSIE MAY JOHNSON WRIGHT, INCLUDING SUCH UNBORN CHILDREN OR OTHER LINEAL DESCENDANTS OF THE SAID ELSIE MAY JOHNSON WRIGHT.

(Filed 14 January, 1966.)

1. Venue § 3—

An action for the construction of a will should be instituted in the county where the will was admitted to probate.

2. Venue § 1—

Failure to object to improper venue constitutes a waiver thereof.

3. Wills § 32—

The rule in *Shelley's* Case applies where there is a remainder over after a life estate to the heirs general of the life tenant, and if the words used, regardless of phraseology, disclose an intent to carry the remainder to such heirs the rule applies as a rule of property, notwithstanding testator may have intended to convey only a life estate to the first taker.

4. Same—

The word "purchaser" when used with reference to the rule in *Shelley's* Case designates one who takes an estate in his own right under the instrument, while words of limitation define the extent or quality of the estate.

5. Same—

The word "children" is usually a word of purchase and does not attract the rule in *Shelley's* Case unless the language of the instrument discloses that the word was used to designate heirs generally.

6. Same—

A devise to a life tenant and at her death "to the children or other lineal descendants of the said" life tenant * * * "to them and their heirs, executors and administrators absolutely," *held* not to attract the rule in *Shelley's* Case, since it is apparent that testator was not describing heirs general to take in indefinite succession but wished the remainder to go to the children of the life tenant who survived the life tenant and to the issue of children who predeceased her.

APPEAL by plaintiffs from *Johnston, J.*, May 1965 Civil Session of ROCKINGHAM.

Action for a declaratory judgment to construe the will of W. W. Davis. The pleadings establish these facts:

The will, dated November 20, 1913, was probated in Gaston County on January 10, 1924. By the first provision of his will, testator bequeathed and devised all his property to his wife, Julia Davis, for her lifetime. The second and third provisions are as follows:

> "Second — After the death of my said wife, I give, bequeath and devise all of my property, real, personal and mixed, to Elsie May Johnson, to have and to hold the same to her use for and during her life time.
>
> "Third — After the death of my said wife and after the death of said Elsie May Johnson, I give, bequeath and devise all of my property, real, personal and mixed, to the children or other lineal descendants of said Elsie May Johnson, to have and to hold the same to them and their heirs, executors and administrators absolutely."

Julia Davis is dead. Elsie May Johnson married David M. Wright. To them were born three children, Julia Davis Wright Chaney, Davis Wilson Wright, Jr., and Hugh Cobb Wright. All three children are over 21 years of age. Elsie May Johnson (Wright) is now 65 years of age. Her husband is dead and she has not remarried.

The assets of testator's estate, now "in the form of cash and other lawful investments," are held by defendant William A. Vaden as trustee for the testamentary beneficiaries. Plaintiffs are Elsie May Johnson (Wright) and her three children. Defendants are the trustee and grandchildren of Elsie May Johnson (Wright) and all

other lineal descendants of Elsie May Johnson (Wright) yet unborn. The minor grandchildren and unborns are represented by their duly appointed guardian *ad litem.*

Plaintiffs contend that the devise to Elsie May Johnson (Wright) constituted an estate in tail which, under the rule in *Shelley's Case* and G.S. 41-1, was converted into a fee simple, and that she is presently entitled to testator's entire estate. Defendants contend that Elsie May Johnson (Wright) took only a life estate. From a judgment decreeing that she took a life estate in the property, "and that upon her death, her children, or other lineal descendants, shall take the remainder in said property in fee," plaintiffs appeal.

McMichael & Griffin for plaintiff appellants.

Charles W. Campbell, Guardian ad litem for Jean Johnson Wright et al, defendant appellees.

SHARP, J. This action, being for the construction of a will, should have been brought in Gaston County where the will was admitted to probate. Since, however, no objection on this ground was taken in the court below, the improper venue was waived. *Devereux v. Devereux,* 81 N.C. 12; McIntosh, N. C. Practice and Procedure § 804 (1956).

The question presented by this appeal is whether, in the devise of the remainder after her death, the words *"to the children or other lineal descendants* of said Elsie May Johnson" are words of purchase, or words of limitation which bring the devise within the rule in *Shelley's Case.* (Emphasis added.)

> "The rule in *Shelley's Case* was first stated, 1 Coke 104, in 1581, and is as follows: 'When an ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not a word of purchase.' " *Crisp v. Biggs,* 176 N.C. 1-2, 96 S.E. 662.

See also *Martin v. Knowles,* 195 N.C. 427, 142 S.E. 313; *Nichols v. Gladden,* 117 N.C. 497, 500, 23 S.E. 459, 460. " 'The rule . . . applies whenever judicial exposition determines that *heirs* are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term *heirs.*' " *Martin v. Knowles, supra* at 430, 142 S.E. at 314.

Without doubt, testator intended that Elsie May Johnson (Wright) should take only a life estate in his property. If, how-

ever, the rule in *Shelley's Case* is applicable, she is entitled to the entire corpus of testator's estate, for it operates " 'as a rule of property without regard to the intent of the grantor or devisor.' " *Hammer v. Brantley,* 244 N.C. 71, 72, 92 S.E. 2d 424, 425; *accord, Chappell v. Chappell,* 260 N.C. 737, 133 S.E. 2d 666. Furthermore, with us the Rule applies to personalty as well as to realty. *Riegel v. Lyerly,* 265 N.C. 204, 143 S.E. 2d 65.

In considering the applicability of the rule in *Shelley's Case,* it is important to draw and constantly keep in mind the difference between words of purchase and words of limitation. When used with reference to the Rule, words of purchase give the remainder to designated persons who thus take in their own right under the will or conveyance, and not by descent as heirs of the first taker. A purchaser, therefore, is one who acquires property in any manner other than by descent. See 1 Mordecai, Law Lectures § 648 (2d Ed. 1916); Black, Law Dictionary 1399 (4th Ed. 1951); Ballentine, Law Dictionary 1369-70 (2d Ed. 1948); 96 C.J.S., Wills § 870 (1957). Words of limitation denote the creation of an estate and define its extent or quality. *Starnes v. Hill,* 112 N.C. 1, 19-20, 16 S.E. 1011, 1016; *Campbell v. Everhart,* 139 N.C. 503, 511, 52 S.E. 201, 204; Ballentine, *op. cit. supra* 760; Black, *op. cit. supra* 1076. They are words

> "which by referring to some other words in the instrument describe the extent or size of an estate that has already attached to some person. And so when the Rule says that the words 'heirs' or the 'heirs of the body' of *A* are words of limitation and not words of purchase, it simply means that 'heirs' or the 'heirs of the body' refer to and are read in connection with the estate given to *A*, extending or modifying that estate, and are not taken as describing a group to whom an estate will first attach." Block, The Rule in *Shelley's* Case in North Carolina, 20 N.C.L. Rev. 49, 50 (1941).

Plaintiffs contend that the devise "to the children or other lineal descendants of said Elsie May Johnson" is the equivalent of a devise to the heirs of her body and that the words are, therefore, words of limitation which create in her a fee tail, converted by G. S. 41-1 into a fee simple.

It is settled in North Carolina, and generally, that the word *children* is ordinarily a word of purchase. *Moore v. Baker,* 224 N.C. 133, 29 S.E. 2d 452; 47 Am. Jur., *Shelley's* Case § 18 (1943). *Children,* standing alone, does not refer to an indefinite line of succession from generation to generation; they are a class within heirs generally. "When the devise is to one for life and after his death to his children or issue, the rule has no application, unless it mani-

festly appears that such words are used in the sense of heirs generally." *Faison v. Odom,* 144 N.C. 107, 109, 56 S.E. 793, 794. *Accord, In re Will of Wilson,* 260 N.C. 482, 133 S.E. 2d 189; *Moore v. Baker, supra; Bobbitt v. Pierson,* 193 N.C. 437, 137 S.E. 160; *Hutton v. Horton,* 178 N.C. 548, 101 S.E. 279; *Smith v. Moore,* 178 N.C. 370, 100 S.E. 702; *Wilkinson v. Boyd,* 136 N.C. 46, 48 S.E. 516; *Hauser v. Craft,* 134 N.C. 319, 46 S.E. 756.

> " 'Thus, even the word *children,* aided by the context, or the word *issue,* uncontrolled by the context, may have all the force of the word *heirs,* and then the rule applies; while the word *heirs,* restrained by the context, may have only the force of the word *children,* and then the rule is utterly irrelevant. These are preliminary questions, purely of construction, to be considered without any reference to the rule, and to be solved by, exclusively, the ordinary process of interpretation. *This* point, kept steadily in view, would have prevented infinite confusion.' " *Martin v. Knowles, supra* at 430, 142 S.E. at 314.

In paragraph Third of his will, had testator stopped with the word *children,* no question of the application of the Rule could have arisen. To sustain their position that the addition of the words "or other lineal descendants" invokes the Rule, plaintiffs rely on the case of *In re Will of Wilson, supra.* In *Wilson,* after devising lands to her three nephews and a grandnephew, testatrix said, "at there death I want the place to go to there children & so on—I would love for it to always be the Spain place." This Court was of the opinion that the phrase *& so on,* coupled with her expressed desire "for it to always be the Spain place," indicated testatrix' intention that each succeeding generation should take the property. The Court held, therefore, that the *Wilson* language was equivalent to "heirs of the body." The result was that, under the rule in *Shelley's Case* and the doctrine of merger, the nephews and grandnephew took an estate tail, converted by G.S. 41-1 into a fee simple. See *Martin v. Knowles, supra* at 432, 142 S.E. at 314-15.

In the instant case, however, we do not think the superadded words "or other lineal descendants . . . to have and to hold the same to them and their heirs, executors and administrators absolutely" demonstrate that testator contemplated an indefinite succession from generation to generation. On the contrary, the finality of the term *absolutely* and the use of the disjunctive *or* clearly indicate testator's intention that his estate should vest at the death of Elsie May Johnson and that, should any of her children predecease her, the issue of such child would take the parent's share. As the "absolute" takers, he designated those of her children who sur-

vived her or, alternatively, the issue of children predeceasing her. Members of such a class are not heirs "who take generally without exception, as a class of inheritable persons." *Miller v. Harding,* 167 N.C. 53, 54, 83 S.E. 25, 26. In its reference to descendants, the devise in question refers only to descendants of a particular class of heirs, *i.e.,* predeceased children of the life tenant. Thus, the words "children or other lineal descendants" are words of purchase, and the rule in *Shelley's Case* has no application.

We hold, therefore, that Elsie May Johnson (Wright) has only a life estate in the property of testator. At her death, her children then surviving, together with the issue of any predeceased child (which issue will represent their parent), will take the fee simple.

The judgment below is

Affirmed.

JOHNNIE F. EDWARDS AND DR. JOHN D. MESSICK, AND THE AETNA INSURANCE CO. OF HARTFORD, CONNECTICUT v. J. C. HAMILL AND COASTAL REFRIGERATION COMPANY, INC., DOING BUSINESS AS ALL-WEATHER COOLING & HEATING COMPANY.

(Filed 14 January, 1966.)

1. Negligence § 24a— Evidence held to permit inference that acetylene torch caused explosion and employee should have apprehended danger.

Evidence that the floors of a house had just been lacquered, that fumes were strong and pervading, that the employee of the heating and cooling contractor was told that he could not walk on the floors for several hours and also not to strike a match "around here," together with evidence competent as against the employee alone that he went under the house and used an acetylene torch on coils connected with the duct work leading to the rooms, *held* sufficient to be submitted to the jury on the question of whether the employee failed to exercise the care of a reasonably prudent man under the circumstances in the face of a danger which he should have apprehended, but as to the heating and cooling contractor, there being no evidence competent against it that the employee did light the acetylene torch, nonsuit was proper.

2. Trial § 21—

On motion to nonsuit, plaintiffs' evidence must be taken as true and considered in the light most favorable to them.

3. Pleadings § 29—

On defendant's motion for nonsuit, inferences of fact may not be drawn from evidentiary recitals in the pleadings unless such recitals have been introduced in evidence.

4. Evidence § 43—

The trial court's findings, supported by evidence, as to the qualifications and field of an expert witness are binding on appeal when supported by competent evidence.

APPEAL by plaintiffs from *Bone, E.J.,* May 24, 1965 Civil Session of PITT.

Plaintiffs, J. F. Edwards as general contractor, and Dr. John D. Messick as owner, instituted this action against J. C. Hamill and his employer, Coastal Refrigeration Company, Inc., doing business as All-Weather Cooling & Heating Company, to recover damages resulting from an explosion and flash fire in the dwelling which Edwards was constructing for Messick. The house was covered by a policy of builder's-risk insurance issued by plaintiff Aetna Insurance Company, which paid $5,349.60 of the loss of $5,764.79.

Plaintiffs allege: On June 14, 1962, the house was nearly completed. That morning, L. H. Whitehurst, a subcontractor of Edwards, applied to the floors the third and final coat of lacquer, a highly volatile, inflammable finishing material. Before he finished, defendant Hamill, the agent and employee of the corporate defendant, which had the air-conditioning contract, came to the house for the purpose of doing some work. He was warned by Whitehurst that the floors had just been varnished and that he must not enter the house for two hours. While waiting to check the thermostat inside the house, Hamill went underneath to make certain connections to the air-conditioning unit, which used the same system of ducts as the heating unit. The ducts were conjoined and opened, without obstruction, into the rooms which had just been lacquered. Notwithstanding that he knew or should have known that flammable vapors from the floor lacquer would probably settle into this ductwork, Hamill, using an acetylene torch, undertook to remove caps from the cooling coils of the air-conditioning unit. As a result, there was a flash fire and an explosion, which did damage in the amount of $5,764.79 to the house.

Defendants admit that, at the time in question, Hamill was the employee of All-Weather Cooling & Heating Company, acting within the course and scope of his employment. They deny, however, that he was in anywise negligent. They aver that Whitshurst asked Hamill not to walk on the floors for 1½ hours but that he negligently failed to warn him that the lacquer had formed a flammable gas which might become ignited by work done beneath the house; that Hamill had no knowledge that such a hazardous condition existed. Defendants allege that negligence of Whitehurst was the sole proximate cause of plaintiffs' damage. Also, in their answer,

defendants alleged a cross action for contribution against Whitehurst, but his demurrer to this cross action was sustained. *Edwards v. Hamill,* 262 N.C. 528, 138 S.E. 2d 151.

At the trial, plaintiffs offered evidence which tended to show: On the morning of June 14, 1962, Whitehurst was applying the final coat of lacquer to the floors of the Messick house. As he and his employees were finishing the last rooms, Hamill appeared. He said he wanted to check the thermostat in the hall, and inquired if he could walk on the floors. Whitehurst told him that "it would be at least a couple or three hours before they would be dry enough to walk on." Hamill replied that he had work he could do outside or under the house. Observing that he had a book of matches in his hand, Whitehurst said to him: "Whatever you do, don't strike a match around here." The lacquer which was being applied, according to Whitehurst, "carries a real high odor; if you walk into it or crawl under the house when it's being applied to a floor it will almost burn your eyes out."

When Whitehurst finished his work, he blocked off the front door, locked the back door, and, with his employees, left the premises. The windows had been opened a foot at the top and bottom to create a circulation of air which would stir up the heavy vapors and speed the drying process. Except on a very hot day these fumes settle rather than rise. At that time there was no electric current in the house.

The same ductwork was designed both to heat and to cool the house. Under the house, the main trunkline from the furnace branched off into ducts leading to each room. Copper tubes and coils from the cooling unit were installed in the front of the "one huge duct at the end of the heating system."

After his conversation with Whitehurst, Hamill went under the house. While he was there an explosion occurred. The fire was so hot that trees in the street were burned almost to a crisp; the bay window was blown out into the yard; walls were blackened; part of the woodwork, particularly the floor in the livingroom, was burned over; some of the heat registers were melted.

Hamill told J. L. Hassell, an insurance adjuster for Aetna Insurance Company, that after his conversation with Whitehurst he went under the house to connect the copper line from the air-conditioning compressor to the cooling coils which were already in place inside the ductwork; that each coil came with a cap which had to be removed before the connection could be made; and that while he was using an acetylene torch to remove one of the caps, a terrific explosion occurred. Hassell testified that Hamill told him:

"(T)he atmosphere, it was heavy; it was very humid and apparently the fumes from this floor finishing material may have entered the vents and settled down into the vents and gone to where he was working and became ignited by the acetylene torch which he was using and which was lighted."

These statements of Hamill were admitted only against him and not against his employer, the corporate defendant.

At the close of plaintiffs' evidence the court allowed defendants' motion for nonsuit, and plaintiffs appealed.

David E. Reid, Jr., for plaintiff appellants.

James & Speight by W. W. Speight and William C. Brewer, Jr., for defendant appellees.

SHARP, J. Plaintiffs' evidence justifies the conclusion that Hamill's use of an acetylene torch under the conditions and circumstances disclosed by the evidence caused the explosion and flash fire which is the subject of this action. *Patton v. Dail,* 252 N.C. 425, 114 S.E. 2d 87. "It was his duty to exercise reasonable care; and that includes reasonable foresight as to harmful consequences of his acts and omissions." *Johnson v. Nicholson,* 159 Cal. App. 2d 395, 407-08, 324 P. 2d 307, 314. The question here is whether plaintiffs' evidence would permit a jury fairly and reasonably to infer that Hamill, in the exercise of proper care, should have apprehended that explosion and fire might follow his use of an acetylene torch in and around the ductwork which led to vents in rooms the floors of which had just been treated with lacquer. Defendants contend that plaintiffs' evidence will not justify such an inference.

On a motion for nonsuit, the court must not only take plaintiffs' evidence as true, but must consider it in the light most favorable to them. *Thomas v. Motor Lines; Motor Lines v. Watson,* 230 N.C. 122, 52 S.E. 2d 377. Thus considered, the evidence reveals that when Whitehurst told Hamill he could not walk on the floors for several hours, he also said to him, "Whatever you do, don't strike a match around here." When this warning was given both men were in the kitchen and, at that time, the floors of the den and livingroom were being treated. Whitehurst said, "The odor was about to get me myself. That type of lacquer carries a higher odor than gasoline." He had described the area of danger as being "around here" which, although indefinite, would surely include the space beneath the house. If a lighted match were dangerous "around here," *a fortiori,* an acetylene torch which produced heat enough to melt solder! A workman competent to install air conditioning and

to use an acetylene torch presumably was not totally without knowledge and experience in other aspects of home construction. The average person knows that floor lacquer, varnish, and shellac are all highly volatile, flammable liquids which should be kept away from an open flame. Hamill's statement to the insurance adjuster is sufficient to establish that he was using the torch when the explosion occurred. Whether he used it in the face of a danger which he should have apprehended, and thus failed to exercise the care of the reasonably prudent man under the circumstances, was a question for the jury. Clearly, therefore, the nonsuit as to Hamill was erroneous.

The evidence of Hamill's statement to the insurance adjuster, however, was not admitted as against his employer, the corporate defendant. Defendants filed a joint answer, in paragraph 7 of which it is admitted that, at the time Hamill went under the house with the acetylene torch, he was an employee "acting in the course and scope of his employment by the defendant All-Weather Cooling & Heating Company." This admission eliminated the issue of agency from the case. But there is no admission in the answer that Hamill *ever lighted the torch.* If paragraph 7 contains recitals not responsive to specific allegations which might justify an inference that Hamill did light the torch, these were not introduced in evidence, and, for that reason, cannot be considered in passing upon the motion for nonsuit. See *Leathers v. Tobacco Co.*, 144 N.C. 330, 340, 57 S.E. 11, 14; *Smith v. Smith*, 106 N.C. 498, 504, 11 S.E. 188, 189; Stansbury, N. C. Evidence § 177 (2d Ed. 1963).

The absence of evidence *competent against All-Weather Cooling & Heating Company* on the crucial question of what caused the explosion requires that the nonsuit as to it be sustained. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395. No doubt this evidence could have been—and yet may be—obtained by an adverse examination of Hamill.

Since the case goes back for a new trial as to Hamill, we take notice of plaintiffs' assignments of error based upon their exceptions to the refusal of the court to find that the Chief of the Greenville Fire Department was an expert in the detection of causes of fires and explosions. His training and professional knowledge failed to satisfy the court of his competency to testify as such an expert and the court concluded that it could only find him to be "an expert fireman." The judge's conclusion was a factual one which is sustained by competent evidence. Under these circumstances this Court cannot review his findings. *Blue v. R. R.*, 117 N.C. 644, 23 S.E. 275; Stansbury, N. C. Evidence § 133 (2d Ed. 1963).

Reversed in part;
Affirmed in part.

CLAYTIE C. ANDERSON, INDIVIDUALLY, AND CLAYTIE C. ANDERSON, ADMINISTRATRIX OF THE ESTATE OF CARL EDWARD ANDERSON, PLAINTIFF V. ALLSTATE INSURANCE COMPANY, ORIGINAL DEFENDANT, AND NATIONAL GRANGE MUTUAL INSURANCE COMPANY, ADDITIONAL PARTY DEFENDANT.

(Filed 14 January, 1966.)

1. Insurance § 3—

While an ambiguity in an insurance contract will be construed favorably to insured, when there is no ambiguity the court must interpret the terms of the contract according to their usual and commonly accepted meaning, and may not under the guise of construction insert provisions not contained therein.

2. Insurance § 66.1—Policy in suit held to cover only excess over other insurance collectible at time of accident.

The policy in suit provided payment of funeral expenses for insured if fatally injured while a passenger in an automobile, with provision that such insurance should be only for the excess over any other valid and collectible medical payment insurance. The driver of the car in which intestate was riding was covered by a policy providing for funeral expenses to any person fatally injured by accident while occupying the vehicle owned by the driver thereof, which policy provided that upon payment thereunder the insurer should be subrogated to the rights of the injured person against the tort-feasor, and that the injured person should do nothing after loss to prejudice such rights. Testatrix compromised her claim against the driver of the other car involved in the accident. *Held:* Testatrix may recover only funeral expenses in excess of the coverage provided in the policy of the driver of the car in which insured was riding, since this was collectible insurance at the time of the accident even though not collectible after the settlement.

3. Appeal and Error § 49—

Failure of the court to make findings requested cannot be prejudicial when such requested findings are not material.

4. Same—

In a trial by the court, it will be presumed that it ignored any incompetent evidence.

5. Compromise and Settlement—

The admission in evidence of a letter containing an offer of compromise cannot be prejudicial when the court resolves the question of the amount of damages in favor of plaintiff.

APPEAL by plaintiff from *Martin, S.J.*, 30 August 1965 Civil Small Claim Session of FORSYTH.

This is an action brought by the plaintiff in her own behalf and as administratrix of the estate of her deceased husband, Carl Edward Anderson, hereinafter called the deceased, against the Allstate Insurance Company to recover from it the funeral expenses of the deceased, pursuant to the Medical Payments Clause contained in a policy of automobile liability insurance issued by Allstate to him. Allstate contends that it is liable to the plaintiff for only the excess of these expenses over and above the amount which the plaintiff could have recovered under a policy issued by National Grange Mutual Insurance Company to the owner of the automobile in which the deceased was riding when he received the injury from which he died. At the suggestion of the court, Allstate filed a cross-action against National Grange and made it a party defendant, the prayer in the cross-action being that Allstate's liability to the plaintiff be declared "excess medical payments coverage" over and above the coverage in the National Grange policy. National Grange filed an answer to the cross-action denying any liability by it to the plaintiff under the terms of its policy, the plaintiff having executed a release to the driver of the other vehicle, whose negligence was responsible for the accident, thus defeating any right which National Grange might otherwise have against him under the subrogation provisions of its policy.

The case was heard without a jury upon stipulated facts and upon the provisions of the policies and other documents introduced in evidence.

These stipulations and documents tend to show the following facts:

On 23 February 1964, the deceased was riding as a passenger in an automobile owned and driven by one Burnett. It collided with the vehicle driven by one Graham, the collision being proximately caused by the negligence of Graham. The deceased died as a result of injuries received by him in the collision and the plaintiff incurred and paid funeral expenses in the amount of $1,373.25.

At the time of the collision there was in effect a policy of insurance issued by Allstate to the deceased containing a Medical Payment Clause. This clause provided that Allstate would pay necessary funeral expenses for the insured in event of his death caused by accident while occupying an automobile, the maximum of all payments under this clause on account of one person being $2,000. However, this clause also stated:

> "[P]rovided, however, the insurance with respect to a * * * non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance."

The Burnett automobile was a "non-owned" automobile within the definition of that term in the Allstate policy.

At the time of the collision there was also in effect a policy issued by National Grange to Burnett providing coverage, up to $1,000, for medical payments and funeral expenses of any person injured by accident while occupying the Burnett vehicle while it was being driven by the owner thereof, as it was being driven at the time of this collision. However, the National Grange policy also contained the following provision:

> "In the event of any payment under the Medical Expense Coverage of this policy, the Company shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights."

With knowledge of these provisions in the two policies the plaintiff settled the claim against Graham, the driver at fault in the accident, and executed a full release to him. Thereafter, she filed a claim with National Grange under its policy, which it denied because the plaintiff had released Graham and was not in a position to execute a subrogation agreement to National Grange.

The court having found these facts, and others not material to this appeal, concluded that, at the time the funeral bills were incurred, the National Grange policy provided valid and collectible automobile medical payments insurance within the meaning of the proviso in the Allstate policy, and, therefore, the medical payments coverage provided by the Allstate policy was excess coverage over and above that afforded by the National Grange policy, so that Allstate is liable to the plaintiff for only the funeral expenses less the $1,000 which she might have collected from National Grange. From a judgment entered in accordance with these findings and conclusions the plaintiff appeals.

Elledge & Mast for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice; by Grady Barnhill, Jr., for defendant appellee.

LAKE, J. The judgment of the court below was clearly correct if the benefits to which the plaintiff was entitled under the National Grange policy constituted "valid and collectible automobile medical payments insurance." They obviously did constitute such insurance unless they are removed from that category by the circumstance that, by the terms of the policy, upon payment of such benefits to the plaintiff, National Grange would be subrogated, to that extent, to her rights against the negligent driver.

The plaintiff in her brief contends that the National Grange policy did not provide "other valid and collectible" automobile medical payments insurance, because the coverage it provided was not as valuable as that provided in the Allstate policy since the Allstate policy did not contain a subrogation provision. That is, under the Allstate policy, had there been no medical payments clause in the National Grange policy at all, the plaintiff could have collected the full funeral expense from Allstate and could also have collected the same expense as part of her damages against the negligent driver. She cites no authority in support of her proposition that the provision in the Allstate policy must be construed to mean other medical payments insurance of the type provided in the Allstate policy. We have found no authority supporting that proposition.

It is, of course, true that ambiguous provisions in an insurance policy are construed most favorably to the insured and strictly against the company since the company wrote the policy. *Skillman v. Insurance Co.*, 258 N.C. 1, 127 S.E. 2d 789; *Barker v. Insurance Co.*, 241 N.C. 397, 85 S.E. 2d 305; *Johnson v. Casualty Co.*, 234 N.C. 25, 65 S.E. 2d 347. However, the court may not rewrite the policy under the guise of interpreting it so as to enlarge the coverage afforded thereby. "Insurance contracts will be construed according to the meaning of the terms which the parties have used and unless such terms are ambiguous, they will be interpreted according to their usual, ordinary, and commonly accepted meaning." *Johnson v. Casualty Co., supra.*

In her brief the plaintiff says:

> "The heart of the contract between the defendant, Allstate, and the decedent, Anderson, was their intention to provide medical and funeral expense coverage to Mr. Anderson, regardless of whether or not he could recover against a third party tort feasor or not."

This is precisely the kind of coverage provided by the National Grange policy. The liability of that company to the plaintiff under its policy was not contingent upon the right of the plaintiff to re-

cover from the negligent driver or the collectibility of a judgment which she might obtain against him. It undertook to pay the medical or funeral expenses of any occupant of the Burnett car caused by injuries received while riding therein. This is the essence of medical payments insurance. The provision for subrogation to the right of such beneficiary against the negligent driver of another vehicle does not change the nature of this coverage.

The plaintiff also contends that the insurance afforded by the National Grange policy was not collectible because National Grange refused to pay the plaintiff on account of her having settled with and released the negligent driver. Whether the National Grange policy provided "other valid and collectible automobile medical payments insurance" must be determined as of the time of the collision. See *Newcomb v. Insurance Co.*, 260 N.C. 402, 133 S.E. 2d 3. The plaintiff's own destruction of her claim against National Grange by her release of the negligent driver cannot enlarge her rights against Allstate.

We have examined the plaintiff's other assignments of error and find them to be without merit. The additional findings of fact requested by the plaintiff were not material, so the court's failure to include them within the findings was not prejudicial error. There was no error in the court's receiving in evidence the letter of 13 July 1964 from plaintiff's counsel to the defendant, to which the plaintiff objected on the ground that it contained an offer of compromise. This case being tried by the court without a jury, the presumption is that the court ignored any portion of the letter which was incompetent. *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E. 2d 835. The effect of the letter was simply to show that the plaintiff, when she settled with the negligent driver, was aware of the provision in the National Grange policy. This fact was stipulated by the parties. As to the element of compromise, the court resolved the question of the amount of funeral expenses in favor of the plaintiff. She was not prejudiced in any way by the introduction of this letter in evidence.

No error.

WALTER G. HUNT v. CAROLINA TRUCK SUPPLIES, INC.

AND

ROSA L. DAVIS v. CAROLINA TRUCK SUPPLIES, INC.

AND

JOHNSIE D. HUNT v. CAROLINA TRUCK SUPPLIES, INC.

(Filed 14 January, 1966.)

1. Automobiles § 41c—

Evidence that the driver of a tractor-trailer applied his brakes on a wet and slippery highway, that the trailer jackknifed, causing the vehicle to skid and to cross over and block the left lane, resulting in the injuries in suit when a vehicle approaching from the opposite direction collided therewith, *held* sufficient to be submitted to the jury on the issue of the truck driver's negligence.

2. Automobiles § 46—

Where defendant's evidence is to the effect that his driver when confronted with the sudden emergency of an unlighted vehicle in his lane of travel, applied his brakes, causing the trailer to jackknife and the vehicle to skid across his left lane, blocking traffic, an instruction that if the driver failed to drive on his righthand side of the highway, without any reference upon this issue to defendant's evidence of sudden emergency excusing the maneuver, must be held for prejudicial error.

3. Appeal and Error § 42—

While an instruction will be construed contextually, the failure of the court to refer to sudden emergency in connection with defendant's evidence that he put on his brakes and skidded to the left on a wet and slippery highway upon being suddenly confronted with an unlighted vehicle in his lane of travel, cannot be held cured by a later general instruction upon the doctrine of sudden emergency not related to the particular issue.

4. Automobiles § 19—

Evidence that defendant's driver was confronted with an unlighted vehicle in his lane of travel on a wet and slippery highway, that he applied his brakes and exercised his best efforts, but that his trailer jackknifed, causing his vehicle to skid to the left and stop with the engine in the ditch and the trailer blocking most of the highway, *held* not to disclose as a matter of law that the driver contributed to the emergency in traveling at excessive speed or in failing to keep a proper lookout so as to preclude the doctrine of sudden emergency.

APPEALS by defendant from *Brock, Special Judge,* June 21, 1965 Civil Session of RICHMOND.

These three actions to recover damages for personal injuries, which were consolidated for trial, grow out of a collision that occurred December 14, 1963, about 5:30 p.m., on U. S. Highway #74, in the Town of Marshville, N. C., between an eastbound Cadillac

and a westbound tractor-trailer combination. The collision occurred about 60 feet east of the intersection of #74 and Elizabeth Avenue.

The Cadillac was owned by plaintiff Johnsie D. Hunt and was operated by her husband, plaintiff Walter G. Hunt. Mrs. Hunt and her mother, plaintiff Rosa L. Davis, were riding in the back seat of the Cadillac. The tractor-trailer was operated by Bruce Jackson Smith as agent for and in the course of the business of defendant.

Each plaintiff alleged the collision and his (her) injuries were proximately caused by the negligence of defendant's operator in that he (a) operated the tractor-trailer at excessive speed, (b) failed to keep a proper lookout, (c) failed to keep the tractor-trailer under proper control, and (d) failed, in violation of G.S. 20-146, to drive on his right side of the highway.

In separate answers, defendant denied plaintiffs' allegations as to its actionable negligence. In addition, defendant alleged: "(A)s its tractor unit approached the intersection of U. S. Highway #74 and Elizabeth Avenue, traveling west on U. S. Highway 74, defendant's operator was suddenly confronted with an unlighted automobile which was parked or stopped in the westbound lane and directly in the path of travel of this defendant's oncoming vehicle; that at said time and place, it was raining, and the pavement was wet, lightly covered with clay or mud, and was slippery; that it was dusk and almost dark; that when the defendant's operator was confronted with this sudden emergency, he immediately applied the brakes of the vehicle and attempted to avoid a collision with the vehicle which was stopped or parked directly in its path of travel, and, thereafter, despite the best efforts of the defendant's operator and despite the exercise of due care on his part, the trailer unit to the rear of this defendant's tractor jackknifed and caused the vehicle to go into a skid, to cross over into the eastbound traffic lane, and to come to a stop with the trailer extending across the eastbound traffic lane and partially into the westbound traffic lane of said Highway 74; thereafter, the 1962 Cadillac automobile being operated by the plaintiff collided with and struck the right side of the trailer."

Defendant, in its answers in the Hunt cases, also pleaded conditionally the contributory negligence of the plaintiff.

Evidence was offered by plaintiffs and by defendant.

Appropriate issues were submitted in each case and answered in favor of the plaintiff; and a judgment for each plaintiff in accordance with the verdict was entered. Defendant excepted to each judgment and appealed. The three appeals are before us on a consolidated record.

Webb, Lee & Davis for plaintiff appellees.
Charles T. Myers for defendant appellant.

BOBBITT, J. All the evidence tends to show the collision, which was between the front of the Cadillac and the right side of the trailer, *occurred on Hunt's side of the two-lane highway;* that, as the Hunt eastbound Cadillac and defendant's westbound tractor-trailer approached each other, the tractor-trailer crossed to its left of the center of #74 and jackknifed, stopping with the front of the tractor in the ditch along the south shoulder and with the trailer across the lanes (particularly the lane for eastbound traffic) of #74; and that it was or had been "drizzling rain" and #74 was wet.

Evidence offered by plaintiffs tends to show there was no westbound vehicle in front of the tractor-trailer as it approached the point of collision.

Defendant's assignment of error directed to the court's denial of its motion(s) for judgment of nonsuit is without merit. There was ample evidence to require submission of the case to the jury.

With reference to the first (negligence) issue, the court, after discussing each of the alleged specifications as to defendant's negligence, instructed the jury as follows: "(I)f the plaintiffs have satisfied you by the greater weight of the evidence that the defendant's driver drove at an excessive speed under the circumstances existing, or that he failed to maintain a proper lookout, or that he failed to maintain proper control, or that he drove the vehicle without exercising due care, *or that he failed to drive on his right-hand side of the highway,* if the plaintiffs have satisfied you by the greater weight of the evidence that the defendant's driver was negligent in any one or more of those respects, and has further satisfied you by the greater weight of the evidence that such negligence not only exists, but that such negligence was the proximate cause or one of the proximate causes of the accident and the injury in question, *then it would be your duty to answer this first issue in favor of the plaintiffs, and you would answer the first issue in each of these cases, the three cases, 'Yes.'* If the plaintiffs have failed to carry that burden of proof and have failed to so satisfy you by the greater weight of the evidence, then your answer must be for the defendant, and you would answer the first question in each case, 'No.'" (Our italics.)

Defendant excepted to this portion of the court's instructions.

The court made no reference to defendant's plea of sudden emergency or evidence pertaining thereto at any time during the instructions relating to the first (negligence) issue.

After instructing the jury with reference to the second (contributory negligence) issue in the Hunt cases, the court, without relating it to any particular issue, gave the jury a correct general instruction relating to the sudden emergency doctrine.

Although it is well established a charge must be considered and interpreted contextually, 1 Strong, N. C. Index, Appeal and Error § 42, we are constrained to hold that the failure to relate defendant's plea of sudden emergency and the evidence pertinent thereto to the first issue was erroneous and prejudicial. The jury having been instructed explicitly to answer the first issue, "Yes," if they found, *inter alia,* that defendant's tractor-trailer was operated to the left of the center of the highway, and that such action proximately caused the collision and resulting personal injuries, it cannot be assumed the jury would understand that this explicit instruction was modified in any way by the subsequent general instruction relating to the doctrine of sudden emergency.

The more serious question is whether defendant's evidence was sufficient to entitle him to *any* instruction relating to the doctrine of sudden emergency. To answer this question, we must consider the evidence in the light most favorable to defendant.

There was evidence "(i)t was kindly dusky, not just black dark, but it was dusky." The tractor-trailer "had its lights on." The evidence is silent as to whether the lights of the Cadillac were burning.

Smith's testimony, when considered in the light most favorable to defendant, tends to show: The tractor-trailer was traveling on its right side of #74. The brakes "were working fine." The headlights were on and working. The windshield wipers "were running." When four car-lengths away, Smith first noticed a car, stopped in front of him, when the operator "turned his lights on all of a sudden." The tractor-trailer was traveling 20-25 miles an hour. When Smith saw "the car up front," he applied his air brakes. Under ordinary conditions, the distance was such he could have stopped, but on account of the slippery condition of the highway at this particular point, caused by a coating of clay that had spilled onto the highway from trucks in the area, the tractor-trailer, upon application of the brakes, swerved to the left and jackknifed.

While inferences may be drawn from Smith's testimony, particularly that elicited by plaintiffs on cross-examination, tending to show that the sudden emergency, if any, that confronted Smith was attributable, at least in part, to his own negligence, we are constrained to hold that these matters were for jury determination under a proper instruction applying the doctrine of sudden emergency to the evidence as related to the first (negligence) issue.

Since a new trial is awarded on the ground indicated, we do not consider defendant's other assignments of error. The questions presented may not arise at the next trial.

New trial.

G. G. LETT, ADMINISTRATOR OF THE ESTATE OF CURLEY LETT, DECEASED v. JAMES A. MARKHAM AND WIFE, MARIE W. MARKHAM.

(Filed 14 January, 1966.)

1. Payment § 1—

Payment is an affirmative defense, and the burden is upon the party alleging payment to prove payment in money or by some other thing given and received in payment.

2. Payment § 4—

This action was instituted by an administrator to recover the balance due on the purchase price of land sold by intestate under contract for the payment of the balance of the purchase price in cash upon delivery of deed or in cash according to a fixed time schedule. Defendant claimed payment of the balance by giving plaintiff's intestate credit on obligations which intestate owed defendant. *Held:* The evidence raised an issue of fact as to payment and it was error for the court to enter judgment of involuntary nonsuit.

APPEAL by plaintiff from *Pless, J.*, February, 1965 Civil Session, WAKE Superior Court.

The plaintiff, in his capacity as administrator of the estate of Curley Lett, instituted this civil action against the defendants to recover the sum of $3,500.00 and interest—balance due on the purchase price of a specifically described tract of land conveyed by plaintiff's intestate to the defendants on August 9, 1962, by deed recorded in the Wake County Registry in Book 1519, p. 424.

The deed was executed and delivered pursuant to the terms of an option dated June 16, 1962, by which Curley Lett agreed to sell the described lands for the sum of $5,000.00. The defendants paid the intestate $100.00 to be retained if the option was not exercised; to be credited on the purchase price if it was. The option provided payment should be "either in cash or upon the following agreed terms: $1,400.00 when option is exercised; $1,000.00 due and payable January 1, 1964, and $1,000.00 each succeeding year until entire amount is paid; $3,500.00 shall bear interest @ six per cent. . . ."

The plaintiff introduced the option, the deed and evidence of his unsuccessful demand for the payment of $3,500.00 and interest. The plaintiff introduced certain admissions from the pleadings and the adverse examination of the defendant, James A. Markham, who admitted he had paid only $1,500.00 in cash, but he testified he had paid the remaining $3,500.00 by the cancellation of indebtedness which the intestate was due him.

At the close of the defendants' evidence the court entered judgment of involuntary nonsuit. The plaintiff excepted and appealed.

Bunn, Hatch, Little & Bunn by E. Richard Jones, Jr., and Thomas D. Bunn for plaintiff appellant.

J. C. Keeter for defendant appellees.

HIGGINS, J. The record evidence, consisting of the option and the deed, disclosed the sale of the described lands by the plaintiff's intestate for the sum of $5,000.00, either in cash or upon specific terms: $100.00 cash at the time the option was signed; $1,400.00 in addition to be paid on the day the option was exercised, the balance of $3,500.00 to be in annual payments beginning January 1, 1964. The deed recited a consideration of $10.00 "and other valuable considerations."

The defendant, James A. Markham, by adverse examination, admitted he had paid in cash only the $100.00 for the option and the $1,400.00 the day it was exercised. He claimed in his adverse examination that he had paid the $3,500.00 balance due by giving the plaintiff's intestate credit on obligations which intestate was due him.

The defendant's admission that he had not paid in cash or in accordance with the terms of the option, placed upon him the burden of showing he had paid or accounted to the intestate for the sum of $3,500.00 and interest thereon in satisfaction of the amount due. The contract called for payment in cash on delivery of deed, or in cash according to the fixed time schedule if not paid on delivery of the deed. The admission shows failure to pay in cash as required. "A debtor, claiming payment by the transfer to the creditor of something other than money, has the burden of establishing all the facts necessary to constitute such transfer a payment." 70 C.J.S., Payment, § 96, p. 302. "The defense of payment may be supported either by proof of payment in money or by proof that some other thing was given and received in payment. If the contract is ambiguous or is silent on the medium of payment, parol evidence with respect thereto is admissible. But parol evidence is not admissible where the contract is free from ambiguity upon the question, to

show that payment was to be made in a manner other than that specified in the contract." 40 Am. Jur., Payment, § 294, p. 902. "It is well settled that the plea of payment is an affirmative one and the general rule is that the burden of showing payment must be assumed by the party interposing it." *Finance Co. v. McDonald,* 249 N.C. 72, 105 S.E. 2d 193; *Iredell County v. Gray,* 265 N.C. 542, 144 S.E. 2d 600; *White v. McCarter,* 261 N.C. 362, 134 S.E. 2d 612.

The evidence was sufficient to raise an issue of fact as to the payment of the $3,500.00 and interest. The court committed error in deciding the issue as one of law. The judgment of involuntary nonsuit is

Reversed.

MARTHA LAUGHLIN TEAGUE v. ROGER EDGAR TEAGUE.

(Filed 14 January, 1966.)

1. Appeal and Error § 11—

Notice of appeal must be served upon appellee within 10 days as a jurisdictional requirement. G.S. 1-279, G.S. 1-280.

2. Appeal and Error § 12—

Where notice of appeal is not served within the time required, the case remains in the Superior Court which may dismiss the attempted appeal.

3. Divorce and Alimony § 16—

The complaint in this case *held* to state a cause of action for alimony without divorce under G.S. 50-16.

4. Divorce and Alimony § 16—

Where the affidavits and verified pleadings support order for subsistence *pendente lite* and the award of custody of the children of the marriage, and there is no charge that the wife was unfaithful and no request for findings of fact, detailed findings are not required.

5. Divorce and Alimony § 21; Contempt of Court § 3—

Where an order to show cause is issued by one judge and, without notice to the contemner, such judge transfers the proceeding and orders it to be heard by another Superior Court judge, the order of contempt issued by such other judge must be set aside, since contemner is entitled to notice and an opportunity to be heard.

APPEAL by defendant from orders of *Gambill, J.,* entered April 5 and May 10, 1965, and order of *Shaw, J.,* entered July 8, 1965, in the Superior Court of GUILFORD County.

The plaintiff, wife, instituted this civil action against the defendant, her husband, for alimony without divorce, for the custody of the two children, Linda Jane Teague, age 15, and Roger Darrell Teague, age 10, for counsel fees and for temporary allowance for herself and the children, including the use of the home. She alleges she has been a dutiful wife and gave the defendant no cause whatever for his abandonment, separation, and his misconduct, giving details. The plaintiff alleges abandonment, the defendant's ability and his failure to support the plaintiff and the children. She further alleges his constant and continued attention to his "lady friend" disrupted the home and so upset Linda Jane that she required hospitalization and medical treatment on several occasions.

The defendant, by answer, denied his abandonment, misconduct, etc., and alleged that the plaintiff's "temper tantrums" caused their differences. On April 5 (all dates being in 1965) Judge Gambill conducted a hearing based on affidavits and the verified pleadings. No question as to the plaintiff's character being raised, and in the absence of a request, Judge Gambill did not record specific findings of fact but concluded the plaintiff and the children were entitled to support in the amount of $40.00 per week. The award included an allowance of $100.00 to plaintiff's counsel. No exceptions or appeal entries were then made. However, the record indicates that on April 27 exceptions and notice of appeal were served on the plaintiff and her attorney. On that day Judge Gambill, upon verified motion, issued an order requiring the defendant to appear before him on May 4 and show cause why he should not be adjudged in contempt for failure to make the weekly payments and counsel fees as required in the order of April 5. The defendant filed a verified reply to the motion, alleging partial payment, and inability to comply fully with the order. On May 10 Judge Gambill found:

"7. That Case on Appeal to the Supreme Court was filed in the Superior Court on April 27, at 4:05 o'clock p.m. and served on the counsel for the plaintiff on the same day. . . .

"11. That the Court as a result of the defendant's appeal is without power or authority to hold the defendant in contempt for failure to comply with its order, but that the court has the power and authority to order execution against the personal property of the defendant to wit, the Buick automobile and order it sold and proceeds applied to amount due for support and for counsel fees."

On June 2, on plaintiff's motion and after hearing, Judge Shaw entered an order dismissing the appeal on the ground that neither the plaintiff nor the plaintiff's attorney had been served with notice of the appeal within the prescribed time.

On June 8 the plaintiff filed before Judge Gambill a petition alleging defendant had wilfully failed to make the payments required in the June 5 order; that he had encumbered the Buick automobile before it could be sold. Judge Gambill issued a show cause order as prayed for and set the hearing to be held June 15, at 2:00 p.m. The order and petition were served on defendant by the Sheriff. However, Judge Gambill transferred the show cause proceeding and ordered it heard by Judge Shaw. The record does not show the defendant or his counsel consented to the transfer, had any notice thereof, or attended the hearing. The record clearly indicates the contrary. The defendant challenges the validity of the contempt hearing before Judge Shaw by Exception No. 18 upon the ground he had no notice of the hearing and no opportunity to be heard. He contends the first knowledge he had of the transfer and hearing before Judge Shaw, was the order of arrest served on him by the Sheriff on July 12. The defendant's case on appeal was served on the plaintiff's attorney on August 2. It was certified to this Court on October 25. The appeal referred to in Judge Gambill's finding No. 7 appears never to have been perfected.

B. Gordon Gentry for plaintiff appellee.

Cahoon & Swisher by Robert S. Cahoon, James L. Swisher for defendant appellant.

HIGGINS, J. The record is far from satisfactory. For example, Judge Gambill seems to have concluded that the exceptions and notice of appeal served on the plaintiff and her counsel on April 27 were sufficient to remove the case from the Superior Court to this Court. Actually, appeal notice was not given at the time the order was entered. G.S. 1-279 and 280, when construed together, required the defendant to serve notice of the appeal within 10 days. "The provisions are jurisdictional and unless complied with this Court acquires no jurisdiction of the appeal and must be dismissed." *Aycock v. Richardson,* 247 N.C. 233, 100 S.E. 2d 379. Since this Court acquired no jurisdiction, the case was still in the Superior Court and the attempted appeal was subject to be dismissed there. Judge Shaw's order to that effect was not error. *Walter Corp. v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313.

The complaint states a cause of action under G.S. 50-16 and complies fully with the authorities in this jurisdiction. *Murphy v. Murphy,* 261 N.C. 95, 134 S.E. 2d 148; *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24; *Creech v. Creech,* 256 N.C. 356, 123 S.E. 2d 793; *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Ollis v. Ollis,* 241 N.C. 709, 86 S.E. 2d 420; Lee's N. C. Family Law, Vol. 1, § 80. The

demurrer *ore tenus* which the defendant filed in this Court is overruled.

The affidavits and pleadings before Judge Gambill furnish ample proof of the needs of the plaintiff and the children, the ability and the failure of the defendant to make reasonable provision for them. The evidence establishes the plaintiff's suitability for the custody of the children. The court, it is true, did not make detailed findings of fact. There was no request for such findings and no charge of the plaintiff's unfaithfulness. *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589; *Harrell v. Harrell,* 256 N.C. 96, 123 S.E. 2d 220; *Byerly v. Byerly,* 194 N.C. 532, 140 S.E. 158.

The show cause order issued by and returnable before Judge Gambill was properly issued after the appeal entries had been removed upon the showing that appeal had not been perfected. Nevertheless, the record fails to disclose the defendant had any notice of the transfer before Judge Shaw for hearing, at which neither the defendant nor his counsel was present. He was entitled to notice of the hearing and an opportunity to be heard before a judgment of wilful contempt could be entered against him. He contends he was in Judge Gambill's court according to the order served on him and when Judge Gambill adjourned court without calling his case he went back to work. The sheriff's order of arrest for service of the contempt judgment was his first notice that the proceeding was ever before Judge Shaw. At least these are his contentions. The record here fails to show notice and an opportunity to be heard. The challenge to the judgment on that ground is sustained.

The condition of the record requires that we vacate the order adjudging the defendant in contempt. We find no error in the record otherwise. When the cause is returned to the Superior Court it may be disposed of in the manner approved by this Court in *Joyner v. Joyner,* 256 N.C. 588, 124 S.E. 2d 724.

Order of contempt reversed.

The proceeding in other particulars is affirmed.

RALPH DEES, JR. v. COLONIAL PIPELINE COMPANY.

(Filed 14 January, 1966.)

1. Easements § 2—

An easement may be created by agreement as well as by grant, and may be conditioned upon the happening of a stipulated event, and may be terminable upon the failure of the event.

2. Same—

An instrument denominated a "Right of Way Easement Option" granting a described right of way easement upon the payment of an initial consideration stipulated, with further provision that upon payment of an additional stipulated amount within four months the easement should become indefeasible, is not an ordinary option, and, upon the payment of the additional stipulated sum within the time specified, the easement becomes absolute and indefeasible.

APPEAL by plaintiff from *Armstrong, J.,* 12 April 1965 Regular Civil Session of GUILFORD (Greensboro Division).

This is a civil action in which the plaintiff seeks to recover a judgment to the effect that the easement claimed by defendant across plaintiff's land is a cloud on plaintiff's title.

The findings of fact and conclusions of law pertinent to this appeal are set forth in the judgment entered below as follows:

"THIS MATTER coming on to be heard and being heard before the Honorable FRANK M. ARMSTRONG, Judge Presiding at the regular 12 April 1965 Civil Session of the Superior Court of Guilford County Greensboro Division; and

"It appearing to the court that at pre-trial of this matter the parties entered into certain stipulations and agreements which have been introduced in evidence, and that the parties agreed to waive a jury and agreed that the court would find the facts, conclude the law and enter judgment herein without the intervention of a jury; and that pursuant to said agreement the plaintiff and the defendant introduced evidence and rested;

"NOW, THEREFORE, upon the stipulations, evidence and record herein, the undersigned Judge does hereby find the facts to be as follows:

"1. That the plaintiff, being a citizen and resident of Guilford County, North Carolina, is the grantee of a deed to the property described in the complaint in Paragraph III thereof, said deed having been conveyed to him by Georgia *(sic)* Dees, single, dated 9 April 1963, and being duly recorded at Book 2081, Page 400, Guilford County Public Registry, on 16 April 1963.

"2. That Georgie Dees, single, by virtue of a deed to her from Ralph E. Dees, Sr., and wife, Janie M. Dees, recorded at Book 1091, Page 467, Guilford County Public Registry, was the record title owner of the property described in Paragraph III of the complaint herein from 1945 until 9 April 1963, when

she conveyed said property to plaintiff. That the plaintiff has not since 9 April 1963, conveyed said property in any manner.

"3. That on or about 21 November 1962, Georgie Dees executed and delivered to the defendant a paper writing, in evidence by stipulation, which is Exhibit A attached to the defendant's Answer herein, which instrument was also signed by Janie M. Dees, who is the mother of the plaintiff and Georgie Dees. That said instrument was duly recorded in the Guilford County Public Registry on 21 January 1963, at Book 2065, Page 530, and describes the same land as is described in the deeds referred to above and in the complaint. A (Said instrument in pertinent part grants to defendant an easement of right-of-way for pipeline purposes as more fully set out therein, on, over, and through said land, upon an initial consideration of $10.00 and further provides that upon the making of an additional payment of $316.00 within four months from date thereof said easement shall become indefeasible, the easement otherwise to cease and terminate at the end of such four months' period.) A The instrument provides for payments thereunder to be made to Janie M. Dees. EXCEPTION 2.

"4. That on or about 20 December 1962, the plaintiff executed a paper writing referred to as 'consent of tenant' to the defendant and delivered the same to the defendant, which instrument has been introduced in evidence by stipulation. The plaintiff therein gave his consent to defendant to construct, operate, and maintain a pipe line over the land in suit, subject to the terms of any easement which had been or might be granted to defendant by the owner of the land.

"5. That said defendant paid to Janie M. Dees the consideration of $10.00 referred to in the aforesaid instrument of record at Book 2065, Page 530, on or about 21 November 1962, and that defendant thereafter paid $316.00 to Janie M. Dees on or about 12 December 1962, within four months, pursuant to the terms of said instrument.

"6. B That it was the intention and agreement of the parties to said instrument recorded at Book 2065, Page 530, that the defendant, upon compliance with the terms of the instrument, should have an indefeasible right-of-way easement; that the terms of the instrument have been fully complied with by defendant; and that when plaintiff took title under deed recorded at Book 2081, Page 400, above referred to, he

did so subject to and with notice of said easement. B EXCEPTION #3.

"WHEREFORE, the court, upon the foregoing findings of fact, concludes as a matter of law as follows:

"1. C That Georgie Dees, by the instrument recorded in Book 2065, Page 530, Guilford County Registry, conveyed to the defendant a right-of-way easement over, upon, and through the lands described in plaintiff's complaint, which has become indefeasibly vested in defendant.

"2. That the defendant's claim of a right-of-way easement does not constitute a cloud on plaintiff's title to the land described in the complaint. C EXCEPTION #4.

"NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that the plaintiff shall have and recover no relief against the defendant in this action; that the defendant's claim of easement under the instrument recorded in Book 2065, Page 530, Guilford County Registry, is not a cloud on plaintiff's title; and that defendant shall recover its costs of the plaintiff."

The plaintiff appeals, assigning error.

Hoyle, Boone, Dees & Johnson for plaintiff appellant.

Wharton, Ivey & Wharton; Ervin, Horack, Snepp & McCartha for defendant appellee.

DENNY, C.J. Plaintiff assigns as error finding of fact No. 3, to the effect that the instrument involved, in pertinent part, grants to the defendant an easement of right of way for pipeline purposes as more fully set out therein, on, over, and through said land, upon an initial consideration of $10.00, and further provides that upon the making of an additional payment of $316.00 within four months from date thereof said easement shall become indefeasible, the easement otherwise to cease and terminate at the end of such four months' period.

The appellant argues and contends the agreement, called a "Right of Way Easement Option," at most contemplates the conveyance of an easement *in futuro* and not *in praesenti* upon compliance with its terms. We do not concur in plaintiff's contentions.

In 17A Am. Jur., Easements, § 27, page 637, it is said:

"An easement may be created by agreement or covenant. An easement or a right in the nature of an easement may be created by words of covenant as well as by words of grant. A

covenant or agreement may operate as a grant of an easement if it is necessary to give it that effect in order to carry out the manifest intention of the parties. If the owner of land enters into a covenant concerning the land or its use and thereby subjects it, or his remaining property, to an easement, the covenant is construed the same as an express grant and by the same rules in accomplishing the intention of the parties," citing, among numerous other cases, *Waldrop v. Brevard,* 233 N.C. 26, 62 S.E. 2d 512.

The agreement involved herein, upon the initial payment of $10.00, granted a defeasible easement which was to become indefeasible upon the making of an additional payment of $316.00 on or before the expiration of four months from the execution thereof. The agreement simply created an option on the part of the defendant to determine whether or not it would pay the additional consideration in order to get an indefeasible easement. It is conceded that the additional consideration was paid within the time required by the agreement and that the agreement was executed under seal, duly acknowledged, and registered in the office of the Register of Deeds of Guilford County, North Carolina, on 21 January 1963, several months prior to the time the plaintiff acquired title to the property.

"No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms." 28 C.J.S., Easements, § 24, page 677; *Borders v. Yarbrough,* 237 N.C. 540, 75 S.E. 2d 541.

The agreement involved herein is not an ordinary option involving the purchase and sale of real estate, requiring the execution of a deed in the event the option is exercised. The instrument involved herein granted a determinable easement upon the initial payment of $10.00, and became an absolute and indefeasible grant upon the payment of the additional consideration required within the time specified therein.

Determinable easements are well recognized, as in *Wallace v. Bellamy,* 199 N.C. 759, 155 S.E. 856, where an easement was granted, to terminate upon the construction of certain streets which would provide for ingress and egress to and from the property conveyed in lieu of the way granted in the easement. Likewise, in *McDowell v. R. Co.,* 144 N.C. 721, 57 S.E. 520, an easement for the construction of a railroad was granted on condition the road was constructed in five years; this was held to be a valid easement, subject

to terminate if the condition was not met. Also, in *Hall v. Turner,* 110 N.C. 292, 14 S.E. 791, the easement was to continue so long as grantee maintained a mill at a certain location.

In our opinion, the findings of fact by the court below are supported by competent evidence and the facts are sufficient to support the conclusions of law and the judgment entered below.

A careful review of all the appellant's assignments of error leads us to the conclusion they are without merit and are, therefore, overruled. The judgment entered below is

Affirmed.

EMMETT D. WILKINS v. GEORGE E. TURLINGTON AND PANZIE C. TURLINGTON.

(Filed 14 February, 1966.)

1. Trial § 21—

On motion to nonsuit defendants' counterclaim, the evidence must be considered in the light most favorable to defendants, and evidence favorable to plaintiff disregarded.

2. Automobiles § 41h—

The drivers of the first and fourth vehicles proceeding in the same direction were involved in the collision in suit. The evidence tended to show that the driver of the fourth vehicle while having a clear view of the left lane for approximately half a mile undertook to pass the others, blowing her horn successively before passing the third and second vehicles, that when she was immediately to the rear of the first vehicle the driver thereof, without signal, made a left turn across her lane of travel to enter a private drive. *Held:* The evidence is sufficient to be submitted to the jury on the issue of negligence of the driver of the first vehicle.

3. Appeal and Error § 20—

Where one driver contends that the other driver was negligent in respect to speed but there is no evidence as to such speed, the act of the court in reading the provisions of G.S. 20-141(c) is favorable to the first driver and he may not complain thereof.

4. Automobiles § 46.1—

Where the court in regard to plaintiff's action submits issues of negligence, contributory negligence and damages, but as to defendants' counterclaims submits only issues of negligence of plaintiff and damages, and there is no objection to the issues submitted, the answer of the jury to the first issue determines the question of defendants' negligence, and the failure of the court to submit issues of contributory negligence in respect to the counterclaims will not be held for error.

5. Trial § 37—

A party may not complain of the failure of the court to submit a contention not supported by allegation.

6. Appeal and Error § 24—

An exception to an excerpt from the charge does not ordinarily challenge the omission of the court to charge further on the same or any other aspect of the case.

7. Trial § 10—

Remarks of the court in the presence of the jury and questions asked by the court of certain witnesses for the purpose of clarification, *held* not to amount to an expression of opinion by the court upon the evidence under the facts of this case.

8. Trial § 51—

Motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court and its ruling thereon will not be reviewed in the absence of a showing of abuse.

APPEAL by plaintiff from *Carr, J.*, August 1965 Civil Session of HARNETT.

Plaintiff's action and defendants' counterclaims grow out of a collision that occurred July 12, 1963, about 6:00 p.m., on U. S. Highway No. 70 (#70), between an International dump truck owned and operated by plaintiff and a Chevrolet owned by defendant George E. Turlington and operated by his wife, defendant Panzie C. Turlington.

Plaintiff's action is to recover for personal injuries and property damage allegedly caused by the negligence of defendants in specified particulars. Defendants denied negligence, interposed a conditional plea of contributory negligence, and asserted counterclaims in which they alleged the negligence of plaintiff in specified particulars was the sole proximate cause of the collision, the counterclaim of Mrs. Turlington being for personal injuries and that of Mr. Turlington being for property damage. Plaintiff, by reply, denied all essential allegations of defendants' counterclaims.

It was admitted that Mr. Turlington is liable under the family purpose doctrine for the negligence, if any, of Mrs. Turlington.

Where the collision occurred, #70 is a two-lane highway. It runs generally east and west and is straight and level. It was daylight when the collision occurred and the road was dry.

Plaintiff's truck was the first of four vehicles proceeding west along #70. The second was a Ford car operated by Mrs. Azalie Wilkins. The third was a dump truck operated by Joe Benson. The fourth was the Turlington Chevrolet.

According to his allegations and evidence, plaintiff, after giving proper signal of his intention to do so, had completed or almost completed a left turn into a private driveway to his home when the left rear of his truck was struck by the Turlington car.

According to defendants' allegations and evidence, Mrs. Turlington, after giving signal of her intention to do so, had passed the Benson truck and the Ford when plaintiff, without giving notice of his intention to do so, made a sudden left turn across her line of travel.

The court submitted and the jury answered the following issues:

"1. Was the plaintiff injured and damaged as a result of the negligence of the defendants, George E. and Panzie C. Turlington, as alleged in the complaint? ANSWER: No.

"2. If so, did the plaintiff, by his own negligence, contribute to his injuries and damages as alleged in the answer? ANSWER: .....

"3. What amount of damages, if any, is the plaintiff entitled to recover for property damage? For personal injury? ANSWER: .....

"4. Were the defendants, Panzie C. Turlington and George E. Turlington, injured and damaged as a result of the negligence of the plaintiff, as alleged in the answer? ANSWER: Yes.

"5. If so, what amount of damages, if any, is the defendant, Panzie C. Turlington, entitled to recover for personal injuries? ANSWER: $7500.00.

"6. What amount of damages, if any, is the defendant, George E. Turlington, entitled to recover for property damage? ANSWER: $2500.00."

In accordance with the verdict, the court entered judgment that Mrs. Turlington recover of plaintiff the sum of $7,500.00, that Mr. Turlington recover of plaintiff the sum of $2,500.00, and that plaintiff pay the costs.

Plaintiff excepted and appealed.

Braswell & Strickland for plaintiff appellant.

Smith, Leach, Anderson & Dorsett, C. K. Brown, Jr., and D. K. Stewart for defendant appellees.

BOBBITT, J. In considering the sufficiency of the evidence to withstand plaintiff's motions for judgments of nonsuit as to defendants' counterclaims, the evidence must be considered in the

light most favorable to defendants. Evidence favorable to plaintiff must be disregarded. *Gillikin v. Mason,* 256 N.C. 533, 124 S.E. 2d 541; *Robinette v. Wike,* 265 N.C. 551, 144 S.E. 2d 594.

Mrs. Turlington's testimony tends to show: She had been following the three vehicles for several miles. When she undertook to pass, she had reached a place where she had a clear view of the left lane for approximately half a mile. There was no oncoming traffic, no yellow lines and no intersection or turnoff. The three vehicles in front of her had been and were proceeding in the right lane. She was watching these vehicles and observed no signals from any of them. She blew her horn and started around the Benson truck. After pulling into the left lane, she got near the Ford and blew her horn again. She was "right back of" plaintiff's truck when it made its left turn across her line of travel.

While plaintiff's evidence was in sharp conflict, in our opinion, and we so hold, the foregoing testimony of Mrs. Turlington was sufficient to require submission of an issue as to plaintiff's alleged actionable negligence and did not disclose that Mrs. Turlington was contributorily negligent as a matter of law. Hence, the assignment of error directed to the court's refusal to nonsuit defendants' counterclaims is without merit.

Plaintiff assigns as error the portion of the charge in which the court read to the jury the provisions of G.S. 20-141(c). Plaintiff alleged defendants were negligent, *inter alia,* in respect of speed. The applicable maximum speed limit was 55 miles per hour. There was no evidence the speed of the Turlington car exceeded 55 miles per hour. Hence, the reading of G.S. 20-141(c) was favorable to plaintiff since it called attention to the fact that a speed of 55 miles per hour or less might be considered greater than was reasonable and prudent under the conditions disclosed by the evidence.

Plaintiff assigns as error, based upon an exception to a portion of the charge, the failure of the court to submit, with reference to the counterclaims, an issue as to defendants' contributory negligence. The record indicates no objection to the issues submitted by the court prior to the service of plaintiff's case on appeal. Moreover, the jury answered the first issue, "No," and thereby established that the collision and resulting injury and damage were not proximately caused by the negligence of defendants.

Plaintiff assigns as error a portion of the charge in which the court stated in substance that plaintiff *contended* defendants' negligence in respect of speed and failure to keep a proper lookout proximately caused plaintiff's injury and damage and that the jury should answer the first issue, "Yes." Plaintiff contends this instruction is erroneous because the court made no reference to the duty

of the driver of an overtaking vehicle to give warning before attempting to pass a vehicle proceeding in the same direction. In this connection, it is noted that plaintiff did not allege, as a specification of defendants' negligence, the failure of defendants to give warning before attempting to pass. Too, the court, in the excerpt to which plaintiff's exception relates, was stating contentions of plaintiff. Nothing indicates plaintiff then excepted to such statement of his contentions. Moreover, "(a)n exception to an excerpt from the charge does not ordinarily challenge the omission of the court to charge further on the same or any other aspect of the case." 1 Strong, N. C. Index, Appeal and Error, § 24, p. 101.

Plaintiff asserts, based on numerous exceptions, that the court erred "in repeatedly interrupting the introduction of evidence, asking questions, and commenting in the presence of the jury and making statements in the presence of the jury, thereby constituting an expression of opinion to the prejudice of the plaintiff and thereby tending to interrupt the introduction of evidence in an ordinary fashion to the prejudice of the plaintiff." It appears that plaintiff, in preparing his case on appeal, entered exceptions to practically all words spoken by the court during the progress of the trial, including colloquies with counsel relating to the competency of evidence and questions asked to ascertain what a witness had said or to get a better understanding of the witness' intended meaning. After careful consideration of each of these exceptions, the conclusion reached is that the statements, comments and questions to which exceptions were noted do not, separately or collectively, disclose error prejudicial to plaintiff.

Assignments of error based on exceptions to rulings on evidence have been carefully considered. Suffice to say, none discloses prejudicial error or merits detailed discussion.

Plaintiff's motion to set aside the verdict as contrary to the greater weight of the evidence was for determination by the trial judge in the exercise of his discretion. Nothing appears indicative of an abuse of discretion.

While the evidence would have supported a verdict in plaintiff's favor, the jury, upon conflicting evidence, resolved the issues in favor of defendants; and plaintiff's assignments of error do not show prejudicial error entitling him to a new trial.

No error.

SHIRLEY BURCH v. GLENNIE BELLE SUTTON, SHELBY ANN DAUGHTRY AND HUSBAND, ELBERT DAUGHTRY, DOROTHY MAE BOWDEN AND HUSBAND, ROBERT BOWDEN, SHIRLEY FAY CARTER AND HUSBAND, RAY CARTER, BOBBIE WHITFIELD SUTTON AND WIFE, RUBY SUTTON.

(Filed 14 January, 1966.)

1. Wills § 63—

The doctrine of election is in derogation of the record title, and therefore it must clearly appear from the terms of the will that testator intended to put a beneficiary to an election in order for the doctrine to apply.

2. Same—

Testator, when disposing of four tracts of land, referred successively to each as "my" land. One tract devised to a person other than his wife belonged to her as surviving tenant by the entireties. *Held:* The doctrine of election does not apply, since it clearly appears from the will that testator erroneously thought the tract held by the entireties to be his own, and therefore that he did not intend to put his wife to her election.

APPEAL by defendants from *Mintz, J.*, June 7, 1965 Session of WAYNE.

Civil action under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, to determine the ownership of a 60-acre tract of land in Wayne County.

Prior to his death on August 24, 1962, R. C. Burch and his wife, Shirley Burch, plaintiff herein, owned the 60-acre tract as tenants by entirety, having acquired title thereto in 1938.

The will of R. C. Burch is dated January 26, 1950 and was probated on or about August 28, 1962. His widow, Shirley Burch, and J. E. Thigpen were named executrix and executor, respectively. They qualified, completed administration, filed their final account and were discharged.

The final account shows receipts of $4,095.31, disbursements (including North Carolina inheritance tax of $130.30) of $3,538.60, and this notation: "The remainder of the personal property has been given to Shirley Burch, (widow), under the terms of the will left by R. C. Burch, deceased."

The record contains no findings or evidence bearing upon the value of the personal property, the 36-acre home tract or the 60-acre tract referred to in Items 2, 4 and 5, respectively, of the will of R. C. Burch.

The dispositive provisions of the will of R. C. Burch are quoted below.

"ITEM 2: To my beloved wife, Shirley Burch, I will and bequeath all my personal property in money, in notes, stocks and bond, or indebtedness due me; and I direct that my Executrix and Executor hereinafter named, need not sell the tangible personal property, unless, Shirley Burch wishes to.

"ITEM 3: To my beloved wife, Shirley Burch, I will and devise, for the term of her natural life only, all my real property, she to receive the rents from the same, and to have the use of the same, so long as she may live.

"ITEM 4: After the death of my said wife, to Stacey Thigpen and Elton Thigpen, I will and devise my home tract of land, containing Thirty-Six (36) Acres, to share, and share alike, to them, and their heirs in fee simple forever. And at the death of my said wife, I charge the said Devise of the Thirty-six acres with a payment of TWO HUNDRED ($200.00) DOLLARS, to be paid to Zilphia Burch, within one year of the death of my said wife. To Elton Thigpen, I direct, in the division of this land, a share, equal in value with the other share, with the house situate on it.

"ITEM 5: To R. W. Sutton and Glennie Belle Sutton, for the term of their natural life only, and for the life of the survivor of them, I will and devise my other land, consisting of SIXTY (60) ACRES."

"ITEM 7: And, at the death of R. W. Sutton and Glennie Belle Sutton, and at the death of the survivor of them, I will and devise the said SIXTY acre tract of land to such of the children of R. W. Sutton and Glennie Belle Sutton as shall survive them. If any of the children of R. W. Sutton and Glennie Belle Sutton, or the survivor of them, the said child, or children living surviving them a child or children, then, I devise the share that would have gone to the child or children of R. W. Sutton and Glennie Belle Sutton, to the child, or children of R. W. Sutton and Glennie Belle Sutton."

R. W. Sutton is now dead. His widow, Glennie Belle Sutton, and the four children of their marriage and their spouses are defendants herein.

While not expressly stated in the record, it may be implied that R. C. Burch was sole owner of the 36-acre home tract referred to in Item 4 and that plaintiff claims a life estate therein under Item 3.

Defendants pray "that the court declare that the plaintiff, Shirley Burch, by qualifying and acting as executrix of R. C. Burch, and by disbursing to herself and accepting as legatee the personal property bequeathed by item two and by accepting the real property devised in Item Three was put to an election, and that she elected to have the real property described in Item Five of said

will subjected to the devise as set out in Item Five and Seven of said last will and testament; and that the court further declare that the said Shirley Burch, having exercised her right of election, is now estopped to assert any interest in the lands described in said will other than the interest created in her by Item Three of the last will and testament of R. C. Burch."

The court, "being of the opinion that the plaintiff Shirley Burch, was not put to an election under the Last Will and testament of R. C. Burch with respect to the said sixty (60) acre tract," ordered, adjudged and decreed "that the plaintiff, Shirley Burch, as surviving tenant by the entirety, is the owner in fee simple of the sixty acre tract referred to in Item Five of the last Will and Testament of the said R. C. Burch." Defendants excepted and appealed.

Langston & Langston and Herbert B. Hulse for plaintiff appellee.

Sasser & Duke and J. Thomas Brown, Jr., for defendant appellants.

BOBBITT, J. The doctrine of equitable election is in derogation of the property right of the true owner. Hence, the intention to put a beneficiary to an election must appear plainly from the terms of the will. *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29; *Bank v. Misenheimer,* 211 N.C. 519, 191 S.E. 14; *Rich v. Morisey,* 149 N.C. 37, 62 S.E. 762; *Walston v. College,* 258 N.C. 130, 128 S.E. 2d 134. "An election is required only when *the will* confronts a beneficiary with a choice between two benefits which are *inconsistent with each other.*" *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598. An election is required only if the will discloses it was the testator's manifest purpose to put the beneficiary to an election. *Bank v. Barbee,* 260 N.C. 106, 110, 131 S.E. 2d 666.

In *Lamb v. Lamb, supra,* in accordance with prior decisions, this Court said: "(I)f, upon a fair and reasonable construction of the will, the testator, in a purported disposal of the beneficiary's property, has mistaken it to be his own, the law will not imply the necessity of election." This statement is quoted with approval in *Bank v. Barbee, supra,* in which pertinent prior decisions are cited.

R. C. Burch refers in Item 3 to "all *my* real property"; in Item 4 to "*my* home tract of land, containing Thirty-Six (36) Acres"; and in Item 5 to "*my* other land, consisting of SIXTY (60) ACRES." (Our italics). Obviously, upon a fair and reasonable construction of his will, R. C. Burch, in his purported disposition of the 60-acre tract, has acted under the mistaken belief that he was the sole owner thereof. Since it appears clearly that R. C. Burch erroneously

considered the 60-acre tract purportedly devised in Item 5 to be his own, no election was required. *Honeycutt v. Bank, supra,* and cases cited therein; *Taylor v. Taylor,* 243 N.C. 726, 92 S.E. 2d 136; *Walston v. College, supra; Bank v. Barbee, supra.* The factual situation now under consideration is closely analogous to that considered in *Taylor v. Taylor, supra.*

As noted by Sharp, J., in *Bank v. Barbee, supra,* the doctrine of equitable election as declared in earlier cases "has been tempered somewhat" in our later decisions.

Appellant cites and stresses *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183. There the controversy related to real property described in the will of Dr. Burrus only as "the Hollifield property." In contrast, the record shows Dr. Burrus identified other devised real estate as *his* property, *e. g.,* (1) "*my* land holdings known as the McCormick farm," (2) "the river bottom originally owned by my father," (3) "the Burrus home property," and (4) "that property which was conveyed to me by G. M. Burrus, my uncle." (Our italics.) Suffice to say, the will of Dr. Burrus did not disclose affirmatively he was under the erroneous impression that he was the sole owner of "the Hollifield property." On account of factual differences, and in the light of later decisions, *Trust Co. v. Burrus, supra,* does not control decision with reference to the factual situation now under consideration.

Whether the testator would have made a different disposition of *his* property if he had been aware of the true status of the title to the 60-acre tract and, if so, to what extent, are matters in the realm of speculation. The determinative fact is that the will itself, which is the only basis on which the doctrine of equitable election may be invoked, contains no provision that manifests an intent that an election was required. *Honeycutt v. Bank, supra.*

Affirmed.

C. W. BANNER, JR., AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF C. W. BANNER, DECEASED, AND C. W. BANNER, JR., INDIVIDUALLY v. NORTH CAROLINA NATIONAL BANK (FORMERLY SECURITY NATIONAL BANK OF GREENSBORO), TRUSTEE FOR CHARLES WHITLOCK BANNER, JR., JOSEPHINE ENGLE BANNER, ROBERT GLENN BANNER, WILLIAM FAWCETT BANNER, AND DANIEL WHITLOCK BANNER, AND JOSEPHINE ENGLE BANNER, INDIVIDUALLY, ROBERT GLENN BANNER, INDIVIDUALLY, WILLIAM FAWCETT BANNER, INDIVIDUALLY, AND DANIEL WHITLOCK BANNER, INDIVIDUALLY, AND ELIZABETH YOUNG BANNER, BENEFICIARIES UNDER THE WILL OF C. W. BANNER, DECEASED.

(Filed 14 January, 1966.)

Wills § 50—

By virtue of the provisions of G.S. 36-23.1, direction that after a life estate to testator's widow, testator's home should be given to some charity to be selected by the executor, testator's son, is not void for indefiniteness.

APPEAL by plaintiff, C. W. Banner, Jr., as Executor, Trustee, and Individually, from *Johnston, J.*, October 4, 1965 Civil Session, GUILFORD Superior Court, Greensboro Division.

The plaintiff in his several capacities instituted this civil action to have the court construe the will, including the codicils, of C. W. Banner, Deceased, and to instruct the plaintiff as to his duties as executor and trustee.

The parties stipulated that C. W. Banner died on August 30, 1964, a resident of Guilford County — leaving a last will dated November 13, 1950, which, with a number of codicils, was probated in common form on September 2, 1964. The testator left surviving the defendant, Elizabeth Young Banner, his widow, the plaintiff, C. W. Banner, Jr., his son and only child by a former marriage. On January 29, 1965, the widow, electing to share in the estate as in case of intestacy, filed her dissent to the will.

Item 6 of the will provided: "If my wife, Elizabeth Young Banner, survives me, I give and devise to her, for and during the term of her natural life, my residence property (including the house, lot and outbuildings) known as No. 808 North Elm Street, Greensboro, North Carolina. If my said wife predeceases me, or upon her death after my death, if she survives me, I give and devise the above-mentioned residence property known as No. 808 North Elm Street, Greensboro, North Carolina, to the then living issue of my son, Charles W. Banner, Jr., *per stirpes.*"

A codicil dated November 1, 1955, provided: "It is my will that our home, 808 North Elm Street, shall be given to some charity organization same to be selected by my Executor after the death of

my wife, Elizabeth, together with all the furniture and fixtures not desired by my son, Chas. W. Banner, Jr."

The court appointed Mr. Bryce R. Holt, Attorney, guardian *ad litem* to represent and answer for William Fawcett Banner, Daniel Whitlock Banner, minor sons of C. W. Banner, Jr., and other unborn remaining issue of Charles W. Banner, Jr., living at the death of the life tenant.

All necessary parties were adjudged to be before the court which rendered judgment that the codicil dated November 1, 1955, is "legally invalid and of no effect." The judgment provided further that the estate be taxed with the costs. Judge Johnston did not pass on any other question. The plaintiff, in all capacities, excepted and appealed.

Frazier & Frazier, Smith, Moore, Smith, Schell & Hunter for plaintiff appellant.

D. Newton Farnell, Jr., for defendant Elizabeth Young Banner, appellee.

Bryce R. Holt, attorney for Guardian Ad Litem and for Josephine Engle Banner and Robert Glenn Banner defendant appellees.

HIGGINS, J. The judgment appealed from held invalid and of no effect the codicil giving the executor power to select the "charity organization" to receive the gift of the home on North Elm Street as contemplated by the codicil dated November 1, 1955. The validity of the judgment holding the codicil invalid is the only question presented on this appeal.

The appellees successfully contended that the codicil is invalid "by reason of uncertainty and indefiniteness as to the object and individuals to be benefited under the terms thereof." They cite copious authority in support of the view, contending, "The scheme of charity must be sufficiently indicated or a method must be provided whereby it may be ascertained and its objects made sufficiently certain to enable the court to enforce an execution of the trust according to the scheme." 10 Am. Jur., Charities, pp. 643, 644; *Holland v. Peck*, 37 N.C. 255; *Weaver v. Kirby*, 186 N.C. 387, 119 S.E. 564; *Gaston County United Dry Forces v. Wilkins*, 211 N.C. 560, 191 S.E. 8; *Woodcock v. Wachovia Bank & Trust Co.*, 214 N.C. 224, 199 S.E. 20.

After the decision in *Woodcock* (1938) holding a bequest invalid for indefiniteness, the General Assembly enacted Ch. 630, now codified as G.S. 36-23.1, which provides:

"1. Declaration of Policy. — It is hereby declared to be the policy of the State of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes, or for some or all of such uses or purposes, are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to effect the policy herein declared.

"2. No Gift, Transfer, etc., Invalid for Indefiniteness. — No gift, transfer, grant, bequest, or devise of property or income, or both, in trust or otherwise, for religious, educational, charitable, or benevolent purposes, or for some or all of such purposes, is or shall be void or invalid because such gift, transfer, grant, bequest, or devise is in general terms, or is uncertain as to the specific purposes, objects, or beneficiaries thereof, or because the trustee, donee, transferee, grantee, legatee, or devisee, or some or all of them, is given no specific instructions, powers, or duties as to the manner or means of effecting such purposes. When any such gift, transfer, grant, bequest, or devise has been or shall be made in general terms the trustee, donee, transferee, grantee, legatee, or devisee, or other person, corporation, association, or entity charged with carrying such purposes into effect, shall have the right and power; to prescribe or to select from time to time one or more specific objects or purposes for which any trust or any property or income shall be held and administered; to select or to create the machinery for the accomplishment of such objects and purposes, selected as hereinabove provided, or as provided by the donor, transferor, grantor, or testator, including, by way of illustration but not of limitation, the accomplishment of such objects and purposes by the acts of such trustee or trustees, donee, transferee, grantee, legatee, or devisee, or their agents or servants, or by the creation of corporations or associations or other legal entities for such purpose, or by making grants to corporations, associations, or other organizations then existing, or to be organized, through and by which such purposes can or may be accomplished, or by some or all of the said means of accomplishment, or any other means of accomplishment not prohibited by law."

The section is referred to in *Bennett v. The Attorney General*, 245 N.C. 312, 96 S.E. 2d 46 (1957), and in *Farnan v. Bank*, 263 N.C. 106, 139 S.E. 2d 14 (1964).

By the terms of the codicil the testator's son, as executor of the will, is given power to select the recipient of the gift. The selection

is limited to a "charity organization." It is not difficult to understand the testator's purpose in giving the power of appointment to his son as executor to be exercised at the death of the life tenant. The subject of the bequest is not money but the Banner home. Not all "charity organizations" are likely to be in a position equally to make effective use of the devise. The home, of course, might fit better into the work of one charity organization than in others. The testator, in giving power of selection by the codicil, trusted to his son to make a wise and proper selection as of the time selection was required.

Under the law as it existed at the time *Woodcock* and the other cases referred to were decided, the rules of interpretation would require us to hold the gift in such general terms as void for indefiniteness. At the time the cases were decided a testator did not have the benefit of authority conferred by Ch. 630, Public Laws of 1947, G.S. 36-23.1. The section spells out in such language as will not permit us to misunderstand what the lawmaking power meant. We hold the General Assembly acted within its competence in enacting Chapter 630. We hold, likewise, that the section authorized the testator to make the gift of his home in the manner set forth in the codicil. In declaring the codicil invalid, the court was in error. The attorneys have favored us with a concise record and excellent arguments, both orally and by brief.

The judgment, except as to costs, is

Reversed.

STATE v. ARLENE JORDAN STROUTH (APPLE).

(Filed 14 January, 1966.)

Automobiles § 70; Indictment and Warrant § 14—

A defendant who goes to trial on a warrant charging him with operating a motor vehicle upon a public highway "while under the influence of intoxicating liquor—narcotic drugs" may not for the first time on appeal raise the question of duplicity, since he waives the defect by failing aptly to move to quash.

APPEAL by defendant Arlene Jordan Strouth (Apple) from *McLoughlin, J.*, June 7, 1965 Regular Session, GUILFORD Superior Court, Greensboro Division.

This criminal prosecution originated by affidavit and warrant issued by the Criminal Division, Municipal County Court of Guilford. The affidavit was made by Frank Miller, member of the State Highway Patrol, charging that the "Defendant on or about the third day of March, 1965, . . . did unlawfully and wilfully drive a motor vehicle upon the highway while under the influence of intoxicating liquor—narcotic drugs at Raleigh Street and Sullivan Street, Greensboro."

The order of arrest contained the following: "For the reasons stated in the foregoing affidavit which is hereby made a part of the warrant, you are hereby commanded to arrest the above named . . ."

The records of the Municipal County Court show the following: "Plea: Not guilty. Verdict: Guilty. Prayer for judgment continued for 12 months on condition the defendant pay a fine of $100.00 and costs and not operate a motor vehicle in the State of North Carolina for a period of 12 months. . . . The defendant . . . gives notice of appeal in open court."

In the Superior Court before the jury, Patrolman Miller testified that on March 3, 1965, at 11:40 p.m., he observed a slowly moving motor vehicle on Raleigh and Sullivan Streets in Greensboro, being driven by the defendant. When the vehicle stopped several feet from the curb, the officer found the defendant slumped over on the steering wheel and, in his opinion, she was under the influence of intoxicating liquor. She admitted to the officer that some time before she had had a beer. She stated she had been taking different medicines which had been prescribed by her physician.

The defendant testified in her own defense. She denied she was under the influence of alcoholic beverages. She admitted, "That day I had drank the beer that I told him about, a part of one, and a cocktail between 1:00 and 1:30 in the afternoon. . . . I have taken narcotics, but not that day."

The jury returned this verdict: "Guilty as charged." From the judgment imposed, the defendant appealed.

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

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

HIGGINS, J. The defendant went to trial in the Municipal Court upon the charge of operating a motor vehicle upon the public highway while she was "under the influence of intoxicating liquor—narcotic drugs." She was convicted and appealed to the Superior Court. In the Superior Court she was tried *de novo* on the warrant.

The jury returned a verdict: "Guilty as charged." In neither court did the defendant challenge or object to the warrant.

In her appeal to this Court, for the first time, she takes the position that the warrant charges operation of a motor vehicle while under the influence of intoxicating liquor or, in the alternative, under the influence of narcotic drugs. Possibly the better view of the language used is that the warrant charges both. A driver may be under the influence of both liquor and drugs. If it be conceded, however, that the warrant charges in the disjunctive, the objection should have been raised by motion to quash the warrant made before trial. "As to the duplicity of charging two of the criminal offenses created and defined in G.S. 20-138, see *State 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." *State v. Best*, 265 N.C. 477, 144 S.E. 2d 416. "By going to trial without making a motion to quash, he waived any duplicity which might exist in the bill." *State v. Merritt*, 244 N.C. 687, 94 S.E. 2d 825.

The record does not contain the judge's charge. We may assume, therefore, that he properly instructed the jury as to permissible verdicts under the evidence.

No error.

STATE OF NORTH CAROLINA, EX REL. GLAMORGAN PIPE & FOUNDRY COMPANY, A CORPORATION, AND ALL OTHER CREDITORS OF THE ESTATE OF K. R. BENFIELD, DECEASED, WHO DESIRE TO JOIN IN THE PROSECUTION OF THIS ACTION AND CONTRIBUTE TO THE COSTS HEREOF, RELATORS, AND GLAMORGAN PIPE & FOUNDRY COMPANY, A CORPORATION v. MARGARET S. BENFIELD, ADMINISTRATRIX OF THE ESTATE OF K. R. BENFIELD, DECEASED, AND THE PHOENIX INSURANCE COMPANY, A CORPORATION.

(Filed 14 January, 1966.)

1. Actions § 2; Process § 13—

Motion to dismiss on the ground that plaintiff is a foreign corporation which had transacted business in this State without being domesticated must be determined prior to trial, since the motion challenges the authority of the court to proceed. G.S. 55-154(a).

2. Same; Appeal and Error § 55—

Where, upon defendants' motion, the court dismisses the action under G.S. 55-154(a), upon the court's conclusion that plaintiff is a nonresident

corporation that has transacted business here without being domesticated, the cause must be remanded, since the court must find the specific facts supporting its conclusion, notwithstanding the court denominates the conclusion a finding of fact.

APPEAL by plaintiff from *Latham, Special Judge,* First February Assigned Civil Session 1965 of WAKE.

Glamorgan Pipe & Foundry Company, a Virginia corporation, herein referred to as plaintiff, instituted this civil action against the administratrix of the estate of K. R. Benfield (Benfield) and the surety on her administration bond.

Plaintiff alleges it sold and delivered certain pipe and fittings to Benfield on or about April 16, 1959; that Benfield was indebted to plaintiff therefor in the amount of $1,778.06 plus interest at the time of his death on December 26, 1959; that plaintiff's claim therefor, which was duly filed with defendant administratrix, remains unpaid; and that, on account of the failure of defendant administratrix in specified particulars to administer the estate of Benfield in accordance with law, defendants are liable to plaintiff for the amount of its claim.

Defendants, in separate answers, denied, *inter alia,* plaintiff's allegations to the effect Benfield was indebted to plaintiff at the time of Benfield's death.

When the case was called for trial, each defendant moved under G.S. 55-154 that plaintiff's action be dismissed. The court then denied said motions. After plaintiff and defendants had offered evidence, defendants renewed their said motions. Thereupon, the court entered judgment, which, after formal recitals, provides:

". . . and the Court finds the following facts:

"1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Virginia.

"2. That said plaintiff corporation is not and has never been domesticated to transact business in the State of North Carolina in accordance with General Statutes 55-154.

"3. That said plaintiff corporation has transacted business in the State of North Carolina without being domesticated in the State of North Carolina in accordance with the North Carolina General Statutes 55-154.

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed, and the plaintiff is taxed with the costs."

Plaintiff excepted to "Finding of Fact" No. 3 and to the judgment and appealed.

Emanuel & Emanuel for plaintiff appellant.

Ellis Nassif for Margaret S. Benfield, Administratrix, defendant appellee.

Maupin, Taylor & Ellis and Frank W. Bullock, Jr., for The Phoenix Insurance Company defendant appellee.

BOBBITT, J. G.S. 55-154, in pertinent part, provides: "(a) No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to trial; . . . An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial."

The issue raised by defendants' motions to dismiss should have been determined by the trial judge prior to trial. These motions challenged the authority of the court to proceed with a trial of the cause on its merits.

What is denominated "Finding of Fact" No. 3 is actually a conclusion of law, not a finding of fact. *Mills, Inc. v. Transit Co.*, 265 N.C. 61, 73, 143 S.E. 2d 235. Under authority of the cited case, which was decided July 23, 1965, defendants confess error and concede the cause must be remanded for specific findings as to facts pertinent to whether plaintiff "has transacted business in the State of North Carolina." Defendants are well advised.

Absent specific findings of fact supported by evidence and justifying the conclusion of law embodied in "Finding of Fact" No. 3, the judgment of the court below is erroneous and is therefore vacated. The cause is remanded for a *de novo* hearing and determination of defendants' said motions to dismiss in accordance with requirements stated herein.

There has been no determination of any of the issues raised by the pleadings relating to the merits of plaintiff's cause of action.

Error and remanded.

LUTHER DOZIER HATCHELL, EMPLOYEE v. JOHN D. COOPER AND W. T. COOPER, T/A COOPER'S FURNITURE HOUSE, EMPLOYER; AND THE SHELBY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 14 January, 1966.)

1. Appeal and Error § 21—

A sole exception to the judgment presents the single question whether the facts found are sufficient to support the judgment, and does not present the question of the sufficiency of the evidence to support the findings.

2. Master and Servant § 94—

Where on appeal from the Industrial Commission the Superior Court expressly overrules each of defendant's exceptions by number and affirms the award, a sole exception to the judgment on further appeal to the Supreme Court does not present the correctness of the rulings of the Industrial Commission on which the exceptions were taken, but only whether the findings support the judgment of the Superior Court.

3. Master and Servant § 93—

The refusal of the Superior Court to remand the cause to the Industrial Commission for additional evidence will not be disturbed when the motion is not based on newly discovered evidence.

APPEAL by defendants from *Mallard, J.*, May 31, 1965 Special Civil Session of WAKE.

Claim for compensation under the Workmen's Compensation Act.

On October 17, 1963, plaintiff had been continuously employed for over seven years as a salesman by defendant Cooper's Furniture House, an employer subject to the provisions of the Workmen's Compensation Act. On that date, as the result of a fall in the store, he suffered a fractured skull and serious brain injury. On January 22, 1964, the date of the original hearing, plaintiff was still totally disabled. The hearing commissioner awarded him compensation for temporary total disability and medical expenses. Defendants appealed to the full Commission. At the hearing on October 30, 1964, defendant moved that the case be reset for the taking of additional testimony. This motion was not granted and, on November 10, 1964, the full Commission substituted its own findings, which were not materially different from those of the hearing commissioner, and the award was unchanged.

Defendants duly filed exceptions (16 in number) to the full Commission's award, and gave notice of appeal to the Superior Court. In substance, defendants' exceptions charged (1) that the crucial findings of fact were not supported by competent evidence; (2) that the conclusions of law were based on erroneous and insufficient findings; and (3) that the Commission erred in failing to allow defendants' motion that it hear additional evidence.

In the Superior Court defendants renewed their motion to remand, which motion was denied. On June 2, 1965, after reviewing and considering the transcript on appeal, Judge Mallard entered judgment specifically overruling each of defendants' 16 exceptions and affirming the award of the Industrial Commission. Defendants made the following appeal entries: "To the foregoing order, defendants object and except and give notice of appeal to the Supreme Court of North Carolina. . . ." (The omitted portions pertain only to the appeal bond and terms for serving case and countercase.)

Emanuel & Emanuel for plaintiff appellee.
I. Weisner Farmer for defendant appellants.

SHARP, J. The only exception taken by defendants in the Superior Court is the one which the law implies from the appeal itself. An appeal is an exception to the judgment. Under our decisions, "the effect of an exception to the judgment is only to challenge the correctness of the judgment, and presents the single question whether the facts found are sufficient to support the judgment. . . ." *Fox v. Mills, Inc.*, 225 N.C. 580, 583-84, 35 S.E. 2d 869, 871. *Accord, Glace v. Throwing Co.*, 239 N.C. 668, 80 S.E. 2d 759; *Worsley v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467. Defendants concede this rule of appellate procedure. They argue, however, that the judgment is erroneous in that it is "a blanket denial" of their exceptions to the findings and conclusions of the Industrial Commission and that it does not specifically pass upon the sufficiency of the evidence to support them. This contention is without merit.

In *Fox v. Mills, Inc., supra,* the judge "after due consideration of the entire record" and argument of counsel, held that "the award of the North Carolina Industrial Commission be in all respects affirmed." In reviewing this judgment, Devin, J. (later C.J.), speaking for this Court, said:

> "Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the Superior Court thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated. We think this practice conducive to more orderly and accurate presentation of appeals brought forward under the Act. The appeal from the Industrial Commission in this case pointed out the particulars in which errors of law were assigned, and the judgment in the Superior Court merely decreed that the award be in all respects affirmed. Presumably the judge below considered each of the assignments of error and

overruled them. In this view we do not hold that a remand is required in this case." *Id.* at 583, 35 S.E. 2d at 871.

In this case, the action of Judge Mallard in expressly overruling each of defendants' exceptions by number eliminates any necessity for indulging in presumptions.

Although the competency and sufficiency of the evidence upon which the Industrial Commission based its findings of fact are not before us for review, we have examined the record. It appears that competent evidence supports all the material findings of fact and that the findings, in turn, support the Commission's award, which the Superior Court properly affirmed.

Defendants' motion to remand the case to the Industrial Commission for the taking of additional testimony is not based on newly discovered evidence. They do not contend that they have any such evidence. We apprehend that defendants desire "to mend their licks" by asking the same witnesses additional questions which could just as well have been asked on the original hearing. In addition, they contend that the full Commission should have the opportunity to see and hear this particular claimant before evaluating his testimony. The judge properly denied the motion to remand. *Moore v. Stone Co.*, 251 N.C. 69, 110 S.E. 2d 459.

The judgment below is

Affirmed.

HENRY H. SINK, ANCILLARY ADMINISTRATOR C. T. A. OF THE ESTATE OF NOBLE C. CARTWRIGHT v. FORREST J. SCHAFER.

(Filed 14 January, 1966.)

Process § 4—

The suffix "Jr." is no part of a person's name but is *descriptio personae*, and therefore when the caption of the summons does not designate defendant as a junior but the body does so designate him, and the summons is served in compliance with the applicable statute upon the defendant, the fact that the caption fails to properly describe him as junior is immaterial.

APPEAL by defendant from *Bailey, J.*, July 12, 1965, Regular Civil Session, WAKE Superior Court.

On May 6, 1965, the plaintiff, as administrator of Noble C. Cartwright, instituted this civil action for the wrongful death of his intestate. The caption of the summons designated the defendant

as Forrest J. Schafer. The body of the summons directed the Sheriff of Wake County to summon Edward Scheidt, Commissioner of Motor Vehicles, as statutory process agent for Forrest J. Schafer, Jr., giving his street address in Philadelphia. The complaint alleged a cause of action for wrongful death resulting from the negligent operation of a motor vehicle upon the public highway near Camp Lejeune by the defendant, a nonresident of this State.

The plaintiff filed with the court an affidavit that the nonresident defendant had been served with the summons and a copy of the complaint as required by G.S. 1-105. Forrest J. Schafer, Jr., refused to accept the registered letter containing the copy of the complaint and summons upon the ground that the caption of the summons designated the defendant as Forrest J. Schafer. Upon the return of the registered letter the plaintiff enclosed the same in another letter and mailed it to Forrest J. Schafer, Jr., at his address in Philadelphia. Forrest J. Schafer, Jr., entered a special appearance in the Superior Court and moved to quash the service of process upon the ground the service upon the Motor Vehicles Commissioner was insufficient to bring Forrest J. Schafer, Jr., into court.

Judge Bailey overruled the motion. The defendant, Forrest J. Schafer, Jr., appealed.

Teague, Johnson and Patterson by Robert M. Clay for plaintiff appellee.

Smith, Leach, Anderson & Dorsett for Forrest J. Schafer, Jr., defendant appellant.

HIGGINS, J. The record discloses the caption in the summons designated Forrest J. Schafer, as the defendant. The body of the summons directed the Sheriff to serve Forrest J. Schafer, Jr. The Sheriff served the summons on the Commissioner of Motor Vehicles as defendant's statutory process agent for the purpose of bringing him into court in this wrongful death action resulting from his negligent operation of a motor vehicle upon a North Carolina public highway. The Commissioner of Motor Vehicles mailed the process to Forrest J. Schafer, Jr., who seeks to quash the service upon the sole ground that the suffix, Jr., was omitted in the caption of the summons. The appellant is alleged to have been the driver of the vehicle causing the death of the intestate. Copies of the summons and complaint were served on the Commissioner of Motor Vehicles and by him transmitted to the appellant. The service was complete.

The suffix, Jr., is no part of a person's name. It is a mere *descriptio personae. State v. Best,* 108 N.C. 747, 12 S.E. 907. "Names

are to designate persons, and where the identity is certain a variance in the name is immaterial." *Patterson v. Walton,* 119 N.C. 500, 26 S.E. 43; *Clawson v. Wolfe,* 77 N.C. 100; 71 C.J.S., Pleadings, § 36(b).

Judge Bailey's order denying the motion to quash the summons is sustained by the great weight of authority. This the appellant admits in his brief. *Quaere:* Does the caption of the summons designating Forrest J. Schafer, or the body of the process giving the correct designation, Forrest J. Schafer, Jr., control? In either event, the order of the Superior Court of Wake County is correct and is

Affirmed.

STATE v. PETER KLOPFER.

(Filed 14 January, 1966.)

1. Criminal Law § 30—

After a *nolle prosequi*, the cause can be replaced on the docket by the solicitor only with the consent of the court, while a *nolle prosequi* with leave implies the consent of the court, and the solicitor may have the case restored for trial without further order.

2. Same; Constitutional Law § 30—

In this prosecution of defendant for trespass, the jury was unable to agree and a mistrial was ordered. Thereafter the solicitor took a *nolle prosequi* with leave. *Held:* Defendant may not object thereto on the ground that the proceeding denied him his constitutional right to a speedy trial, since the defendant does not have the right to compel the State to prosecute him if it elects not to do so.

APPEAL by defendant from *Johnson, J.,* August, 1965 Criminal Session, ORANGE Superior Court.

This criminal prosecution was founded upon a bill of indictment signed by Thomas J. Cooper, Solicitor, and submitted by him to the Grand Jury and returned a true bill by that body at its February, 1964 Session, Orange Superior Court. The indictment charged that on January 3, 1964, the defendant "did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts . . . located on Route 3, Chapel Hill, North Carolina, . . . Watts being then and there in peaceable possession, and the said Peter Klopfer, after being ordered to leave the said premises willfully and unlawfully refused to do so, knowing he . . . had no license therefor . . . etc."

At the March, 1964 Special Criminal Session, the defendant, represented by counsel of his own selection, entered a plea of not guilty. The issue raised by the indictment and the plea was submitted to the jury which, after deliberation, was unable to agree as to the defendant's guilt. The court declared a mistrial and ordered the case set for another hearing. Thereafter, the record discloses the following.

"No. 3556 — State v. Peter Klopfer
"The State moves the Court that it be allowed to take a nol pros with leave. The motion is allowed. Defendant takes exception to the entry of the nol pros with leave and gives notice of appeal in open court."

T. W. Bruton, Attorney General, Andrew A. Vanore, Jr., Staff Attorney for the State.
Wade H. Penny, Jr., for defendant appellant.

HIGGINS, J. The appellant challenged the right of the solicitor, even with the approval of the judge, to enter a *nolle prosequi* with leave in the criminal prosecution pending against him in the Superior Court. Stated another way, he insists his objection takes away from the solicitor and the court the power and authority to enter the order. The reason assigned is that the procedure denies him his constitutional right of a speedy trial.

When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. When a *nolle prosequi with leave* is entered, the consent of the court is implied in the order and the solicitor (without further order) may have the case restored for trial. "A *nolle prosequi,* in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." *Wilkinson v. Wilkinson,* 159 N.C. 265, 74 S.E. 740; *State v. Thornton,* 35 N.C. 256. Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the state's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi.* In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort.

In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record. The order is

Affirmed.

JACK E. VERNON, PLAINTIFF v. R. CROSBY REHEIS, DEFENDANT, AND J. STEWART FINCH, ADDITIONAL DEFENDANT.

(Filed 14 January, 1966.)

Parties § 4—

In an action against one partner to recover damages for such partner's breach of agreement to sell plaintiff his one-half interest in the partnership, the other partner, who arranged the meeting but did not participate in the negotiations culminating in the contract, *held* not a necessary party, and the Superior Court properly vacated the order of the clerk making him a party to the action.

APPEAL by defendant Reheis from *Bone, E.J.*, June 1965 Civil Session of ORANGE.

Plaintiff instituted this action to recover the sum of $1,573.26, allegedly due plaintiff by defendant Reheis, by reason of the failure of defendant to comply with the provisions of a contract for the sale of a one-half interest in Ye Olde Tavern, Inc., Chapel Hill, North Carolina, by plaintiff and the purchase thereof by defendant. The contracts with respect to the purchase and sale were pleaded and attached to the complaint as Exhibits A and B.

On 22 April 1965, defendant moved before the Clerk of the Superior Court of Orange County to have J. Stewart Finch made an additional party defendant. The motion was allowed. In his answer, defendant Reheis alleged that J. Stewart Finch, owner of the other one-half interest in Ye Olde Tavern, Inc., approached him about purchasing the interest of the plaintiff in said Tavern, and "solicited on behalf of Jack Vernon an offer to acquire a one-half interest therein. That said J. Stuart *(sic)* Finch arranged a meeting with Jack Vernon at the law offices of an attorney to effectuate a binding offer, which was consummated in the form of Plaintiff's Exhibit A; and later completed on or about June 15, 1962," which latter agreement is plaintiff's Exhibit B.

The additional defendant moved before the trial judge at the June 1965 Civil Session to vacate the order entered by the Clerk of

the Superior Court of Orange County making him a party defendant. The court below held that J. Stewart Finch is neither a proper nor necessary party to this action, and entered an order vacating the order previously entered by the Clerk of the Superior Court of Orange County.

Defendant Reheis appeals, assigning error.

James R. Farlow for defendant appellant.

Manning & Page by James Allen, Jr., for additional defendant appellee.

PER CURIAM. J. Stewart Finch was not a party to the contracts entered into by and between the plaintiff and the defendant, upon which contracts the plaintiff is relying for the relief sought in his complaint. Moreover, there is no allegation in the defendant's answer to the effect that Finch was present at any time during the negotiations between the plaintiff and the defendant when the terms set forth in plaintiff's Exhibits A and B were agreed upon and the contracts executed. On the other hand, it is alleged in the answer that Finch was acting for Jack Vernon when he arranged the meeting for Vernon and the original defendant to meet at the office of an attorney to effectuate a binding offer which was consummated as set forth in plaintiff's Exhibits A and B. Furthermore, practically all the matters complained of by the original defendant were incorporated in the contracts entered into between the plaintiff and the original defendant.

In McIntosh, North Carolina Practice and Procedure, 2nd Ed., § 584, page 292, it is said: "* * * Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. * * *" *Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165; *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659.

"Ordinarily it is within the discretion of the court to allow or deny a motion to make a party who is not a necessary party to the proceeding a party plaintiff or defendant, and the order entered is not reviewable." *Kimsey v. Reaves,* 242 N.C. 721, 89 S.E. 2d 386. See also *Adler v. Curle,* 254 N.C. 502, 119 S.E. 2d 393.

A careful review of the pleadings leads us to the conclusion that Finch certainly is not a necessary party and that the order entered below should be upheld, and it is so ordered.

Affirmed.

STADLER COUNTRY HAMS, INC. v. ELBERT SCOTT.

(Filed 14 January, 1966.)

Automobiles § 42g—

Evidence held not to show contributory negligence as a matter of law on the part of plaintiff in entering an intersection while faced with the green traffic control signal after having observed the traffic in all directions and ascertained that no vehicles were in the intersection in his lane of travel, but who was hit by defendant's vehicle which entered the intersection while faced with a red traffic signal and collided with the left side of plaintiff's vehicle, since plaintiff had the right to act upon the assumption that defendant would stop in obedience to the red light.

APPEAL by plaintiff from *Johnson, J.*, August 1965 Civil Session of ALAMANCE.

Ross, Wood & Dodge for plaintiff.
Sanders & Holt and Clyde A. Wootton for defendant.

PER CURIAM. This is an action to recover property damage which resulted when motor vehicles of plaintiff and defendant collided at the intersection of South Main and Morehead Streets in the city of Burlington. The collision occurred about 9:55 A.M. on 16 November 1963, in a business district. Traffic at the intersection is controlled by automatic signal lights. Plaintiff's panel truck, operated by plaintiff's agent, was proceeding northwardly on Main. Defendant was operating his automobile eastwardly on Morehead.

At the close of the evidence the court allowed defendant's motion for judgment of involuntary nonsuit, and dismissed the action. Plaintiff excepted and appealed.

The evidence, considered in the light most favorable to plaintiff, discloses these facts: Plaintiff's truck was proceeding northwardly on Main in the east traffic lane at a speed of 15 to 20 miles per hour. When it was about 100 feet from the intersection the driver observed that the traffic light facing him was red and he started to shift his foot from the accelerator to the brake. When he was in the act of doing so the light changed to green. He continued forward at about the same speed as before. He observed that a line of traffic headed south on Main had been stopped at the intersection. When he was about 20 feet from the intersection, the front car in that line of traffic turned right and proceeded west on Morehead. He looked to his right on Morehead and saw no traffic approaching; he glanced to his left and saw defendant's automobile about 40 feet from the intersection, coming eastwardly toward the intersection. When plaintiff's truck reached the approximate center of the intersection

it was struck "in the left fender and door" by defendant's automobile.

In his brief "Defendant concedes that on the issue of defendant's negligence there was sufficient evidence . . . to take the case to the jury. . . . defendant proceeds on the theory that the evidence of plaintiff established contributory negligence as a matter of law. . . ." The crux of defendant's argument in support of nonsuit is that plaintiff's evidence shows that its driver "was travelling blindly into the intersection." We do not agree. Plaintiff's truck entered the intersection on a green light. The driver observed traffic in all directions. There were no vehicles in the intersection in the truck's lane of travel. Defendant was nearing the intersection but was faced with a red light. Plaintiff had the right to assume, and to act upon the assumption, that defendant would stop in obedience to the red light. Contributory negligence as a matter of law does not appear. *Wright v. Pegram*, 244 N.C. 45, 92 S.E. 2d 416.

The judgment below is

Reversed.

STATE OF NORTH CAROLINA v. ROBERT N. BRIDGES.

(Filed 14 January, 1966.)

1. Criminal Law § 65—

Testimony of a witness that "I think" defendant was the culprit is competent, since the want of positiveness of identification goes to the weight and not to the admissibility of the testimony.

2. Robbery § 5—

Where the evidence tends to show a completed robbery accomplished with the use of firearms, the court need not instruct the jury as to its right to return a verdict of guilty of common law robbery.

APPEAL by defendant from *Johnson, J.*, August 1965 Criminal Session of ORANGE.

Defendant was tried upon a bill of indictment charging him with armed robbery (G.S. 14-87). The State's evidence tended to show that about 8:00 p.m. on April 20, 1964, defendant, with another person, entered the store of E. G. Merritt. Defendant, who was armed with a .32 automatic pistol, fired a shot into the counter, and threatened to kill Merritt and Ben Grantham, his son-in-law, if they resisted the "hold-up." Defendant's companion removed

$133.00 from the cash register and the two men fled. Defendant's evidence tended to show that he was in the State of Maryland on April 20, 1964, and could not have committed the crime. The judge instructed the jury to return a verdict of guilty as charged or not guilty. The verdict was "guilty as charged." From a judgment of imprisonment defendant appeals.

Attorney General T. W. Bruton, Charles D. Barham, Jr., Assistant Attorney General, and Wilson B. Partin, Jr., for the State.

F. Gordon Battle for defendant appellant.

PER CURIAM. Ben Grantham's testimony positively identified defendant as one of the participants in the robbery charged. Mr. Merritt testified, "I think he (defendant) is the man that did it." His "lack of positiveness" as to the identification of defendant went to the weight and not to the admissibility of the testimony. *State v. Church,* 231 N.C. 39, 55 S.E. 2d 792; Stansbury, N. C. Evidence § 129 (2d Ed. 1963). Defendant's assignment of error based upon an exception to this evidence cannot be sustained.

Defendant's defense was alibi. All the evidence tends to show a completed robbery accomplished with the use of firearms. There was no evidence from which the jury could find that any of the lesser offenses included within an indictment charging armed robbery were committed. Therefore the judge was not, as defendant contends, required to instruct the jury that it might return a verdict of guilty of common-law robbery. *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834. See *State v. Hicks,* 241 N.C. 156, 159-60, 84 S.E. 2d 545, 547-48. The judge's definition of reasonable doubt was in accord with our decisions. *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133.

In the trial we find

No error.

STATE v. JUNIOR VANN COLEMAN.

(Filed 14 January, 1966.)

Criminal Law § 23—

Where the evidence supports the court's findings that defendant, on trial for murder in the first degree, freely and understandingly entered a plea of guilty of murder in the second degree, the acceptance of the plea by the court will not be disturbed.

STATE *v.* COLEMAN.

APPEAL by defendant, Junior Vann Coleman, from *Mallard, J.*, April, 1965 Criminal Session, ROBESON Superior Court.

The defendant was indicted at the January, 1965 Session for the first degree murder of Coleman B. Hodge. Upon a showing of the defendant's indigency, the court appointed Mr. F. D. Hackett, attorney, to represent him.

The defendant entered a plea of not guilty. After the trial had proceeded for nearly three days, during which the State had introduced evidence the deceased had died as a result of at least four stab wounds penetrating the lung cavity, and other evidence connecting the defendant with the infliction of the wounds, the defendant and his counsel, in the absence of the jury, requested and obtained permission of the court to tender to the State a plea of guilty of murder in the second degree. The court gave the permission only after detailed explanation of the elements of murder in the second degree and the possible punishment. The defendant stated under oath that he freely and understandingly entered the plea. Thereupon the plea was accepted by the State. The court imposed a prison sentence of 25 years in the State's prison. After sentence the defendant first stated he wanted to appeal, later attempted to withdraw the request, but finally decided to prosecute the appeal. The court ordered Mr. Hackett and Mr. J. F. Britt to make the appeal entries, prepare the record and perfect the appeal.

T. W. Bruton, Attorney General, George A. Goodwyn, Assistant Attorney General for the State.

Joe Freeman Britt, Robert Weinstein, and F. D. Hackett by Joe Freeman Britt for defendant appellant.

PER CURIAM. The defendant was tried for his life. During the third day of the trial and before the State had completed its evidence, the defendant and his counsel tendered to the State a plea of guilty of murder in the second degree. After lengthy investigation, "(T)he Court ascertains, determines and adjudges that the plea of Guilty by the defendant of the felony of Murder in the Second Degree is freely, understandingly and voluntarily made and was made without any undue influence, compulsion or duress and without promise of leniency, IT IS THEREUPON ORDERED that his plea of Guilty be entered on the minutes."

After a full review and examination of the record and the carefully prepared briefs filed both by the defendant and by the State, we conclude that the defendant's constitutional rights were afforded him at all stages of the trial.

No error.

STATE OF NORTH CAROLINA v. VANCE V. RICHMOND.

(Filed 14 January, 1966.)

Crime Against Nature §§ 1, 2—

Specific intent to commit an unnatural sexual act is an essential element of the offense defined by G.S. 14-202.1, and when there is evidence tending to show that defendant took immoral, improper and indecent liberties with a minor, but no evidence of the essential specific intent, nonsuit must be entered.

APPEAL by defendant from *Bickett, J.*, April 1965 Criminal Session of ORANGE.

Criminal prosecution on an indictment charging that defendant unlawfully and wilfully, with intent to commit an unnatural sexual act, did take immoral, improper and indecent liberties with ...., a child under the age of 16 years, he, the said defendant being over the age of 16 years, a violation of G.S. 14-202.1.

Plea: Not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment defendant appeals.

Attorney General T. W. Bruton and Staff Attorney Andrew A. Vanore, Jr., for the State.

Dalton and Long by W. R. Dalton, Jr., for defendant appellant.

PER CURIAM. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of the State's case. Defendant offered no evidence.

The indictment is drawn in the language of G.S. 14-202.1, which reads in part: "Any person over 16 years of age who, with intent to commit an unnatural sexual act, shall take, or attempt to take, any immoral, improper, or indecent liberties with any child of either sex, under the age of 16 years, * * *, shall, for the first offense, be guilty of a misdemeanor * * *." In order to convict a defendant for the offense charged the State's evidence must show beyond a reasonable doubt not only that defendant committed immoral, improper and indecent liberties with the young girl named in the indictment, but also that he committed such liberties "with intent to commit an unnatural sexual act."

The State's evidence, which it would serve no useful purpose to state, shows that defendant took immoral, improper and indecent liberties with the young girl named in the indictment, but the State has no evidence in the record before us, in our opinion, from which a jury might reasonably come to the conclusion that defendant committed such liberties "with intent to commit an unnatural sexual

act" with her or upon her. Such intent is an essential element in the crime charged and must be proved by the State. At most, the circumstances raise a mere conjecture that defendant had such an intent, and that is an insufficient foundation for a verdict and the case should not have been submitted to the jury. *S. v. Langlois,* 258 N.C. 491, 128 S.E. 2d 803; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Massey,* 86 N.C. 658; *S. v. Vinson,* 63 N.C. 335.

The court erred in denying defendant's motion for a judgment of compulsory nonsuit.

Reversed.

STATE v. JOHN JACOB STAUFFER.

(Filed 14 January, 1966.)

Automobiles § 71; Criminal Law § 55—

An officer who is present at the scene of an arrest for the purpose of assisting in it if necessary is an "arresting officer" within the meaning of G.S. 20-139.1(a), and testimony by such officer as to the result of a Breathalyzer test which he conducted is incompetent.

APPEAL by defendant from *Cowper, J.,* 23 August 1965 Session of LENOIR.

The defendant was tried upon a warrant charging him with the operation of a motor vehicle upon the public streets of the City of Kinston while under the influence of intoxicating liquor in violation of G.S. 20-138. Having been found guilty in the recorder's court of the city, he appealed to the superior court where he was tried *de novo.* The jury returned a verdict of "guilty as charged" and he was fined $100 and costs. From this judgment he appeals to this Court.

The State offered as witnesses Captain Broadway and Officer McIntosh of the Kinston Police Department. Their testimony tends to show:

At approximately 1:45 a.m. on 6 March 1965, Officer McIntosh observed the defendant driving on Queen Street in an unusual manner. He followed the defendant and observed him driving at a rate of speed which was not normal and weaving back and forth upon the left side of the street. Being unable to stop the defendant, he called for assistance. Finally, the defendant suddenly stopped in the middle of the street and Officer McIntosh got out of his car and approached the vehicle of the defendant. At the same time Captain Broadway arrived and he alone talked to the defendant prior to the

arrest. The defendant had a strong odor of alcoholic beverage on his breath, had difficulty in standing, walking, talking and locating his driver's license. Captain Broadway told the defendant that he was placing him under arrest, took him by the arm and carried him to the police station. In his opinion the defendant was very much under the influence.

At the police station the defendant agreed to take a "Breathalyzer" test, this being in response to an inquiry by Captain Broadway. Officer McIntosh, who was found by the court to be an expert in giving Breathalyzer tests, and who had the necessary permit from the State Board of Health, administered such a test to the defendant, this being done approximately 25 minutes after he had first observed the defendant operating his automobile upon the street. He was permitted by the court, over objection by the defendant, to testify as to the results of the test and that, based upon these results, he was of the opinion that the defendant was appreciably under the influence of some intoxicating beverage. He also testified that upon the basis of his observation of the defendant, apart from the test, he was of the same opinion.

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

Turner & Harrison for defendant appellant.

PER CURIAM. G.S. 20-139.1(a) provides that in any criminal action arising out of acts alleged to have been committed by any person while driving a vehicle under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's breath, shall be admissible in evidence. However, paragraph (b) of this section states expressly, "[I]n no case shall the arresting officer or officers administer such test."

The purpose of this limitation in the statute is to assure that the test will be fairly and impartially made. An officer, who is present at the scene of the arrest for the purpose of assisting in it, if necessary, is an "arresting officer" within the meaning of this statute even though a different officer actually places his hand upon the defendant and informs him that he is under arrest.

Officer McIntosh was, therefore, forbidden by the statute to make the Breathalyzer test of the defendant and it was error to permit him to testify as to the result of the test and as to his opinion based thereon. This was prejudicial to the defendant notwithstanding the presence in the record of other evidence which, considered alone, would have been sufficient to support the verdict.

New trial.

GARNER *v.* WHITLEY.

KAY GARNER, BY NEXT FRIEND, WILLIAM GARNER, C.I.D. 4492 *v.* RODETH PRESSON WHITLEY, ORIGINAL DEFENDANT, AND GEORGE W. BOONE, ADDITIONAL DEFENDANT.

AND

WELDON D. PATTERSON, BY NEXT FRIEND, RINZO W. PATTERSON, C.I.D. 4493 v. RODETH PRESSON WHITLEY.

AND

WILLIAM GARNER, C.I.D. 4496 v. RODETH PRESSON WHITLEY.

AND

RINZO W. PATTERSON, C.I.D. 4497 v. RODETH PRESSON WHITLEY, ORIGINAL DEFENDANT, AND GEORGE W. BOONE, ADDITIONAL DEFENDANT.

(Filed 14 January, 1966.)

APPEAL by plaintiffs from *Latham, J.*, March 1965 Civil Session of ALAMANCE.

Four civil actions to recover damages for personal injuries suffered by plaintiffs in an automobile accident. They were consolidated for trial.

Plaintiffs were guest passengers in an automobile operated by one George W. Boone. The accident occurred about 8:30 P.M. 8 November 1962, on N. C. Highway 49 about 9 miles south of Burlington in Alamance County. The highway runs generally north and south and at the place of the accident it curves right for southbound traffic, left for northbound traffic. The hardsurface is 18 feet wide. There is an embankment to the west of the highway.

This is plaintiffs' account of the accident. Boone was driving northwardly at a speed of 45 miles per hour. As he entered the curve he saw the bright lights of defendant's car approaching from the north and dimmed his lights. He was in his proper righthand lane. Defendant's car was partially in the east (Boone's) lane and ran head-on into Boone's car. The left fronts of both cars were extensively damaged, and plaintiffs were injured.

Defendant's version: Defendant was travelling south at a speed of 45 to 50 miles per hour. She saw the bright lights of Boone's car approaching from the south. She dimmed her lights but Boone failed to dim his; his lights blinded her. When the Boone car was about 65 feet away she observed that it was in her (the west) lane of travel. The embankment was on her right. She turned left, partially into the east lane, and Boone pulled back into the east lane and the cars collided.

Plaintiffs allege that defendant was negligent in that she was driving recklessly, failed to reduce speed, failed to maintain control and keep a proper lookout, failed to yield one-half of the highway. Defendant alleges and contends that she was faced with a sudden

emergency and acted as an ordinarily prudent person would under the circumstances.

The jury found that plaintiffs were not injured by the negligence of defendant. Accordingly, judgments were entered in favor of defendant.

Hines & Dettor for plaintiffs.
Cooper & Cooper for defendant.

PER CURIAM. Plaintiffs contend that the judge erred in his instructions to the jury with respect to lookout, control and sudden emergency. We find these instructions in substantial compliance with the rules laid down by this Court. Plaintiffs further contend that the court erred in failing to charge with respect to reckless driving and the duty of defendant to decrease speed. These legal principles do not clearly apply to the evidence adduced. There is no evidence that defendant did or did not reduce speed. The only evidence of defendant's speed is her statement that she was travelling at 45 to 50 miles per hour. The speed limit was 55. The evidence is in sharp conflict as to which driver failed to dim lights and which was operating in the wrong lane of travel. The jury resolved these matters in favor of defendant and found that she, in the sudden emergency created by Boone's wrongful conduct, acted as an ordinarily prudent person would have acted under the circumstances. The verdict is supported by evidence.

No error.

STATE v. WILLIAM ROBERT WHITE, JR.

(Filed 14 January, 1966.)

APPEAL by defendant from *Houk, J.*, July 1965 Session of CHATHAM.

Defendant was convicted of resisting arrest and of assault on an officer and judgment was pronounced in the Chatham County Recorder's Court. He appealed to the Superior Court of Chatham County and was there tried *de novo* upon an amended warrant which, in part, charged that defendant "did unlawfully and wilfully resist, delay and obstruct a public officer, to wit: Reece Coble, a Policeman for the Town of Pittsboro, while he, the said Reece

Coble was attempting to discharge and discharging a duty of his office, to wit: by striking the said Reece Coble with his fist."

Evidence was offered by the State and by defendant.

The jury returned a verdict of "Guilty of Assault." The court pronounced judgment "that the defendant be confined in the common jail of Chatham County for a period of ten (10) days."

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

James C. Harper for defendant appellant.

Per Curiam. The court was of the opinion, and rightly so, that the amended warrant was insufficient to charge a violation of G.S. 14-223. See *S. v. Smith,* 262 N.C. 472, 474, 137 S.E. 2d 819, and cases cited. Hence, the trial was conducted solely with reference to whether defendant was guilty of a simple assault on Reece Coble, a police officer.

Defendant's motion for judgment as in case of nonsuit was properly overruled. The matters referred to in defendant's exceptions to the charge are not considered of such prejudicial nature as to justify a new trial. Hence, the verdict and judgment will not be disturbed.

No error.

BOGGAN JUNIOR McIVER v. WILLIAMSON POTEAT and DOUGLAS POTEAT.

(Filed 14 January, 1966.)

Appeal by defendants from *Latham, S. J.,* March 1965 Civil Session of Alamance.

Civil action to recover damages for personal injuries allegedly proximately caused by the actionable negligence of Williamson Poteat in operating an automobile owned by Douglas Poteat, as servant, agent, and employee of Douglas Poteat, and within the scope of his employment.

Defendants filed a joint answer in which they deny any negligence on their part, and as a further answer and defense conditionally plead plaintiff's contributory negligence as a bar to recovery.

The following issues were submitted to the jury and answered as indicated:

"1. Was the plaintiff injured as a result of the negligence of the defendants, as alleged in the Complaint?

"ANSWER: Yes.

"2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the Answer?

"ANSWER: No.

"3. What amount, if any, is the plaintiff entitled to recover from the defendants?

"ANSWER: $3,200.00."

From a judgment upon the verdict defendants appealed.

Sanders & Holt by Emerson T. Sanders and Clyde A. Wootton for defendant appellants.

Ross, Wood & Dodge by B. F. Wood for plaintiff appellee.

PER CURIAM. Plaintiff's evidence was sufficient to carry his case to the jury. The jury, under application of well-settled principles of law, resolved the issues of fact against defendants. While the appellants' well-prepared brief presents contentions involving fine distinctions and close differentiations, a careful examination of their assignments of error discloses no feature requiring extended discussion. Neither prejudicial nor reversible error has been made to appear which would justify disturbing the verdict and judgment. "A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial or harmful." 1 Strong's N. C. Index, Appeal and Error, § 40. The verdict and judgment are upheld.

No error.

STATE v. JOHN BUCK BURGESS.

(Filed 14 January, 1966.)

APPEAL by defendant from *Clarkson, J.*, June 1965 Session of POLK.

Defendant was tried on a bill of indictment containing three counts, to wit: First, feloniously breaking and entering a certain building occupied by Dr. W. T. Head; second, larceny of described personal property of the value of $100.00, consisting of a typewriter

and a radio; and third, feloniously receiving stolen property, to wit, said typewriter and radio. The indictment alleged said criminal offenses were committed in Polk County, North Carolina, on November 10, 1963. (Note: Our records disclose that defendant pleaded *nolo contendere* to said charges at January 1964 Session and thereupon judgment imposing prison sentences was pronounced; that, on defendant's petition, a post-conviction hearing was held in which an order was entered January 25, 1965 denying defendant's petition; and that this Court, by its order of April 13, 1965, allowed defendant's petition for *certiorari,* reversed said order of January 25, 1965, vacated said plea and said judgment, and remanded the cause for trial *de novo.*)

Wm. A. McFarland, Esq., court-appointed counsel, who had previously represented defendant in connection with said post-conviction proceedings, represented defendant at his trial *de novo* at June 1965 Session.

Evidence was offered by the State and by defendant.

As to the third count, defendant's motion for judgment as in case of nonsuit was allowed. At to the first and second counts, defendant's motion for judgment as in case of nonsuit was denied.

Verdict: "Guilty of breaking and entering, as charged in the Bill of Indictment, and guilty of larceny of property of the value of less than $200.00 as charged in the Bill of Indictment."

Based upon defendant's said conviction on said first and second counts, the court pronounced judgment imposing prison sentences of eight years and two years, respectively, the two-year sentence on the second count to commence upon expiration of the eight-year sentence on the first count. 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 Polk County provide the necessary transcript and pay the necessary costs of preparing the record and briefs incident to defendant's appeal.

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

Wm. A. McFarland for defendant appellant.

PER CURIAM. By oral argument and by brief, defendant's counsel stressed the assignment of error based on the denial of defendant's motion for judgment as in case of nonsuit as to the first and second counts of the bill of indictment.

The State relied upon circumstantial evidence to prove defendant was guilty of the criminal offenses charged in said first and second counts. We have examined the evidence carefully 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. Hence, defendant's said motion for judgment as in case of nonsuit was properly overruled.

Consideration of all other assignments of error brought forward in substantial compliance with our rules, Rules of Practice in the Supreme Court, 254 N.C. 783, fails to disclose error of such prejudicial nature as to justify a new trial.

No error.

STATE v. WALTER WEAVER.

(Filed 14 January, 1966.)

APPEAL by defendant from *Braswell, J.,* June 1965 Criminal Session of ALAMANCE.

Defendant was tried and convicted in the Municipal Recorder's Court of the City of Burlington, North Carolina, on 12 May 1965, upon a warrant charging him with an assault upon his wife. From the judgment imposed the defendant appealed to the Superior Court of Alamance County where he was tried *de novo* on the original warrant.

When this case was called for trial in the Superior Court the defendant was not represented by counsel. The court advised him of his right to counsel. The defendant waived his right to counsel and requested that the case be continued for business reasons. The motion was denied. The defendant then requested the solicitor to let the assistant solicitor represent the State at his trial. The court, with the approval of the solicitor, allowed this motion.

The State and the defendant offered evidence. However, the defendant did not take the stand. The jury returned a verdict of "guilty of an assault on a female as charged in the warrant."

After the jury returned its verdict but prior to the imposition of judgment by the court, the defendant was represented by counsel who requested the court to impose a suspended sentence. The

court, however, imposed an active prison sentence on the defendant, from which he appeals, assigning error.

Attorney General Bruton, Deputy Attorney General Harrison Lewis, Trial Attorney Millard R. Rich, Jr., for the State.

Paul H. Ridge for defendant.

PER CURIAM. A careful review of the exceptions and assignments of error set out in the record, leads us to the conclusion that no prejudicial error has been shown that would justify a new trial.

No error.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. NELLO L. TEER COMPANY.

(Filed 4 February, 1966.)

1. Utilities Commission § 7—

A shipper complaining of unjust discrimination in rates has the burden of proving the facts essential to its right to relief. G.S. 62-75.

2. Utilities Commission § 9—

Rates of the Utilities Commission are *prima facie* just and reasonable and will be upheld on appeal when a review of the whole record fails to disclose prejudicial error and the order of the Commission is supported by findings supported by competent evidence. G.S. 62-94(c)(e), G.S. 62-132.

3. Utilities Commission § 6—

The statutory requirement that the Utilities Commission prevent discrimination in rates and services does not require an equality of rates where shipments are from different points of origin to the same destinations, even though the distances be equal or approximately so, since the Commission must take into consideration in addition to distance other factors which furnish a distinction between customers, such as quantity, time, manner of service, cost of service, and competition from other forms of transportation.

4. Same; Carriers § 5— Evidence held to support conclusion that differentiation in rates was not unreasonable.

Complainant objected that it was charged a "joint-line" rate for shipments from its plant to market destinations over a connecting carrier, while its competitor, shipping from a point approximately equidistant to the same destinations, was charged the lesser "single-line" rate, notwithstanding the shipment had to be handled by two carriers. The evidence

disclosed that complainant's shipments, because of the distance to the interchange point of its connecting carrier, had to be handled in the regular manner for interchange shipments, which involved increased costs, while its competitor's plant was so near the interchange track of its connecting carrier that its loaded cars were pulled by a yard engine to the interchange point, which entailed nothing more than would be required had the entire shipment been over a single line, and further that there was active barge competition at the point of its competitor's plant, but not at its own. *Held:* There was ample competent evidence to support the finding by the Commission that the rate differential was reasonable, and therefore the Commission was not compelled by statute to order it abolished.

APPEAL by Nello L. Teer Company from *Carr, J.*, February 1965 Non-Jury Session of WAKE.

In its amended complaint, filed before the North Carolina Utilities Commission, the appellant, hereinafter called Teer, complains of Norfolk-Southern Railway Company, the Atlantic and East Carolina Railway Company, Southern Railway Company, original defendants, and the Atlantic Coast Line Railroad Company, additional defendant, alleging unreasonable discrimination against it in the matter of railroad freight rates. The Superior Stone Company and the North Carolina State Highway Commission intervened in opposition to the complaint. After a hearing, the Commission entered an order denying the relief sought, from which order Teer appealed to the Superior Court of Wake County. From a judgment of the superior court overruling each of Teer's exceptions, and affirming the order of the Commission, Teer now appeals.

The complaint alleges in essence: Teer produces crushed stone, called aggregates, at Rocky Mount and ships them from there to Elizabeth City and other points on the Norfolk-Southern in northeastern North Carolina. These shipments move by rail over the tracks of the Coast Line to Plymouth and thence over the tracks of the Norfolk-Southern to the points of destination. For such transportation, Teer pays a "joint-line" rate, in accordance with rate tariffs heretofore filed with and approved by the Commission. Its competitor, Superior Stone, ships similar materials from Oaks, North Carolina, near New Bern, to the same destinations, these shipments moving by rail over the tracks of the Atlantic and East Carolina Railway to New Bern and thence over the Norfolk-Southern. The total distances are substantially the same, Rocky Mount being slightly nearer to the destinations than Oaks. Pursuant to tariffs heretofore filed and approved by the Commission, Teer's competitor pays a "single-line" rate. The "single-line" rate is 10 cents per ton less than the "joint-line" rate. Southern Railway is the operator of the Atlantic and East Carolina Railway. Alleging that this discrepancy between the rate charged it and the rate charged its competitor

is unjust, unreasonable and unfairly discriminatory against it, Teer prayed the Commission, in the alternative, to enter an order directing the Southern, Atlantic and East Carolina, and Norfolk-Southern to delete from their tariffs the provision for "single-line" rates on traffic moving between stations on the Atlantic and East Carolina and stations on the Norfolk-Southern, or to enter an order directing the Coast Line and the Norfolk-Southern to make provisions in their tariff for a "single-line" rate to apply from Rocky Mount to destinations on the Norfolk-Southern between Plymouth and the Virginia State line.

The Norfolk-Southern filed no answer and does not resist the complaint in either alternative of the prayer for relief. The Southern and the Atlantic and East Carolina filed a joint answer denying that the "single-line" rate between the Atlantic and East Carolina and the Norfolk-Southern is an unreasonable discrimination against Teer, or that it is otherwise unlawful. They pray that the complaint be dismissed. The Coast Line filed an answer alleging that the differential between "single-line" rates and "joint-line" rates is reasonable, that the service rendered by it and the Norfolk-Southern to Teer is "joint-line" service so that the "joint-line" rate properly applies to it. The Coast Line alleges that to compel it and the Norfolk-Southern to perform this service for the "single-line" rate would force them to render the service at a rate which is non-compensatory, unreasonable and violative of the statutes and Constitution of North Carolina. The Coast Line denies that the rate differential set forth in the complaint is unreasonable discrimination or otherwise unlawful and prays that the complaint be dismissed and that the "joint-line" rate be maintained.

It is not denied by any of the railroads that the "joint-line" rate is charged Teer by the Coast Line and the Norfolk-Southern for shipments from Rocky Mount and that the "single-line" rate is charged its competitor by the Atlantic and East Carolina and the Norfolk-Southern for shipments from Oaks to the same destinations northeast of Plymouth. It is likewise undisputed that, as a result, on shipments of aggregates to Elizabeth City, Teer pays $1.60 per ton whereas Superior Stone, shipping from Oaks, pays $1.50 per ton. Norfolk-Southern is the delivering carrier in all shipments to the points in question northeast of Plymouth.

The plaintiff offered evidence tending to show:

Its stone and that of its competitor can be used for the same purposes. The Teer quarry at Rocky Mount is the only potential competitor of the quarry of Superior Stone at Oaks for the markets in question. Shipments by rail from Oaks must originate on the Atlantic and East Carolina Railroad. It interchanges shipments con-

signed to points on the Norfolk-Southern with the Norfolk-Southern at New Bern, 3.4 miles east of Oaks. Shipments by rail to such points, originating at Teer's quarry at Rocky Mount, move by the Coast Line to Plymouth where they are interchanged with the Norfolk-Southern. The total charge of $1.50 per ton on the shipments from Oaks to Elizabeth City is divided between the railroads so the Atlantic and East Carolina receives 39 cents for carrying the shipments 3.4 miles, and the Norfolk-Southern receives $1.11 for carrying the shipments 114.1 miles. Many years ago the Norfolk-Southern operated what is now the line of the Atlantic and East Carolina. At present the two railroads are entirely separate. The rate advantage enjoyed by Superior Stone by reason of this differential puts Teer at a disadvantage in its efforts to compete for the markets northeast of Plymouth. In former years, Teer also operated a quarry at Oaks and on shipments from it to the destinations now in question it was charged the "single-line" rate.

The Southern controls the Atlantic and East Carolina. These two carriers offered evidence tending to show:

At Oaks, which is on the Atlantic and East Carolina, the railroad competes with barge transportation. This caused the Atlantic and East Carolina and the Norfolk-Southern to institute a special low rate on multiple car lots of crushed stone to Plymouth, Elizabeth City and intermediate points, which are the destinations in question. This multiple car rate is a matter separate and apart from the "single line" rate attacked in this proceeding by Teer, and is not attacked by Teer in this proceeding. Superior Stone uses the same conveyor belts to load barges at Oaks that it uses to load railroad cars there. Barges, so loaded, can move the stone from Oaks to Plymouth, Elizabeth City and Mackeys. There is no such barge competition for the movement of aggregates at any other place in the State. The multiple car rate designed to meet this barge competition applies to movements of aggregates from Oaks to Norfolk-Southern stations northeast of Plymouth. The multiple car rates so applicable would remain in effect whether or not the "single line" rate continues.

The Southern and the Atlantic and East Carolina oppose the abolition of the "single line" rates from Oaks. They do not oppose the establishment of such a rate by the Coast Line and the Norfolk-Southern for shipments from Rocky Mount.

The movement of the cars from Oaks to New Bern is a yard switch engine operation. The yard engine pulls the cars from the quarry at Oaks to the yard where they are weighed and placed on the interchange track, from which they are picked up by the Norfolk-Southern train and carried to the destination. The two rail-

roads use the same yard at New Bern. As a consequence, the interchange operation is a very simple one. The simplicity of the yard operation at New Bern results in a substantially lower cost of handling the shipments from Oaks to one of the Norfolk-Southern stations beyond Plymouth than would be the case if each railroad at the interchange point had its own yard, in which latter event cars to be interchanged would have to be moved from the interchange track in the yard of the incoming carrier to the interchange track in the yard of the outgoing carrier.

The cost analysis study made by the Southern, assuming it to be correct, both in analysis and in computation, shows that the "single-line" rate is "highly compensatory" to both participating carriers. In this connection, the term "highly compensatory" means that the rate produces revenue substantially in excess of the out-of-pocket cost of handling the shipment.

The Coast Line offered evidence tending to show:

The differential between "single-line" and "joint-line" rates originated with an order by the predecessor of the Utilities Commission, the Corporation Commission, in 1921. Since that time the differential has varied in amount but has always been maintained. With one exception, shipments moving over the Atlantic and East Carolina and the Norfolk-Southern are the only shipments actually moving over the tracks of more than one railroad to which a "single-line" rate is applied.

The Coast Line has no objection to the elimination of this application of the "single-line" rate, in which it has no participation. What it objects to is an order requiring it and the Norfolk-Southern to establish a "single-line" rate for the shipment of aggregates from Rocky Mount to points on the Norfolk-Southern beyond Plymouth. There are many points on the Coast Line, other than Rocky Mount, at which road aggregates are produced. If the "single-line" rate were made applicable to the shipments here in question, the Coast Line fears that they might ultimately have to be made applicable from other such production points on its system within the State. The differential between "single-line" and "joint-line" rates also applies to many commodities other than road aggregates.

The shipments from Rocky Mount, here in question, move 68 miles by the Coast Line to Plymouth. There they are interchanged with the Norfolk-Southern and move by that railroad to the final destination. To require the Coast Line and the Norfolk-Southern to put the "single-line" rate into effect on these shipments would deprive the Coast Line of substantial revenues.

The Coast Line and the Norfolk-Southern are two entirely separate railroads. The cost analysis made by the Coast Line, assum-

ing its correctness of analysis and computation, shows that the out-of-pocket cost per ton for a "joint-line" haul is 27 cents greater than such cost for a "single-line" haul, this additional cost increasing by a like amount for each additional railroad involved in the haul. This additional cost of the "joint-line" haul is due to the additional service required in interchanging (switching) the car from one railroad to another. This is the justification for the higher rate on the "joint-line" haul. The additional charge of 10 cents per ton is not sufficient to cover the additional out-of-pocket cost. If the "single-line" rate is made applicable to a "joint-line" haul, the participating railroad must absorb the additional cost of 27 cents per ton. It costs more to handle traffic in "joint-line" service than to handle such traffic in "single-line" service. This difference is 27.5 cents per ton where two railroads participate in the haul.

The State Highway Commission offered evidence tending to show that if the "single-line" rate were abolished on shipments from Oaks to Norfolk-Southern destinations (not necessarily those involved in the Teer complaint) there would be some diversion of the traffic from the railroads to truck transportation.

The Superior Stone Company introduced evidence tending to show that if the "single-line" rate from Oaks to Norfolk-Southern destinations were changed to a "joint-line" rate there would be a diversion of traffic from the railroads to trucks and to barges.

The Commission made eighteen numbered findings of fact of which only the following need to be set forth here:

> "12. The operations performed in moving road aggregates from Oaks to destinations on Norfolk-Southern when transferred to the latter at New Bern are unlike operations in moving similar commodities from Rocky Mount to the same destinations when interchanged with Norfolk-Southern at Plymouth. Operations between Oaks and New Bern, the interchange point with Norfolk-Southern, a distance of 3.4 miles, are performed as a yard switching service by New Bern yard personnel. No train or line-haul movement between Oaks and New Bern is involved. The road aggregates from Rocky Mount to Plymouth, the point of interchange with Norfolk-Southern, a distance of 68 miles, move in train or line-haul service. The operations between Oaks and the interchange tracks with Norfolk-Southern through a jointly operated station and yard is not as costly as one requiring a train movement in addition to switching through yards not maintained and operated jointly by connecting carriers.

"13. Out-of-pocket costs of transporting road aggregates in gondola cars, average weight 119,100 pounds, from Oaks to Mackeys and Elizabeth City are $52.00 and $65.81 per car, respectively. The revenues under single-line rates of $74.44 and $89.33 per car, respectively, exceed the out-of-pocket costs by $22.44 and $23.52 per car. The out-of-pocket costs of transporting road aggregates in gondola cars of 55 tons' capacity, based on a formula applicable generally to the entire Southern Region of the United States for distances of 78 and 116 miles over two carriers, being the equivalent of the distances from Rocky Mount to Mackeys and Elizabeth City over Coast Line and Norfolk-Southern, are 162 cents and 184 cents a net ton. These out-of-pocket costs are 27 cents and 24 cents, respectively, in excess of the mileage commodity scale rates of 135 cents and 160 cents a ton.

* * * *

"18. Single-line rates between A&EC stations and Norfolk-Southern stations and their predecessors have applied since the two railroads connected shortly after the turn of the century and have continued, subject only to adjustments or revisions to reflect changed conditions, without unjust discrimination or undue preference or advantage. The differential of 10 cents a ton in the single-line rates under the joint-line rates applicable from Rocky Mount is not unduly preferential of Superior Stone Company at Oaks, nor is it unduly prejudicial to Complainant."

The Commission thereupon concluded that the complaint should be dismissed and it so ordered. The superior court overruled all exceptions by Teer to the order of the Commission.

Nancy Fields Fadum for appellant.

Attorney General Bruton and Assistant Attorney General Barham for North Carolina State Highway Commission.

Edward B. Hipp for North Carolina Utilities Commission.

Norman C. Shepard and Charles B. Evans for Atlantic Coast Line Railroad Company.

Joyner & Howison for Atlantic & East Carolina Railway Company.

Maupin, Taylor & Ellis for Intervener, Superior Stone Company, Division of Martin Marietta Corporation.

LAKE, J. This proceeding was instituted before the Utilities Commission by the filing of a complaint by Teer. Consequently, the statute imposes upon Teer the burden of proving the facts essential

to its right to relief from the rate relationship of which it complains. G.S. 62-75. Since the cost data and other circumstances concerning justification for the differential in rates of which Teer complains are more readily available to the participating railroads than they are to a complaining shipper, it may well be thought that in such proceedings as these, just as in proceedings instituted by the Utilities Commission, the burden should be placed upon the carriers to prove the reasonableness of the rate relationship. However, the Legislature has clearly provided to the contrary.

In its brief Teer says:

> "Appellant does *not* contend that the Uniform Mileage Commodity Scale on aggregates which provides for the application of single-line rates to single-line hauls and the application of joint-line rates to joint-line hauls, and which has been in effect since 1921 for application over all railroads in the State of North Carolina, is *per se* unreasonable or discriminatory. Appellant emphatically insists, however, that it is unreasonable and discriminatory to label a joint-line haul as a single-line haul and apply a single-line rate to such a haul while at the same time describing a similar haul as a joint-line haul and applying a joint-line rate to it. * * * Again it should be kept in mind that we are not discussing the reasonableness of the joint-line or single-line rates *per se*."

It is further provided by the statute that rates established by the Commission shall be deemed just and reasonable. G.S. 62-132. Again, the statute with reference to appeals from the Commission provides: "Upon any appeal, the rates fixed, or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this chapter shall be *prima facie* just and reasonable." G.S. 62-94(e). In the consideration of such appeal the court is required to review the whole record, or such portions thereof as may be cited and "due account shall be taken of the rule of prejudicial error." G.S. 62-94(c).

G.S. 62-140 provides:

> "(a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section.

"(b) The Commission shall make reasonable and just rules and regulations:

"(1) To prevent discrimination in the rates or services of public utilities. * * *"

The first paragraph of this statute is similar to Section 3 of the Interstate Commerce Act. It does not require an equality of rates where the shipments are from different points of origin to the same destination even though the distances be equal or approximately so. As Higgins, J. said, in *Utilities Commission v. Motor Carriers Asso.*, 253 N.C. 432, 440, 117 S.E. 2d 271:

"[R]ate-making involves more than mileage. * * * There are factors involved in rate-making which justify lower per-mile rates from some points than from others. * * * The law does not contemplate that all rates shall be equal for like distances. Room is left for a rate structure which takes all factors of rate-making into account."

While that case involved motor carriers, the rule as to railroad rates is the same in those respects.

It is not necessary for us to determine upon this appeal, and we do not pass upon, the question of the authority of the Utilities Commission, by an appropriate order, to remove the existing rate differential between shipments from Oaks to points northeast to Plymouth and shipments from Rocky Mount to the same destination. It may well be that the authority of the Commission under G.S. 62-32 to fix and regulate "reasonable rates and charges" of public utilities is sufficient to permit it to eliminate rate differentials between localities which are not unreasonable so as to constitute a discrimination forbidden by G.S. 62-140. Nor do we find it necessary to decide whether the application of the "single-line" rate to shipments moving between other points on the Atlantic and East Carolina and the Norfolk-Southern is lawful. The question for decision on this appeal is whether the complainant has carried the burden, imposed upon it by the statute, of proving an "unreasonable difference" between the rates charged on shipments of aggregates from Oaks to points on the Norfolk-Southern and those charged Teer so as to make it the duty of the Commission to remove the differential.

Since we reach the conclusion that the complainant has not proved such "unreasonable difference," we do not reach the question of what the Commission might have required the Coast Line to do, if such difference had been proved. The complainant is served by the Coast Line in conjunction with the Norfolk-Southern. It does

not question the reasonableness of the rate charged to it *per se.* This rate is the "joint-line" rate, computed according to the scale approved by the Commission and in effect throughout the State, with few exceptions. The Coast Line had no participation in the establishment of the more favorable rate from Oaks and has no power to change that rate. It may well be doubted that any violation of G.S. 62-140(a) is established by the showing of even an "unreasonable difference" between rates upon shipments from different points of origin to a common destination when no carrier, or group of carriers, has a controlling power over both of the rates. See: *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 53 S. Ct. 768, decided under the original Section 3 of the Interstate Commerce Act. Compare, however, *New York v. United States,* 331 U.S. 284, 67 S. Ct. 1207, decided after Section 3 was amended. If such rate differential be a violation of G.S. 62-140(a), there would also arise the serious question as to whether the Commission, acting under paragraph (b) of that statute, could require a reduction of the rate from Rocky Mount in order to equalize the two rates, or would be limited to an order increasing the rate from Oaks. Since these questions are not necessary for the determination of this appeal, we do not now express any opinion as to either of them.

The Commission found: "The differential of 10 cents a ton in the single-line rates under the joint-line rates applicable from Rocky Mount is not unduly preferential of Superior Stone Company at Oaks, nor is it unduly prejudicial to Complainant." There is in the record "competent, material and substantial evidence" to support this finding.

The justification for the higher rate normally charged where the shipment moves over the lines of two railroads, as contrasted with a shipment moving over the line of but one, is that in the "joint-line" movement there is an additional switching movement which adds to the expense of rendering the service. Where the "joint-line" haul is handled under such circumstances that there is no such additional expense, there is no such justification for the higher rate. Certainly, in such case the charging of the "single-line" rate is not unreasonable.

This Court has said: "There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service." *Utilities Commission v. Mead Corp.,* 238 N.C. 451, 462, 78 S.E. 2d 290; *Utilities Commission v. Municipal Corporations,* 243 N.C. 193, 203, 90 S.E. 2d 519. In the *Municipal Corporations* case, the Court quoted with approval *Brown v. Pa.*

Public Utilities Comm., 152 Pa. Super. 58, 31 Atl. 2d 435, where is said, "The charging of different rates for service rendered under varying conditions and circumstances is not unlawful." It also quoted with approval *Ford v. Rio Grande Valley Gas Co.*, 141 Tex. Rep. 525, 174 S.W. 2d 479, saying, "Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material * * * factor." Thus, a substantial difference between the costs of rendering the two services justifies some difference in the rates, nothing else appearing.

The record shows that a car of aggregates moving from Oaks to one of the destination points in question is handled exactly as it would be if the track of the Norfolk-Southern extended to Oaks so as to make this, in fact, a shipment over a single line. The yard engine pulls the loaded car from the quarry at Oaks to the track scales in the New Bern yard, where the car is weighed, and from there pulls it to the interchange track, where it is picked up by the line-haul train of the Norfolk-Southern and carried to its destination without further switching. It must then, of course, be switched and "spotted" for unloading.

In the absence of any evidence to the contrary, the Commission was entitled to infer from competent evidence in the record that a switch engine pulled the loaded cars from the Teer quarry at Rocky Mount to track scales for weighing and thence to a track in the Coast Line yard, where the Coast Line-haul train picked it up and hauled it to Plymouth. That is, the procedure at Rocky Mount was the same as the procedure at Oaks-New Bern. At Plymouth, it would be necessary to set the car on an interchange track for pick-up by the Norfolk-Southern. Assuming the simplest operation at Plymouth and a yard jointly operated by the Coast Line and the Norfolk-Southern, there would have to be at least one switching operation involving this car at Plymouth before it could pass on to the ultimate destination. At the ultimate destination, it would again have to be switched so as to "spot" the car for unloading just as would have to be done with a car coming from Oaks.

Thus, the record shows that in the haul from Rocky Mount to the ultimate destination there is, necessarily, at least one more switching movement than is involved in the shipment from Oaks to the same destination. There is also evidence in the record by a Coast Line witness that the differential of 10 cents per ton between "joint-line" and "single-line" rates is not sufficient to cover this additional cost. That being true, it is not unreasonable to charge a lower rate on the shipment from Oaks than on the shipment from Rocky Mount, nothing else appearing.

It is also shown by competent, substantial evidence in the record that at Oaks there is active competition between the railroad and barges for the hauling of this commodity to the destinations in question. There is no such competition at Rocky Mount, or at any other point in the State where this material is produced. To eliminate the existing rate differential, by charging the same rate from Oaks as is now charged from Rocky Mount, would not improve Teer's competitive position if the only effect were to divert this commodity to water transportation. The record contains competent, substantial evidence to show that this would be the result of such action. Competition with carriers by water at one point of origin and absence of such competition at the other is a material difference in circumstances which must be considered in passing upon the reasonableness of a differential in railroad rates.

In *East Tenn., V & G Ry. Co. v. Interstate Commerce Comm.*, 181 U.S. 1, 18, 21 S. Ct. 516, speaking of Section 3 of the Interstate Commerce Act, which is similar to G.S. 62-140, the Court said:

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. * * * The commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines."

Again, in *Barringer & Co. v. United States*, 319 U.S. 1, 7, 63 S. Ct. 967, with reference to Section 3, the Court said:

> "It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful."

There is, therefore, ample, competent evidence in the record to support the finding by the Commission that the rate differential between Oaks and Rocky Mount is not an "unreasonable difference." Consequently, the Commission is not compelled by the statute to order it abolished.

The plaintiff having failed to sustain the burden of proving a discrimination forbidden by G.S. 62-140, and there being in the record ample, competent evidence to support the ultimate finding of the Commission and its order, we do not deem it necessary to discuss in detail the appellant's assignments of error contending that the Commission admitted other evidence which was incompetent and took judicial notice of facts not set forth with the particularity required by G.S. 62-65(b). We have examined each of these assignments. If the Commission erred in these respects, such error was not prejudicial to the appellant so as to require a reversal of the order. There was, therefore, no error in the overruling by the superior court of the appellant's exceptions to the order of the Commission and its judgment is

Affirmed.

ELSIE R. TRIPP v. WILLIAM HENRY TRIPP.

(Filed 4 February, 1966.)

1. Husband and Wife § 12—

A separation agreement under which the wife receives most of the household furnishings, monthly payments of alimony for two years, and release of the husband's interest in two tracts of land, upon her agreement that if he complied with the agreement for a period of two years she would quitclaim her interest in land deeded to them by the entireties by his parents, is not subject to attack on ground of want of consideration.

2. Same—

The certification of a separation agreement executed in accordance with G.S. 52-6 is conclusive except for fraud.

3. Same—

Where the wife's own evidence discloses that she signed the separation agreement against the advice of her counsel in order to "be rid of" her husband, that she had received practically all of the benefits provided for her under the agreement but that her obligations thereunder had not matured, that the agreement was supported by consideration and was executed in conformity with G.S. 52-6, and that she went alone to the clerk's office and signed the agreement, the evidence is insufficient to raise the issue of whether the agreement was vitiated by fraud.

APPEAL by defendant from *Carr, J.*, August 1965 Session of HARNETT Superior Court.

The plaintiff instituted this civil action to have the court set aside a written separation agreement entered into on June 28, 1961,

between the parties, who were then living in a state of separation. The wife's suit for divorce from bed and board, for alimony, counsel fees and custody of the children was then pending.

The plaintiff alleged the agreement should be declared void and set aside upon two grounds: (1) She received no consideration for its execution. (2) She executed and acknowledged it under duress. After hearing the plaintiff's evidence the court submitted an issue which the jury answered finding the plaintiff executed the agreement under "duress exerted upon her by her husband." From the judgment declaring the agreement void and setting it aside, the defendant appealed.

Wilson, Bain & Bowen by Edgar R. Bain for plaintiff appellee.

Morgan and Williams by Robert B. Morgan for defendant appellant.

HIGGINS, J. The plaintiff attached copy of the separation agreement as an exhibit to her complaint. She introduced the instrument in evidence for the purpose of attack. The agreement shows the mutual promises the parties made as consideration for its execution. The plaintiff received all the household furnishings (except those in the defendant's room), monthly payments of alimony for two years, and release of the husband's interest in two tracts of land owned by the plaintiff. The plaintiff agreed if the husband complied with the agreement for two years she would execute a quitclaim deed for her interest in the 23 acres of land which the defendant's parents had deeded to the parties as tenants by the entireties. In her testimony the plaintiff admitted the defendant had fulfilled his obligations according to the agreement. For these reasons the presiding judge was correct in refusing to submit an issue based on the allegation the agreement was without consideration.

On appeal, counsel for the parties debated the question whether duress, as alleged in the complaint, is sufficient in its vitiating effect to require that the agreement be set aside. A contract between husband and wife falls within a special classification. The law requires the certifying officer to conduct an examination and to determine the contract was duly executed, and to certify that it is not unreasonable or injurious to her. G.S. 52-12 (now G.S. 52-6). The certificate is conclusive except for fraud. If we concede duress is a species of fraud embraced within the statute, and if the complaint contained enough factual averments to raise the issue of fraud, even then we are confronted with the question whether the plaintiff's evidence is sufficient to go to the jury.

The plaintiff testified the defendant had assaulted her many

times during their married life, especially when he was drinking. He threatened her life if she ever attempted to take any interest in the lands his parents gave them as tenants by the entireties. She was afraid of him for what he might do to her and to the children and for that reason signed the separation agreement. However, on cross-examination she admitted she wanted the separation agreement. "I know my lawyer told me I did not have to sign it, but it was such a pleasure to be rid of him." Since the separation she has obtained an absolute divorce. Hence, if the contract was set aside she would have no further claim for support for herself. The defendant is still responsible for the support of the children. She would be relieved of her obligation to execute the quitclaim deed.

This Court has reviewed many cases in which one party has attempted to set aside a separation agreement, although executed and certified according to the formalities required by G.S. 52-12, now 52-6. The recent cases are *McLeod v. McLeod, ante* 144, *Van Every v. Van Every,* 265 N.C. 506, 144 S.E. 2d 603; *Joyner v. Joyner,* 264 N.C. 27, 140 S.E. 2d 714; *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235, and *Bowles v. Bowles,* 237 N.C. 462, 75 S.E. 2d 413. When the contract is made in good faith, is executed according to the requirements, and performed on one side, the Court does not look with favor on efforts to set it aside except upon valid legal grounds.

In this case the plaintiff made no complaint until after she had received the benefits under the contract for the full two years. She delayed her objection from the date of the agreement, June 28, 1961, until July 18, 1963. According to her own admission, she went to the clerk's office by herself and signed the agreement, although her attorney had mildly advised her against it. If we treat the conclusory aspects of her complaint as factual averments, nevertheless her evidence of duress is not sufficient to support the issue which the court submitted and which the jury answered. The court at the conclusion of the plaintiff's evidence should have sustained the motion to nonsuit and entered judgment dismissing the action. The judgment entered in the superior court is

Reversed.

CLARENCE W. MAURER, JR., EMPLOYEE v. THE SALEM COMPANY, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, INSURER.

(Filed 4 February, 1966.)

1. Master and Servant § 94—

If the evidence before the Industrial Commission, viewed in the light most favorable to plaintiff, is sufficient to support the Commission's findings of fact the courts are bound thereby.

2. Master and Servant § 60—

Evidence tending to show that a fellow employee agreed to give claimant a ride home, that claimant and the fellow employee went straight from work to the car, which was parked in an adjacent parking lot which the employer furnished for the use of the employees free of charge, and that after some 20 minutes used exclusively in trying to get the engine started, claimant was injured while pushing the car, *held* to support an award, the case falling within the exception to the general rule that injuries in travel to and from work are not compensable.

APPEAL by defendants from *Shaw, J.*, September 6, 1965 Session, FORSYTH Superior Court.

This proceeding originated as a compensation claim before the North Carolina Industrial Commission.

The parties stipulated: (1) The employer-employee relationship existed. (2) The parties are subject to and bound by the Workmen's Compensation Act. (3) Claimant's average weekly wage was $52.90. (4) The employer maintained for its employees a parking lot adjacent to the factory for the vehicles they used in going to and from work.

The claimant testified that on June 1 he did not drive his car to work but made arrangements for Donald Caudle, a fellow employee, to take him home by way of a friend's house where he intended to deliver a package. Caudle's automobile was parked in the company's lot. After completing their work, claimant and Caudle went from the exit door of the plant to Caudle's vehicle, which failed to start. For a period of 20 to 25 minutes Caudle and claimant continued their efforts to get the engine started. Finally they released the brakes and endeavored to start the engine by pushing the vehicle. Its forward movement caught claimant and inflicted the injuries which are the basis of his claim.

The Hearing Commissioner, from the stipulations and the evidence, found and concluded that claimant suffered injury by accident arising out of and in the course of his employment, and awarded compensation. On review, the Full Commission adopted the findings and conclusions and approved the award. On appeal, Judge Shaw overruled all assignments of error and affirmed the award. The defendants appealed.

Booe, Mitchell and Goodson by William S. Mitchell for plaintiff appellee.

Deal, Hutchins and Minor by John M. Minor for defendant appellants.

HIGGINS, J. The facts in the case are not in dispute. The sole question of law is whether there was sufficient evidence and stipulations before the Commission to support the finding that claimant's injury arose out of and in the course of his employment. If the evidence and the stipulations, viewed in the light most favorable to claimant, support the findings the courts are bound by them. *Huffman v. Aircraft Co.*, 260 N.C. 308, 132 S.E. 2d 614; *Pitman v. Carpenter & Associates*, 247 N.C. 63, 100 S.E. 2d 231.

The Commission found the claimant was injured on employer's parking lot adjacent to the building where he worked. The employees were permitted by the employer to use the lot free of charge for parking vehicles in which they rode to and from work. After punching the clock at the end of the day's work both the claimant and his fellow-employee Caudle went directly to Caudle's vehicle according to their agreement that Caudle would take the claimant home. On the way home claimant intended to stop at a friend's house to deliver a package. This intent is without significance. The injury occurred while they were in the act of starting the vehicle and before they left the parking lot. Likewise without significance is the delay (20 or 25 minutes) after they left the exit door of the plant. The time was devoted exclusively to their efforts to start the vehicle. The delay under the circumstances was not unreasonable, nor was it caused by anything except the failure of the engine to ignite.

The claimant's injury in this case falls within the exception to the general rule that injuries in travel to and from work are not compensable. The injury in this case occurred on the parking lot used as an adjunct of the plant where the claimant worked. The lot was a part of the employer's premises. ". . . the great weight of authority holds that injuries sustained by an employee while going to and from his place of work upon the premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the meaning of the Workmen's Compensation Acts and are compensable provided the employee's act involves no unreasonable delay." *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E. 2d 570 (citing many authorities). "Parking lot cases are an increasingly common example in this category. It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's

premises." *Davis v. Manufacturing Co.*, 249 N.C. 543, 107 S.E. 2d 102; *John Rogers Case*, 318 Mass. 308, 61 N.E. 2d 341, 159 A.L.R. 1394; 99 C.J.S., Workmen's Compensation, sec. 234, f. Parking Lots.

The stipulations and the evidence before the Commission were sufficient to support the Commission's critical findings and to justify the award. The judgment of the superior court overruling the appellants' assignments of error is

Affirmed.

MATTIE FAISON, PLAINTIFF v. T & S TRUCKING COMPANY, INC.; NELLIE B. JOY, ADMINISTRATRIX OF WILDON M. JOY, DECEASED; AND ETHELYN SHAW FISHER, ORIGINAL DEFENDANTS; AND RAYMOND FLOYD, JR., AND PERSON-GARRETT COMPANY, INC., ADDITIONAL DEFENDANTS.

(Filed 4 February, 1966.)

1. Automobiles § 11—

The violation of G.S. 20-129 and G.S. 20-134, setting forth statutory requirements as to lights, is negligence *per se*.

2. Automobiles § 41e—

Evidence that the individual defendant stopped the corporate defendant's tractor-trailer on the highway at night, without lights, and that plaintiff, a guest in a following car, was injured when the car crashed into the rear of the trailer, *held* to take the issue of negligence to the jury, notwithstanding conflict in the evidence as to whether lights were burning on the trailer.

3. Automobiles § 40; Evidence § 30—

Statements of a driver made some time after the accident as to what occurred on the occasion of the collision, the driver having died prior to trial, are hearsay and incompetent.

4. Trial § 33—

The trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. G.S. 1-180.

5. Automobiles § 9—

"Parking" and "leaving standing" as used in G.S. 20-161(a) are synonymous, and neither term includes a mere temporary or momentary stoppage on a highway for a necessary purpose when there is no intent to break the continuity of travel.

6. Automobiles § 46— Failure to charge that stopping under situation presented by evidence would not constitute parking held error.

Where there is evidence to the effect that a tractor-trailer was stopped with its wheels on the shoulder but with the rear of the trailer extending

over the hardsurface some two feet, that defendant's tractor-trailer stopped momentarily to enable oncoming traffic to pass before attempting to swing around the tractor-trailer on the shoulder, the court should instruct the jury, as constituting one of the factual situations presented by the evidence, that in such circumstances the driver of defendant's tractor-trailer in stopping would not be parking or leaving the vehicle standing in violation of G.S. 20-161(a), and an instruction correctly defining the terms "parking" and "leave standing" but failing to apply the law to this factual situation is prejudicial error.

7. Trial § 33—

A charge which does not state any of the evidence except in the form of the contentions of the parties is not sufficient. G.S. 1-180.

8. Pleadings § 28—

Plaintiff must prove her case substantially as alleged in her complaint, and may not take a position contrary to her pleadings.

9. Automobiles § 41a—

Plaintiff's evidence must be viewed in relation to the factual situation alleged in the complaint in determining the sufficiency of the evidence.

10. Automobiles § 41f—

Evidence favorable to plaintiff tending to show that a vehicle without lights was stopped on a straight highway some 300 to 400 feet beyond a curve, and that the driver of the car in which plaintiff was a passenger collided with the rear of the standing vehicle, *held* sufficient to take the issue of the driver's negligence to the jury.

11. Trial § 33—

Evidence of a defendant which is favorable to plaintiff must be considered in passing on motion to nonsuit and be included in the charge as one of the variant factual situations presented by the evidence. G.S. 1-180.

12. Automobiles § 46—

An instruction on the duty of a motorist to maintain a reasonably careful lookout and control and not to drive at a speed greater than reasonable and prudent under the circumstances, but which fails to relate these principles of law to a factual situation presented by plaintiff's allegations and evidence to the effect that defendant driver crashed into the rear of an unlighted tractor-trailer standing in her lane of travel on a straight highway some 300 to 400 feet beyond a curve, must be held for prejudicial error.

APPEALS (1) by defendants Trucking Company and Joy, administratrix, and (2) by plaintiff, from *Latham, Special Judge,* January 25, 1965, Civil Session of WAKE.

Plaintiff was injured August 22, 1961, when the 1959 Chevrolet owned and operated by defendant Fisher (Mrs. Fisher), in which plaintiff was a guest passenger, collided with the rear of the trailer portion of a tractor-trailer combination (T/T) owned by defendant

Trucking Company and operated by defendant Wildon M. Joy, its employee, within the scope of his employment. Both vehicles were headed south on N. C. Highway No. 41. The collision occurred about 7:45 p.m., after dark, approximately three miles south of Lumberton, N. C.

Upon the death of Wildon M. Joy during the pendency of this action, the administratrix of his estate was substituted as a party defendant and adopted his pleadings.

Plaintiff alleged Wildon M. Joy (Joy) had parked the Trucking Company's T/T in the right lane for southbound traffic without displaying "the lights required by law"; and that the Fisher car, traveling "at a high and dangerous rate of speed," collided with the rear of the Trucking Company's T/T "with great force." Upon these allegations, plaintiff alleged defendants were guilty of actionable negligence in the respects set out below.

Plaintiff alleged Joy parked the Trucking Company's T/T upon the paved portion of a main-traveled highway, outside of a business or residential district, when it was practicable to park it on the shoulder of said highway; and that he parked and stopped the T/T he was operating upon the paved portion of a main-traveled highway without displaying lights upon such vehicle as required by G.S. 20-134.

Plaintiff alleged Mrs. Fisher failed to keep a proper lookout and to maintain proper control of her car; that she operated her car at a speed greater than was reasonable and prudent under existing conditions; that she "failed to cut to the left or to the right or to take any other evasive action to avoid striking" the T/T; and that she failed to reduce speed as she approached the parked T/T in her line of travel.

Plaintiff alleged the negligence of defendants in the respects alleged "jointly, concurrently, and successively" proximately caused the collision.

Defendants Trucking Company and Joy, in a joint answer, denied plaintiff's allegations as to their negligence. They alleged the collision was caused by the negligence of Mrs. Fisher in specified respects. Upon their allegations and motion, Raymond Floyd, Jr., and Person-Garrett Company, Inc., alleged joint tort-feasors, were joined as additional parties defendant under G.S. 1-240.

Defendant Fisher, in a separate answer, denied plaintiff's allegations as to her negligence. She alleged, *inter alia*, that the negligence of defendants Trucking Company and Joy was the sole proximate cause of the collision.

Evidence was offered by plaintiff, by defendants Trucking Company and Joy and by defendant Fisher.

Uncontradicted evidence tends to show the facts narrated below.

N. C. No. 41, in the vicinity of the collision, is a two-lane highway. The paved (blacktop) portion thereof is approximately 22 feet wide. The shoulders, surfaced with grass and sandy rock, were slightly lower (an inch or less) than the paved portion; and each shoulder was approximately 10 feet wide. The highway ran through open farming country. Where the collision occurred, the highway was level and straight. The collision occurred south of a curve.

Miss Faison, the plaintiff, and Mrs. Hilburn, both of Raleigh, were visiting Mrs. Fisher, Mrs. Hilburn's sister, at her home in Robeson County, having arrived during the afternoon of August 22, 1961. Mrs. Fisher's home is on said highway, approximately one-half mile south of the place of collision. The ladies had been to Lumberton and were returning to Mrs. Fisher's home when the collision occurred. Mrs. Fisher was driving; Miss Faison was on the front seat to the driver's right; and Mrs. Hilburn was on the back seat, on the right side.

A Chevrolet tractor-trailer owned by Person-Garrett Company, Inc., and operated by Raymond Floyd, Jr., its employee, was on its way from Lumberton to Fairmont with a load of tobacco. When the "engine went off completely," Floyd steered the vehicle onto the right shoulder as it was rolling to a stop. When the Person-Garrett T/T came to a stop, all four wheels of the tractor were on the shoulder. The left rear corner of the trailer was over the paved part of the highway about two feet. Henry Watson and Emerson Watson, employees of Person-Garrett, were in the trailer to take care of the tobacco. They were seated on stacks of tobacco, looking back over the tail gate of the trailer.

Defendant Trucking Company's T/T, operated by Joy, stopped approximately in the center of the lane for southbound traffic, some 25 feet from the Person-Garrett T/T. No vehicle collided with the Person-Garrett T/T.

Conflicts in the evidence relevant to decision will be discussed in the opinion.

After plaintiff and defendants Trucking Company and Joy had offered their evidence, the court, upon motion therefor, entered judgment of involuntary nonsuit as to the cross action of defendants Trucking Company and Joy against additional defendants Raymond Floyd, Jr., and Person-Garrett Company, Inc., for contribution.

The issues submitted and the jury's answers are as follows:

"1. Was plaintiff Mattie Faison injured and damaged as a result of the negligence of defendants T & S Trucking Company, Inc. and Wildon M. Joy, as alleged in the Complaint? ANSWER: Yes.

"2. Was plaintiff Mattie Faison injured and damaged as a re-

sult of the negligence of defendant Ethelyn Shaw Fisher, as alleged in the Complaint? ANSWER: No.

"3. What amount, if any, is plaintiff Mattie Faison entitled to recover for personal injuries? ANSWER: $18,550.00."

The court entered judgment that plaintiff have and recover of defendants Trucking Company and Joy the sum of $18,550.00 and costs. (Note: While the judgment sets forth the issues and answers thereto, there is no "adjudication" as between plaintiff and defendant Fisher.)

Defendants Trucking Company and Joy excepted to said judgment and appealed.

Plaintiff excepted "to the signing and entry of the Judgment as it relates to defendant Ethelyn Shaw Fisher" and appealed.

Teague, Johnson & Patterson and Ronald C. Dilthey for plaintiff appellant appellee.

Jordan & Toms and William R. Hoke for T & S Trucking Company, Inc., and Nellie B. Joy, administratrix, defendant appellants.

Smith, Leach, Anderson & Dorsett and C. K. Brown, Jr., for Ethelyn Shaw Fisher, defendant appellee.

BOBBITT, J.

APPEAL OF DEFENDANTS TRUCKING COMPANY AND JOY.

With reference to nonsuit, there was evidence sufficient to support jury findings that the Trucking Company's T/T had stopped in the lane for southbound traffic, after dark, without displaying *any* lights, and that the driver and occupants of the Fisher car had no notice of its presence until the headlights of the Fisher car, when it rounded the curve and was within a short distance of the T/T, picked up two reflectors on the back of the trailer. The violation of G.S. 20-129 and of G.S. 20-134, setting forth statutory requirements as to lights, is negligence *per se*. *Correll v. Gaskins*, 263 N.C. 212, 139 S.E. 2d 202, and cases cited. While defendants Trucking Company and Joy offered conflicting evidence to the effect lights were burning on the back of the Trucking Company's T/T and also on the Person-Garrett T/T and that the distance from the curve to the Trucking Company's T/T was 300-400 feet, the evidence, when considered in the light most favorable to plaintiff, was sufficient to withstand the motion of nonsuit and to require the submission of the first issue.

It is noted that plaintiff's action against defendants Trucking Company and Joy is based on two alleged acts of negligence, namely, (1) failure to display lights as required by G.S. 20-134 and (2) parking on the highway in violation of G.S. 20-161(a). The evidence relating to G.S. 20-161(a) will be considered below.

Joy died, apparently from causes unrelated to the collision, subsequent to the filing of answer and prior to trial.

Assignments of error based on exceptions to the court's refusal to permit the investigating State Highway Patrolman and the widow-administratrix to testify as to statements made by Joy as to what occurred on the occasion of the collision are without merit. It is noted that counsel for defendant Trucking Company and for defendant administratrix sought to elicit testimony as to Joy's declarations on cross-examination of the State Highway Patrolman and on direct examination of Mrs. Joy. There is no contention the declarations were admissible as part of the *res gestæ*. The evidence sought to be elicited was hearsay and therefore incompetent. Stansbury, North Carolina Evidence, Second Edition, § 138.

G.S. 20-161(a) in part provides: "No person shall park or leave standing any vehicle . . . upon the paved . . . portion of any highway . . . when it is practicable to park or leave such vehicle standing off of the paved . . . portion of such highway: Provided, in no event shall any person park or leave standing any vehicle . . . upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon . . ."

When instructing the jury on the first issue, the court, after stating in substance the quoted statutory provisions, continued as follows: "Now, gentlemen, this word 'park' as used in this statute means something more than a mere temporary or momentary stoppage on the road for a necessary purpose. The word 'park' and 'leave standing' as used in the statute are synonymous. It has been said that a vehicle is parked within the meaning of this statute upon the highway when those in charge stop it upon a highway and intentionally leave it upon the concrete to pursue some activity other than that concerned with the car and its operation, however commendable it may be."

Immediately following the quoted instruction, the court instructed the jury as follows:

"(F) So, gentlemen, if the plaintiff should satisfy you from the evidence and by its greater weight that Mr. Joy as he drove the T & S Trucking Company vehicle on North Carolina Highway at the time and at the place in question, *parked or left standing* this tractor-trailer on the paved or main-traveled portion or hard-surfaced portion of North Carolina 41, when it was practicable to park or leave such vehicle standing off of the paved or main-traveled portion of such highway, or if the plaintiff satisfies you from the evidence and by its greater weight that Mr. Joy *parked or left stand-*

ing the T & S truck-trailer on the paved main-traveled or hard-surfaced part of North Carolina 41, and did not leave a clear and unobstructed width of not less than 15 feet upon the main-traveled portion of North Carolina 41 opposite the tractor-trailer, or that Mr. Joy *parked* the tractor-trailer upon the highway at a spot where a clear view could not be obtained from a distance of 200 feet in both directions, then the Court charges you as a matter of law that such conduct would constitute negligence on the part of T & S Trucking Company and Mr. Joy. (F)" (Our italics.)

Defendants Trucking Company and Joy excepted to the portion of the charge between (F) and (F) on the ground the court did not attempt to relate and apply the law to the respective factual contentions of the parties.

If, as the court indicated in the first quoted excerpt, a vehicle is parked upon the highway within the meaning of the statute only "when those in charge stop it upon a highway and intentionally leave it upon the concrete to pursue some activity other than that concerned with the car and its operation, however commendable it may be," (see dissenting opinion in *Beck v. Hooks*, 218 N.C. 105, 114, 10 S.E. 2d 608) there would be serious doubt as to whether there is evidence disclosing a violation of G.S. 20-161(a). Evidence offered by defendants Trucking Company and Joy tends to show that Joy and his 11-year old son, Ronnie Joy, were in the cab of the Trucking Company's tractor from the time the T/T stopped until the time of the collision. Included in the testimony of Mrs. Fisher and of Mrs. Hilburn is testimony to the effect they saw a man standing on the paved portion of the highway at the cab of the Trucking Company's T/T immediately preceding the collision. Mrs. Fisher's testimony purports to identify the man as "a white man" wearing "a light shirt."

The evidence was in irreconcilable conflict as to whether, preceding and at the time of collision, northbound traffic was approaching. Evidence for defendants Trucking Company and Joy tends to show there was such traffic. Evidence for plaintiff and Mrs. Fisher tends to show there was no such traffic.

With reference to how long the Trucking Company's T/T had been stopped before the collision, the estimate of the two men seated in the back of the Person-Garrett T/T was in terms of seconds. The more vivid testimony was that of young Ronnie Joy who testified: "As for how long it was after we came up on the truck in the highway before the car hit us from behind, just something like soon as we got there; we were getting ready to go around, car coming, couldn't go around, happened so quick. Yes, sir, you could say immediately."

Under G.S. 1-180, the trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. *Westmoreland v. Gregory,* 255 N.C. 172, 177, 120 S.E. 2d 523, and cases cited.

All the evidence tended to show the Trucking Company's T/T stopped approximately in the center of the lane for southbound traffic. Defendants Trucking Company and Joy did not contend Joy could not have driven the Trucking Company's T/T onto the shoulder or that the Trucking Company's T/T was a disabled vehicle as defined in G.S. 20-161(c). If the T/T was parked or left standing in violation of G.S. 20-161(a), Joy was guilty of negligence *per se. Hughes v. Vestal,* 264 N.C. 500, 508, 142 S.E. 2d 361. The crucial question was whether the Trucking Company's T/T was *parked or left standing* within the meaning of those terms as used in G.S. 20-161(a).

The court correctly stated that "park" and "leave standing," as used in G.S. 20-161(a), are synonymous; and that neither term includes a mere temporary or momentary stoppage on the highway for a necessary purpose when there is no intent to break the continuity of the travel. *Peoples v. Fulk,* 220 N.C. 635, 18 S.E. 2d 147, and cases cited; *Saunders v. Warren,* 264 N.C. 200, 203, 141 S.E. 2d 308, and cases cited.

If, as defendants Trucking Company and Joy contended and as their evidence tended to show, the Trucking Company's T/T, operated by Joy, had stopped temporarily or momentarily to enable northbound traffic to pass before attempting to swing the Trucking Company's T/T (the trailer portion was 36 feet long and 7 feet, 10 inches wide) to the left and thereby avoid possible collision with either the Person-Garrett tractor-trailer or oncoming traffic, the Trucking Company's T/T was not parked or left standing in violation of G.S. 20-161(a). Application of the law to the facts in evidence required that the court, in substance, so instruct the jury. The court's failure to do so constitutes prejudicial error for which defendants Trucking Company and Joy are entitled to a new trial.

It is noted that the court did not state any of the evidence except in the form of contentions. Under our decisions, this does not comply with the requirement of G.S. 1-180 that the judge "shall declare and explain the law arising on the evidence given in the case." *Brannon v. Ellis,* 240 N.C. 81, 83, 81 S.E. 2d 196, and cases cited.

"The chief purpose of a charge is to aid the jury to understand clearly the case and arrive at a correct verdict. For this reason, the Court has consistently held that G.S. 1-180 confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge the law on the substantial features of the case

arising on the evidence is prejudicial error, and this is true even without prayer for special instructions." *Bulluck v. Long,* 256 N.C. 577, 587, 124 S.E. 2d 716.

Whether defendants Trucking Company and Joy violated G.S. 20-161(a) has no bearing upon their obligations in respect of lighting equipment and lights imposed by G.S. 20-129 and G.S. 20-134. *Melton v. Crotts,* 257 N.C. 121, 125, 125 S.E. 2d 396.

APPEAL OF PLAINTIFF.

With reference to the second issue, the court instructed the jury that defendant Fisher would be negligent if, while driving south on said highway, she (1) "did not keep such a lookout as a reasonably prudent person under the same or similar conditions would have kept," or (2) "did not operate her automobile at such a speed or in such a manner that she could maintain the control of her car which under the same or similar circumstances a reasonably prudent person would have maintained," or (3) "drove her automobile . . . at a speed that was greater than was reasonable and prudent under the then existing conditions, regardless of whether that speed was more or less than 55 miles per hour." Plaintiff excepted to excerpts from the charge containing these instructions.

Later, the court instructed the jury to answer the second issue, "Yes," if they found from the evidence and by its greater weight that defendant Fisher was negligent and that her negligence was the proximate cause or one of the proximate causes of plaintiff's injury.

The court did not state any of the evidence pertinent to the second issue except in the form of defendant Fisher's contentions as to what the evidence tended to show. There was no reference to what plaintiff contended the evidence pertinent to the second issue tended to show. Nor, with reference to the second issue, did the court attempt to relate and apply the law to the variant factual situations disclosed by the evidence.

Plaintiff was required to prove negligence against defendant Fisher substantially as alleged in her complaint. *Messick v. Turnage,* 240 N.C. 625, 83 S.E. 2d 654. Plaintiff alleged and testified Trucking Company's T/T was parked on the highway without lights in the lane for southbound traffic. She cannot take a position contradictory to her pleading. *Nix v. English,* 254 N.C. 414, 420, 119 S.E. 2d 220; *Davis v. Rigsby,* 261 N.C. 684, 686, 136 S.E. 2d 33. Consequently, all of plaintiff's allegations and evidence as to failure to keep a proper lookout, as to failure to exercise proper control and as to excessive speed must be considered in the context of plaintiff's allegations and evidence that Mrs. Fisher was confronted by an unlighted T/T.

We agree with the court's ruling that the evidence when considered in the light most favorable to plaintiff was sufficient to withstand defendant Fisher's motion for judgment of nonsuit and to require submission of the second issue. This being so, compliance with G.S. 1-180 was required.

We recognize the difficulty inherent in a case such as this where plaintiff is seeking to establish that the collision was caused both by the actionable negligence of defendants Trucking Company and Joy *and* by the actionable negligence of defendant Fisher. However, assuming there were no lights on the back of the Trucking Company's trailer, this fact in itself would not exculpate defendant Fisher. Assuming a basis therefor in the evidence, it would be for the jury to determine whether defendant Fisher was negligent in respect of failure to keep a proper lookout and in respect of excessive speed and whether such negligence was a proximate cause of the collision.

According to plaintiff's testimony: Plaintiff was engaged in conversation, principally with Mrs. Hilburn, while the Fisher car was proceeding south toward Mrs. Fisher's home. When the collision occurred, plaintiff was 66 years of age. She had not driven a car since the days of the "Model T." She was not familiar with the area where the collision occurred and "wasn't looking." She did not know how fast Mrs. Fisher was driving. Plaintiff testified: "(A)ll of a sudden I felt Mrs. Fisher's car kind of jerk, and I throwed up my hands like that, and I seen this truck in front of us with no lights on it . . ." Again: "As for how soon after I felt the car jerk did the collision occur, by the time I could say, 'Lord, save me', I didn't know any more." Plaintiff testified she saw no oncoming (northbound) traffic.

On cross-examination, plaintiff testified as follows: "Mrs. Fisher was driving at a rate of speed that was nothing unusual about it. Yes, I was perfectly content sitting there in the car with her as I rode along; I thought she was a careful driver. I didn't find a thing to criticize her about as I was going along about her driving."

Mrs. Fisher and Mrs. Hilburn estimated Mrs. Fisher's speed at 40-45 miles per hour. Henry Watson estimated the speed of the Fisher car at "55 or 60." Mrs. Fisher testified the road was "curvy"; and that when she completed a curve to the right the Trucking Company's T/T was "very close," only two car-lengths ahead and directly in her path, when her headlights picked up the reflectors on the back of the Trucking Company's trailer. Mrs. Fisher testified: "Yes, it had rained that day. On and off all day. As a matter of fact, it was not exactly rainy at the time of the accident, but kind of

misty fog, and I had my windshield wipers on. It was enough to get that dirt on the highway throwing on my windshield."

Evidence offered by defendants Trucking Company and Joy tended to show the distance from the curve to the Trucking Company's T/T was 300-400 feet.

It is well established that evidence offered by defendant that tends to support plaintiff's allegations is to be considered in passing upon a motion for judgment of nonsuit. *Nix v. English, supra; Sugg v. Baker,* 261 N.C. 579, 135 S.E. 2d 565, and cases cited. G.S. 1-180 requires that the court "declare and explain the law arising" on such evidence.

If Mrs. Fisher by the exercise of due care should have seen the Trucking Company's T/T even if there were no lights on the rear of the trailer when she was such distance away that by the exercise of due care she could have avoided the collision by stopping, slowing down or taking other evasive action, her failure to do so would constitute actionable negligence. Again: If Mrs. Fisher, taking into consideration all existing conditions, was operating her car at a greater rate of speed than was reasonable and prudent, and on account of such excessive speed was unable to avoid the collision after she saw or by the exercise of due care should have seen an unlighted T/T in her path, such excessive speed would constitute actionable negligence on the part of Mrs. Fisher. Plaintiff was entitled to have the jury instructed substantially as indicated. Actionable negligence in the respects indicated would not be in conflict with plaintiff's allegations and evidence tending to show that negligence on the part of defendants Trucking Company and Joy was also a proximate cause of the collision.

Hence, the jury's answer to the second issue is set aside and the judgment, to the extent it may affect the case as between plaintiff and defendant Fisher, is vacated.

The result of the foregoing is that the entire verdict and the judgment are set aside. A new trial on all issues raised by the pleadings is awarded.

On appeal by defendants Trucking Company and Joy, new trial.

On plaintiff's appeal, new trial.

EARL E. GAY, ADMINISTRATOR OF THE ESTATE OF BABY GAY, DECEASED v. DR. G. R. C. THOMPSON; DR. C. J. POWELL; DR. ROBERT W. NICHOLSON AND DR. J. B. LOUNSBURY.

(Filed 4 February, 1966.)

1. Death § 3—

In this jurisdiction a right of action to recover damages for wrongful death is purely statutory, and the statute confines recovery to a fair and just compensation for the pecuniary injuries resulting from the death. G.S. 28-174.

2. Damages § 2—

Compensatory damages may not be based on mere speculation devoid of factual basis.

3. Pleadings § 12—

A demurrer admits for its purpose the truth of the factual averments well stated and the relevant inferences of fact reasonably deducible therefrom, but does not admit inferences or conclusions of law.

4. Death § 3; Physicians and Surgeons § 11—

No action lies to recover for the wrongful prenatal death of a viable child *en ventre sa mere*, since there can be no evidence from which a jury may infer upon any factual basis any pecuniary injury resulting from such death.

ON *certiorari* from *Morris, J.*, 24 August 1965 Session of NEW HANOVER.

Civil action by the administrator of the estate of Baby Gay to recover damages for the alleged wrongful prenatal death of Baby Gay, a viable child *en ventre sa mere*.

The complaint alleges in substance: Plaintiff is the duly qualified administrator of the estate of Baby Gay, deceased. Baby Gay was the child of plaintiff and his wife Barbara Pickett Gay, was conceived about 24 December 1961, and was delivered stillborn 26 August 1962. On 10 March 1962 Barbara Pickett Gay consulted Dr. G. R. C. Thompson with respect to her condition and the child developing in her womb, and the relationship of physician and patient was then created, which existed until the child's death 25 or 26 August 1962. Dr. Thompson made several examinations of her and the child between 10 March 1962 and 23 August 1962. On 23 August 1962 she was in good health, her condition was normal for a woman eight months pregnant, and the child's condition and growth were normal for a child conceived about eight months previously, and the child was capable of a separate existence outside of his mother's womb, if proper medical care had been received by him and his mother. On 23 August 1962 Barbara Pickett Gay had

no symptoms of being in labor, and no complications existed with respect to her condition or that of the child which required that labor be induced prematurely. On 23 August 1962, upon recommendation of Dr. Thompson, she entered a hospital in order that Dr. Thompson could cause a premature delivery of her baby. Later on that day Dr. Thompson in an effort to induce the premature delivery of her baby ruptured her amniotic membranes and administered labor-inducing drugs for a period of about 41 hours without success. About noon on 25 August 1962 he directed her to return to her home. During the night of that day in her home she suffered chills and pressure pains, and the next morning she had a high temperature and was readmitted to the hospital suffering from an acute infection of the uterus, which later resulted in her death, and her baby was delivered dead that afternoon. The complaint then alleges with particularity a number of acts of negligence by Dr. Thompson, and that such acts of negligence on his part proximately caused Baby Gay's death; that Baby Gay prior to defendant's negligence was a healthy, normal boy, and because of his wrongful death plaintiff is entitled to damages in the amount of $50,000.

On 26 August 1964 plaintiff took a voluntary nonsuit as to Drs. C. J. Powell, Robert W. Nicholson, and J. B. Lounsbury.

Defendant Dr. G. R. C. Thompson on 11 September 1964 demurred to the complaint on the grounds (1) that it does not state facts sufficient to constitute a cause of action, in that no action can be maintained for the wrongful death of a stillborn child, (2) that plaintiff has no legal capacity to sue, and (3) the relationship of doctor and patient did not exist between defendant and Baby Gay.

Judge Morris overruled defendant's demurrer on 24 August 1965, and allowed him 30 days within which to answer.

On 22 September 1965 we allowed *certiorari.*

Burney & Burney, Marshall & Williams, and A. Dumay Gorham, Jr., for defendant appellant, Dr. G. R. C. Thompson.

Aaron Goldberg and Eugene H. Phillips for plaintiff appellee.

PARKER, J. The sole question for decision in this case is whether there is a right of action under our wrongful death statute, G.S. 28-173, 174, by the administrator of a stillborn child who died as a proximate result of tortious injuries to his mother and himself while *en ventre sa mere,* when the child was viable at the time of the injuries. This is a case of novel impression in this State.

The common law, adopted as the law of our State, G.S. 4-1, gave no right of action for the tortious killing of a human being. *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793, 69 A.L.R. 2d

620; *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307. The right of action to recover damages for death caused by wrongful act was given in England in 1846 by the enactment of 9 and 10 Victoria, Ch. 93. This statute is commonly called "Lord Campbell's Act," because he, who had the rare distinction of having been successively Lord Chief Justice and Lord Chancellor of England, was its author and mainly instrumental in its adoption. *In re Estate of Ives*, 248 N.C. 176, 102 S.E. 2d 807; *Hartness v. Pharr*, 133 N.C. 566, 45 S.E. 901. Thereafter, Lord Campbell's Act has been copied and enacted, with many variations, in all, or practically all, the states of this nation, as well as by the U. S. Congress. *Killian v. R. R.*, 128 N.C. 261, 38 S.E. 873; 25A C.J.S., Death, § 14.

In *Armentrout v. Hughes, supra,* the Court, after stating that Lord Campbell's Act was enacted in England in 1846, said: "Our Legislature, eight years later, enacted a statute modeled on the English statute, c. 39, Laws 1854, R.C. c. 1, § 9 and 10. The statute then enacted is now, without material change, incorporated in our laws as G.S. 28-173, 174. The statute by express language limits recovery to 'such damages as are a fair and just compensation for the pecuniary injury resulting from such death.' It does not provide for the assessment of punitive damages, nor the allowance of nominal damages in the absence of pecuniary loss."

In this jurisdiction a right of action to recover damages for wrongful death is purely statutory, and exists only by virtue of G.S. 28-173, 174. *In re Miles,* 262 N.C. 647, 138 S.E. 2d 487; *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761; *In re Estate of Ives, supra; Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49.

Armentrout v. Hughes, supra, was an action for damages for the wrongful death of plaintiff's intestate, defendant's wife, a woman 80 years old and in good health. Defendant admitted the killing, his conviction for murder and prison sentence, but denied the deceased had any earning capacity. One issue was submitted to the jury: "What amount, if any, is plaintiff entitled to recover of the defendant?" The jury answered: "None." Judgment was entered on the verdict, and plaintiff appealed. The Court held that plaintiff's contention that he is entitled to nominal damages at least which would entitle him to the costs, G.S. 6-1, is untenable, and the court's charge limiting recovery to the pecuniary loss resulting from the death is without error.

Hines v. Frink and Frink v. Hines, 257 N.C. 723, 127 S.E. 2d 509, was an appeal in two cases, involving claims and counterclaims for personal injuries, property damage, and the wrongful death of Thomas Ray Gore resulting from a collision between a pickup truck and an automobile. Upon the trial Hines and Eagle offered evidence.

Frink, Administrator, offered none. At the close of all the evidence, the counterclaim (cross-action) of Frink, administrator, for the alleged wrongful death of Gore, his intestate, was nonsuited on motion of Hines and Eagle. The jury awarded damages to Hines and Eagle. Frink, administrator, appealed. On appeal, *inter alia*, Frink, administrator, assigned as error the court's nonsuit of his counterclaim (cross-action) for the wrongful death of his intestate, Gore. Sharp, J., said for the Court: "No discussion of negligence or proximate cause is necessary to sustain the motions of Hines and Eagle to nonsuit the action of Frink, administrator, for the wrongful death of his intestate. He offered no evidence and the record is devoid of any evidence as to the age, health, habits, or earning capacity of Gore."

Scriven v. McDonald, 264 N.C. 727, 142 S.E. 2d 585, was an action by plaintiff, administrator, to recover damages for the alleged wrongful death of his intestate, Anthony Glenn Scriven, hereafter called Anthony. Issues as to the alleged negligence of defendants and as to the alleged contributory negligence of Anthony's mother and sole beneficiary were answered in favor of plaintiff, and damages were awarded in the amount of $5,750. Judgment was entered on the verdict. Defendants appealed, and contended the action should have been nonsuited on the ground the evidence fails to show pecuniary loss on account of Anthony's death. Plaintiff's evidence, considered in the light most favorable to him, showed the following facts in brief summary: Anthony on the day of his death was eleven years, four months and fourteen days old. His height was four feet and ten inches. He had not been in any public school. He could dress himself, but there were a few things he could not do; he could not fasten buttons; he could put on his shoes, but he could not tie them. He was mentally retarded, and thereby seriously handicapped. He had not done any work to make money. He was able to understand and carry out simple directions. Bobbitt, J., speaking for the Court, said:

> "Plaintiff's evidence and portions of Dr. Mangum's testimony not in conflict therewith confront us with the fact that Anthony, from birth until death, was mentally retarded and thereby seriously handicapped. Absent substantial evidence, medical or otherwise, tending to show a reasonable probability Anthony could or might overcome his handicap, the only reasonable conclusion to be drawn from the evidence is that he would continue to be a dependent person rather than a person capable of earning a livelihood. The burden of proof is upon plaintiff to show pecuniary loss to the estate on account of An-

thony's death. In our view, plaintiff's evidence negatives rather than shows such pecuniary loss. Hence, the court erred in denying defendants' motion for judgment of involuntary nonsuit.

"The statute, G.S. 28-174, leaves no room for sentiment. It confers a right to compensation only for pecuniary loss."

The Court has consistently held that G.S. 28-173, 174, which gives the right of action for wrongful death, confines the recovery to "such damages as are a fair and just compensation for the pecuniary injury resulting from such death," and by the express language of G.S. 28-174 this is a prerequisite to the right to recover damages under our wrongful death statute. "It does not contemplate *solatium* for the plaintiff, nor punishment for the defendant." Negligence alone, without "pecuniary injury resulting from such death," does not create a cause of action. *Collier v. Arrington,* 61 N.C. 356; *Kesler v. Smith,* 66 N.C. 154; *Carpenter v. Power Co.,* 191 N.C. 130, 131 S.E. 400; *Hoke v. Greyhound Corp.,* 226 *N.C.* 332, 38 S.E. 2d 105; *Armentrout v. Hughes, supra; Hines v. Frink and Frink v. Hines, supra; Scriven v. McDonald, supra.*

In *Graf v. Taggert,* 43 N.J. 303, 204 A. 2d 140 (1964), the Court said: "When our statute [Death Act] was enacted in 1848 it expressly limited damages to pecuniary loss. The same limitation remains today. The act created a new cause of action for the loss suffered by the designated beneficiaries, measured by their reasonable expectations of pecuniary advantage from the continuance of the life of the deceased. [Citing authority.] In the absence of pecuniary loss the cause of action will not lie. [Citing authority.]"

We recognize that the damages in any wrongful death action are to some extent uncertain and speculative. A jury may indulge in such speculation where it is necessary and there are sufficient facts to support speculation. Conversely, damages may not be assessed on the basis of sheer speculation, devoid of factual substantiation. 22 Am. Jur. 2d, Damages, § 24; 25 C.J.S., Damages, § 26, page 675 *et seq.; Graf v. Taggert, supra.*

In the case of prenatal death there is no competent means of measuring the probable future earnings of the *foetus.* It is virtually impossible to predict whether an unborn child, but for its death, would have been capable of giving pecuniary benefit to anyone. "None of the usual indicia such as mental and physical capabilities, personality traits, aptitudes and training of the wrongfully killed are present. While it is true that the social position of the parents may constitute a slight unit of measure, the probable future earnings of a stillborn *foetus* are patently a matter of sheer speculation. An objection, in the same vein, specifically applicable to the wrong-

ful death action is that it can hardly be seriously contended that the death of a *foetus* represents *any* real pecuniary loss to the parents. There may have been a time when the average child went to work as soon as he was able. That day has passed. Today, the rearing of a child typically constitutes a great pecuniary liability for the parents." Comment, "Developments in the Law of Prenatal Wrongful Death," 69 Dickinson Law Review 258, 267 (1965).

In *Graf v. Taggert, supra,* the sole question on the appeal was "whether there is a right of recovery under the New Jersey Death Act, N.J.S. 2A:31-1 *et seq.,* N.J.S.A., by the administrator *ad prosequendum* of a stillborn child who died as a result of injuries received while *en ventre sa mere.*" From a final judgment dismissing the wrongful death count, the plaintiffs appealed. In affirming this judgment the Court said:

> ". . . [T]he anticipated evidence on the issue of damages for loss of pecuniary benefit in prenatal death cases is *uniformly* speculative. The parents or other beneficiaries will merely be able to show their respective ages and economic and social status. There can be no evidence as to the child's capabilities and potentialities. In short, there can be no evidence from which to infer pecuniary loss to the surviving beneficiaries. Our Death Act was not intended to grant damages against a tortfeasor merely to punish him. We therefore hold that under our Death Act there can be no right of recovery for the wrongful death of an unborn child."

The old doctrine that when a pregnant woman is injured, and as a result the child subsequently born alive suffers deformity or some other injury the child cannot recover damages, has since 1946 lost all or most all of its legalistic following. Prosser on Torts, 3rd Ed., Ch. 10, § 56, Prenatal Injuries. Since the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence. Cases of prenatal injury followed by a live birth constitute a type of common law personal injury action, whereas wrongful death actions, particularly in this jurisdiction, are statutory creations. Consequently, there is a distinction between the concepts of prenatal injury followed by a live birth and wrongful prenatal death. 69 Dickinson Law Review, *supra,* 264 *et seq.*

It is hornbook law that a demurrer admits, for the purpose of testing the sufficiency of the pleading, the truth of the factual averments well stated and the relevant inferences of fact reasonably de-

ducible therefrom, but a demurrer does not admit inferences or conclusions of law. 3 Strong, N. C. Index, Pleadings, § 12.

In brief, there can be no evidence from which to infer "pecuniary injury resulting from" the wrongful prenatal death of a viable child *en ventre sa mere;* it is all sheer speculation. We therefore hold that under our Death Act, G.S. 28-173, 174, there can be no right of action for the wrongful prenatal death of a viable child *en ventre sa mere.*

The following cases have denied any recovery for prenatal death: *Graf v. Taggert, supra,* which is a scholarly and excellent decision; *Hogan v. McDaniel,* 204 Tenn. 235, 319 S.W. 2d 221; *Durrett v. Owens,* 212 Tenn. 614, 371 S.W. 2d 433; *Muschetti v. Pfizer,* 208 Misc. 870, 144 N.Y.S. 2d 235; *In re Logan's Estate,* 4 Misc. 2d 283, 156 N.Y.S. 2d 49, *aff'd* 2 App. Div. 2d 842, 156 N.Y.S. 2d 152, *aff'd* 3 N.Y. 2d 800, 166 N.Y.S. 2d 3; *Norman v. Murphy,* 124 Cal. App. 2d 95, 268 P. 2d 178; *Howell v. Rushing,* 261 P. 2d 217 (Supreme Court of Oklahoma 1953); *Drabbels v. Skelly Oil Co.,* 155 Neb. 17, 50 N.W. 2d 229; *Commonwealth v. Equitable Gas Company,* 415 Pa. 113, 202 A. 2d 11; *Acton v. Shields,* 386 S.W. 2d 363 (Supreme Court of Missouri 1965). These authorities, which consider the problem of remote and speculative damages in prenatal death, seem to be in accord with our view: 2 Harper and James, The Law of Torts, § 18.3, p. 1031; 69 Dickinson Law Review, *supra* 264 *et seq.* See also 63 Michigan Law Review 579 (1965), where there is an elaborate and lengthy article by David A. Gordon entitled "The Unborn Plaintiff." On p. 594 Gordon states: "To attack the requirement of live birth is, practically speaking, to abandon an interest in the *fetus* and to embrace a policy that declares that the beneficiaries of a stillborn infant ought to recover under the wrongful death statutes. This is not justifiable, and clearly our knowledge of science does not push us over any line where, in an earlier and different situation, ignorance checked our steps." Gordon also says on p. 595: "A fundamental basis of tort law is the provision of compensation to an innocent plaintiff for the loss that he has suffered. Tort law is not, as a general rule, premised upon punishing the wrongdoer. It is not submitted that the tortious destroyer of a child in *utero* should be able to escape completely by killing instead of merely maiming. But it is submitted that to compensate the parents any further than they are entitled by well-settled principles of law and to give them a windfall through the estate of the *fetus* is blatant punishment."

The following cases allow a recovery for prenatal wrongful death: *Fowler v. Woodward,* 244 S.C. 608, 138 S.E. 2d 42; *Odham v. Sherman,* 234 Md. 179, 198 A. 2d 71 (three judges dissented); *Gorke*

v. LeClerc, 23 Conn. Sup. 256, 181 A. 2d 448; *Hale v. Manion,* 189 Kan. 143, 368 P. 2d 1; *Stidam v. Ashmore,* 109 Ohio App. 431, 167 N.E. 2d 106; *Poliquin v. MacDonald,* 101 N.H. 104, 135 A. 2d 249, rule modified as to viability by *Bennett v. Hymers,* 101 N.H. 483, 147 A. 2d 108; *Worgan v. Greggo,* 50 Del. 258, 128 A. 2d 557 (Superior Court of Delaware); *Bonbrest v. Kotz,* 65 F. Supp. 138 (D. C. Cir. 1946) (recovery was specifically limited to infants born alive, 65 F. Supp. at 142); *Mitchell v. Couch,* 285 S.W. 2d 901 (Ky. 1955); *Rainey v. Horn,* 221 Miss. 269, 72 So. 2d 434; *Verkennes v. Corniea,* 229 Minn. 365, 38 N.W. 2d 838, 10 A.L.R. 2d 634; *Porter v. Lassiter,* 91 Ga. App. 712, 87 S.E. 2d 100. These cases should be distinguished from decisions where death actions were allowed for infants who have been primarily injured, and have died subsequent to birth. In such cases, the court in essence is merely recognizing a cause of action for prenatal injury. *Cf. Hall v. Murphy,* 236 S.C. 257, 113 S.E. 2d 790; *Amann v. Faidy,* 415 Ill. 422, 114 N.E. 2d 412; *Jasinsky v. Potts,* 153 Ohio St. 529, 92 N.E. 2d 809.

This is said in 69 Dickinson Law Review, *supra,* p. 259 *et seq.:*

> "A survey of the various jurisdictions does not disclose a satisfactory explanation for the allowance of prenatal wrongful death recovery. Although ten jurisdictions have permitted actions for prenatal wrongful death, none of the cases offer a compelling argument in favor of recovery. The leading case, *Verkennes v. Corniea* [229 Minn. 265, 38 N.W. 2d 838, 10 A.L.R. 2d 634], recognized a cause of action for the stillbirth of a viable *foetus.* However, the opinion dwelt almost exclusively on the subject of prenatal injury. Since no distinction was made between prenatal death and prenatal injury, the implication is that the court equated the two. Five of the ten jurisdictions permitting the action for wrongful death cite *Verkennes* as controlling. Moreover, none of these jurisdictions had previously recognized a right of recovery for prenatal injury. It is submitted that this propensity to discuss the death issue in terms of prenatal injury may reflect the courts' desire to disassociate themselves from the unpopular and crumbling rule of *Dietrich v. Northampton,* [138 Mass. 14, 52 Am. Rep. 242 (1884)]. The courts may have merely utilized the factual situation of prenatal death as a vehicle to join the growing trend in support of recovery for prenatal injuries.
>
> "Three of the four remaining jurisdictions which had previously permitted actions for prenatal injury, also followed the general rationale of *Verkennes v. Corniea.* These courts, however, relied primarily on prenatal injury cases which had been

decided within their respective jurisdictions. The tenth jurisdiction, Connecticut, in *Gorke v. LeClerc* [23 Conn. Sup. 256, 181 A. 2d 448], recognized the death action on the theory that it was unjust to permit recovery where the infant survives for only a few minutes and deny recovery where the infant dies just before birth. In essence, *Gorke* ruled that birth is an arbitrary and inappropriate limitation upon the right to recovery."

In *Dietrich, Adm. v. Inhabitants of Northampton,* 138 Mass. 14, 52 Am. Rep. 242 (1884), the Court in an opinion written by Justice Oliver Wendell Holmes, Jr., afterwards a most distinguished member of the United States Supreme Court, held:

"If a woman, between four and five months advanced in pregnancy, by reason of falling upon a defective highway, is delivered of a child, who survives his premature birth only a few minutes, such child is not a 'person,' within the meaning of the Pub. Sts. c. 52, § 17, for the loss of whose life an action may be maintained against the town by his administrator."

G.S. 28-173 reads in part: "When the death of a *person* is caused by a wrongful act, neglect or default of another. . . ." (Emphasis ours.) We have based our decision on the ground there can be no evidence from which to infer "pecuniary injury resulting from" the wrongful prenatal death of a viable child *en ventre sa mere;* it is all sheer speculation. Consequently, it is not necessary for us to decide in this case the debatable question as to whether a viable child *en ventre sa mere,* who is born dead, is a person within the meaning of our wrongful death act. See *Graf v. Taggert, supra,* at p. 143 of 204 A. 2d 140.

The learned judge below erred in overruling defendant's demurrer to the complaint. He should have sustained it, and dismissed the action. The judgment below is

Reversed.

DAVE GODFREY, ADMINISTRATOR OF THE ESTATE OF BRENDA MAE THOMAS v. WILLIE RUFUS SMITH.

(Filed 4 February, 1966.)

APPEAL by defendant from *Nimocks, E.J.,* 5 April 1965 Civil Session of HARNETT.

Civil action by the duly appointed and qualified administrator of the estate of Brenda Mae Thomas to recover damages for the

alleged wrongful prenatal death of Brenda Mae Thomas, a viable child *en ventre sa mere*, heard upon a demurrer to the complaint and the amended complaint.

The complaint and amended complaint allege in substance: On 5 July 1963 Brenda Mae Thomas was a viable child in her eighth month of gestation *en ventre sa mere;* that on that day there was a collision between an automobile driven by her mother and an automobile driven by defendant; that said collision was caused by the negligence of defendant in the operation of his automobile, and the acts of negligence by defendant are specifically alleged; and that as a proximate result of such collision Brenda Mae Thomas was killed, and was born dead on 9 July 1963.

Defendant demurred to the complaint and amended complaint on the following ground: The complaint and amended complaint do not state facts sufficient to constitute a cause of action against defendant, in that it appears upon the face of the complaint and upon the face of the amended complaint that plaintiff's alleged intestate was an unborn *foetus* at the time of her alleged death by wrongful act. The trial court overruled the demurrer and allowed defendant 30 days thereafter in which to answer. Defendant appealed.

Teague, Johnson and Patterson by Robert M. Clay for defendant appellant.

Morgan and Williams by Ben T. DeBerry for plaintiff appellee.

PARKER, J. Defendant has ignored Rule 4(a), Rules of Practice in the Supreme Court, 254 N.C. 783, 784, in appealing instead of petitioning this Court for a writ of *certiorari*. However, under the particular circumstances here we have decided to pass on the appeal.

Decision in the instant case is controlled by the decision in *Gay, Administrator v. Dr. G. R. C. Thompson*, 266 N.C. 394, 146 S.E. 2d 425, the opinion in which is filed contemporaneously with the opinion in this case. Upon authority of the decision in that case, the learned judge below erred in overruling the demurrer in the instant case. He should have sustained it, and dismissed the action. The judgment below is

Reversed.

HENRY L. INGRAM, JR., SUBSTITUTED TRUSTEE v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 4 February, 1966.)

1. Negligence § 9—

Where the injured party has obtained a joint and several judgment against the joint tort-feasors, the one defendant may not, upon payment of the judgment, recover from the other on grounds of primary and secondary liability until there is an adjudication of the issue of primary and secondary liability in an action in which the other defendant is a party and has an opportunity to defend.

2. Same; Insurance § 65.1—

After payment of judgment by one tort-feasor and the assignment of the judgment to a trustee, the trustee brought suit against the insurer of the other tort-feasor, alleging that such tort-feasor's liability was primary. *Held:* Demurrer was properly sustained, since the question of primary and secondary liability could not be adjudicated in an action to which the asserted primarily liable tort-feasor was not a party.

3. Constitutional Law § 24—

There can be no adjudication of the rights of a party unless such party is a party to the proceeding in which such liability is determined and is given an opportunity to be heard.

APPEAL by defendant from *Gwyn, J.*, February 8, 1965 Civil Session, RANDOLPH Superior Court.

From a verdict and judgment that the plaintiff recover from the defendant the sum of $10,000.00, the defendant excepted and appealed.

John Randolph Ingram for plaintiff appellee.
Coltrane and Gavin by W. E. Gavin for defendant appellant.

HIGGINS, J. The facts here involved were stated and the pleadings as originally drawn were analyzed by this Court when the case was here on demurrer at the Fall Term, 1962. The decision sustaining the demurrer, and granting leave to amend, is reported in 258 N.C. 632, 129 S.E. 2d 222. Only a few additional facts, the amended complaint, and the result of the second hearing need be discussed in order to complete the legal picture as the record now presents it.

At no time has there been a court adjudication of an issue of primary and secondary liability as between H. F. Garner and W. C. Garner. In their joint answer to the original suit instituted against both by Reece Trotter, the Garners admitted that the truck involved in the accident was owned by W. C. Garner and was driven at the time of the accident by H. F. Garner. Trotter's judgment for $35,-

000.00 was joint and several against both. The only pleading filed in the original action by the Garners was their joint answer. Neither alleged any cross action or any different degree of liability of one against the other. Both were adjudged jointly and severally liable to Trotter.

By the action as originally brought, the assignee of W. C. Garner sought to recover from the insurer of H. F. Garner the sum of $10,000.00 upon the ground that W. C. Garner, though secondarily liable to Trotter, had paid the sum of $10,000.00 to Trotter and that W. C. Garner was entitled to reimbursement because H. F. Garner was primarily liable.

Justice Moore's opinion sustained the demurrer to the original complaint upon this ground: "It does not appear from the complaint that it has been judicially established that W. C. Garner is entitled to indemnity from H. F. Garner. The policy issued by Nationwide provides that 'No action shall lie against the Company unless, as a condition precedent thereto, . . . the amount of the insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the insured, the claimant and the Company.' . . . The question of primary and secondary liability is for the offending parties to adjust between themselves. . . . The complaint in the present action is defective in that it does not allege, as a condition precedent to the right to maintain the action, that the right to indemnity has been determined according to the provisions of the policy."

By proper allegations and issues the Garners could have had determined in Trotter's action the question of their primary and secondary liability. *Davis v. Radford,* 233 N.C. 283, 63 S.E. 2d 822. This they did not do. Or, after paying the judgment to Trotter, W. C. Garner could have brought suit against H. F. Garner, alleging payment of the debt for which the latter was primarily liable, and recover judgment for the amount paid. After recovering judgment, W. C. Garner, or his assignee, could have required H. F. Garner's insured, Nationwide, to discharge the insured's liability.

Justice Moore's opinion is the law of the case to this extent: The complaint in a cause of action by W. C. Garner or his trustee against Nationwide must allege the issue of H. F. Garner's liability to W. C. Garner has been settled by judgment after trial, or that liability has been stipulated in writing, signed by the claimant, by H. F. Garner, and by Nationwide. There is no claim that Nationwide has signed any written agreement. Hence the trustee must allege the issue of H. F. Garner's primary liability has been settled by a judgment after trial.

The amended complaint contains the following which is a summary of its other allegations: "VII. According to the above mentioned Complaint, Answer, Stipulation (that W. C. Garner owned the truck driven by H. F. Garner) and the Trial, the liability of W. C. Garner was secondary and that of H. F. Garner, primary." The amended complaint alleges H. F. Garner's liability *is* primary. That allegation is not enough. The amended complaint must allege H. F. Garner's primary liability has been judicially determined after trial. Before H. F. Garner is adjudged to be liable to W. C. Garner by reason of the latter's payment to Trotter, H. F. Garner must be a party and must be given an opportunity to be heard. No such hearing or opportunity to be heard is alleged. A party ". . . is entitled to a day in court, and it is but just that he should have an opportunity to defend the suit . . . in order to defeat a recovery, or to reduce the amount for which he must answer over, by setting up his defense in his own way and through his own counsel." *Guthrie v. Durham,* 168 N.C. 573, 84 S.E. 859.

In the trial before Judge Gwyn, H. F. Garner was not a party. His liability to W. C. Garner could not be adjudicated. In this action by the assignee of W. C. Garner against H. F. Garner's insurer the amended complaint is no improvement over the original.

In the trial before Judge Gwyn the court should have entered judgment sustaining the defendant's demurrer on the second ground stated therein. The judgment overruling the demurrer is

Reversed.

STATE v. JACK LANG ADAMS.

(Filed 4 February, 1966.)

1. Criminal Law § 103—

The court's election to submit only the question of defendant's guilt of the lesser charge is equivalent to a verdict of not guilty of all other charges included in the bill of indictment.

2. Homicide § 30; Criminal Law § 131—

The 1933 Amendment to G.S. 14-18, providing that punishment for involuntary manslaughter should be in the discretion of the court and that the defendant may be fined or imprisoned, or both, does not provide specific punishment and therefore the punishment is governed by the limits prescribed in G.S. 14-2 and G.S. 14-3, and a sentence of 18 to 20 years is in excess of that permitted by statute.

STATE *v.* ADAMS.

APPEAL by defendant from *McLean, J.*, July, 1965 Session, BUNCOMBE Superior Court.

This criminal prosecution originated by indictment charging that on May 28, 1965, the defendant unlawfully, wilfully, and feloniously did kill and slay Gertrude Parker. The defendant entered a plea of not guilty.

The State's evidence disclosed that Gertrude Parker was killed in an automobile collision on Highway 19-23 between Weaverville and Asheville. She was a passenger in the Mercury being driven by her husband near the city limits of Asheville. The time was 5:10 p.m. The weather was clear. The road was dry. The collision occurred on a sharp curve at a point where the roadsign designated 35 miles per hour as the maximum safe speed. Mr. Parker was driving on his side of the two-lane highway at a speed of 20 miles per hour. The defendant, driving his Buick on the wrong side of the road, collided head-on with the Parker Mercury. Mrs. Parker was killed and Mr. Parker was injured. The defendant's estimated speed was 60 miles per hour. There was evidence that the defendant was under the influence of liquor. He did not offer evidence.

The court instructed the jury that the bill of indictment charged involuntary manslaughter and that the jury should render one of two verdicts: guilty or not guilty. The jury returned a verdict of guilty. The court imposed a prison sentence of not less than 18 nor more than 20 years. The defendant appealed.

T. W. Bruton, Attorney General, Bernard A. Harrell, Assistant Attorney General for the State.

I. C. Crawford for defendant appellant.

HIGGINS, J. Technically the indictment charged manslaughter. However, the court, by its clear and explicit instructions, limited the jury's consideration to the question of guilt or innocence of involuntary manslaughter. The evidence presented the issue whether the defendant was guilty of culpable negligence in the operation of his automobile on the wrong side of the road, at excessive speed, and while he was under the influence of liquor; and, if so, whether the negligence proximately caused Mrs. Parker's death. The jury returned a verdict of guilty. By limiting the verdict to involuntary manslaughter, the court withdrew voluntary manslaughter from the jury. The court's election to submit only one charge was equivalent to a verdict of not guilty on all other charges included in the bill. *State v. Mundy*, 243 N.C. 149, 90 S.E. 2d 312; *State v. Smith*, 226 N.C. 738, 40 S.E. 2d 363; *State v. Whitley*, 208 N.C. 661, 182 S.E. 338.

During the trial the defendant took numerous exceptions to the admission of evidence and to the court's charge. We have examined the assignments of error based on these exceptions. They fail to disclose error of material substance. In fact, up to and including the verdict, the trial was in accordance with procedural rules. However, after verdict, the court committed error in the imposition of punishment.

Prior to April 10, 1933, the prescribed punishment for manslaughter (G.S. 14-18) was imprisonment for not less than four months nor more than 20 years. Effective on the above date, the General Assembly (by Ch. 249, Public Laws, Session 1933) amended the statute by adding: "Provided, however, that in cases of involuntary manslaughter the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both." ". . . (T)he proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter . . ." *State v. Dunn,* 208 N.C. 333, 180 S.E. 708.

This Court, in *State v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880, held that punishment "in the discretion of the court" is not specific punishment and hence is governed by the limits (10 years for felonies and two years for misdemeanors) prescribed in G.S. 14-2 and 14-3. In so holding, the *Blackmon* decision followed *State v. Driver,* 78 N.C. 423, and overruled *State v. Swindell,* 189 N.C. 151, 126 S.E. 417, and *State v. Cain,* 209 N.C. 275, 183 S.E. 300, both of which were based on the dictum in *State v. Rippy,* 127 N.C. 516, 37 S.E. 148. In *Rippy* the punishment was within the limits of G.S. 14-2. The effect of the decision in *Blackmon* is to hold the maximum provided in G.S. 14-2 and 14-3 places a ceiling on the court's power to punish by imprisonment when a ceiling is not otherwise fixed by law.

For the reasons herein stated, we hold the court was without power to impose a sentence of 18-20 years for involuntary manslaughter. The judgment of imprisonment is set aside. The cause is remanded to the Superior Court of Buncombe County for imposition of a sentence authorized by law. In fixing punishment, the court will give the defendant credit for any time served under the original sentence.

Remanded for Judgment.

IN RE THE ASSIGNMENT OF JAMES VARNER TO TRINITY SCHOOL.

(Filed 4 February, 1966.)

1. Schools § 10—

Our Pupil Assignment Law places the duty upon the board of education of the respective administrative units to assign and reassign pupils in accordance with the procedures and standards set forth in the Act, with emphasis on the welfare of the individual pupil and the effect of assignment and reassignment upon the respective units, and this duty the board must exercise in accordance with the standards set forth in the statute, and it may not by contract or agreement limit its power in this regard, notwithstanding any coercion or threat to withhold school aid funds by an employee of the Federal Government, or otherwise. G.S. 115-176.

2. Same—

The Civil Rights Act of 1964 has no application to proceedings to determine to which of two administrative units a pupil should be assigned when such proceeding is based solely on the welfare of the individual pupil and the proper administration of the schools, without any indication that race had anything to do with the application for reassignment.

3. Same—

Upon appeal from an order of a board of education upon an application for the reassignment of a child, the court hears the matter *de novo* as though no action had theretofore been taken, G.S. 115-179, and the court has the power to assign or reassign the pupil subject only to the standards and limitations prescribed by the Pupil Assignment Law.

4. Same—

Under the Pupil Assignment Law as amended, an administrative unit may not permit to be enrolled in one of its schools a child who resides in the territory of another unit solely upon its own willingness to do so and the desire of the child or its parents to attend that school, but it is also necessary that the assent of the board of the unit in which the child resides be obtained. On appeal, however, the court may reassign the pupil without such assent.

5. Same— Court may properly continue order restraining reassignment of pupil upon a prima facie showing.

This action was instituted for a temporary injunction restraining the county board of education from enforcing its assignment of petitioners' child to a school in the unit of his residence pending the final determination of the parents' action for the reassignment of the pupil to the unit in which he had theretofore gone to school. *Held:* Upon the making out of a *prima facie* case by showing that children in the locale had attended school in the administrative unit of another county for some 30 years, and evidence supporting the conclusions that the best interest of the child required that he be reassigned to such unit, and that such unit had stated in writing that it would accept the child, the temporary restraining order is properly continued to the hearing.

6. Same—

Where the unit to which the parents wish to have their child reassigned has expressed in writing its willingness to accept such child, such unit is not a necessary party to an action for reassignment.

7. Injunctions § 13—

The purpose of an interlocutory injunction is to preserve the *status quo* until there can be a judicial determination on the merits, and an order will ordinarily be continued upon a *prima facie* showing of plaintiff's right to the final relief sought.

APPEAL by respondent from *Walker, S.J.*, 28 August 1965 Session of RANDOLPH.

James Varner resides with his parents in Randolph County on Route 3, Thomasville. At the time this matter arose he was 15 years of age and in the 9th grade. He has never attended a public school in Randolph County. For 30 years children residing in the portion of Randolph County in which the Varner family live have attended the schools of Davidson County by agreement of the boards of education of the two counties, no tuition being charged by Davidson County on account of the attendance of its schools by such children. In the school year 1964-1965 this boy attended the Fair Grove School in Davidson County and, but for the action of the Randolph Board of Education noted below, would have been enrolled in and would have attended the East Davidson High School for the 1965-66 school year, this school being a replacement of the Fair Grove school, apparently by consolidation. There is ample room for him in the East Davidson High School and the Davidson County Board of Education is willing to enroll him there and permit him to attend it. This is what he and his parents want him to do.

On 10 June 1965, with no request therefor from the boy or his parents, the Board of Education of Randolph County assigned James Varner to the Trinity School, in Randolph County, for the 1965-66 school year and so notified him and his parents.

In due time, 18 June 1965, the parents of the boy filed with the Board of Education of Randolph County their application, proper in form, for the reassignment of their son to East Davidson High School, stating thereon the following reasons:

> "The distance to the school to which the child has been assigned is much greater than the distance to the school previously attended, and to which reassignment is requested.
>
> "The curriculum offered at the school to which reassignment is requested includes a greater range of subjects enabling the child to plan a course of study which will better qualify the child for college.

"The child is pursuing a course of study under a planned curriculum at the school to which reassignment is requested which includes subject matters not offered at the schools to which assignment has been made. This may require a new course of study unsuitable for the child, and which may delay ultimate graduation beyond the year in which such is intended.

"The children in this area have been attending Davidson County schools for over 30 years.

"The reassignment requested herein is for the best interest of the child."

The application for reassignment was denied. In due time the Varners requested a hearing by the Board of Education of Randolph County, which hearing was had on 22 July 1965, and the Board again denied the application. Again in due time, Mr. and Mrs. Varner gave to the Board notice of their appeal to the Superior Court of Randolph County where the matter now awaits hearing and final determination.

Within a few days after their notice of appeal, and prior to the opening of the 1965-66 school year, the Varners filed in the Superior Court their verified application for the issuance of a temporary injunction restraining the Randolph County Board of Education from enforcing the assignment of the boy to Trinity School, pending the final determination of their appeal, and for the issuance of an order directing that he be allowed to attend the East Davidson High School during the pendency of the case. From the order of the Superior Court so restraining the Randolph County Board of Education, pending the final determination of the cause, and reassigning the boy to East Davidson High School, pending the final determination of the matter, the Randolph County Board of Education now appeals to this Court.

At the hearing in the Superior Court upon the application for the temporary injunction and temporary reassignment the Varners offered evidence tending to show, in addition to the foregoing matters, the following:

(1) James Varner would have to travel 19.2 miles to attend the Trinity School, to which the Randolph Board assigned him, as compared with only 7.4 miles to attend the East Davidson High School.

(2) The Davidson County Board of Education is willing to accept him for enrollment in the East Davidson High School without any tuition charge.

(3) The East Davidson High School has proper facilities to take care of the students from that area of Randolph County from

which children have been attending Davidson County Schools for thirty years. The school is fully accredited. (A copy of its courses of study was placed in evidence.)

(4) Schools of Randolph County, including the Trinity School, would be overcrowded for the 1965-66 school year.

(5) This boy has never previously been assigned to the school to which the Randolph Board has now assigned him (Trinity) and the change in schools is "emotionally disturbing to the child."

(6) The curriculum offered at the East Davidson High School "includes a greater range of subjects enabling the child to plan a course of study which will better qualify the child for college."

The Randolph County Board of Education offered evidence tending to show that due to a recent reorganization the Trinity School is no longer overcrowded, that its high school is fully accredited but its junior high school "has not been evaluated."

The Board also offered in evidence a letter from one Francis Keppel, United States Commissioner of Education, the pertinent portions of which state:

> "The plan submitted by the Randolph County Schools for the desegregation of its school system in compliance with Title VI of the Civil Rights Act of 1964 has been reviewed by this Office. On the basis of our review of the plan * * * I have determined that pursuant to the understanding below the plan * * * is adequate to accomplish the purposes of the Act and the Regulation of the Department of Health, Education, and Welfare (Section 80.4(c).)
>
> "Based upon conversations which you had with members of our staff, we understand * * * *that no pupils residing inside Randolph County will be assigned to schools outside the County;* and that no pupils residing outside Randolph County will be assigned to schools inside the County. * * * Based on the understandings, the plan provides a basis for the approval of applications and for the payment of Federal financial assistance at this time." (Emphasis added.)

The Board also offered in evidence a letter from one David S. Seeley, Director, Equal Educational Opportunities Program, Department of Health, Education and Welfare, Washington, D. C., the pertinent portions of which state:

> "It is understood that your request grows out of the applications of approximately 128 white pupils residing in Randolph County for reassignment to Schools in Chatham County, and the applications of approximately 56 white pupils residing in

Randolph County who wish to attend schools in Davidson County. * * *

"The Office of Education * * * reaffirms its approval of the Randolph County Plan as heretofore accepted. *Any reassignment as suggested above would constitute noncompliance with the approved plan.*" (Emphasis added.)

The Superior Court found the following facts, which findings it incorporated into its order:

"1. That this matter is properly before the Court * * *.

"2. That evidence was presented tending to show:

a. That the child above named will be required to travel greater distances in order to reach Trinity School to which assigned than to East Davidson School, to which reassignment is requested.

b. That Trinity School is in a crowded condition.

c. That the East Davidson School is not overcrowded and can accommodate the child of the applicants.

d. That if the child is reassigned by the Court to the East Davidson School the Court finds from the evidence presented that the child will be accepted by the Davidson County Administrative Unit.

e. That the child has never previously been assigned to the Trinity School.

f. That for more than 30 years those persons of qualifying school age and grade residing in the community or surrounding area of the applicants have been attending East Davidson School or the school in that area which the said school replaced.

g. That the child of this applicant in past years has been assigned and sent to the East Davidson School with the sanction and approval of the Randolph County Board of Education. * * *

"And it further appearing to the Court:

"1. That there was no evidence presented showing that the assignment of the child of this applicant to the school requested would interfere with the proper administration of either of the affected schools.

"2. That unless the Court enjoins the enforcement of the assignment by the Board of Education and issues such orders and directives necessary to permit the child to attend the school to which reassignment is requested pending final termination of this cause, there is reasonable apprehension that irreparable

harm and damage will result to the child and that this matter will not be tried before school commences thereby denying the relief which might be given by jury verdict and for which these applicants have shown much merit and good cause.

"3. That these applicants have no plain, adequate or speedy remedy at law.

"4. That the reassignment to the school requested pending final determination of this cause is in the best interest of the said child."

Smith & Casper by Archie L. Smith, Charlie B. Casper for petitioner appellee.

Miller & Beck by G. E. Miller for respondent appellant.

LAKE, J. In this Court the appellant Board demurred on the ground that the Court had no jurisdiction to assign the Varner boy to a school in the Davidson County Administrative unit in absence of an agreement between the two units. The demurrer is overruled. *Application for Reassignment of Hayes,* 261 N.C. 616, 135 S.E. 2d 645.

In its brief the appellant Board states that its decision to deny the application for the reassignment of the Varner child was reached upon the basis of the above mentioned letters to it from Messrs. Keppel and Seeley. It then refers to the Federal Civil Rights Act of 1964 and states:

"The violation of a requirement or standard set by this law or the regulations authorized by it, or actions taken pursuant to either, which curtails a program established under Federal law will transcend the limitations of State administrative or judicial power."

The Legislature of 1955 enacted what is now known as the Pupil Assignment Law, which was amended in some respects by the same Legislature at its Special Session of 1956. G.S. 115-176 to G.S. 115-179. That statute provides, "Except as otherwise provided in this article, the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, * * *." G.S. 115-176. Concerning applications for the reassignment of pupils it states, "If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, *or* if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health

or safety of the children there enrolled, the board *shall* direct that the child be reassigned to and admitted to such school." (Emphasis added.) G.S. 115-178. The statute then provides for an appeal by "any person aggrieved" from the order of the board to the superior court where the matter is to be heard *de novo*. G.S. 115-179. The Varners are "persons aggrieved" by the action of the Board. *Re Application for Reassignment,* 247 N.C. 413, 101 S.E. 2d 359.

Speaking of the Pupil Assignment Law in his concurring opinion in *Application for Reassignment of Hayes, supra,* Rodman, J., who served with distinction in that Legislature and played a major role in the enactment of the law, especially in the revisions of it by the Special Session of 1956, said:

> "It is the *duty* of the board to reassign if 'the reassignment of the child to such school will be for the best interest of the child and will not interfere with the proper administration of the school.' " (Emphasis added.)

In the same case, speaking for the majority, Higgins, J., said:

> "It is worthy of note that the statute places all emphasis on the *welfare of the child and the effect upon the school to which reassignment is requested.*" (Emphasis added.)

The State has entrusted to the appellant Board, and to like boards in other county and city administrative units, the "full and complete" power to assign and reassign each child residing within its unit to a public school, subject only to the standards and limitations prescribed by the Pupil Assignment Law, including the power of the courts of this State to hear *de novo* an appeal from the final order of the Board and, thereupon, to enter the appropriate order. The Act imposes upon the Board, and upon the courts on appeal from it, a solemn duty, for in applying this Act to the application for the reassignment of a child, the Board is dealing with an asset of the State which cannot be valued in the terms of the market place. It is the best interest of the applying child which must guide the deliberations and control the decision of the Board, unless the granting of the application will interfere with the proper administration of the school to which the child seeks reassignment or will endanger the proper instruction, the health or the safety of the other children enrolled therein. Of course, the board of one administrative unit cannot assign a child to a school in another administrative unit without the consent of the board of the other unit.

The Pupil Assignment Law does not authorize the Board to abdicate or delegate this duty to exercise the power so entrusted to it for the best interests of the applying child. The Board may not, in

the hope of receiving money for its school, shut its eyes to the mandate of the statute. It may not, by contract or otherwise, transfer this power to an employee of the Federal Government, or bind itself to exercise it as he may direct, or in any other manner than that provided in the Act, or for any purpose other than that for which the State conferred the power upon it. No agreement of the Board with anyone, be he an employee of the Federal Government or otherwise, can authorize the Board to deny an application for reassignment which the Legislature, by a statute within its authority to enact, has provided that the Board shall grant. No such agreement of the Board can deprive the courts of this State of jurisdiction conferred upon them by such a statute, or bar the court, before which an appeal from the Board's order is brought as provided by the statute, from entering the judgment prescribed in such case by the statute.

So long as the Pupil Assignment Law remains the law of North Carolina, the courts of this State in passing upon appeals from orders of the Boards of Education concerning applications for the reassignment of children to the public schools, will determine the right to reassignment in accordance with the standards prescribed by the statute, not pursuant to agreements between the Board and another or letters from such other party setting forth his *ex parte* construction of the alleged agreement.

The Pupil Assignment Law provides, "A child residing in one administrative unit may be assigned either with or without the payment of tuition to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards." G.S. 115-176. Obviously, the Legislature contemplated agreements between boards acting within the framework of the statute and free to accomplish its purpose — the assignment of the individual child to the school where his or her "best interest" would be served without disruption of that school. It is not within the fair intendment of this law that a board may enter into an agreement with some other agency or person that, come what may and regardless of the welfare of the applying child, the board will never agree to assign any child to any school in another county. That is what the Randolph County Board of Education now tells us it has done.

The Civil Rights Act of 1964 has no application to this matter. There is nothing in the record to indicate that race had anything to do with the application of the Varners for the reassignment of their son to the East Davidson High School. On the contrary, the record contains abundant evidence that they are simply requesting that he

be allowed to return to the administrative unit where he has attended schools from the beginning of his school career, where his school friends are, where the children from his neighborhood have gone to school for thirty years.

Under the Pupil Assignment Law, as amended in 1956, the board of education of one city or county administrative unit may not permit to be enrolled in one of its schools a child who resides in the territory of another unit solely upon its own willingness to do so, plus the desire of the child or its parents to attend that school. Nothing else appearing, the assent of the board of the unit in which the child resides must be obtained. *Fremont City Board of Education v. Wayne County Board of Education*, 259 N.C. 280, 130 S.E. 2d 408. This is a protection to each unit against raids upon its student body by another unit so as to gain additional teacher allotment by the State on account of increased enrollment, or so as to gain accomplished athletes, or for any other purpose. Whether the board of the county of residence, after nine years of acquiescence in a child's going to another unit's school, may arbitrarily make him come home when, in the tenth grade, he shows ability as a football player we need not now decide. There is nothing to indicate that James Varner has any such ability.

The Pupil Assignment Law provides that, upon appeal from the Board to the Superior Court, the matter shall be heard *de novo*. *In the matter of Application for Reassignment of Hayes, supra,* this Court held that, upon such appeal, the Superior Court has the authority to reassign the child to a school of another administrative unit even though the board of education of the administrative unit wherein the child resides objects. The language of the statute, G.S. 115-179, is:

> "If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned."

The matter being heard in the superior court *de novo,* it is as if it were before the court in the first instance. That is, the court has the same powers, the same duties and the same standards to guide it as the board had in the first instance. It has the authority to reassign the child to the school which he and his parents want him to attend, if that is in the best interest of the child and the child's enrollment therein will not interfere with the proper administration

of that school or endanger the instruction, the health or the safety of the other pupils there enrolled. The court, by its order, supplies that which was found lacking in *Fremont City Board of Education v. Wayne County Board of Education, supra* — the consent of the unit of the child's residence. This is the protection to that unit against unwarranted raids upon the student bodies of its schools.

We need not decide now whether the court, upon such appeal, may order the enrollment of the child in a school of an administrative unit other than that in which the child resides over the objection of the board of education of that other unit. Here, the record contains a statement by the Chairman of the Davidson County Board of Education to the effect that it will accept this boy if the court assigns him to the East Davidson High School. It is not necessary under these circumstances that the Davidson Board be made a party to this proceeding.

To hold otherwise would make the child the captive of the schools of the area where he resides, however inadequate for his needs they may be, if the board of education of that area arbitrarily refuses to grant his request to go to another school willing and ready to receive him. We do not think that was the intent of the Legislature in providing for an appeal to the court from the order of the board.

It has not yet been determined where James Varner should go to school; that is, whether it is in his best interest to attend the East Davidson High School or the Trinity School, or whether his enrollment in the school of his parents' choice would interfere with the administration of that school or endanger the instruction, health or safety of the other children there enrolled. That decision must be reached through trial of the matter by a jury in the superior court, unless jury trial be waived as it was in the matter of *Application for Reassignment of Hayes, supra.* G.S. 115-179.

This appeal is from an interlocutory injunction and a temporary assignment *pendente lite.* The purpose of such an injunction is to preserve the status quo until a trial can be had on the merits, the applicant having made a *prima facie* showing of his right to the final relief he seeks in the proceeding. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590; *Edmonds v. Hall,* 236 N.C. 153, 72 S.E. 2d 221; *Harrison v. Bray,* 92 N.C. 488; Strong, N. C. Index, Injunctions, § 13.

The effect of the order below is to permit James Varner to continue to attend the school system he has been attending since his education began nine years ago, pending the final determination of the matter. It would obviously be detrimental to him to shift him to an entirely different school system, which he objects to attending

and where he would, presumably, be an unhappy student, and then back again to the East Davidson School if the jury finds that to be in his best interest. For this interference with his educational program he and his parents would have no adequate remedy at law. No substantial injury can be done to the appellant Board, or to the schools under its administrative control, by permitting this boy, who has never attended a school in Randolph County, to attend the East Davidson High School pending the jury's determination of the matter.

There is ample evidence in the record to support each finding of fact made by the court below, except the finding that the Trinity School is presently overcrowded. The greater weight of the evidence on that point is that it has been recently reorganized and converted into a different type of school than it formerly was, so that there is now ample space therein for the pupils assigned to it. However, this finding is relatively immaterial to the decision of the matter.

Affirmed.

TONY JAMES BARNHARDT v. YELLOW CAB COMPANY, INC. AND GREAT AMERICAN INSURANCE COMPANY.

(Filed 4 February, 1966.)

1. Master and Servant § 45—

While the North Carolina Workmen's Compensation Act must be liberally construed to accomplish its humane purpose of providing swift and certain compensation to injured workmen, the purpose of the Act is also to insure a limited and determinate liability for employers, and the Supreme Court may not, under the guise of construction, enlarge its scope beyond the limits prescribed by the statute.

2. Master and Servant § 69—

"Exceptional reasons" for which another method of computing the average weekly wage may be resorted to under the provisions of G.S. 97-2(5), refer to exceptional circumstances relating to the employment and not to the severity of the injury, and computation of the average weekly wage under this method must relate to the employment in which the employee was injured.

3. Same—

Where an employee holds two separate jobs and is injured in one of them, the award may not be based on his aggregate compensation from both employments, but must relate only to the wages earned in the job producing the injury.

4. Statutes § 5—

Where a statute excludes from its general operation a single specific circumstance, it is evidence of the legislative intent not to exempt other circumstances not expressly provided for by the statute.

5. Constitutional Law § 10—

The courts must construe a statute in accordance with the expressed legislative intent.

6. Master and Servant § 96—

Where error is found in respect to the sole controversy on appeal of the employer and the insurance carrier, motion of claimant that defendants be required to pay a reasonable fee to plaintiff's attorney as part of the costs must be denied. G.S. 97-88.

APPEAL by defendants from *Houk, J.*, May 17, 1965 Schedule A Session of MECKLENBURG.

Proceeding under Workmen's Compensation Act.

Defendants admit liability. The controversy relates solely to the ascertainment of claimant's "average weekly wage."

The facts material to this appeal are not in dispute. On March 7, 1964, plaintiff Barnhardt, aged 25, had been employed for six months by the National Cash Register Company (National) as a machine-maintenance man at an average weekly wage of $68.00. This was a day-time job during five days a week. Needing more money for the support of his growing family, plaintiff, on February 7, 1964, secured a part-time job driving a taxicab three nights a week for defendant Yellow Cab Company (Cab Company). He worked four hours on Wednesday nights, six hours on Fridays, and eight hours on Saturdays. The Commission found that plaintiff's average weekly income as a taxicab driver was $26.90. In their brief, defendants waive any objection to this finding.

On the night of March 7, 1964, while plaintiff was driving his cab, a passenger shot him three times in the head and robbed him. As a result, plaintiff is totally and permanently disabled and has serious facial and bodily disfigurement. He is industrially blind; his hearing is impaired; his right arm and hand are useless. He has lost his equilibrium and is subject to epileptic seizures. He requires an attendant around the clock.

Upon the hearing of plaintiff's claim for compensation, the deputy commissioner found, *inter alia*, that:

> "Due to the fact that the plaintiff had only been driving for the Yellow Cab Company on a part-time basis for less than five weeks, it would be manifestly unfair to the employee to take only the earnings during the five-week period that he was with Yellow Cab Company to establish his average weekly wage;

that to do so would establish his average weekly wage at approximately one-third of his actual earnings at the time; that for exceptional reasons it is found as a fact that such a method of computation would be unfair and that it would not most nearly approximate the amount which the injured employee would be earning were it not for the injury; it is found as a fact that the plaintiff's average weekly wage at the time of his injury by accident was $94.45."

The sum of $94.45 is the average of plaintiff's combined weekly wages from both Cab Company and National. The hearing commissioner awarded plaintiff $37.50 per week for his lifetime, the maximum rate allowable. Defendants were further ordered to pay medical expenses incurred and a weekly sum in lieu of nursing services and institutional care.

Defendants appealed to the Full Commission, contending *inter alia,* that, under G.S. 97-2(5), plaintiff was entitled to compensation based solely upon the average weekly wages he was earning from Cab Company, the employment in which he was injured, without regard to wages received from his full-time job with National. The Full Commission sustained the hearing commissioner, adopting as its own his findings of fact, conclusions of law, and award. Defendants appealed to the Superior Court, which entered judgment overruling each of defendants' objections and exceptions and affirming the award of the Full Commission. From this judgment defendants appeal, assigning errors.

Robert L. Scott for plaintiff appellee.

Helms, Mulliss, McMillan & Johnston by Larry J. Dagenhart for defendant appellants.

SHARP, J. When an employee who holds two separate jobs is injured in one of them, may his compensation be based on his average weekly wages from both, or must it relate only to the wages earned in the job producing the injury? This is the determinative question posed by this appeal.

Compensation to an injured employee under the North Carolina Workmen's Compensation Act is based upon his *average weekly wages* as defined by G.S. 97-2(5), the pertinent portions of which follow, with our enumerations, paragraphing and italics:

"Average Weekly Wages.—(1) *'Average weekly wages' shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury* during the period of fifty-two weeks immediately preceding the date of

the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. (2) Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. (3) Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

"(4) *But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.*"

* * *

"(5) In case of disabling injury to a volunteer fireman under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman was earning in the employment wherein he principally earned his livelihood as of the date of injury."

As enumerated above, G.S. 97-2(5) provides five possible methods of determining "average weekly wages." In making its award to plaintiff, the Industrial Commission purported to use method (4). Because plaintiff had been driving the cab for only five weeks when he was injured, defendants concede that the Commission was authorized to use method (4) to arrive at an average weekly wage *in his taxicab employment* of $26.90, a sum larger than plaintiff had earned during any week of cab driving. Defendants maintain, however, that 60% of this figure, or $16.14 per week, is the limit of their liability.

Defendants' position is that the Commission may require an employer to pay compensation only as authorized in the Act, which does not permit aggregation of wages from different employments. Specifically they contend: (a) The first declaration in G.S. 97-2(5), *i.e.*, that "average weekly wages *shall mean* the earnings of the injured employee in the employment in which he was working at the time of the injury," is applicable not only to method (1) but to all other methods except (5), which is expressly exempted from this absolute limitation. Although method (3) permits the wages of *another* individual to be considered, such wages must be earned "in the same class of employment," in the same community, and "by a person of the same grade and character." (b) In all methods, G.S. 97-2(5) requires that results fair to both employer and employee be obtained. It would be unfair to an employer and his carrier to burden them with a liability out of proportion to employer's payroll and the premium computed thereon.

Plaintiff contends: (a) The extent of his injuries, which eliminates any possibility that he will ever again be gainfully employed, provides the "exceptional reasons" for which method (4) was enacted. (b) It would be unfair to the employee to base his compensation on an average weekly wage which was only about one-third of his actual earnings. (c) Method (4) authorizes the computation which will most nearly approximate the average weekly wages the employee *would be earning* had he not been injured. Since this provision does not, *ipsissimis verbis*, restrict such earnings to the employment in which the injury occurred, the Legislature must have contemplated the aggregation of earnings from any and all sources. (d) In determining "disability," the employer is given the benefit of the employee's earnings "in the same *or any other employment.*" G.S. 97-2(9). (Italics ours.) Therefore, in exceptional cases, G.S. 97-2(5) should be liberally construed to give the injured employee the benefit of his earnings in that other employment. (e) This Court in *Casey v. Board of Education,* 219 N.C. 739, 14 S.E. 2d 853, has already decided in plaintiff's favor the question presented.

According to Larson, Workmen's Compensation Law § 60.31 (1961), "It is generally held, sometimes by virtue of an express statute and sometimes not, that the wage basis of an employee injured in one of two related employments in which he is concurrently employed should include his earnings from both employments. Most concurrent employment controversies therefore resolve themselves into the question of what employments are sufficiently related to come within the rule." To the same effect, see 99 C.J.S., Workmen's

Compensation § 294(d) (1958); 11 Schneider, Workmen's Compensation Text § 2190 (3d Ed. 1957). In the absence of a controlling statute, however, it is difficult to perceive any convincing reason why wages from similar jobs should be aggregated when those from dissimilar jobs are not. A disabled employee, accustomed to full earnings, is no less destitute because he happened to be earning his living in unrelated employments. As to the employer in whose employment the worker was injured, it is *he* who pays the compensation—not "the industry"; and the other wages which the injured employee was earning in a similar job are no more "insured" (or taken into account in reserves, if employer is a self-insurer) than those earned in dissimilar employment.

Statutory provisions fixing the wage basis of an injured employee entitled to compensation vary widely in the jurisdictions. Some states, including New York and Texas, provide for aggregation of earnings from concurrent *related* or *similar* employments. Four states — California, Maine, Massachusetts and Pennsylvania — require that wages from *all* employments be combined. The problem of the injured part-time worker has also been solved by reckoning his wages "as earned while working full time." *De Asis v. Fram Corp.*, 78 R.I. 249, 81 A. 2d 280. Many states, like North Carolina, restrict the wage base to the employment in which the injury occurred. Of these states, however, only five — Arkansas, Michigan, New Mexico, South Carolina and Virginia — also have the equivalent of our method (4), the "exceptional reasons" provision. Our research reveals that of these five states, only Michigan and South Carolina have considered this precise question.

In *Buehler v. University of Michigan*, 277 Mich. 648, 270 N.W. 171, plaintiff, a cleaning woman, was employed by a private sorority house and by the University of Michigan. She was injured while working in one of the University's buildings. The Michigan Department of Labor and Industry awarded compensation based upon her total earnings in both employments. The Supreme Court reversed, saying:

> "We have nothing to do with the policy of the law. That is a matter for the Legislature. But, under the facts in this case, *plaintiff was not employed by one of these employers for the benefit of the others.* Her employment by each of her employers was separate and distinct from her employment by the others and, under the law, the university may not be held liable for compensation computed on the basis of what plaintiff earned when not employed by the university, and the insurer may not be held liable for compensation based upon earnings by the

plaintiff while not on the pay roll of the insured." *Id.* at 651, 270 N.W. at 172. (Italics ours.)

The facts in the case at bar are indistinguishable from those in *McCummings v. Anderson Theatre Co.*, 225 S.C. 187, 81 S.E. 2d 348. The opinion in *Anderson* quotes South Carolina's Code of Laws § 72-4 (1952), which appears to be identical with our G.S. 97-2(5). In *McCummings*, plaintiff regularly earned $55.00-$60.00 a week as a brickmason. He was injured while engaged in his part-time job of relief-projectionist and carpenter at $6.00 per week for defendant Theatre Company. The Commission held that it would be unfair to plaintiff to compute his wage basis at $6.00, and the Supreme Court of South Carolina upheld the resulting award based on his combined wages, $61.00 per week. In doing so, however, the court said:

> "(W)e find no error . . . but such is not to be considered as a precedent for the purpose of computing an employee's average weekly wages within the contemplation of the . . . Act.
> * * *
> "Inasmuch as . . . no other method . . . was raised or discussed either in the briefs or in oral argument, we prefer not to pass upon any other method of doing so until properly before this Court and fully argued." *Id.* at 194, 81 S.E. 2d at 350-51.

From the foregoing, it is obvious that *McCummings* is not authority for *any* method of computing average weekly wages under any circumstances. Therefore, unless as plaintiff contends, our decision in *Casey v. Board of Education, supra,* supports his position, precedent for it is lacking in the absence of an authoritative statute. In *Casey,* plaintiff was employed as a janitor or custodian of the Southside School in Durham on a 12-month basis at $18.00 per week. The statement of facts reveals that:

> " 'For eight months of this time (Casey) was in part paid by the State School Commission, the remaining four months was paid from the local funds furnished through the Board of Education, City of Durham, and in addition thereto, was paid through the Board of Education, City of Durham's special funds for extra maintenance work performed out of regular hours; that for his services as custodian he received $18.00 per week, and for his extra work, approximately 30¢ per hour.' " *Id.* at 740, 14 S.E. 2d at 853.

The State School Commission never paid for any repair or maintenance work. On the night of November 29, 1939, school officials "properly requested" Casey and another employee, Melvin, to do

some painting and maintenance work in a room at the Durham Junior High School. On that night after plaintiff and other employees had attended a custodian's school, he and Melvin went to the Junior High School, where he was injured. The Commission found that plaintiff was an employee of the Board of Education of the City of Durham at the time of his injury and that he was not working for, or being paid by, the State School Commission. In determining his average weekly wages to be $18.00 a week, the Commission found:

> " 'That for exceptional reasons it would be unfair to the employee to take his earnings for the extra work he was doing at the time of his injury to establish his average weekly wage, and, it is, therefore, necessary to use his full earnings to establish a wage that will most nearly approximate his earnings if he were not injured.' " *Id.* at 741, 14 S.E. 2d at 854.

The Superior Court sustained the award, and the City Board of Education and its carrier appealed.

An examination of the record in *Casey* reveals that, before the Commission, the only question debated was which "employer" was liable. Whether the Commission employed the proper method in computing plaintiff's average weekly wages was a question not raised by the assignments of error, nor did appellants contest the amount of the award. Their only contention was that the State School Commission — not they — should pay the compensation.

It appears to us that Casey was not actually working in two different employments. As janitor-custodian of Southside School, he had the same job and the same duties twelve months a year. As an incident of this employment, he was expected to do maintenance work at any school in the City of Durham. For this work the City Board paid him at 30¢ per hour. For eight months, therefore, he was paid by two public agencies; for four months, by only one. All his work, however, was actually done for the Durham Board of Education, which, in turn, was benefiting from an allocation of State funds. *Casey,* on its facts, is not authority for the proposition that earnings from two distinct employments, similar or dissimilar, may be combined in computing the basis for compensation payments.

In 99 C.J.S., Workmen's Compensation § 294(e) (1958), *Casey* is cited in support of the following rule:

> "Where an employee serves in a dual capacity under one contract of hire, his earnings for purposes of compensation are the amounts received for work in both capacities, not merely that received for the work during the performance of which he

was injured; and it is immaterial that his pay for his services in each of the two capacities was at different rates."

In the West Digest System, *Casey* is listed under the heading Workmen's Compensation, Key No. 824 — "Basis for Determination of Amount (of compensation) — Overtime."

G.S. 97-2(5) contains no *specific* provision which would allow wages from any two employments to be aggregated in fixing the wage base for compensation. Plaintiff contends, however, that such authority is implied in method (4), since "the amount which the injured employee would be earning were it not for the injury" necessarily includes earnings from all sources if the employee had more than one job.

It is frequently said that the Workmen's Compensation Act must be liberally construed to accomplish the humane purpose for which it was passed, *i.e.*, compensation for injured employees. The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers. *Quinn v. Pate,* 124 Vt. 121, 197 A. 2d 795. In any event, this Court may not legislate under the guise of construing a statute liberally. *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862; *Guest v. Iron & Metal Co.,* 241 N.C. 448, 85 S.E. 2d 596. Unusually severe or totally disabling injuries are not the *exceptional reasons* contemplated by method (4). See *Mion v. Marble & Tile Co., Inc.,* 217 N.C. 743, 9 S.E. 2d 501; *Early v. Basnight & Co.,* 214 N.C. 103, 198 S.E. 577; *Munford v. Construction Co.,* 203 N.C. 247, 165 S.E. 696.

It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Plaintiff, of course, will greatly benefit if his wages from both jobs are combined; but, if this is done, Cab Company—and its carrier, which has not received a commensurate premium—will be required to pay him a higher weekly compensation benefit than Cab Company ever paid him in wages. Whether an employer pays this benefit directly from accumulated reserves, or indirectly in the form of higher premiums, to combine plaintiff's wages from his two employments would not be fair to the employer. Method (4), "while it prescribes no precise method for computing 'average weekly wages,' sets up a standard to which results fair and just to both parties must be related." *Liles v. Electric Co.,* 244 N.C. 653, 658, 94 S.E. 2d 790, 794.

After having specifically declared, in the usual situations to which method (1) is applicable, that an injured employee's average

weekly wages *shall be* the wages he was earning in the employment in which he was injured, had the Legislature intended to authorize the Commission in the exceptional cases to combine those wages with the wages from *any* concurrent employment, we think it would have been equally specific. As was said in *De Asis v. Fram Corp., supra* at 253, 81 A. 2d at 282: "If that radical and important change were intended, it is not likely that the legislature would have left such intent solely to a questionable inference."

The intent of the Legislature that average weekly wages determined by method (4) be also related to the employment in which the employee was injured is further evidenced, we believe, by method (5) which relates only to a volunteer fireman injured "under compensable circumstances." This method requires that the compensation of a volunteer fireman be based upon the average weekly wage he was earning "in the employment wherein he principally earned his livelihood." Clearly, the Legislature thought that statutory authority in addition to that contained in method (4) was necessary for the Commission to vary the rule of method (1). Except for method (5), no wage-computation provision of the Act allows a consideration of any earnings except those earned in the employment in which the employee was injured. Vermont has a provision with reference to volunteer firemen identical with ours. In deciding that a claimant, in the absence of special statutory authority, was not entitled to have his earnings from two employments combined in computing his average weekly wages, the Vermont court held this section to be strong evidence of the legislative intent not to allow aggregation. *Quinn v. Pate, supra.*

It is also noted that, even in making the exception for volunteer firemen, the North Carolina Legislature did not permit a *combination* of wages, but adopted as its basis the wages of his principal employment. Had plaintiff here been injured while serving as a volunteer fireman, instead of while driving a taxi, his compensation would have been based on his average weekly wages from National.

It is true, as plaintiff points out, that G.S. 97-2(9) is drawn so as to give the employer the benefit of wages which plaintiff, after his injury, is able to earn from any other source. See *Branham v. Pond Co.,* 223 N.C. 233, 236-37, 25 S.E. 2d 865, 868. Thus, if plaintiff, while regularly employed as a bookkeeper, had been injured as a part-time construction worker to the extent that he was permanently unable to perform manual labor, his part-time employer might well escape all liability for compensation if plaintiff were still able to earn his regular bookkeeping wages. And this, even though the part-time employer's premiums had been computed on a payroll which included plaintiff's wages. The employer and his car-

rier thus *benefit* from other wages plaintiff is still able to earn, but escape liability for other wages he is no longer able to earn. (For New York's solution to this problem see *Branfon v. Beacon Theater Corp.*, 300 N.Y. 111, 89 N.E. 2d 617.) Notwithstanding this argument may appeal to our sense of justice, any modification of G.S. 95-2(5) must be made by the Legislature.

We hold that, in determining plaintiff's average weekly wage, the Commission had no authority to combine his earnings from the employment in which he was injured with those from any other employment. Its finding that his average weekly wage was $94.45 was based upon a misapprehension of the law and cannot be sustained.

This case brings into sharp focus not only the plight of plaintiff Barnhardt, but the potential plight of all workers who are concurrently engaged in more than one employment. So many workers are now, from economic necessity, "holding two jobs at once" that these quoted words were included among the definitions of *moonlighting* in Webster's Third New International Dictionary (1961). It is tragic indeed that plaintiff should be thus victimized by his diligence and his ambition to provide for his own — particularly since, in our society, voluntary idleness is frequently compensated. Only the Legislature, however, can remedy this condition. Smith, J., speaking for the Supreme Court of Vermont in a similar case, epitomized our predicament:

> "A worker injured in one such employment, but which injury prevents him from working in his other employment as well, may suffer financial hardship by reason of the fact that the compensation he can receive must be based only upon his wages from the employment in which he received the injury.
>
> "But Courts are limited to the interpretation of statutes to effect the purpose expressed by the Legislature which enacted them. If a statute seems unfair or unjust the remedy must be sought in a legislative change or modification. It cannot be furnished by judicial action in the guise of interpretation." *Quinn v. Pate, supra* at 127, 197 A. 2d at 799.

This disposition of the case necessitates a denial of plaintiff's motion, made under G.S. 97-88, that defendant carrier be required to pay a reasonable fee to plaintiff's attorney as a part of the costs. "G.S. 97-88 does not apply when as here this Court finds error in the Commission's decision in respect of the sole controversy presented by this appeal." *Liles v. Electric Co., supra* at 661, 94 S.E. 2d at 797.

The judgment of the Superior Court overruling defendants' exceptions to the award of the Full Commission is vacated, and this

cause is remanded to the Superior Court to the end that it enter a judgment returning the case to the Industrial Commission for the entry of an award to plaintiff based upon an average weekly wage of $26.90.

Error and remanded.

JAMESTOWN MUTUAL INSURANCE COMPANY, A CORPORATION v. NATIONWIDE MUTUAL INSURANCE COMPANY, A CORPORATION; WILLIAM CLARK HAMRICK AND WILLIE BOWLES LOVELACE, DEFENDANTS, AND FRANCES SISK HOLLAND, DALE STEVEN LOVELACE AND EDWIN ELI LOVELACE, ADDITIONAL DEFENDANTS.

(Filed 4 February, 1966.)

1. Appeal and Error § 49—

Findings of fact which are supported by competent evidence are conclusive on appeal.

2. Appeal and Error § 22—

Exceptions to the refusal of the trial court to find certain facts will not be sustained when some of the findings requested are immaterial and the evidence in regard to the others is conflicting.

3. Insurance § 63—

Defense of the action brought by the injured third party against insured does not waive insurer's defense of noncoverage when insurer gives full notice of its reservations of all its rights and defenses.

4. Insurance § 3—

When there is no ambiguity, an insurance policy must be construed according to its terms, but when there is ambiguity the policy will be construed in favor of coverage and against insurer who selected its language.

5. Same; Contracts § 12—

In the construction of contracts, words which are in common use will be given their ordinarily accepted meaning in the absence of evidence disclosing an intent that they be given their technical or legal meaning.

6. Insurance § 57— Evidence held to support conclusion that son was a "resident" of his father's home within coverage of liability insurance.

The policy in suit covered insured and any relatives resident in the same household. The evidence tended to show that insured's twenty-nine year old son, after a marriage and separation, service in the Army, and employment in other municipalities, returned to his father's home, intending to remain there an indefinite time until he obtained living quarters more

convenient to his new employment. *Held:* The evidence is sufficient to sustain a finding that the son was a resident in insured's home within the meaning of the policy.

7. Insurance § 56—

The policy in suit excluded coverage of the insured's vehicle while used in the automobile business by insured or any other business or occupation of insured. The accident in suit occurred while an insured under the policy was driving the car as a prospective purchaser from an automobile dealer. *Held:* The vehicle was not being used in the automobile business by insured, and therefore the exclusion does not apply.

APPEAL by defendants from *Riddle, S.J.,* 4 January 1965 Regular Civil "B" Session of MECKLENBURG.

This is a suit for a declaratory judgment in which Jamestown Mutual Insurance Company seeks a determination of the proper construction and effect of a policy of automobile liability insurance issued by it to Tedder Motor Company, in the light of a policy issued by the defendant Nationwide Mutual Insurance Company to W. F. Hamrick, and a determination of the rights and liabilities of the parties under the two policies.

While both policies were in force, William Clark Hamrick, son of W.F. Hamrick, driving an automobile owned by Tedder Motor Company, negligently caused it to collide with an automobile operated by Mrs. Lovelace, in which Frances Holland, Dale Lovelace and Edwin Lovelace were passengers. He was driving the automobile with the permission of Tedder Motor Company "to try it out," he then contemplating its purchase. Mrs. Lovelace has recovered a final judgment against him for injuries received by her in the collision. Frances Holland, Dale Lovelace and Edwin Lovelace have made claims against him on account of alleged injuries received by them.

The policy issued by Jamestown to Tedder Motor Company was a "garage liability insurance policy," providing insurance, against liability for personal injury or property damage, to any person using an automobile covered by the policy (including the automobile so driven by William Clark Hamrick) with the permission of Tedder Motor Company. However, the policy provided that the coverage would extend to persons other than the Tedder Motor Company *(i.e.,* William Clark Hamrick) "only if no other valid and collectible automobile liability insurance * * * is available to such person * * *."

At the time of the collision, there was also in effect a policy of automobile liability insurance issued by Nationwide to W. F. Hamrick, father of William Clark Hamrick. This policy provided to any "relative" of W. F. Hamrick, while using an automobile not owned

by him and not regularly furnished for the use of such relative, insurance against liability of the relative for personal injury or property damage due to the operation of such automobile. The Nationwide policy excluded, however, from its coverage a "non-owned automobile while used (1) in the automobile business by the Insured or (2) in any other business or occupation of the Insured," subject to an exception not now material. This policy defined a "relative" to mean "a relative of the Named Insured who is a resident of the same household." The term "Insured" was defined by the policy to include such a "relative."

It is the contention of Nationwide that its policy does not insure William Clark Hamrick against liability for personal injury or property damage arising out of the collision in question because: (1) He was not a "relative" of his father since he was not, at the time of the collision, a resident of the same household with his father, and (2) the automobile which he was driving was a non-owned automobile then being "used in the automobile business."

Jamestown contends that William Clark Hamrick, at the time of the collision, was a resident of the same household as his father and that the automobile belonging to Tedder Motor Company, which he was then driving, though a non-owned automobile within the meaning of the Nationwide policy, was not being "used in the automobile business" by the Insured (*i.e.*, William Clark Hamrick). Therefore, Jamestown contends that the Nationwide policy afforded automobile liability insurance to William Clark Hamrick for personal injury and property damage claims arising out of this collision, and, consequently, no liability for any such claim is imposed upon Jamestown by its policy.

Mrs. Lovelace and Frances Holland contend that both companies are liable, up to the limits of their respective policies, upon their respective claims against William Clark Hamrick.

Edwin Lovelace and Dale Lovelace contend that they are not proper parties to this action and, as to them, it should be dismissed.

William Clark Hamrick filed no answer.

These several contentions present two questions: (1) Was William Clark Hamrick a resident of the household of his father at the time of the collision? (2) Was the automobile which he was driving then being "used in the automobile business by the Insured"?

As to the residence of William Clark Hamrick on 8 February 1963, the date of the collision, his testimony, taken on adverse examination and offered by the plaintiff, may be summarized as follows:

His father, W. F. Hamrick, lived in the same house at Cliffside, in Rutherford County, at all times since a date prior to the birth of

William Clark Hamrick. At the time of the collision, William Clark Hamrick was 29 years of age, married but separated from his wife. He lived with his father until after his 18th birthday. He then went to Virginia to work, remaining there 14 months and then returning to his father's house. He stayed there several months until his marriage, when he again left. Some two years later, he entered the Army and remained in the service for two years. Thereafter, he and his wife lived in Spindale until they separated some 16 months prior to the collision. He then went to Greenville, South Carolina, worked there and stayed in a boarding house for approximately one year. Leaving Greenville, he went to work at the J. P. Stevens mill in Shelby on the first shift. For approximately five weeks he stayed at his sister's home because that was more convenient than his father's home in view of the available transportation to and from his work. He was then transferred to the second shift, which made a different transportation arrangement necessary. Such transportation could be obtained more conveniently if he stayed at his father's home. For this reason he left his sister's home and returned to the home of his father, intending ultimately to find a boarding house in Shelby and get a room there. At the time of the collision, he had found a boarding house in Shelby but had not moved to it and had not decided when he would do so. He had no home of his own and no furniture. His only belongings were his clothes, some of which had been at his father's house since he and his wife separated, he considering that as "the only permanent place" that he had to go back to. His other clothing he carried with him in a suitcase as he moved from place to place. When he left his sister's home, he carried the suitcase containing his clothes with him and went to his father's house to stay until he "could make some better arrangement about living quarters." He did not intend to stay there permanently but he had no fixed plan as to when he would leave. At the time of the collision, he had been so staying in his father's home for approximately two weeks, but had not stayed there every night. He took his meals in his father's home, paying nothing for his board or room or for his laundry, which was put in with that of his parents. He drove his father's automobile occasionally during this period. He used his father's home as his permanent mailing address. He had the full use of the house and slept in the room which he had used when he was growing up. He had no other home and thought of his father's house as his home. He continued to stay in his father's house on this basis for approximately two weeks after the collision, at which time he was imprisoned on charges arising out of the collision.

W. F. Hamrick, called as a witness for the defendant, Nationwide, testified to substantially the same facts concerning the resi-

dence of William Clark Hamrick at the time of the collision.

Concerning his use of the automobile owned by Tedder Motor Company, the testimony of William Clark Hamrick may be summarized as follows, there being no other evidence offered by any party upon this question:

The Tedder Motor Company was in the business of selling automobiles. The car in question was a used car which it had for sale. William Clark Hamrick was considering purchasing it, but wished to try it out and to obtain his father's approval of it. With the permission of the Motor Company's salesman, he drove it away from the company's lot for these purposes. The collision occurred while he was so driving the car.

The action being tried without a jury, the court made findings of fact, substantially in accord with the above summary of the pleadings and evidence, it not being necessary to set forth these findings verbatim. Upon these findings of fact, the court concluded that William Clark Hamrick was a resident of the same household as his father, W. F. Hamrick, that he was not using the automobile of the Tedder Motor Company in the automobile business at the time of the collision, that he was an insured covered by the Nationwide policy, that he was not insured by the Jamestown policy and that the plaintiff is not estopped from denying liability under its policy with respect to any claim arising out of the collision in question.

The court thereupon adjudged and decreed that the Nationwide policy affords coverage to William Clark Hamrick with respect to the various claims arising out of the collision in question, within the limits of liability set out therein, and that the Jamestown policy does not afford coverage to him and neither he nor any other defendant has any claim against Jamestown as a result of such collision.

Haynes, Graham, Bernstein & Baucom for appellant Nationwide Mutual Insurance Company.

Hamrick & Hamrick by J. Nat Hamrick; Joyner & Howison by R. C. Howison, Jr., for defendant appellants Frances Sisk Holland, Dale Steven Lovelace, and Edwin Eli Lovelace.

Craighill, Rendleman & Clarkson by Hugh B. Campbell, Jr., for plaintiff appellee.

LAKE, J. We have considered each of the exceptions of the respective defendants to findings of fact made by the court. There is ample evidence to support each of these findings. They are, therefore, conclusive on appeal. *Mitchell v. Barfield,* 232 N.C. 325, 59

S.E. 2d 810; *Distributing Corp. v. Seawell*, 205 N.C. 359, 171 S.E. 354.

Likewise, there was no error in the refusal of the court to make the findings of fact tendered by Nationwide. Insofar as these differ from the findings made by the court, the proposed findings are not material and, as to each of the proposed findings which do differ somewhat from the findings made by the court, there is conflicting evidence and the court's determination of the fact is binding on appeal.

By undertaking the defense of the actions brought and the other claims made against William Clark Hamrick, the plaintiff did not admit or represent that the policy issued by it afforded insurance coverage to him with reference to this collision. It is not thereby estopped or barred to assert the defenses which it raises in this action. It undertook such defense after Nationwide had denied liability under its policy and after giving full notice to William Clark Hamrick and to Nationwide of its reservation of all of its rights and defenses and of its denial of any liability upon it by virtue of its policy issued to Tedder Motor Company.

We come, therefore, to the two questions: (1) At the time of the collision, was William Clark Hamrick "a resident of the same household" with his father, W. F. Hamrick, within the meaning of the Nationwide policy? (2) At the time of the collision, was William Clark Hamrick using the automobile owned by the Tedder Motor Company "in the automobile business" within the meaning of the Nationwide policy?

Insurance policies must be given a reasonable interpretation and where there is no ambiguity they are to be construed according to their terms. *Huffman v. Insurance Co.*, 264 N.C. 335, 141 S.E. 2d 496. Where there is ambiguity and the policy provision is susceptible of two interpretations, of which one imposes liability upon the company and the other does not, the provision will be construed in favor of coverage and against the company. *Mills v. Insurance Co.*, 261 N.C. 546, 135 S.E. 2d 586.

The words "resident," "residing" and "residence" are in common usage and are found frequently in statutes, contracts and other documents of a legal or business nature. They have, however, no precise, technical and fixed meaning applicable to all cases. As was said by Higgins, J., in *Barker v. Insurance Co.*, 241 N.C. 397, 399, 85 S.E. 2d 305:

> "Residence has been variously defined by this Court. The definitions vary according to the purposes of the several statutes referring to residence and the objects to be accomplished by them. Definitions include 'a place of abode for more than a

temporary period of time;' in other cases the word residence is construed to mean 'domicile,' signifying a permanent and established home. The definitions of residence range all the way between these extremes."

Similarly, Ervin, J. said, in *Sheffield v. Walker,* 231 N.C. 556, 58 S.E. 2d 356:

"[T]he word 'residence' * * * has many shades of meaning, ranging all the way from mere temporary presence to the most permanent abode.

" 'Residence' is sometimes synonomous with 'domicile.' But when these words are accurately and precisely used, they are not convertible terms. *Thayer v. Thayer,* 187 N.C. 573, 122 S.E. 307. 'Residence' simply indicates a person's actual place of abode, whether permanent or temporary; 'domicile' denotes a person's permanent dwelling place, to which, when absent, he has the intention of returning. * * *

"[U]nder these [registration] statutes 'residence' means something more than a mere physical presence in a place, and something less than a domicile. The term clearly imports a fixed abode for the time being."

In *Watson v. R. R.,* 152 N.C. 215, 67 S.E. 502, Clark, C.J., speaking for the Court, said:

"The word 'residence' has, like the word 'fixtures,' different shades of meaning in the statutes * * * and even in the Constitution, according to its purpose and the context. * * *

"Probably the clearest definition is that in *Barney v. Oelrichs,* 138 U.S. 529: 'Residence is dwelling in a place for some continuance of time, and is not synonomous with domicile, but means a fixed and permanent abode or dwelling as distinguished from a mere temporary locality of existence; and to entitle one to the character of a "resident," there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purposes.' To same effect *Coleman v. Territory,* 5 Okl. 201: 'Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. "Residence" indicates the place where a man has his fixed and permanent abode and to which, whenever he is absent, he has the intention of returning.' "

Again, in *Chitty v. Chitty,* 118 N.C. 647, 24 S.E. 517, Faircloth, C.J., said:

"'Residence' and 'domicile' are so nearly allied to each other in meaning that it is difficult sometimes to trace the shades of difference, although in some respects they are distinct; and the definitions of 'residence' are sometimes apparently conflicting, owing mainly to the nature of the subject with which the word is used, the purpose being always to give to it such meaning and force as will effectuate the intention of that particular statute. The great bulk of cases in the books are cases of statutory residence, as applied to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce proceedings, probate and administrations, limitations, attachments and the like cases. The word is frequently used in the sense of bodily presence in a place, sometimes a mere temporary presence and sometimes the most settled and permanent abode in a place, with all the shades of meaning between those extremes, and also with reference to the distinction between an actual and legal residence. So it seems entirely proper to consider its meaning in connection with the subject matter and the purpose of the statute in which it is found, as well as the relation of the citizen to the subject matter."

In 17A Am. Jur., Domicile, § 9, it is said:

"'Residence' has many shades of meaning — from mere temporary presence to the most permanent abode. Generally, however, it is used to denote something more than mere physical presence, in which event intent is material. 'Residence,' as a legal term, is something more than the mere actual presence in a locality, even where it is not equivalent to domicile. * * *

"Any place of abode or dwelling place constitutes a residence, however temporary it may be, while the term 'domicile' relates rather to the legal residence of a person or his home in contemplation of law."

In 77 C.J.S., Resident, p. 305, it is said:

"The word 'resident' is in common usage, and many definitions of it are to be found in the decision. It is, nevertheless, difficult to give an exact, or even a satisfactory, definition, for the term is flexible, elastic, slippery, and somewhat ambiguous."

When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may,

by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.

In the construction of contracts, even more than in the construction of statutes, words which are used in common, daily, non-technical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage. In the construction of contracts the purpose is to find and give effect to the intention of the contracting parties, if possible. Thus the definition of "resident" in the standard, non-legal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries. Webster's New International Dictionary, 2d Ed., contains the following definition:

> "Resident. One who resides in a place; one who dwells in a place for a period of more or less duration. *Resident* usually implies more or less permanence of abode, but is often distinguished from *inhabitant* as not implying as great fixity or permanency of abode."

In *Newcomb v. Insurance Co.*, 260 N.C. 402, 133 S.E. 2d 3, this Court had before it for construction the identical language used in the Nationwide policy. There, a mother had two sons and a daughter. One son was away from home in military service, the other away from home in college. The daughter married. She and her husband stayed in the home of the mother for several months. Then they renovated and furnished another house, belonging to the mother, about one quarter of a mile away, and moved into it. Some months later, following the death of the mother's mother, who had been living with her, the daughter and her husband returned to the mother's home and remained there for three or four months until the son, who was in college, came home. The daughter and her husband then moved back to their own cottage and remained there approximately a month until the son returned to school. They then moved back into the mother's house where they slept, ate and lived until an accident occurred, at all times keeping their own cottage ready for immediate occupancy and intending to return to it when either of the sons came home. Under those circumstances, we held that the mother, the daughter, the son-in-law and the daughter's child were "residents of the same household."

In the *Newcomb* case the daughter had a home of her own to which she intended to return. While the contemplated stay in the mother's home was longer than William Clark Hamrick's contemplated stay in his father's home, both periods were somewhat indefinite and both were, from the first, recognized as temporary arrangements.

The same language used in the Nationwide policy was before the Supreme Court of Washington in *American Universal Insurance Co. v. Thompson,* 62 Wash. 2d 595, 384 P. 2d 367, 370. There, the Washington Court held that a married son, away from his parents' home due to military service and having established no residence elsewhere, was, during such absence, a "resident" of his parents' household. The Court said:

> "While the cases do not all appear consistent, it can generally be stated that, insofar as the cases involve insurance policies, they can be roughly divided into cases involving policies excluding from coverage of the policies members of the insured's household, and those extending coverage to such persons. Both attempt to apply the rules of construction above discussed. As a result, in the extension cases the questioned terms are broadly interpreted, while in the exclusion cases the same terms are given a much more restricted interpretation. This is necessary because in both situations the courts favor an interpretation in favor of coverage. * * *
>
> "The touchstone * * * is that the phrase 'resident of the same household' has no absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in an insurance policy will be understood in its most inclusive sense."

William Clark Hamrick had no home of his own. He went back to his father's house, carrying with him all his possessions. His intent was to remain there until living quarters more convenient to his employment could be found and the necessary arrangements made for his occupancy of them. In the meantime, he lived in and used his father's house as he had done when a boy, sleeping there, taking his meals there, having the run of the house, and having his laundry included in the family laundry. For all of this he paid no board. We think it clear that under these circumstances he was "a resident of the same household" as his father. He is not in the same position as an adult child having a home of his own to which he intends to return and making a mere visit to his parents. Nor is he in the position of a mere roomer or boarder. He was there because he was a member of the family and had no other home.

The second question raised by the contentions of Nationwide turns upon the construction of the following language in its policy:

> "Exclusions. 1. This policy does not apply * * * (f) to a non-owned automobile while used (1) in the automobile business *by the Insured* or (2) in any other business or occupation *of the Insured* * * *." [Emphasis added.]

The policy defines "automobile business" to mean "the business of selling, repairing, servicing, storing or parking of automobiles."

It is not enough, in order to bring the automobile, driven by William Clark Hamrick at the time of the collision, within this exclusionary clause of the policy, to show that the owner of the automobile, Tedder Motor Company, was engaged in the business of selling automobiles and that the vehicle was part of its stock in trade. The Tedder Motor Company was not an "Insured" under the Nationwide policy. William Clark Hamrick was the "Insured" in question. The exclusionary clause does not come into operation unless William Clark Hamrick was using the automobile "in the automobile business * * * or in any other business or occupation" of his own. He was not engaged in the "automobile business." He was only a prospective purchaser of the car. He was a textile worker. He was not driving the vehicle in that occupation. It would be a strained construction of the phrase "used in the automobile business" to apply it to a prospective purchaser of a vehicle who is "trying it out" to see if he likes it.

There was no error in the conclusion of the trial court with reference to either of these questions presented by the contentions of the parties.

Affirmed.

FLORA C. MOORE, EXECUTRIX OF THE ESTATE OF WILLIAM EDWARD MOORE, DECEASED v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 4 February, 1966.)

1. Pleadings § 24—

A motion to amend the answer after trial has begun is addressed to the discretion of the trial court, and denial of the motion will not be reviewed in the absence of a showing of abuse of discretion.

2. Appeal and Error § 38—

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

3. Trial §§ 40, 41—

The issues arise upon the pleadings and the court properly refuses to submit an issue which is without predicate in the pleadings.

4. Trial § 38—

Where the pleadings do not put in issue an aspect of the case asserted by a party, such party may not object to the refusal of the trial court to charge the jury with reference thereto.

5. Insane Persons § 8—

Contracts of a mentally incompetent are voidable and not void, and he, or after his death his personal representative or heirs, depending upon the nature of the contract, may elect to disaffirm one contract and not to disaffirm another contract even though the contracts be with the same party.

6. Insurance § 23—

Upon the death of insured, the right to attack his surrender of a life policy for its cash value devolves upon his personal representative, and the personal representative may elect to attack insured's surrender of the policy on the ground of mental incapacity without questioning his act in changing the beneficiary, even though both were done at or near the same date.

7. Same—

When the personal representative elects to attack insured's act in surrendering the policy for its cash value and not his act in changing the beneficiary to his personal representative, her evidence tending to show his mental incapacity at the time of both changes in the contract does not perforce destroy her right to maintain the action, and nonsuit on the ground that her evidence discloses her incapacity to sue is properly denied.

8. Insurance § 24a; Estoppel § 3—

Insured changed the beneficiary in the policy on his life from his wife to his estate. The wife as executrix sued on the policy, verified the complaint, and testified as an individual in support of her action. *Held:* The wife recovering judgment in her representative capacity would be estopped from thereafter attacking the change of beneficiary and suing on the policy in her individual capacity.

9. Evidence § 37—

A non-expert witness may testify from his observation of a person within a reasonable time before or after the date in question that in the witness' opinion such person did not have mental capacity on that date to know and understand the nature and effect of the act in question.

10. Evidence § 46—

A medical expert who has examined a person and diagnosed a disease with which such person was suffering may testify that in his opinion such disease existed a number of days prior to his examination and that such person did not then know and understand the nature of the act in question.

11. Same—

Permitting an expert witness to testify that insured's mental status on the date in question was such that he could not understand "legal matters" *held* not prejudicial, although the use of such general terms is not commended.

12. Trial § 16—

Where, immediately upon motion to strike an irresponsive question the court, in the presence of the jury, allows the motion, the fact that the court fails to instruct the jury to disregard the answer of the witness will not be held for prejudicial error when the record discloses that the jury must have understood that the answer of the witness was not to be regarded as evidence in the case.

13. Insane Persons § 8; Insurance § 23—

Upon the attack of insured's surrender of his life policy for its cash value, there being evidence that insured had lost his job and was sick and despondent, it is not error to admit testimony to the effect that insured owned property and was not destitute, the testimony being relevant to the question of the rational quality of insured's act in surrendering the policy.

APPEAL by defendant from *May, S.J.*, 8 February 1965 Civil Session of HARNETT.

On or about 13 November 1951, the defendant issued to the plaintiff's testator (hereinafter called Moore) its life insurance policy # 19 336 513, whereby it contracted to pay, subject to the terms thereof, $5,000 upon his death to the named beneficiary, this being the plaintiff, Mrs. Flora C. Moore, wife of the insured, in her individual capacity, with certain alternatives which are immaterial here.

The policy contained the following provision, among others:

"5. Change of Beneficiary.

"The Insured may, from time to time, change the beneficiary unless otherwise provided herein or by indorsement hereon. * * * Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by this Policy for indorsement of the change hereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change will relate back to and take effect as of the date said written notice of change was signed, whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office."

* * *

"7. Rights of Insured.

"During the lifetime of the Insured and without the consent of the beneficiary, whether revocably or irrevocably designated, the Insured may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, * * *."

The policy also contained a "Table of Loan and Non-Forfeiture Values." The "Non-Forfeiture Value" is also referred to in the policy as the "Tabular Cash Value." The policy provides further that in event of default in payment of premium the insured would have certain rights under the "Non-Forfeiture Provisions," including the following:

"(c) Cash Value within Three Months after Default:—
"At any time within three months after such default, but not later, the Insured may elect in place of such Non-Participating Extended Term Insurance or Participating Paid-up Insurance to surrender this Policy and all claims hereunder and receive its Cash Value as at date of default less any indebtedness hereon. * * *"

Attached to the policy is a printed "Change of Beneficiary" form signed by Moore, dated 23 April 1963, stating that it is to be attached to the policy and that "the 'beneficiary' under the above numbered policy is hereby changed to the executors, administrators or assigns of the insured."

Moore died 17 May 1963. The plaintiff, as executrix of his estate, claiming as beneficiary of the policy pursuant to the above mentioned change of beneficiary, brought this action to recover the amount of insurance provided by the policy. The defendant in its answer alleges that on 24 April 1963 Moore requested the termination of the policy and surrendered it so as to obtain its cash surrender value, in response to which request the Company mailed to Moore its check for such value which was $2,322.43. This check was not cashed. The defendant contends that its liability is for that amount only.

The plaintiff alleges that Moore was mentally incompetent to surrender the policy for its then cash surrender value at the time he undertook to do so. The jury so found. From a judgment that the plaintiff have and recover of the defendant upon the policy, as if Moore had never applied for the payment of the cash surrender value to him, the defendant appeals.

The following is a summary of the material portions of the evidence offered by the plaintiff in addition to the provisions of the policy and proof of the death of Moore on 17 May 1963:

From 27 April to his death, Moore was confined in a hospital in Wilmington. He and his wife had then been separated for approximately six months, but she visited him several times while he was in the hospital. They retained the same post office box in Lillington. While he was hospitalized the defendant's check for the cash surrender value of the policy was delivered to the box and taken therefrom by the plaintiff. She took the check to her counsel and he returned it to the defendant. Moore was then in the hospital and was not rational. (Apparently, he was not informed of the arrival or return of the check.) In the opinion of the plaintiff, Moore did not have sufficient mental capacity on 24 April 1963 to know the nature and effect of his signing a paper purporting to cancel the policy in return for its cash surrender value. He was not his normal self. He had "cracked up."

For some time prior to their separation, and thereafter, Moore drank whisky heavily and, at times, was violent, threatening to kill the plaintiff, their daughter and himself. When the plaintiff saw him in the hospital on 27 April 1963, he appeared to have jaundice and he was very much swollen about the abdomen. His drinking habits had grown progressively worse for 10 years. Following his separation from his wife, the plaintiff, some six months before his death, he lost his job and continued to drink heavily. However, he was not destitute, having $2,500 in the bank and other property.

Witnesses for the plaintiff, who were friends and associates of Moore, testified that on 24 April and thereafter he was sick, "off his rocker," threatening suicide and despondent. He was drinking to such an extent that he was not able to do his job and lost it. He was not "normal and rational during 1963." Tears would come in his eyes and he was mentally wrought up and nervous. In the opinion of each of these witnesses, he did not have sufficient mental capacity on and after 24 April 1963 to know and understand the effect of signing a paper concerning the surrender of his life insurance policy for its cash surrender value.

The doctor who treated Moore in the hospital had never observed him prior to 27 April 1963, at which time he diagnosed Moore's condition as cirrhosis of the liver with severe jaundice. He was acutely ill, nervous and drowsy. He was "moderately disoriented." These conditions, in the opinion of the doctor, could have existed prior to 27 April and possibly did. It was also his opinion that it was unlikely that Moore's mental status was such "that he could understand legal matters for a few days prior to April 27."

Evidence offered by the defendant may be summarized as follows:

Some three weeks prior to 24 April, the date on which he under-

took to surrender the policy, he suggested doing so to the agent of the defendant who tried to dissuade him from that course. Moore then appeared normal. On 24 April he went to the office of the defendant's agent and again stated that he wanted to surrender the policy. The agent again tried to persuade him to continue it but Moore said he did not desire to continue the policy because he did not want his wife to have the proceeds. He knew what he wanted and requested the cash surrender value of the policy. In such a situation, it is the normal procedure for the agent to have the policyholder sign both a request for a change of beneficiary and a request for the cash surrender value of the policy. Both of these forms were so signed by Moore. The first was a request to change the beneficiary to make the policy payable to his estate. The agent dated the change of beneficiary request on 23 April and the request for cash surrender value on 24 April but they were signed simultaneously by Moore. Moore's condition then appeared normal in every respect to the agent, who had known him for many years. In the opinion of the agent, Moore then had sufficient mental capacity to know and understand the effect of signing the document requesting the cash surrender value and termination of the policy, and had not been drinking at the time.

Moore's sister, called as a witness for the defendant, testified that in her opinion when he visited her in January, February and March 1963, he was mentally competent and had sufficient capacity to know and understand the nature and effect of his business affairs. In April she observed that his physical condition had changed for the worse but his mental capacity had not. He visited her on 24 April, at which time he told her he needed money desperately and intended to cash in the insurance policy. In her opinion he had sufficient mental capacity to understand the nature and effect of surrendering the policy.

Smith, Leach, Anderson & Dorsett by Henry A. Mitchell for defendant appellant.

Wilson, Bain & Bowen by Edgar R. Bain for plaintiff appellee.

LAKE, J. The defendant assigns as errors, among other things, the denial of its motion for judgment as of nonsuit, the refusal to submit to the jury an issue as to whether Moore had sufficient mental capacity to change the beneficiary, and the refusal to instruct the jury that if Moore did not have sufficient mental capacity to surrender the policy he did not have sufficient mental capacity to change the beneficiary. All of these assignments rest upon the same contention, which is that Moore signed the request for change of

beneficiary and the form for the surrender of the policy at the same time so that, if, as the jury has found, he did not have sufficient mental capacity to surrender the policy, neither did he have sufficient mental capacity to change the beneficiary and thus the plaintiff, executrix, as the new beneficiary, cannot maintain this action.

In its answer the defendant admitted that "by the express terms of said insurance contract said change of beneficiary became effective on April 23, 1963." After the trial was in progress and the plaintiff had virtually completed the introduction of her evidence, the defendant moved to amend its answer to assert, as an additional defense, that if Moore was mentally incompetent to surrender the policy he was also mentally incompetent to change the beneficiary. This motion was denied. Its denial was in the discretion of the court. *Motor Co. v. Wood,* 238 N.C. 468, 78 S.E. 2d 391. It may not be reviewed on appeal in the absence of a clear showing of abuse of discretion, which does not appear. Furthermore, while the defendant excepted to the denial of its motion to amend and assigned this ruling as error, the exception is not mentioned in its brief and no argument is made or authority cited with reference to it so it is deemed abandoned. Rule 28.

Issues arise upon the pleadings of the parties and need not be submitted to the jury with reference to matters as to which there is no controversy raised by the pleadings. *Rubber Co. v. Distributors,* 253 N.C. 459, 117 S.E. 2d 479; *Wheeler v. Wheeler,* 239 N.C. 646, 80 S.E. 2d 755. There was, therefore, no error in the refusal of the court to submit an issue to the jury with reference to the validity of the change of beneficiary. There being no such issue before the jury, the denial of the requested instruction with reference thereto was not error.

The defendant argues in its brief that its motion for judgment as of nonsuit should have been allowed because the plaintiff's own evidence shows Moore was mentally incompetent at the time he signed the request for the change of beneficiary. It is the defendant's evidence, not the plaintiff's, which shows that the request for change of beneficiary and the form for surrender of the policy were signed contemporaneously. The plaintiff's evidence, consisting of the policy with the change of beneficiary form attached thereto, indicates that the request for change of beneficiary was signed on 23 April 1963, the day before the form for the surrender of the policy was signed. Nevertheless, the plaintiff's evidence as to the mental condition of Moore can lead to no conclusion other than that his condition was the same on the one day as on the other.

It does not follow that the motion for judgment of nonsuit should have been granted. Even if these two documents were executed con-

temporaneously, as the evidence of the defendant tends to show, they related to two separate and distinct rights of the insured under the policy. When completed, the two transactions were separate and distinct, each capable of standing alone without support from the other. The evidence offered by the defendant indicates that the company, for reasons not disclosed, customarily requests an insured, desiring to surrender his policy, first to change the beneficiary so as to make the policy payable to his estate. The policy, however, does not require this to be done. Under the policy Moore had the right to change the beneficiary without surrendering the policy, and vice versa.

As Denny, J. (now C.J.) said, in *Walker v. McLaurin,* 227 N.C. 53, 40 S.E. 2d 455, "An agreement entered into by a person who is mentally incompetent, but who has not been formally so adjudicated, is voidable and not void." The same is true of the surrender or cancellation of a contract by such person. If he dies without regaining his mental competency, his right to disaffirm his contract passes to his heirs or to his executor, depending upon the subject matter of the contract. *Walker v. McLaurin, supra; Cameron v. Cameron,* 212 N.C. 674, 194 S.E. 102; *Orr v. Mortgage Co.,* 107 Ga. 499, 33 S.E. 708; *Bullard v. Moor,* 158 Mass. 418, 33 N.E. 928; *Verstandig v. Schlaffer,* 296 N.Y. 62, 70 N.E. 2d 15; Williston on Contracts, 3rd Ed., § 253.

The exercise by an insured of his right under the policy to change the beneficiary thereof, effects an amendment of the former contract and is, itself, the making of a contract which is voidable at his option if he then lacks the mental capacity to make it. Similarly, the surrender by such a person of a life insurance policy for its cash value is voidable at his option. Upon his death, without regaining his mental capacity, his right to disaffirm each of these transactions passes to his executor. The executor, like the insured, may disaffirm and set aside both of the transactions, or neither, or he may disaffirm and avoid the cancellation of the policy while leaving the change of beneficiary in effect.

It is not necessary for us now to determine, and we do not determine, what, if any, rights the original beneficiary under the policy may have when the insured, lacking mental capacity, changes the beneficiary. In the present case, the original beneficiary was Mrs. Flora C. Moore, wife of the insured, who now sues, as the executrix of his estate, to enforce the policy pursuant to the change of beneficiary effected by him. It is true that she has sued in her official capacity as executrix. However, she has testified in support of this action as an individual and she verified the complaint. If, as the original beneficiary of the policy, she was entitled, upon the death

of the insured, to attack his act in changing the beneficiary, she has by these acts of her own, subsequent to his death, acquiesced in, ratified and affirmed his change of the beneficiary. The judgment in favor of the plaintiff in this action will be a complete bar to any recovery by her, as an individual, in another action.

Since there has been no disaffirmance of the change of beneficiary by the only person or persons having the right to do so, and there has been a disaffirmance of the surrender and cancellation of the policy, the policy is now valid and effective and is payable to the new beneficiary so designated by the insured in accordance with the terms of the policy. Consequently, the motion for judgment of nonsuit was properly denied.

We have examined the numerous assignments of error with reference to the admissibility of testimony relating to the physical and mental condition of Moore prior to these transactions and during the short interval between their occurrence and his death. The lay witnesses, including his wife, testified to their respective observations of his physical condition, his habits, disposition, appearance and actions shortly before the date on which he undertook to surrender the policy. Although they had separated some six months earlier, his wife testified that she saw him frequently between their separation and his undertaking to surrender the policy. She also visited him in the hospital several times in the short interval thereafter prior to his death. There was no error in permitting these witnesses, each upon the basis of his or her own observation of Moore, to state an opinion that he did not have sufficient mental capacity on 24 April 1963 to know and to understand the nature and effect of signing a paper cancelling his life insurance policy for its cash surrender value. "Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders." *In Re Will of Brown,* 203 N.C. 347, 166 S.E. 72; *State v. Witherspoon,* 210 N.C. 647, 188 S.E. 111; *Harris v. Aycock,* 208 N.C. 523, 181 S.E. 554; *Whitaker v. Hamilton,* 126 N.C. 465, 35 S.E. 815; *Clary v. Clary,* 24 N.C. 78; Stansbury, North Carolina Evidence, § 127. Here, each witness based his or her opinion upon circumstances observed by the witness within a reasonable time before or after the date in question.

Dr. Andrews, stipulated to be a medical expert, testified that he saw Moore for the first time at the hospital in Wilmington, where he examined him on 27 April 1963, just three days after Moore un-

dertook to surrender the policy. He testified concerning Moore's physical condition then so observed by him and, over objection, was permitted to testify that these conditions "could have existed prior to April 27 and possibly did." This was not error. It is a matter of common knowledge that "cirrhosis of the liver with severe jaundice" does not come about over night. In any event, the expression by a medical expert of the opinion that such condition possibly existed prior to the date of his examination is well within the limits of admissible expert opinion testimony.

The doctor was also permitted, over objection, to testify that in his opinion it was unlikely that Moore's "mental status was of such nature that he could understand legal matters for a few days prior to April 27." While the use of such general terms as "legal matters" in testimony of this nature is not to be commended, we do not believe it was prejudicial to the defendant or confusing to the jury in this instance. See: *Beard v. R. R.*, 143 N.C. 136, 55 S.E. 505; Stansbury, North Carolina Evidence, § 127.

The Reverend Frank Grill, pastor of the church of which Moore was a member, testified as to his observations of Moore's habits, conversations, physical condition and general attitude. In response to a question, proper in form, calling for his opinion, based upon his observation and conversation with Moore, as to "whether or not Ed Moore had sufficient mental capacity on April 24 or April 30 to know and comprehend or understand the nature and effect or consequences of signing any paper writing cancelling his life insurance policy with New York Life Insurance Company for the cash surrender value," he answered:

> "It is my opinion the man interpreted that decision as he interpreted a lot of other decisions, and that is, I have somewhat stated, not realizing the consequences, the results, seeing things in their normal perspective, knowing that without this, he has no insurance. I think he was not rational to make that or any decision, and how he drove an auto I don't know. That has been mentioned, but how he was safe on the highway, I don't know."

The defendant's counsel immediately moved to strike the answer on the ground that it was not responsive. The court, in the presence of the jury, promptly ruled, "Motion allowed," but did not instruct the jury to disregard the answer of the witness. The witness then went on to say, "My opinion as to whether he knew, understood and comprehended the nature of signing a paper writing cancelling his insurance with the New York Life is that I don't think he was rational enough to make that decision."

Although the proper procedure, upon allowing a motion to strike an answer not responsive to the question, is for the court immediately to instruct the jury not to consider the answer, we think that the failure to do so in this instance, in view of the court's prompt allowance of the motion to strike, is not prejudicial error. The jury could only have interpreted the ruling of the court as meaning that the answer given by the witness was not to be regarded as evidence in the case.

There was no error in permitting the witness Baggett to testify as to property owned by Moore. It was relevant to the question of his lack of reason to surrender the policy so as to get its cash value for his own use, especially in view of the evidence that he had lost his job and was sick and despondent. It had relation to the question of the reasonableness, that is the rational quality of his act in surrendering the policy.

We have examined the defendant's exceptions to the charge of the court, including the court's repetition of the above mentioned testimony by Dr. Andrews in its summary of the evidence, and find these to be without merit.

No error.

STATE OF NORTH CAROLINA EX REL NORTH CAROLINA UTILITIES COMMISSION v. WESTCO TELEPHONE COMPANY.

(Filed 4 February, 1966.)

1. Utilities Commission § 6—

Expert opinion testimony as to the fair value of a utility's property on the date in question in a sum slightly in excess of replacement costs, exclusive of costs of construction in progress, materials and supplies, *held* properly considered by the Commission in determining the fair market value of the property of the utility in use and useful in rendering service to its customers.

2. Same—

In arriving at the fair value of a public utility's property used and useful in providing service to its customers, the Utility Commission is charged with the duty of taking into consideration the requirements set forth in the statute as well as other relevant facts, G.S. 62-133, and when its determination of the fair value of the utility's property is ascertained with due consideration of such factors and is supported by substantial, competent and material evidence, the value as ascertained by it will be sustained.

3. Same—

The low interest rate charged a telephone company on a loan by the REA is properly taken into consideration in figuring the operating costs of such utility, since such low interest rate is granted for the purpose of making it possible to extend telephone services to areas which, in all probability, would not be served otherwise, and the Commission owes the duty to be fair to the public as well as to the utility.

4. Same—

The Utilities Commission and not the courts has the duty and power to establish rates for public utilities.

5. Same—

The fixing by the Utilities Commission, in the exercise of its discretion, of a rate return of 3.8 per cent upon the predetermined value of a utility's property on the date in question will be upheld, there being no evidence of capricious, unreasonable or arbitrary action or disregard of law on the part of the Commission in arriving at such rate.

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

APPEAL by defendant from *Copeland, S.J.*, 16 August 1965 Civil Session of WAKE.

Westco Telephone Company (Westco) filed an application with the North Carolina Utilities Commission (Commission) on 27 February 1964 for a rate increase, requesting authority to put into effect new rates on residential and business telephones ranging from 44% to 147% higher than the approved rates in effect prior to 11 March 1964, and from 10% to 92% higher than the rates approved by the Commission in an order in the proceedings, designated as docket No. P-58, Sub 37 (P-58, Sub 37), signed 11 March 1964, effective 1 April 1964.

Westco is a wholly owned subsidiary of Western Carolina Telephone Company (Western), having been incorporated on 5 July 1960, for the purpose of spinning off 10 of Western's 17 exchanges as a separately incorporated company, in order to secure a loan from the Rural Electrification Authority (REA) at an interest rate of 2%. Westco began operations on 1 June 1962 with the transfer of the telephone exchanges in the following towns from Western:

Bakersville, N. C.	Marshall, N. C.
Burnsville, N. C.	Mars Hill, N. C.
Fontana, N. C.	Murphy, N. C.
Hayesville, N. C.	Robbinsville, N. C.
Hot Springs, N. C.	Clayton, Georgia

The 9 North Carolina exchanges comprised a total of 4,975 tele-

phone stations in service. During 1962 Westco placed into service new exchanges at the following points:

Micaville, N. C.
Garden City, N. C.
Glenwood Providence, N. C.
Sevier, N. C.
Dillard, Georgia

Beginning on 1 June 1962 the company commenced a major plant construction program from funds borrowed from REA, and by 31 December 1963 was serving 13 exchanges in North Carolina and 2 in Georgia, with 7,234 total stations in North Carolina, an increase of 45.4%. The North Carolina main stations averaged 80% of the total of Westco's main stations.

During the test period 1 January 1963 through 31 December 1963, the company had operating revenues of $723,915, including $115,209 of rate increases collected under bond. The average revenue per main station was $120.89. Without the bonded increase it would have been $101.65. Applying the increase in P-58, Sub 37, the revenue was $114.08 per station. The company's operating expenses during the test period, excluding depreciation and taxes, were $279,533, being $46.68 per average station. After all expenses, including depreciation, taxes, interest and other fixed charges, the company enjoyed final net income for 1963 of $86,884.

After the refunds required under P-58, Sub 37, the final net income available to stockholders after all charges for 1963, including a book charge for Federal taxes of $19,458 which was not actually paid or owed, was $40,773.

During the test period, according to the Commission's findings, the company earned a rate of return per company books of 4.54% including the bonded rate increase. After the refunds under P-58, Sub 37, the actual rate of return will be 4.01% without the normalization of investment tax credits, or 3.45% after normalization. After the refund under P-58, Sub 37, the return on equity will be 9.80% before normalization of the tax credit, or 6.64% after normalization.

Westco had under construction for the calendar year 1964 a continuation of the major plant construction program to increase net plant from $3,929,100 at 31 December 1963 to $6,007,120 at 31 December 1964, an increase of plant of 52.9% during 1964. This is an increase in stations in service from 7,234 to 9,784, or 35.3% increase in stations.

The rate increases proposed in the application would produce $240,504 of additional revenue over the rates approved prior to 11 March 1964, and $160,343 over the approved increase in P-58, Sub 37, allowed 11 March 1964.

The financial structure of Westco as of 31 December 1963 was as follows:

		Percent
REA 2% Loan	$4,224,946	85%
Common Stock	608,430)	
Unappropriated Earned Surplus	155,538)	15%

The rates for Westco's North Carolina exchanges have been increased substantially in P-58, Sub 37, signed 11 March 1964, effective 1 April 1964, plus further increases applied for here, whereas the exchanges located in Georgia have not received any increases since 1953, and were lower for a comparable size exchange than the North Carolina rates from 1953 to 1960. Westco has never applied for a rate increase on its Georgia exchanges although an application in an undisclosed amount is proposed in the near future.

On 13 August 1964, the Commission issued its order allowing rate increases amounting to approximately $39,000 additional revenue, being an average increase of 5% over the previous rates fixed in the rate increase allowed in P-58, Sub 37, effective 1 April 1964. This increase amounted to approximately 24% of the $160,000 increase in revenue applied for by Westco. The order prescribed new rate schedules and rate groupings based on the number of main stations and Private Branch Exchange (PBX) trunks in the respective exchanges.

There is no dispute about the depreciated value of Westco's property dedicated to the rendering of service to the public on 31 December 1963 as being $3,929,101; to this figure, applicant contends, should be added plant under construction in the sum of $221,326, and materials and supplies in the sum of $48,662, a total of $4,199,089.

The Commission found that the fair value of applicant's property used and useful in providing the service rendered to the public within the State of North Carolina, considering the reasonable original cost of the properties, less those portions of the cost which have been consumed by previous use recovered by depreciation expense, the replacement or reproduction cost of the properties, and other factors relevant to the fair value of the properties, as of 31 December 1963, was $4,120,000.

From this order Westco appealed direct to the Supreme Court under G.S. 62-99. The Supreme Court held that the statute granting direct appeal was unconstitutional and dismissed the appeal, with the right of the appellant to file the appeal in the Superior Court of Wake County within 60 days, which the appellant did.

State ex rel Utilities Commission v. Westco Telephone Company, 264 N.C. 423, 142 S.E. 2d 13. The Superior Court affirmed the order of the Commission by judgment entered 19 August 1965, and Westco appeals, assigning error.

Edward B. Hipp for the Commission.

Attorney General Bruton, Asst. Attorney General Charles D. Barham, Jr., for the State.

Van Winkle, Walton, Buck & Wall by Herbert L. Hyde for Westco.

DENNY, C.J. The questions posed for determination on this appeal are as follows: (1) Did the court below err in affirming the finding and conclusion of the Commission that the fair value of the property of Westco used and useful in rendering service to the public as of 31 December 1963, was $4,120,000? (2) Did the court commit error in affirming the finding and conclusion of the Commission that a fair and reasonable rate of return was 3.8%, and that such rate would produce $156,560 in net operating income?

Ordinarily the fair value of a utility's property is found to be less than the reconstruction cost of the property. In this case, however, Mr. Russell, of the American Appraisal Company, who was tendered by Westco as an expert witness, testified, "(b)ased on the studies which I have conducted and conditions described, it is my opinion that the fair value of the company's property as of December 31, 1963, is $4,140,000." However, he testified that the replacement cost new, less depreciation, of the Westco property in service as of 31 December 1963, was $4,137,568. Although the witness stated that his fair value figure did not include construction cost in progress, and materials and supplies, it was permissible for the Commission to take into consideration this opinion of fair value in excess of replacement cost when it determined the fair value of Westco's property used and useful in rendering service to be $4,120,000 on 31 December 1963. On the other hand, the president of Westco testified that the net original cost of applicant's property in North Carolina, used and useful in furnishing telephone service to the public as of 31 December 1963, was $4,199,088; that this figure included plant under construction in the sum of $221,325, and materials and supplies in the sum of $48,662. Even so, he testified that in his opinion the fair value of Westco's plant, used and useful in rendering telephone service to the public as of 31 December 1963, was at least $4,407,555.

G.S. 62-133 reads as follows:

"(a) In fixing the rates for any public utility subject to the provisions of this chapter, other than motor carriers, the Commission shall fix such rates as shall be fair both to the public utility and to the consumer.

"(b) In fixing such rates, the Commission shall:

"(1) Ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method.

"(2) Estimate such public utility's revenue under the present and proposed rates.

"(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

"(4) Fix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

"(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to paragraph (3) of this subsection the rate of return fixed pursuant to paragraph (4) on the fair value of the public utility's property ascertained pursuant to paragraph (1).

"(c) The public utility's property and its fair value shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time.

"(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

"(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding."

In arriving at the fair value of a public utility's property used and useful in providing the service rendered to its customers, the Commission is charged with the duty to consider the requirements set forth in G.S. 62-133, as well as other relevant factors. It will be noted that in fixing the value of Westco's property at $4,120,000 as of 31 December 1963, it was fixed at $190,899 above the original cost less depreciation. Moreover, the Commission is required under G.S. 62-133(c) to determine the fair value of the utility's property as of the end of the trial period based on the plant and equipment in operation at that time. In our opinion, the value fixed by the Commission is supported by substantial, competent and material evidence and should be sustained, and it is so ordered.

On the second question, we think what was said in *Utilities Commission v. State* and *Utilities Commission v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133, is applicable. Barnhill, J., later C.J., in speaking for the Court, said:

> "Necessarily, what is a 'just and reasonable' rate which will produce a fair return on the investment depends on (1) the value of the investment—usually referred to in rate-making cases as the Rate Base—which earns the return; (2) the gross income received by the applicant from its authorized operations; (3) the amount to be deducted for operating expenses, which must include the amount of capital investment currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined Rate Base. When these essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation. Due to changing economic conditions and other factors, the rate of return so fixed is not exact. Necessarily, it is nothing more than an estimate.
>
> "In finding these essential, ultimate facts, the Commission must consider all the factors particularized in the statute and 'all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs.' G.S. 62-124 (superseded by G.S. 62-133). It must then arrive at its own independent conclusion, without reference to any specific formula, as to (1) what constitutes a fair value, for rate-making purposes, of applicant's investment used in rendering intrastate service—the Rate Base, and (2) what rate of return on the predetermined Rate Base will constitute a rate that is just and reasonable both to the applicant and to the public. While both original cost and replacement value are to be considered, neither constitutes a proper Rate Base."

According to the evidence in the hearing before the Commission and the findings of the Commission, Westco received an increase in rates under the order entered in P-58, Sub 37, 11 March 1964, effective 1 April 1964, that would produce an increase in annual gross revenue of $80,318, while the order entered by the Commission on 13 August 1963, effective 1 September 1964, further increased the gross annual income in the amount of $39,936. Consequently, these increases in 1964 amounted to $120,254. Therefore, based on the estimated revenues and operating expenses made by the Commission as required by G.S. 62-133(b)(2) and (3), a rate of return of 3.8% would produce a net operating income of $156,560. This sum, according to finding of fact No. 17, will produce a return on the equity investment of 11.74%, which is sufficient to pay an annual dividend of 8% on Westco's capital stock and leave approximately 50% of its net earnings as surplus.

The Commission dealt only with the North Carolina properties of Westco which approximate 80% of Westco's holdings. Approximately 80% of the investment in Westco in North Carolina and Georgia is represented by a loan from REA at an annual interest rate of 2%. The appellant assails the rate of return as fixed by the Commission at 3.8% as being unresaonably low. We realize the area served by Westco is largely a mountainous area and not as densely populated as most areas of the State. Even so, the low interest rate granted by the REA to electric cooperatives and companies like Westco is for the purpose of making it possible to extend electric power service and telephone service to areas which in all probability would not be served otherwise. The Commission must consider its duty to the public as well as to the utility. The area served by Westco would seem to be developing rather satisfactorily since, at the end of 1963, Westco had 7,234 total telephone stations in North Carolina, an increase of 45.4% over the 4,975 telephones at the time of the spin-off from Western. Moreover, according to Westco's evidence, its plans at the time of the hearing before the Commission called for the expansion of its system in North Carolina by the end of 1964 to serve 9,784 telephone stations, an increase of 35.3%.

When Westco put into operation the additional telephones, such service carried the increased rates established by the two orders entered by the Commission in 1964.

The General Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890. Furthermore, under the provisions of G.S. 62-94(e), upon appeal, rates fixed by the Commission shall be deemed

prima facie just and reasonable. *Utilities Commission v. R. R.*, 249 N.C. 477, 107 S.E. 2d 681; *Utilities Commission v. Casey*, 245 N.C. 297, 96 S.E. 2d 8; *Utilities Commission v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519; *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E. 2d 201. Moreover, since we find no evidence of capricious, unreasonable, or arbitrary action, or disregard of the law, the discretionary power of the Commission, in fixing the rate of return at 3.8% on the predetermined value of Westco's property as of 31 December 1963, will be upheld. *Utilities Commission v. McLean*, 227 N.C. 679, 44 S.E. 2d 210; *In re Department of Archives & History*, 246 N.C. 392, 98 S.E. 2d 487.

If it develops that the rate fixed on the predetermined fair value of Westco's property as of 31 December 1963 is not a fair and just rate of return either to Westco or to its customers, the Commission may, upon a proper petition, establish a different rate of return. G.S. 62-133(e).

The judgment of the court below is

Affirmed.

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

WAYNE C. YOUNG v. BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION.

(Filed 4 February, 1966.)

1. Courts § 20—

In an action to recover for negligent injury inflicted in another state, the law of the state in which the accident occurred governs the rights and duties cast upon the parties by law, and the law of this State governs the procedure.

2. Trial § 21—

In passing upon a motion for judgment of nonsuit, the plaintiff's evidence must be taken as true, must be interpreted in the light most favorable to plaintiff, and reasonable inferences favorable to plaintiff must be drawn therefrom.

3. Railroads § 6—

Under the law of Ohio, recovery is not allowed for injury resulting from a collision when a vehicle is driven into the side of a train at a grade

crossing in the absence of special circumstances rendering the crossing peculiarly hazardous.

4. Same— Evidence of negligence in leaving engine unlighted and unattended, partly blocking crossing, held to take issue of negligence to jury.

The evidence tended to show that defendant's train, without lights and unattended, was blocking two-thirds of the north lane of the highway, that a steady stream of vehicles with their lights burning continued to travel east over the crossing, that the driver of the tractor-trailer in which plaintiff was riding did not see the engine until some 60 feet from it, when it was too late to avoid collision, causing the injuries in suit. *Held:* The evidence discloses special circumstances rendering the crossing peculiarly hazardous, and therefore the evidence is sufficient to be submitted to the jury on the issue of the railroad's negligence, and does not disclose negligence on the part of the driver of the tractor-trailer insulating as a matter of law the negligence of the railroad.

5. Automobiles § 50—

Under Ohio law, the negligence of the driver of a vehicle is not imputed to the co-driver riding therein.

6. Negligence § 27—

Nonsuit on the ground of insulating negligence may be granted only when the evidence of plaintiff permits no reasonable conclusion except that the negligence of the third person could not have been reasonably foreseen by defendant.

7. Negligence § 26—

Nonsuit may be granted for contributory negligence only when plaintiff's own evidence establishes it as the sole reasonable conclusion.

8. Automobiles § 49—

Evidence that plaintiff, a co-driver, was sitting beside the driver and leaning over to put on his boots, that when he raised up he saw defendant's locomotive blocking their lane of travel and cried out a warning, without evidence that he could have seen the danger sooner had he not been engaged in putting on his boots, *held* insufficient to disclose contributory negligence as a matter of law.

9. Damages § 15; Torts § 2—

Each tort-feasor is jointly and severally liable for all injuries which result from an accident of which his negligence is a proximate cause, and where there is evidence of concurring negligence on the part of defendant and a third person, an instruction that plaintiff was entitled to recover compensation for injuries which were the proximate result of negligence on the part of defendant must be held for prejudicial error as permitting allocation of damages in accordance with the negligence of the respective parties.

10. Damages §§ 2, 15—

The injured party may recover for all medical expenses actually incurred by or for him, notwithstanding his employer may have paid or provided

for the payment of such expenses, and where there is evidence that plaintiff's hospital expenses were paid out of hospital insurance carried for the benefit of employees, an instruction that plaintiff's right to medical expenses was limited to the actual monetary losses he had suffered, must be held for error.

APPEAL by both plaintiff and defendant from *Brock, S.J.*, 1 March 1965 Civil Session of DAVIE.

The following facts are not controverted:

On 8 January 1962, at approximately 7 p.m., the plaintiff sustained personal injuries when a tractor-trailer, in which he was riding as co-driver, ran into the side of the defendant's locomotive then stopped upon a crossing of the defendant's track and U. S. Highway 40 in the small village of Bachman, Ohio. It was, of course, dark. The tractor-trailer was then being driven by Melvin West. West and the plaintiff were employed by McLean Trucking Company, the owner of the vehicle. They had left Winston-Salem, bound for Chicago early that morning, alternating as drivers. The driver off duty either slept in the sleeping compartment of the vehicle or sat in the seat beside the driver. At the time of the collision, the plaintiff, having awakened from his sleep, was sitting beside the driver and was putting on his boots preparatory to taking over the wheel for another turn as driver. Both drivers had made many other trips over the same route and were familiar with the vicinity. The highway ran from east to west, the railroad track from north to south. Each was level and straight for a considerable distance on either side of the crossing. The highway had one lane of traffic in each direction. It was paved and dry. Signs required by the law of Ohio, notifying of the approach to a railroad crossing, were erected upon the shoulder. The speed limit was 50 miles per hour.

The plaintiff alleges in his complaint that the defendant was negligent in that it caused its locomotive to be stopped on the crossing so that it blocked the plaintiff's right hand lane of the highway at the crossing, allowing it to remain there unattended, without lights and without any signal or notice of its presence upon the crossing, and failed to station a flagman or to place flares or other warning devices so as to notify motorists using the highway of this condition. He alleges that these acts and omissions of the defendant were the proximate cause of the collision and of his injuries. In its answer, the defendant denies negligence by it and alleges that the sole proximate cause of the collision was the negligence of the driver of the tractor-trailer, West, in that he failed to keep a proper lookout, drove at a speed too fast for existing conditions and failed to yield the right of way to the defendant's train. The defendant also pleaded

contributory negligence by the plaintiff as a defense, alleging his own failure to keep a proper lookout and to warn his co-driver.

The defendant offered no evidence. The plaintiff introduced evidence which, in addition to the uncontroverted facts, above stated, and to testimony as to the extent and nature of his injuries, tended to show the following:

The tractor-trailer was in good mechanical condition. At the time of the collision, its headlights were burning on the low-angle beam because of oncoming traffic on the highway. It was traveling between 40 and 45 miles per hour. The surface of the highway was grayish black. The locomotive was of the same color with no bright colors on it. There were no lights on the locomotive and no sound was heard coming from it. The night was cloudy. Several automobiles were meeting the tractor-trailer with their headlights burning. These were approaching the crossing from the opposite direction, their half of the crossing being unobstructed. The tractor-trailer had been meeting a steady stream of traffic. There was no interruption in it. The driver, West, first saw the locomotive on his portion of the crossing when the tractor-trailer was from 60 to 75 feet from it. At the same time the plaintiff cried, "Watch out!" The front of the locomotive, which was standing still, projected over approximately two-thirds of the right (north) side of the crossing. West immediately applied all of the brakes of the tractor-trailer but nevertheless collided with the left front of the locomotive. Young was pinned in the seat of the tractor-trailer cab, being removed from it some 30 minutes after the collision. After the collision the lights of the locomotive were turned on. No one was observed around the locomotive until after the collision. There was no flagman and no lighted signals of any kind were observed. A regulation of the Interstate Commerce Commission requires such motor vehicle, when approaching a railroad grade crossing, to be driven at a speed which will permit it to be stopped before reaching the nearest rail of the crossing, and provides that the vehicle shall not be driven upon the crossing until due caution has been taken to ascertain that the course is clear. At about 400 feet from the crossing the plaintiff leaned over and began putting on his boots. When about 75 feet from the crossing he looked up, saw the engine and cried, "Watch out!"

The issues submitted to the jury and the verdict were as follows:

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

"Answer: Yes.

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

"Answer: $3,500."

From a judgment in accordance with the verdict both parties appealed. The defendant's only assignments of error were with reference to the denial of its motion for judgment of nonsuit. The plaintiff's assignments of error relate to various portions of the charge and alleged omissions therefrom.

William E. Hall and Lafayette Williams for plaintiff.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge and Grady Barnhill, Jr., for defendant.

LAKE, J.

DEFENDANT'S APPEAL

Since the accident out of which this action arose occurred in Ohio, the law of Ohio governs the rights and duties of the parties. *Jones v. Elevator Co.*, 234 N.C. 512, 67 S.E. 2d 492; *Russ v. R. R.*, 220 N.C. 715, 18 S.E. 2d 130. The law of North Carolina governs the procedure to be followed in the trial of the action in the courts of this State.

In passing upon a motion for judgment of nonsuit the plaintiff's evidence must be taken to be true, must be interpreted in the light most favorable to the plaintiff and all reasonable inferences favorable to him must be drawn therefrom. *Ammons v. Britt*, 259 N.C. 740, 131 S.E. 2d 349; *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338.

The Supreme Court of Ohio has held in *Capelle v. B & O Railway*, 136 Oh. St. 203, 24 N.E. 2d 822, that a passenger in a motor vehicle which is driven into "the side of a train standing or moving over a grade crossing cannot in the absence of special circumstances rendering the crossing peculiarly hazardous" recover from the railroad for injuries received. In *Reed v. Erie R. Co.*, 134 Oh. St. 31, 15 N.E. 2d 637, it was said that a railroad is not negligent by reason of its failure to light its train or to give a signal of its presence on the crossing because "when the train has arrived and is in occupation of the crossing, it affords an effective danger signal to approaching travelers." This is the general rule in other jurisdictions, 44 Am. Jur., Railroads, § 501, and is in accord with the law of this State. See: *Morris v. Railroad*, 265 N.C. 537, 144 S.E. 2d 598.

Neither the plaintiff nor the defendant has cited to us any decision of the Ohio Court in the case in which an unlighted train, or

portion thereof, was left standing upon a crossing in such a way that it covered only a part of the crossing and we know of no such decision in Ohio. As to such a situation the decisions from other states are in conflict. In *Peagler v. A.C.L. R. R. Co.*, 234 S.C. 140, 107 S.E. 2d 15, 84 A.L.R. 2d 794, the Supreme Court of South Carolina affirmed a judgment in favor of a motorist who collided in the nighttime with an empty, black flat car standing on a crossing, street lights and the headlights of an oncoming car on the opposite side of the crossing giving the driver the illusion of an open crossing. To the same effect are the decisions in *Hawkins v. Missouri Pac. R. Co.*, 217 Ark. 42, 228 S.E. 2d 642; *Ft. Worth & D.C. R. Co. v. Looney* (Tex. Civ. App.), 241 S.W. 2d 322; *Godwin v. Camp Mfg. Co.*, 183 Va. 528, 32 S.E. 2d 674. The contrary view is adopted in *Allinson v. M.K.P. Railroad* (Mo. App.), 347 S.W. 2d 902; *Lowden v. Bowles*, 188 Okla. 35, 105 P. 2d 1061.

In the present case the plaintiff's evidence, taken in the light most favorable to him, is sufficient to support a finding that there was no light on the locomotive, that no signal or other indication of its presence upon the crossing was given and that it was unattended by a train crew. It did not extend all the way over the crossing but projected only about two-thirds of the way from the plaintiff's right side of the crossing toward the center thereof. At the same time a stream of cars, with headlights shining, approached from the other side of the crossing and some of them proceeded over the crossing toward the vehicle in which the plaintiff was riding, their portion of the crossing not being obstructed. Under these circumstances, the driver of the vehicle in which the plaintiff was riding did not observe the unlighted locomotive partially blocking his half of the crossing until he was some 60 feet from it.

The steadily moving stream of traffic meeting the plaintiff's vehicle created an illusion of an open crossing. This illusion was made possible by the act of the defendant in stopping its unlighted engine so that only a portion of the plaintiff's half of the crossing was blocked. We think these were "special circumstances rendering the crossing peculiarly hazardous," within the rule announced by the Ohio Court in the *Capelle* case, *supra*. While there is no indication in the record as to how long the unlighted locomotive had remained in this position, we think it a reasonable inference that it arrived upon the crossing only a short time before the collision, when it was dark and automobiles with headlights burning were moving upon the highway toward the crossing. Thus, the hazardous circumstances were, or should have been, known to the defendant. Under these conditions the rule of the *Peagler* case, *supra*, appears to us to be

sound and we have no reason to doubt that it states the rule which would be applied to such a situation by the Ohio Court.

The evidence was, therefore, sufficient to support a finding that the defendant was negligent in leaving its unlighted engine upon the crossing at this time and in this position.

Even if the driver of the tractor-trailer be deemed negligent under these circumstances, his negligence can not be imputed to the plaintiff under the law of Ohio. *Parton v. Weilnau,* 169 Oh. St. 145, 158 N.E. 2d 719. The defendant contends that West was so negligent and that his negligence intervened so as to insulate the negligence of the defendant, if any. A judgment of nonsuit on the ground of intervening negligence of a third person may be granted only when the evidence of the plaintiff permits no conclusion except that such third person was negligent and that his act or omission could not reasonably have been foreseen by the negligent defendant. *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241; *Moore v. Plymouth,* 249 N.C. 423, 106 S.E. 2d 695. Here, the evidence does not compel such a conclusion and this question was properly submitted by the court to the jury for consideration in connection with the first issue.

Similarly, a nonsuit may be granted on the ground of the plaintiff's own contributory negligence only when the evidence of the plaintiff admits of no other conclusion. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360. Here, the plaintiff was riding with a driver whom he knew to be well acquainted with this vicinity. In preparation for taking over the duties of driver, the plaintiff was in the process of putting on his boots and thus was leaning over and looking down. As soon as he saw the locomotive he cried out a warning. There is no evidence that he could have seen it sooner had he not been engaged in putting on his boots. This is not sufficient evidence of contributory negligence by the plaintiff to justify a judgment of nonsuit.

We, therefore, hold upon the defendant's appeal that there was no error in the denial of its motion for judgment as of nonsuit.

PLAINTIFF'S APPEAL.

The plaintiff's assignments of error Nos. 1 and 2 relate to portions of the instructions of the court to the jury with reference to the first issue, including the doctrine of intervening negligence of the third party. Since the jury answered this issue in favor of the plaintiff, it is not necessary for us to consider these assignments, for if there was error in these portions of the charge the plaintiff has not been prejudiced thereby. As was said by Moore, J., in *Fleming v. Drye,* 253 N.C. 545, 549, 117 S.E. 2d 416:

"Error in a charge on an issue is harmless if the jury answers the issue in favor of the appellant. *Lookabill v. Regan,* 247 N.C. 199, 202, 100 S.E. 2d 521; *Scenic Stages v. Lowther,* 233 N.C. 555, 557, 64 S.E. 2d 846. We do not indulge the presumption that the jury applied the questioned instructions to issues other than those directed by the court."

Upon the issue of damages, the court charged as follows:

"Upon this second question relating to personal injury, the rule is that where a person is entitled to recover for personal injuries, he is entitled to recover one compensation in a lump sum for all injuries, past, present and future, that you find to be the direct, natural and proximate result of any negligent conduct *on the part of the defendant.*" [Emphasis ours.]

This phrase, "proximate result of any negligent conduct on the part of the defendant," was repeated on three other occasions in the charge relating to the issue of damages and there was no qualifying or explanatory language in the charge.

In connection with the first issue, the court charged the jury as to the law of intervening negligence. In answering the first issue in favor of the plaintiff, the jury obviously rejected the defendant's contention that the negligence, if any, of the driver, West, was an intervening, insulating cause. However, we cannot determine from its verdict whether the jury found that West was not negligent or believed that West was negligent but his negligence was a concurring, not an intervening, and, therefore, not an insulating, cause of the plaintiff's injuries.

"The mere fact that another is also negligent and the negligence of the two results in injury to the plaintiff does not relieve either." *Green v. Tile Co.,* 263 N.C. 503, 139 S.E. 2d 538; *Jones v. Horton,* 264 N.C. 549, 554, 142 S.E. 2d 351. This Court has said many times: "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 for the damages inflicted, and action may be brought against any one or all as joint tort-feasors." *Barber v. Wooten,* 234 N.C. 107, 66 S.E. 2d 690. See also: *Rouse v. Jones,* 254 N.C. 575, 119 S.E. 2d 628; *Tillman v. Bellamy,* 242 N.C. 201, 87 S.E. 2d 253.

The learned judge below evidently overlooked the possibility that the jury might answer the first issue in the plaintiff's favor and nevertheless believe that there was negligence on the part of West. His instruction that they were to answer the second issue in an

amount which would compensate for the injuries which were the result of "negligent conduct on the part of the defendant" may well have misled the jury. They may have understood from the instruction that they were to distinguish between damages for injuries caused by the negligence of the defendant and those caused by the negligence of West, if any. Thus, they may have answered this issue in an amount less than they would have found had they understood that they were to return a verdict in an amount which would compensate the plaintiff for all of his injuries resulting from the collision.

The court also instructed the jury upon this issue with reference to his medical expenses as follows:

> "In this case the things you may consider in determining what amount you will award to the plaintiff, if you award him anything, are *actual monetary losses he has had* from medical expenses * * *." [Emphasis ours.]

There was testimony that the plaintiff's medical expenses had been paid by his employer as the result of hospital insurance carried for the benefit of its employees. In the light of this testimony, the foregoing charge may well have led the jury to believe that no amount was to be included in its verdict on account of medical expenses unless paid by the plaintiff himself.

The correct rule is stated in 22 Am. Jur. 2d, Damages, § 207, as follows:

> "[T]he plaintiff's recovery will not be reduced by the fact that the medical expenses were paid by some source collateral to the defendant, such as by a beneficial society, by members of the plaintiff's family, by the plaintiff's employer, or by an insurance company."

In *Roth v. Chatlos,* 97 Conn. 282, 116 Atl. 332, 22 A.L.R. 1554, it is said:

> "The majority rule of the cases is that an injured person is entitled to recover as damages for reasonable medical, hospital, or nursing services rendered him, whether these are rendered him gratuitously or paid for by his employer."

As to the effect of payment for such services by the employer where the Workmen's Compensation Act applies, see: G.S. 97-10.2(e).

The opinion in *Tart v. Register,* 257 N.C. 161, 125 S.E. 2d 754, expressly states that the decision there is limited to the situation in which the plaintiff seeks double recovery for medical expenses,

first on the ground of the defendant's liability for negligence, and second on the ground that the defendant's automobile liability insurance policy also provides medical payments coverage. Our decision there does not prevent recovery for medical expenses actually incurred by or for an injured person on the ground that his employer has paid or provided for the payment of those expenses.

These inadvertent errors in the instructions upon the issues of damages were substantially prejudicial to the plaintiff and he is entitled to a new trial.

As to the defendant's appeal: Affirmed.

As to the plaintiff's appeal: New trial.

BEACON HOMES, INC. v. SHIRLEY HOLT.

(Filed 4 February, 1966.)

1. Pleadings § 12—

The complaint must be liberally construed in favor of plaintiff upon demurrer.

2. Unjust Enrichment § 1—

When one party builds a house upon the land of another in good faith and under a reasonable mistake as to the true owner of the land, the landowner, if he elects to retain the house upon his property, must pay therefor the amount by which the value of his land has been increased. This right of action is distinct from the right of a person in possession under a *bona fide* claim of right to recover for improvements, and the right of action for unjust enrichment obtains notwithstanding the true owner was not chargeable with knowledge the house was being constructed, and lies irrespective of ratification.

3. Unjust Enrichment § 2—

Allegations to the effect that plaintiff, pursuant to a contract with defendant's mother upon the mother's representation that she was the owner of the land, constructed a house thereon under the *bona fide* belief that the mother owned the land, that the construction of the house improved the value of the land, and that defendant, the true owner, claimed the house and would not allow plaintiff to remove it, *held* to state a cause of action for unjust enrichment.

4. Trial §§ 42, 45—

It is the function of the jury to find the facts in the form of answers submitted to it by the court and not to determine or make recommendations concerning the judgment to be rendered thereon, and therefore the court correctly refused to accept a verdict containing such recommendations.

5. Trial § 10—

Any remark of the presiding judge, made in the presence of the jury, which has a tendency to prejudice the jury against the unsuccessful party, is ground for a new trial.

6. Trial §§ 35, 39—

In response to an inquiry of a juror after the rejection of an unacceptable verdict, the court undertook to explain to the jury the nature of the judgment which would be rendered if they answered the issue in favor of plaintiff and the procedure to be followed by plaintiff to enforce such a judgment. *Held:* The court inadvertently went beyond the statement of the evidence and the explanation of the law arising thereon, and the remark must be held for error as tending to prejudice plaintiff.

7. Appeal and Error § 19—

The requirement that in grouping exceptions to the charge appellant should set forth the precise language to which the exception is taken will not be enforced when grouping of the exceptions on the right hand page refers to the left hand page where the exception and the language objected to appears.

APPEAL by plaintiff from *Gambill, J.*, 26 April 1965 Civil Session of GUILFORD (Greensboro Division).

The plaintiff is in the business of constructing shell homes; that is, houses which are unfinished on the inside. The defendant is the owner of two adjoining lots in Guilford County. In July and August 1961, the plaintiff constructed a shell home in the center of the two lots.

The complaint alleges that the plaintiff so constructed the house at the request of the defendant's mother and upon her representation that she was the owner of the land, which the plaintiff, in good faith, believed her to be. It further alleges that the defendant knew, or should have known, that the house was being erected upon the lots but asserted no claim to the ownership thereof until the house was completed and, thereupon, refused to permit the plaintiff to go upon the land for the purpose of removing the house and refused to pay the plaintiff for the reasonable value of the improvement so placed upon her land. It then alleges that prior to the improvement the value of the lots was $300 and that with the building upon them the lots are worth $3,600, and that the defendant has been unjustly enriched in the sum of $3,300. It prays that the plaintiff recover that amount from the defendant or, in the alternative, that the court restrain the defendant from interfering with the removal of the house by the plaintiff from the lots.

The defendant in her answer denies that the plaintiff acted in good faith and denies that the defendant knew of the construction while it was in progress, alleging that she was then residing in and

employed in New York. She alleges that her parents were divorced when she was an infant, that she has never lived with her mother and that her mother has no ownership interest in the property. She denies that she has been unjustly enriched in any amount, contending that the construction of the house damaged the lots in value, for which damage she counterclaims.

The following issues were submitted to the jury and were answered as shown:

"1. Did the plaintiff make permanent improvements on the land of the defendant under a title believed by the plaintiff to be good?
"ANSWER: Yes.

"2. If so, did the plaintiff have reasonable grounds to believe that Mary Richardson and Clarence Richardson had a good title to the land when they made such improvements?
"ANSWER: Yes.

"3. What is the value of such permanent improvements?
"ANSWER: $1350.00.

"4. What damages, if any, has the defendant sustained because of the construction of the building on her premises to be charged as an off-set against the improvements?
"ANSWER: $1350.00."

The court rendered judgment, in which the foregoing issues and answers are incorporated, adjudging that the plaintiff have and recover nothing of the defendant and that the defendant's realty described in the complaint be discharged from any and all claims of the plaintiff arising in this action. The judgment did not make reference to the defendant's counterclaim. It further ordered cancelled a deed of trust given by the defendant's mother and stepfather upon this property for the benefit of the plaintiff, the plaintiff having conceded and the court having found that this instrument was void, the grantors having no ownership interest in the land.

Prior to the return of the above quoted verdict, the jury returned to the court a document purporting to be its verdict, in which it answered the first and second issues "yes," the third issue "Zero—plaintiff to be allowed to remove house," and the fourth issue "$500.00." Thereupon the court stated:

"Let the record show that the issues as handed to the Court contains certain penciled notations in the form of recommendations. The Court instructs the jury that you may not make any

recommendations; that you will answer the questions as you will find from the evidence and by the law as given to you by the Court, and you will just answer the questions without recommendations. I can't take the recommendations because there is not any way I can apply that."

Thereupon a juror, with permission of the court, asked, "Your Honor, in this particular case, question number three and question number four, does Shirley Holt have to buy the house that is on the property?" The Court replied:

"Well, the Court charged you that you will find from the evidence and by its greater weight what value, if any, the house is, if you come to that, what is the difference between the market value of the property before and after, which is what is the value of the permanent improvements. Now, that means if that sum is greater than number four—what damages, if any, if number three is greater than number four, there will be a judgment against the Defendant for that difference, and an execution will issue to sell the house and lot in order for the Beacon Homes to get the money unless the Defendant wants to pay it; otherwise it would be a lien on the property. If that difference is greater than number four, that difference will be a lien on the property and the house will remain there."

To this comment by the court the plaintiff excepts, assigning it as error.

The jury thereupon again retired to the jury room and returned with the verdict first above quoted. The plaintiff moved to set the verdict aside and for a new trial, which motion was denied. The plaintiff excepted and assigns the denial of the motion as error.

Herbert B. Hulse and Sasser and Duke for plaintiff.
Elreta Melton Alexander for defendant.

LAKE, J. When the appeal was called for argument in this Court the defendant demurred *ore tenus* to the complaint on the ground that it failed to state a cause of action. Upon such a demurrer the complaint must be construed as a whole. *Little v. Little,* 205 N.C. 1, 169 S.E. 799. The allegations of the complaint are to be construed liberally in favor of the plaintiff and all reasonable inferences are to be drawn. *Hargrave v. Gardner,* 264 N.C. 117, 141 S.E. 2d 36; *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620. If, when so construed, the complaint states a cause of action, in any view of it, the demurrer must be overruled. *Burroughs v. Womble,* 205 N.C.

432, 171 S.E. 616; *Scott v. Insurance Co.*, 205 N.C. 38, 169 S.E. 801; *Griffin v. Baker*, 192 N.C. 297, 134 S.E. 651.

So construed, the complaint alleges that Mary Holt Richardson, mother of the defendant, contracted with the plaintiff for the construction by it of the house upon the lots in question, giving the plaintiff a warranty that she, Mary Holt Richardson, owned the land, in reliance upon which warranty the plaintiff, in good faith, constructed the house upon the land, improving its value by $3,300; that the defendant, who was and is the owner of the land, claimed ownership thereof and of the house after the construction was complete; the plaintiff thereupon offered to remove the building and restore the lots to their original condition but the defendant has refused to permit the plaintiff to do so; the defendant has assumed dominion over the house and has rented it to a tenant from whom she has collected rent; that the plaintiff has not been paid for the construction of the house and the defendant has been unjustly enriched to the extent of the improvement, in value, of her land.

Taking these allegations to be true, as we must upon a demurrer, they state a cause of action in favor of the plaintiff against the defendant for unjust enrichment. This right of action is not the same as the common law right, or the right under the statute, General Statutes, Chap. I, Art. 30, to claim for betterments when one, in possession of land under color of title, constructs permanent improvements thereon and is thereafter sued in ejectment by the true owner. That right was and is a defensive right. It accrues when an owner of the land seeks and obtains the aid of the court to enforce his right to possession. *Commissioners of Roxboro v. Bumpass*, 237 N.C. 143, 74 S.E. 2d 436. It applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith and reasonably, believed he had good title to the land. *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E. 2d 306; *Harrison v. Darden*, 223 N.C. 364, 26 S.E. 2d 860; *Rogers v. Timberlake*, 223 N.C. 59, 25 S.E. 2d 167; *Faison v. Kelly*, 149 N.C. 282, 62 S.E. 1086.

In *Rhyne v. Sheppard*, 224 N.C. 734, 32 S.E. 2d 316, the plaintiff having acquired title to two lots in a real estate development, in good faith built a house on two other lots, believing them to be the lots described in his deed. He sued the true owner of the lots for the value of the improvement. Here, neither the common law nor the statutory right to betterments was applicable, for the improver was not being sued and had no color of title to the lots upon which the house was constructed. A demurrer by the defendant to the complaint was overruled, this Court, through Barnhill, J., later C.J., saying:

". . . Plaintiff is not confined to a common law action for improvements, if indeed such right may be enforced by independent action. G.S. 1-340. He may resort to the equitable doctrine of unjust enrichment frequently enforced under the doctrine of estoppel. If the complaint sufficiently states a cause of action under this principle of law, it must stand.

"Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value. But he cannot retain a benefit which knowingly he has permitted another to confer upon him by mistake."

In the present case, the complaint does not allege facts sufficient to show an estoppel of the defendant by silently standing by and permitting the construction with knowledge of it. The complaint alleges that while the plaintiff was constructing the house upon her land "the defendant Shirley Holt knew, or should have known, that the house was being erected upon such land." This is not an allegation that she actually had such knowledge. She owed no duty to the plaintiff to maintain a watch upon her lot to see that no unauthorized person built a house upon it. Therefore, the allegation that she "knew or should have known" that it was being built is not sufficient to charge her with actual knowledge thereof.

Neither can the complaint be sustained on the theory that by exercising dominion over the house and renting it to tenants the defendant ratified the contract made by her mother with the plaintiff. There can be no ratification unless the person making the contract professed to do so on behalf of the person claiming or claimed to be the principal. *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828; *Rawlings v. Neal,* 126 N.C. 271, 35 S.E. 597. The theory of the present complaint is that the defendant's mother contracted with the plaintiff on her own account, representing herself to be the owner of the land.

We are thus brought to the question of whether the plaintiff can maintain this action solely on the ground of unjust enrichment of the defendant through a bona fide mistake of fact by the plaintiff, which mistake is not induced by the conduct of the defendant.

The plaintiff did not construct the house believing itself to be the owner of the land. It did so believing the person with whom it contracted was the owner. The plaintiff could certainly have brought suit upon its contract against the defendant's mother with whom it made its contract. That right it has not lost by virtue of the defendant's ownership of the land. However, the plaintiff's mistake of fact

as to the ownership of the land was a mistake as to the risk involved in contracting with the defendant's mother and it may be assumed that, but for that mistake, the house would not have been built upon the defendant's land.

The plaintiff does not seek in this action to hold the defendant liable for the payment of the contract price of the house, nor does it seek to recover from her its expenses in the construction. The right of a landowner to remove from his premises a structure placed thereon by a trespasser, innocently or otherwise, and to sue the trespasser for damages, including the cost of such removal, is not involved in this action. The question is, Can the owner of a lot upon which a house has been built by another, who acted in good faith under a mistake of fact, believing he had a right to build it there, keep the house, refuse to permit the builder to remove it so as to restore the property to its former condition, enjoy the enhancement of the value of the property and pay nothing for the house? For the owner to do so is as contrary to equity and good conscience as it would be if the builder had believed itself to be the owner of the land. See: *Rhyne v. Sheppard, supra.*

In *Guaranty Co. v. Reagan,* 256 N.C. 1, 9, 122 S.E. 2d 774, Parker, J., speaking for the Court, said:

> "It is a thoroughly well established general rule that money paid to another under the influence of a mistake of fact, that is, of a mistaken belief of the existence of a specific fact material to the transaction, which would entitle the other to the money, which would not have been paid if it had been known to the payor that the fact was otherwise, may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund. (Authorities cited). Such is the law in this jurisdiction. (Authorities cited.)
>
> " 'An action to recover money paid under a mistake of fact is an action in assumpsit and is permitted on the theory that by such payment the recipient has been unjustly enriched at the expense of the party making the payment and is liable for money had and received.' *Morgan v. Spruill,* 214 N.C. 255, 199 S.E. 17. In accord, see 4 Am. Jur., Assumpsit, § 24."

In *Harrington v. Lowrie,* 215 N.C. 706, 2 S.E. 2d 872, Devin, J., later C.J., speaking for the Court, said:

> "In *Bahnsen v. Clemmons,* 79 N.C. 556, where money was twice paid for the same services, it was said: 'It is as inequitable for the one to receive and retain the double payment as it

is wrong that the other who has twice paid his money should lose it and be without remedy,' and the following language was quoted from 2 Greenleaf on Evidence, § 104: 'When the defendant is proved to have in his hands the money of the plaintiff, which *ex equo et bono* he ought to refund, the law conclusively presumes that he has promised so to do.' "

In *Allgood v. Trust Co.*, 242 N.C. 506, 512, 88 S.E. 2d 825, Johnson, J., speaking for the Court, said:

"Recovery is allowed upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. Therefore, the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? The right of recovery does not presuppose a wrong by the person who received the money, and the presence of actual fraud is not essential to the right of recovery. The test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it. In short, 'the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the test of natural justice and equity to refund the money.' *Moses v. MacFerlan*, 2 Burrow 1005, 97 English Reprints 676."

It is as contrary to equity and good conscience for one to retain a house which he has received as the result of a bona fide and reasonable mistake of fact as it is for him to retain money so received. We, therefore, hold that where through a reasonable mistake of fact one builds a house upon the land of another, the landowner, electing to retain the house upon his property, must pay therefor the amount by which the value of his property has been so increased. Consequently, the complaint states a cause of action and the demurrer *ore tenus* is overruled.

When the jury brought in its first proposed verdict, the court properly refused to accept it and sent the jury back for further deliberations and the return of a verdict in the form of answers to the issues without any recommendation as to the judgment to be entered thereon. In cases of this nature it is the function of the jury to find the facts in the form of answers to the issues submitted to it by the court, not to determine or make recommendations concerning the judgment to be rendered.

As the jury was about to return to the jury room for such further deliberations, one member asked the court, with reference to issues three and four, "Does Shirley Holt have to buy the house that is on the property?" The court thereupon, as is above set forth, un-

dertook to explain to the jury the nature of the judgment which would be rendered, if they answered these issues in favor of the plaintiff, and procedures to be followed by the plaintiff to enforce such a judgment. In so doing, the court inadvertently went beyond the statement of the evidence and the declaration and explanation of the law arising thereon. This may well have had the effect of prejudicing the jury against the position of the plaintiff although that was, of course, not the intention of the court. Any remark of the presiding judge, made in the presence of the jury, which has a tendency to prejudice the jury against the unsuccessful party is ground for a new trial. *Thompson v. Angel,* 214 N.C. 3, 197 S.E. 618; *Bank v. McArthur,* 168 N.C. 48, 84 S.E. 39; *Perry v. Perry,* 144 N.C. 328, 57 S.E. 1.

The defendant moved in this Court to dismiss the appeal for failure by the appellant to comply with Rule 19(3). The appellant, in grouping his exceptions immediately prior to the signatures on the case on appeal, should have set forth in the assignment of error above noted the precise language of the court to which it takes exception. This it did not do. It did, however, in its assignment of that error in grouping its exceptions on page 79 of the record refer to page 78, where the exception is noted and the language in question appears. That is, in the grouping of the exceptions on the right hand page of the record we are referred across to the left hand page. While we have said many times we will not embark upon a "voyage of discovery" through the record to search for alleged errors, we will, in this case, cast our eyes from the right hand page to the left hand page and consider an error which we can examine without leaving port.

Since the case must go back for a new trial, we suggest that the following issues would be more appropriate, assuming the evidence then introduced justifies their submission to the jury under the principles of law here discussed:

1. Did the plaintiff, in good faith, and under a reasonable mistake of fact as to the ownership of the defendant's lots, construct a house thereon?

2. Did the defendant refuse to permit the plaintiff to remove the house and to restore her lots to their former condition?

3. By what amount, if any, was the fair market value of the defendant's lots increased by the construction of the said house thereon?

4. What damage, if any, has the defendant sustained by the plaintiff's trespass upon her lots as alleged in her counterclaim?

The answer to the above suggested issue number four should be a nominal amount only unless the answer to issue number three is "Zero."

New trial.

W. LUNSFORD CREW AND JOSEPH N. HATEM, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND OTHER MEMBERS OF FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF ROANOKE RAPIDS, PLAINTIFFS V. CARL S. THOMPSON AND FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF ROANOKE RAPIDS, DEFENDANTS.

(Filed 4 February, 1966.)

1. Actions § 3—

An action instituted by directors, apprehensive that they would lose their offices in the election at the annual meeting, to preclude the counting of alleged invalid proxies, and alleging that the secretary refused to permit them to inspect the books to ascertain the number of votes to which the various stockholders were entitled, *held* properly dismissed as moot when it appears from an amended complaint filed after the stockholders' meeting that plaintiffs were reelected directors and that the right to inspect the books had been granted under court order.

2. Reference § 2—

It is not contemplated that a referee may be appointed to attend an annual meeting of members of a building and loan association and there make determinations relating to the respective rights of the contesting parties during the progress of such meeting.

3. Same—

No order of reference should be entered until the pleadings have been filed and issues raised.

4. Pleadings § 2—

The complaint and the amended or supplemental complaint will be construed together, and allegations in the amended or supplemental complaint supercede those in the original complaint to the extent of any conflict.

APPEAL by plaintiffs from *Bundy, J.*, May 1965 Session of HALIFAX.

On January 19, 1965, the date this action was instituted, Judge Bundy signed an *ex parte* order restraining defendant Association, pending further orders of the court, "from holding its annual meeting of members called for at 2 P.M., Wednesday, January 20, 1965, at its office in Roanoke Rapids, North Carolina." The order recites

it was entered on motion of plaintiffs, supported by affidavit of W. Lunsford Crew. Neither the motion nor the affidavit is in the record.

An order dated February 9, 1965, signed by Judge Bundy, recites it was entered pursuant to a hearing on February 4, 1965, on return of the order to show cause why the temporary restraining order of January 19, 1965, should not be continued in effect until the final hearing. Apart from said order, nothing in the record indicates what transpired at said hearing on February 4, 1965.

The order of February 9, 1965, in substance, provided: It ordered the directors to issue a call for the annual meeting of the members of defendant Association (hereafter Association) to be held February 23, 1965, at a specified time and place. It appointed William H. Watson, Esq., as Referee, and ordered that the said Referee "consider, determine and rule upon the validity of all proxies, revocations thereof, and the right of any member, as of December 31, 1964, to vote at the annual meeting." It ordered that the proceedings before the Referee "shall be deemed a trial in accordance with the provisions of Article 20 of Chapter 1 of the General Statutes of North Carolina"; and that the Referee deliver a report of his actions and rulings to the Clerk of the Superior Court of Halifax County on or before March 8, 1965. It ordered that the Association "furnish a list of the members, including their address, entitled to vote in the annual meeting originally called for January 20, 1965, together with the number of votes which each member is entitled to cast in the 1965 annual meeting, not later than noon on Tuesday, February 9, 1965." It allowed plaintiffs to and including February 24, 1965, to file their complaint, and allowed defendants thirty days thereafter to file answer(s).

Plaintiffs filed their complaint on February 23, 1965, the date fixed by court order for the annual meeting of members, alleging therein in substance, except when quoted, the facts stated below.

The Association was organized under and by virtue of the act of Congress codified as Section 1464, Title 12, of the United States Code. The management of its business is vested in its officers and directors. The directors are elected at each annual meeting of the members. Each director receives a fee of $10.00 for his services in attending regular meetings of the board. The officers are elected by the directors. The secretary had caused to be published a notice of the annual meeting of members.

Plaintiffs are members and directors of the Association and have served continuously as directors since its organization in 1951. Defendant Thompson, "at the time of the commencement of this action," was a member, director and president of the Association.

There are on file with the Association approximately 61 paper

writings bearing signatures of members. These purported proxies are illegal and void for the following reasons: Twenty-eight were not filed with the secretary of the Association five days or more prior to January 20, 1965. Others were out of date. Others were made to "Official Proxy Committee" without naming the individuals who constituted such a committee. Others were "obtained by false representation." Others were executed by fiduciaries in violation of their trusts and contrary to law. (Note: The complaint does not refer to any specific proxy or name any member who signed a proxy.)

Defendant Thompson intends to use the illegal and void proxies to advance his own interest at "undue expense" and loss to the Association and its members. These proxies, solicited or controlled by defendant Thompson, "are, or might be, a decisive factor in the outcome of the annual meeting of the membership of said Association." If defendant Thompson is permitted to vote these proxies, W. Lunsford Crew and Joseph N. Hatem "will suffer irreparable damage by reason of their being wrongfully deprived of their offices as Directors."

The secretary of the Association, acting under the domination of defendant Thompson, "refused to allow plaintiffs and other members of said Association to inspect and make copies of the records . . . showing the number of votes to which the members . . . are entitled and minutes of the previous meetings of the Board of Directors, *until required to do so by Order of Court.*" (Our italics.)

Plaintiffs prayed: (1) that defendants be restrained from using illegal proxies; (2) that the Association, its officers and agents, be required to permit plaintiffs to inspect the Association's said records; and (3) that plaintiffs be awarded such other and further relief, etc.

On March 24, 1965, plaintiffs filed a paper entitled "Amended Complaint," in which they alleged:

"17. That since the commencement of this action an annual meeting of the members of defendant Association was held in the City of Roanoke Rapids, North Carolina, on the 23rd day of February, 1965, pursuant to an order of . . . Bundy, Judge . . .; that at said annual meeting certain votes were cast by members in person and certain votes were cast for said directors by proxies.

"18. That it will be for the best interest of the parties to this action and the members of defendant Association that a full, final and complete determination of the results of the annual meeting . . . held on February 23, 1965, be judicially declared and determined.

"19. That at said annual meeting . . . W. Lunsford Crew, Joseph N. Hatem and Graham Shell received the highest number of votes cast for the three vacancies on the Board of Directors and were, therefore, duly elected directors of defendant Association.

"20. *That prior to the commencement of this action* the Secretary of defendant Association, James A. Rainey, refused to allow plaintiff W. Lunsford Crew to inspect proxies filed with said Association and refused to allow the said plaintiff to inspect minutes of meetings of the Directors of said Association; that since the commencement of this action and the entry of a restraining order herein, to wit: *from January 19, 1965, to January 27, 1965,* said Secretary continued to deny to plaintiff W. Lunsford Crew access to said minutes, and other records. (Our italics.)

"21. That, except as herein amended, the plaintiffs ratify and affirm their complaint.

"WHEREFORE, the plaintiffs renew the prayer of their complaint and further pray:

"4. That the order of reference heretofore entered in this action be enlarged to direct the Referee to answer issues and report to the Court the following:

"(a) The number of legal votes received for each nominee for the offices of Directors of . . . (the) Association . . . at its annual meeting of members held on February 23, 1965.

"(b) Who are the persons elected to be Directors of . . . (the) Association . . . at said meeting?

"(c) Did the defendant Association or any officer or agent thereof refuse to allow the plaintiff W. Lunsford Crew to examine minutes of meetings of the Directors of said Association, proxies, and other records of said Association as alleged in the Complaint and Amended Complaint?

"5. That the costs of this action be taxed against the defendants."

Defendants filed separate demurrers to the complaint. In each, two grounds for demurrer were asserted: (1) that the complaint does not allege facts sufficient to constitute a cause of action, and (2) that the court has no jurisdiction over a civil action "arising out of the internal operations of a Federal Savings and Loan Association, created and existing under the laws of the United States and an instrumentality thereof, the exclusive jurisdiction of such matters being by act of Congress placed in the Federal Home Loan Bank Board, to the exclusion of this court."

Judge Bundy, by order dated May 25, 1965, sustained both demurrers on both grounds and dismissed the action. Plaintiffs excepted and appealed.

Banzet & Banzet for plaintiff appellants.

Allsbrook, Benton & Knott and Dwight L. Cranford for Carl S. Thompson, defendant appellee.

Battle, Winslow, Merrell, Scott & Wiley for First Federal Savings and Loan Association of Roanoke Rapids, defendant appellee.

BOBBITT, J. When plaintiffs instituted this action on January 19, 1965, one day before the time originally fixed for the annual meeting of the members of the Association, they apprehended they might be deprived of their offices as directors by adverse votes cast under the purported authority of illegal and void proxies. This appears clearly from the portion of the complaint filed February 23, 1965. It appears with equal clarity from the supplemental portion of the complaint filed March 24, 1965, that plaintiffs W. Lunsford Crew and Joseph N. Hatem (and also Graham Shell) were duly elected directors of the Association at the annual meeting of its members held February 23, 1965; and there is no allegation or contention that defendants controvert or challenge plaintiffs' election or present status as directors of the Association.

Thus, it appears affirmatively from plaintiffs' pleading that illegal votes, if any, cast under purported authority of illegal and void proxies, if any, did not affect materially plaintiffs' election as directors.

The agreed statement of case on appeal includes the following: "The Referee filed his report on April 30, 1965, but did not pass upon the right of members to vote; he concluded as a matter of law that he did not have jurisdiction over the determination of whether any member had a right to vote." The referee was well advised. When appointed as referee in the order of February 9, 1965, no complaint had been filed. G.S. Chapter 1, Article 20, relates to trials by referees on evidence offered by litigants. It is not contemplated that a referee be appointed to attend a meeting such as the annual meeting of the members of the Association and there make determinations relating to the respective rights of contesting parties during the progress of such meeting. "No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue." *Lumber Co. v. McPherson,* 133 N.C. 287, 291, 45 S.E. 577; *Kerr v. Hicks,* 131 N.C. 90, 92, 42 S.E. 532; *Perry v. Doub,* 249 N.C. 322, 326, 106 S.E. 2d 582; McIntosh, North Carolina Practice and Procedure, § 526. The provision in the order of February 9, 1965, appointing the referee was improvidently entered; and plaintiffs' contention that the referee should be required to file a further report as to what occurred at said meeting of February 23, 1965, is without merit.

Allegations in the portion of the complaint filed on February 23, 1965, are to the effect the secretary of the Association, acting under the domination of defendant Thompson, refused to allow plaintiffs and other members of the Association to inspect and make copies of the records of the Association showing the number of votes to which the members were entitled and minutes of the previous meetings of the board of directors, *until required to do so by the court's order of February 9, 1965.* The only reasonable inference to be drawn from plaintiffs' pleading is that the Association furnished to plaintiffs all data required by the court's order of February 9, 1965.

Obviously, allegations in the supplemental portion of the complaint filed March 24, 1965, supersede, to the extent in conflict therewith, allegations in the portion of the complaint filed February 23, 1965. The annual meeting of February 23, 1965, was held between the filing of the first portion and the filing of the second portion of plaintiffs' pleading.

In passing upon the demurrers, consideration must be given to both portions of plaintiffs' pleading. It is our opinion, and we so hold, that the facts alleged in the supplemental portion filed March 24, 1965, disclose affirmatively that plaintiffs have no cause of action against defendants on account of matters alleged in the portion of the complaint filed February 23, 1965.

If plaintiffs are or become aggrieved on account of events occurring subsequent to said meeting of February 23, 1965, such grievance may be the subject of another action or proceeding. The present action relates to plaintiffs' alleged grievances as of the commencement of this action. Plaintiffs' pleading discloses their original grievances are now moot on account of the action of the members of the Association at the annual meeting on February 23, 1965.

Assuming, without deciding, the North Carolina courts had jurisdiction of plaintiffs' action, the conclusion reached is that both demurrers were properly sustained on the ground the (composite) complaint does not state facts sufficient to constitute a cause of action, and that the action was properly dismissed.

In view of the conclusion reached, we express no opinion as to defendants' contention that the act of Congress under which the Association was organized places exclusive jurisdiction of matters such as are involved in this action in the Federal Home Loan Bank Board. As to this, there is a division of authority. Decisions indicating the Federal Home Loan Bank Board has exclusive original jurisdiction include: *People, etc. v. Coast Federal Sav. & Loan Ass'n,* 98 F. Supp. 311; *Woodard v. Broadway Federal Savings & Loan Ass'n,* 244 P. 2d 467; *Reich v. Webb,* 32 Cal. Rptr. 803; *Home Loan Bank Board v. Mallonee,* 196 F. 2d 336, *cert. den.* 345 U.S. 952,

rehearing den. 345 U.S. 978. Decisions indicating courts (state or federal) have jurisdiction in certain respects include: *In re Election of Directors, etc.,* 51 N.Y.S. 2d 816; *Elwert v. Pacific First Federal Savings & Loan Ass'n,* 138 F. Supp. 395; *Pearson v. First Federal Savings and Loan Ass'n,* 149 So. 2d 891; *Daurelle v. Traders Federal Savings & Loan Ass'n,* 104 S.E. 2d 320.

Suffice to say, a complete development of the facts concerning the Association's charter, bylaws, federal regulations, if any, etc., would seem a prerequisite to a satisfactory consideration of the jurisdictional question.

Affirmed.

WILLIE ISAIAH MOORE v. GRACE McDONALD HALES AND JOHN HANES HALES.

(Filed 4 February, 1966.)

1. Negligence § 25—

While defendant has the burden of proof on the issue of contributory negligence, he is entitled to have the evidence bearing on that issue considered in the light most favorable to him in determining the sufficiency of the evidence to raise the issue.

2. Automobiles § 44—

Allegations that plaintiff, the driver of a vehicle along the dominant highway, entered the intersection with a servient highway at a high and unlawful rate of speed do not require the submission the issue of contributory negligence in the respect alleged when there is no evidence that plaintiff was traveling in excess of the speed limit, and the physical facts as to the distance traveled by plaintiff's car after the collision are explained so that there is no substantial evidence that plaintiff was exceeding the 35 mile speed restriction.

3. Same—

Where the physical facts are that the front of defendant's car, traveling along the servient highway, struck the right side of plaintiff's car, which approached the intersection along the dominant highway from defendant's left, *held* there is no evidence to support defendant's allegation to the effect that defendant's car first entered the intersection at a time when plaintiff's car was approaching it.

4. Automobiles § 39—

Evidence of the distance traveled and the damage wrought by a vehicle after a collision does not raise an inference that the vehicle was traveling at excessive speed prior to the collision when the operator of the vehicle testifies that he lost control of his vehicle upon impact and put his foot on

the gas instead of the brake, and was rendered unconscious when the vehicle thereafter struck a telephone pole, since the driver's testimony is consistent with and tends to explain the physical facts.

5. Automobiles § 17—

The driver along a dominant highway is not under duty to anticipate that the operator of a vehicle approaching along a servient highway will fail to stop as required by statute before entering the intersection with the dominant highway, and the driver along the dominant highway, in the absence of anything which gives or should give him notice to the contrary, is entitled to assume and act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will stop.

6. Automobiles § 44—

Defendant's allegations that she came to a complete stop at the stop sign, and that, seeing no traffic approaching, she proceeded slowly into the intersection with the dominant highway, *held* to preclude defendant from asserting that plaintiff, who entered the intersection from defendant's left along the dominant highway, was negligent in entering the intersection when he should have seen defendant's car approaching at a high rate of speed and should have apprehended, in time to have avoided collision, that defendant was not going to stop, since evidence of negligence in respects not supported by allegations is ineffectual.

7. Negligence §§ 21, 25—

Contributory negligence is an affirmative defense which must be pleaded and proven in accordance with the allegations.

8. Pleadings § 28—

A party must make out his case in substantial conformity with his allegations.

APPEAL by plaintiff from *Gambill, J.*, March 29, 1965 Civil Session of GUILFORD, Greensboro Division.

Plaintiff's action is to recover damages on account of personal injuries and property damage he sustained as a result of a collision that occurred on Sunday, December 2, 1962, shortly after 10:00 a.m., within the intersection of two streets in a residential district of Greensboro, North Carolina, between a 1959 Oldsmobile owned and operated by plaintiff and a 1963 Chevrolet owned by defendant John Hanes Hales and operated by his wife, defendant Grace McDonald Hales.

Benbow Road, the dominant street, runs north and south. Florida Street, the servient street, runs east and west. Stop signs erected pursuant to a Greensboro ordinance faced motorists approaching said intersection on Florida Street.

After plaintiff, driving south on Benbow, had entered the intersection, the right side of plaintiff's Oldsmobile was struck by the front of the Hales Chevrolet. Mrs. Hales, driving east on Florida,

had entered the intersection without stopping in obedience to the stop sign.

The pleadings raised issues of negligence, contributory negligence and damages.

It was stipulated that defendant John Hanes Hales is liable, under the family purpose doctrine, for the actionable negligence, if any, of his wife, defendant Grace McDonald Hales.

The only evidence was that offered by plaintiff.

The first (negligence) issue was answered, "Yes," by consent, defendants having conceded *at trial* that negligence on the part of Mrs. Hales was a proximate cause of the collision and resulting injuries and damage. The second (contributory negligence) issue, submitted over plaintiff's objection, was answered, "Yes." The jury did not reach the issue (third) as to damages.

Judgment that plaintiff recover nothing of defendants and that plaintiff pay the costs was entered. Plaintiff excepted and appealed.

Lee & Lee and David M. Dansby, Jr., for plaintiff appellant.
Smith, Moore, Smith, Schell & Hunter for defendant appellees.

BOBBITT, J. The crucial question is whether the court erred in submitting the issue as to contributory negligence.

While a defendant has the burden of proof on the issue of contributory negligence, he "is entitled to have the evidence bearing on that issue considered in the light most favorable to him in determining whether there is sufficient evidence of contributory negligence to be submitted to the jury." 3 Strong, N. C. Index, Negligence § 25, and cases cited.

The alleged factual basis underlying plaintiff's alleged specifications of defendants' negligence, including failure to keep a proper lookout and failure to exercise proper control, is that Mrs. Hales, in violation of the municipal ordinance, entered the intersection without stopping in obedience to the stop sign and did so when she saw or by the exercise of due care should have seen plaintiff's car was so close to said intersection as to constitute a serious hazard. Plaintiff did not allege Mrs. Hales was operating the Chevrolet at unlawful or excessive speed.

Plaintiff offered in evidence the following excerpt from defendants' answer: "It is further admitted that the automobile operated by Grace Hales eastwardly on Florida Street collided with the automobile driven by the plaintiff and *that she did not come to a complete stop* for the stop sign which is erected on Florida Street." (Our italics.)

It was stipulated "that Mrs. Hales entered a plea of guilty to failing to yield the right of way."

The alleged factual basis underlying defendants' alleged specifications of plaintiff's (contributory) negligence is that Mrs. Hales "did not observe any vehicular traffic . . . on Benbow . . . and did not observe any stop sign" as she approached the intersection; that "(s)he slowed before entering the intersection and, seeing nothing coming, proceeded into the intersection, when suddenly without warning," plaintiff's car approached from her left "at a high and unlawful rate of speed, and the two vehicles collided in the intersection."

Defendants alleged plaintiff was contributorily negligent in that he operated his car (a) carelessly and recklessly, (b) at a speed greater than was reasonable and prudent under existing conditions, and (c) at a speed in excess of 35 miles per hour; and that he (d) approached the intersection "while other traffic was in and entering the intersection" without reducing speed, without sounding his horn and without exercising due care, (e) failed to reduce his speed and thereby avoid a collision when he saw, or should have seen, that defendants' car "was entering the intersection," (f) failed to sound his horn or give any other warning as he approached the intersection when he saw, or should have seen, "the defendants' automobile entering the intersection," and (g) failed to keep a proper lookout and exercise due care for his own safety.

There was evidence Benbow Road is 30 feet wide and that Florida Street, "on the west side of Benbow Road", is 44 feet wide. There is no evidence as to exactly where within the intersection the collision occurred. Since all the evidence tends to show the front of the Chevrolet struck the right side of the Oldsmobile, the only reasonable inference is that the Oldsmobile was crossing the Chevrolet's line of travel when the collision occurred. Suffice to say, we find no evidence sufficient to support defendants' allegations to the effect the Chevrolet entered the intersection first and at a time when plaintiff *was approaching* the intersection.

Plaintiff testified he "was going about 25 miles an hour." A witness who observed the Oldsmobile shortly before it reached the intersection testified plaintiff "was going about 20 or 25 miles an hour." There was no other *testimony* as to the speed of the Oldsmobile as it approached and entered the intersection.

"(W)hat occurred immediately prior to and at the moment of the impact may be established by circumstantial evidence, either alone or in combination with direct evidence. (Citation.) The physical facts at the scene of an accident, the violence of the impact, and the extent of damage may be such as to support inferences of

negligence as to speed, reckless driving, control and lookout. (Citations.)" *Yates v. Chappell,* 263 N.C. 461, 465, 139 S.E. 2d 728.

There was evidence tending to show: When her daughter yelled, "There's a car coming," Mrs. Hales applied her brakes, "leaving 25 feet of skid marks." While the evidence with reference thereto is unclear, apparently the Chevrolet stopped at or near the point of collision. There was evidence the Chevrolet "came to rest headed in a southeasterly direction," and that "skid marks under the left front wheel were curved in a southeasterly direction."

There was evidence the Oldsmobile, after being struck by the Chevrolet, traveled 60 feet south on the east side of Benbow Road, then hit and knocked down a telephone pole and crossed the curb, then continued down the sidewalk approximately 220 feet and there struck and broke into pieces a large rock beside a driveway, and thereafter traveled 96 feet farther south and stopped approximately in the center of Benbow Road.

Defendants cite the destruction wrought by plaintiff's 1959 Oldsmobile four-door sedan as it traveled a total of 376 feet from the point of collision to where it stopped as evidence of excessive speed. However, the evidence with reference thereto must be considered in connection with plaintiff's testimony that he lost control of the Oldsmobile when it was knocked to its left by the Chevrolet; that he "blanked out" and "was totally knocked out" when the Oldsmobile struck the telephone pole; that he did not regain consciousness and control of the Oldsmobile until after it had struck the large rock; and that he (subsequent to the collision) "had put (his) foot on the gas instead of the brake." There was evidence Benbow Road, proceeding south, "is slightly downhill."

Plaintiff's testimony is consistent with and tends to explain the physical facts.

There is no evidence sufficient to support a finding that plaintiff was operating his car at a speed in excess of 35 miles per hour. Whether there was sufficient evidence to support a finding that plaintiff was operating his car at a speed greater than was reasonable and prudent under existing conditions and, if so, whether plaintiff's speed was a proximate cause of the collision, must be considered in relation to all conditions existing as plaintiff approached and entered the intersection.

The reciprocal rights and duties of motorists when approaching an intersection from dominant and servient highways, particularly in relation to G.S. 20-158(a), have been often stated. *Matheny v. Motor Lines,* 233 N.C. 673, 65 S.E. 2d 361; *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373.

"It is established by our decisions that where a highway is designated as a main traveled or dominant highway by the erection of stop signs at the entrances thereto from intersecting servient highways, as prescribed by G.S. 20-158(a), the operator of a motor vehicle traveling upon such main traveled or dominant highway and approaching an intersecting servient highway is under no duty to anticipate that the operator of a motor vehicle approaching on an intersecting servient highway will fail to stop as required by the statute, and, in the absence of anything which gives, or in the exercise of due care should give, notice to the contrary, the driver on the dominant highway is entitled to assume and to act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will act in obedience to the statute and stop before entering the dominant highway. *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17; *Loving v. Whitton*, 241 N.C. 273, 84 S.E. 2d 919." Johnson, J., in *Caughron v. Walker*, 243 N.C. 153, 90 S.E. 2d 305.

The only pertinent evidence bearing upon this feature of the case is to be found in the testimony of plaintiff and of Elbert Street, the Greensboro Police Officer who investigated the collision.

Plaintiff, on direct examination, testified: "As I approached the intersection of Benbow Road and Florida Streets, I saw the car, the car to my right. When I saw the car I was too far in the intersection of Florida Street when I saw it. When I saw that it was going to hit, I was too far in the intersection to do anything about it."

Plaintiff, on cross-examination, testified: "I did not tell the officer that before I got to the intersection I saw Mrs. Hales' car coming at a high rate of speed and knew she wasn't going to stop."

Plaintiff, on further cross-examination, testified: "I saw Mrs. Hales' car when it got to the intersection. I knew it was a stop sign there, but before I realized she wasn't going to stop, I was too far in the intersection to do anything about it. The first time I saw Mrs. Hales' car was when I was entering the intersection. . . . When I saw her, I was entering the intersection, . . . it seemed to me that she was coming at a high rate of speed. Sure, I saw her, but I couldn't tell how far away it was. I couldn't say if it was as far as from here to the back of the courtroom. . . . I would say that she probably was three or four car-lengths back from the intersection when I first saw her. As to whether I turned left, or tried to stop, when I discovered that she was going to hit me, I tried to do everything I could. She was coming at a high rate of speed. I tried my best to go to the left, that's all I could do. I didn't have time to do anything else."

Street, on direct examination, testified: "He (plaintiff) stated that he was approaching the intersection, that he saw Mrs. Hales coming toward him at a high rate of speed and that she ran the stop sign and came in contact with the right side of his vehicle causing him to lose control . . ."

Street, on cross-examination, testified: "The plaintiff . . . stated that he was approaching the intersection, that he had not yet gotten to the intersection when he first saw her, that he was approaching. . . . The plaintiff told me that he was approaching the intersection and that he saw Mrs. Hales' car coming at a high rate of speed."

In pleading contributory negligence, defendants did not allege, conditionally or otherwise, that Mrs. Hales approached the intersection at a high rate of speed or otherwise in such manner as to give notice to plaintiff she was not going to stop in obedience to the stop sign. On the contrary, they alleged Mrs. Hales "did not come to a complete stop for the stop sign which is erected on Florida Street" and that she "slowed before entering the intersection and, seeing nothing coming, proceeded into the intersection." It is noted the investigating officer testified Mrs. Hales told him "that she stopped for the stop sign, looked for oncoming traffic, did not see anything . . ."

Contributory negligence is an affirmative defense. "(I)t must be set up in the answer and proved on the trial." G.S. 1-139. "A plea of contributory negligence must allege negligent acts or omissions on the part of the plaintiff which contributed to his injury as one of its proximate causes." *Maynor v. Pressley*, 256 N.C. 483, 124 S.E. 2d 162. A plaintiff must prove negligence substantially as alleged in his complaint. *Messick v. Turnage*, 240 N.C. 625, 83 S.E. 2d 654. It is equally true that a defendant must prove (contributory) negligence substantially as alleged in his answer.

Conceding, without deciding, there was evidence which, when considered in the light most favorable to defendants, was sufficient to support a finding that plaintiff saw, or by the exercise of reasonable care should have seen, Mrs. Hales approaching said intersection at a high rate of speed and that she could not or would not stop in obedience to the stop sign when plaintiff was such distance from the intersection that he could, if driving at a reasonable and lawful rate of speed, have avoided the collision by the exercise of due care, defendants do not allege plaintiff was negligent in this respect. As indicated, defendants' specifications of plaintiff's alleged negligence are based on a different state of facts. Proof without allegation is as unavailing as allegation without proof. *Messick v. Turnage, supra.* Consequently, contributory negligence, if any, of plain-

tiff in this respect would not justify submission of an issue as to contributory negligence.

The conclusion reached is that the evidence when considered in the light most favorable to defendants was insufficient to warrant submission of the contributory negligence issue to the jury with reference to the specifications of plaintiff's contributory negligence alleged in defendants' answer.

For error in submitting the contributory negligence issue, the verdict and judgment are vacated and plaintiff is awarded a new trial.

New trial.

MARION C. PATTERSON v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

(Filed 4 February, 1966.)

1. Pleadings § 12—

Upon demurrer for failure of the complaint to state a cause of action, the complaint must be construed as a whole, every reasonable intendment and presumption must be made in favor of plaintiff, and the demurrer overruled if facts sufficient to state a cause of action upon any theory are alleged or logically inferred. G.S. 1-151.

2. Principal and Agent § 6—

Where a person without authority or with limited authority purports to act as agent in doing an unauthorized act, the supposed principal, upon discovery of the facts, may ratify the act of the agent and thus give it the same effect as though it had been authorized.

3. Same—

An act must be ratified in whole and not in part; however, the ratification of one unauthorized act does not require the ratification of another and entirely different act, and the principal may ratify the sale of personal property by an agent without authorizing the agent to collect the purchase price therefor.

4. Corporations § 17—

Under the Uniform Stock Transfer Act an unlimited endorsement and delivery of a certificate of stock to another, or the delivery of it to him together with a separate document containing a written assignment or a power of attorney to him for the transfer of the stock, clothes such other with indicia of ownership, and a bona fide purchaser for value will take the shares free from any lack of actual authority. G.S. 55-75, G.S. 55-98.

5. Principal and Agent § 6— Complaint, although alleging facts constituting ratification of agent's transfer of stock, held not to allege facts estopping plaintiff from denying agent's authority to receive payment.

Plaintiff's allegations were to the effect that plaintiff was the owner of certain common stock, that plaintiff entrusted this stock to another for the purpose of exchanging it but without authority in such agent to sell the stock, that the agent did sell the stock to defendant, that it clearly appeared upon the face of the certificate that plaintiff was the owner of the stock and entitled to payment therefor, that defendant negotiated the stock and received the proceeds therefrom, and that the agent had no authority to receive payment for the stock. *Held:* The complaint liberally construed does not allege endorsement of the certificate by plaintiff or that the agent was given indicia of ownership, and while it alleges facts constituting a ratification of the transfer of the stock to defendant by the agent, it does not allege facts constituting the ratification by or estoppel of plaintiff to deny the agent's authority to receive for plaintiff the payment, and therefore demurrer to the complaint for failure to state a cause of action should have been overruled.

APPEAL by plaintiff from *Mintz, J.*, 8 February 1965 Special Civil Session of NASH.

The plaintiff appeals from a judgment sustaining a demurrer to the complaint, the ground of the demurrer being that the complaint fails to state a cause of action.

The complaint alleges: The defendant is a corporation engaged in the purchase and sale of securities; the plaintiff was the owner of 100 shares of the common stock of Carolina Power & Light Company as evidenced by a stock certificate; plaintiff entrusted this certificate to one Lee for the purpose of exchanging it for shares in another company; Lee was not authorized to sell the stock but did sell it to the defendant for $6,150; Lee had no authority to receive payment for the stock; it clearly appeared upon the face of the certificate that the plaintiff was the owner thereof and was entitled to payment therefor; the defendant "negotiated" the stock to various persons unknown to the plaintiff and received the proceeds from the sale of the certificate; the plaintiff has demanded that the defendant pay her for the stock but the defendant refuses to do so. The prayer is that the plaintiff recover of the defendant $6,150, the amount for which the defendant purchased the stock from Lee.

Fields & Cooper & Leon Henderson, Jr., for plaintiff.
Gardner, Connor & Lee for defendant.

LAKE, J. Upon a demurrer to a complaint for the reason that it fails to state a cause of action, the complaint must be construed as a

whole, every reasonable intendment and presumption must be made in favor of the plaintiff and if, when it is so construed, facts sufficient to state a cause of action upon any theory are alleged therein, or may logically be inferred from the allegations thereof, the complaint must be sustained and the demurrer overruled. *Hargrave v. Gardner,* 264 N.C. 117, 141 S.E. 2d 36; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750; *Scott v. Insurance Co.,* 205 N.C. 38, 169 S.E. 801; *Little v. Little,* 205 N.C. 1, 169 S.E. 799; *Griffin v. Baker,* 192 N.C. 297, 134 S.E. 651. The common law rule that pleadings are to be construed most strongly against the pleader has been abrogated in this State by G.S. 1-151. *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620. As Connor, J. said, speaking for the Court, in *Scott v. Insurance Co., supra:*

> "In *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807, it is said: 'It is the purpose of the Code system of pleading, which prevails with us, to have actions tried upon their merits, and to that end pleadings are construed liberally, every intendment is adopted in behalf of the pleader, and a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient.' "

The complaint alleges, "that it clearly appeared upon the face of the aforementioned stock certificate that the plaintiff was the owner thereof and that the plaintiff was entitled to payment therefor." The complaint then alleges that the defendant "negotiated the aforementioned stock." It also alleges that the plaintiff "entrusted the aforementioned certificate" to Lee "for the purpose of exchanging this certificate for shares of stock in another company."

There is no allegation in the complaint that the plaintiff indorsed the certificate to Lee or delivered it to him together with a separate paper authorizing him to transfer it, or clothing him with indicia of ownership of the shares represented thereby.

Applying the foregoing principle of construction, we think that the allegation as to what appeared upon the "face" of the stock certificate should not be construed narrowly so as to limit it to an allegation as to what appeared upon the front side of the certificate. We think a liberal construction of this allegation is that one examining the entire certificate, front and back, without more, would conclude therefrom

that "the plaintiff was the owner thereof and that the plaintiff was entitled to payment therefor." That is, this is an allegation that there was nothing on the certificate to indicate that Lee was the owner of the shares represented by the certificate or had any interest of his own therein.

The allegation that the defendant "negotiated" the stock, interpreted literally and strictly against the pleader, would probably indicate that the plaintiff had indorsed the stock certificate. However, the terms of the complaint may not be construed strictly against the plaintiff. They are to be construed liberally in her favor. So construed, this allegation should be taken to mean only that the defendant re-transferred the shares to others. This could have been done in reliance upon an unauthorized, purported indorsement of the plaintiff's name by Lee. We, of course, do not intend to suggest that this was done. We merely point out that the complaint, liberally construed, in favor of the plaintiff, does not allege an indorsement of the certificate by the plaintiff or that she otherwise clothed Lee with indicia of ownership of the shares.

The complaint, therefore, liberally construed, alleges that the plaintiff delivered her stock certificate to Lee for a specified purpose only, her ownership of the shares appeared clearly upon the stock certificate, and Lee, without authority, sold the shares to the defendant for $6,-150, and thereafter the defendant paid Lee this amount, he having no authority to receive payment for the plaintiff who has demanded, and in this action demands, that the defendant pay her the purchase price agreed upon between it and Lee. From these facts it is a reasonable inference that in the sale of the shares to the defendant, and again in receiving payment therefor from the defendant, Lee purported to act as agent for the plaintiff. The complaint, construed as we must construe it upon a demurrer, alleges no fact suggesting any other right or authority in Lee to sell the stock.

It is elementary that when one, with no authority whatever, or in excess of the limited authority given him, makes a contract as agent for another, or purporting to do so as such agent, the supposed principal, upon discovery of the facts, may ratify the contract, in which event it will be given the same effect as if the agent, or purported agent, had actually been authorized by the principal to make the contract prior to the making thereof. *Payne-Farris Company v. Kuester,* 212 N.C. 545, 193 S.E. 707; *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114; *Acme Mfg. Co. v. McPhail,* 181 N.C. 205, 106 S.E. 672; *Osborne v. Durham,* 157 N.C. 262, 72 S.E. 849; *Trollinger v. Fleer,* 157 N.C. 81, 72 S.E. 795; 3 Am. Jur. 2d, Agency, § 160, *et seq.* Of course, ratification is not possible unless the person making the contract (Lee), in doing so, purported to act as the agent of the person claiming or

claimed to be the principal. *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828; *Flowe v. Hartwick,* 167 N.C. 448, 83 S.E. 841.

Interpreting the complaint, as we do, to allege by inference that Lee, in the sale of the plaintiff's stock and the delivery of her stock certificate, purported to sell the shares as the plaintiff's agent and on her account, ratification of such sale by the plaintiff was possible. That being true, any act of the plaintiff, with knowledge of the sale, showing a purpose by her to elect to treat the sale as a valid disposition of her title to the shares, would constitute a ratification by the plaintiff of the sale. Ratification is implied when the conduct of the principal constitutes an assent to the act in question. *Acme Mfg. Co. v. McPhail, supra.* "One of the most unequivocal methods of showing a ratification of an agent's unauthorized act is by bringing an action or basing a defense on the unauthorized act with full knowledge of the material facts." 3 Am. Jur. 2d, Agency, § 174. The complaint alleges that the plaintiff demanded that the defendant pay her for the shares, and she brings this action to recover the amount of the purchase price fixed by the contract made by the defendant with Lee. The plaintiff had no right to the contract price, as such, without affirming the contract. *Jones v. Bank,* 214 N.C. 794, 1 S.E. 2d 135. She cannot, at the same time, deny the validity of the sale to the defendant and claim the agreed purchase price from the defendant.

Assuming, as we must, that Lee sold the plaintiff's stock to the defendant without her authority and had in his possession nothing but a certificate by which "it clearly appeared * * * that the plaintiff was the owner thereof," the plaintiff originally had the right to repudiate the sale and sue the defendant for the conversion of her shares of stock. In that event, she would not be entitled to recover the price fixed by the contract between Lee and the defendant, as such, but her right would be to recover the fair market value of her property which, since the property was corporate stock fluctuating in value, might possibly be determinable at some time other than the exact date of the conversion. The fact that this might be the same as the price agreed upon between Lee and the defendant is immaterial. The plaintiff, in her complaint, makes no allegation as to the fair market value of the stock. She sues for the contract price set by Lee and the defendant. Thus, it appears from her complaint that she does not proceed in this action upon the theory of conversion but upon the theory of ratification of the sale made for her account by Lee. In her brief in this Court, she states that the question is not whether Lee "exceeded his authority in delivering the certificate" to the defendant but is whether the defendant had authority to pay Lee for the certificate.

In the somewhat similar case of *Osborne v. Durham, supra,* this Court held that, where an agent sold stock in excess of his authority, a demand by the principal upon the purchaser for payment of a note taken by the agent for the purchase price was a ratification of the sale, so that the principal could not thereafter sue the agent and the purchaser on the theory of conversion.

It is also elementary that a contract cannot be ratified in part. The principal cannot claim the benefits without accepting the burden. *Jones v. Bank, supra;* 3 Am. Jur. 2d, Agency, § 172. However, "the ratification of one unauthorized act is not the ratification of another and entirely distinct act." 3 Am. Jur. 2d, Agency, § 181.

The complaint does not allege, and it is not a necessary inference therefrom, that the defendant paid Lee the agreed sale price of the stock simultaneously with the making of the contract for sale. Thus, it does not appear from the complaint, interpreted liberally in favor of the plaintiff, that the contract for the sale of the shares and the payment by the defendant to Lee were parts of the same transactions so as to make it impossible for the plaintiff to ratify the sale and disavow the payment.

Ratification by the plaintiff of the sale has the same effect as prior authority from the plaintiff to Lee to make the sale. This would carry with it implied authority to do all things usually done by an agent authorized to make a sale of a principal's stock. 3 Am. Jur. 2d, Agency, § 99. However, authority to sell, even when coupled with the possession of the goods by the agent, does not necessarily authorize the agent to collect the price or estop the principal from collecting from the purchaser who pays the agent. 3 Am. Jur. 2d, Agency § 106.

It does not appear how or when the payment was made by the defendant to Lee, but it is alleged in the complaint that "it clearly appeared" from the stock certificate "that the plaintiff was the owner thereof and that the plaintiff was entitled to payment therefor." This being true, if the defendant paid Lee in cash or by its check without inserting the name of the plaintiff as a payee thereof, there is nothing in the complaint to suggest that the plaintiff has made any representation to the defendant which now estops her from denying Lee's authority to receive for her the payment which the certificate clearly showed she was entitled to receive.

The matter is before us on demurrer to the complaint. We must, therefore, assume all of the facts stated in the complaint, together with all reasonable inferences which may be drawn therefrom favorable to the plaintiff, are true. If they are not, or if there are other material facts which would constitute a defense, the defendant

may so allege in its answer and thus present to the court questions different from those which we are now called upon to decide.

It does not appear from the complaint whether the certificate was issued to the plaintiff by the issuing corporation before or after 15 March 1941. Consequently, it cannot be determined from the complaint whether the Uniform Stock Transfer Act, G.S. 55-75 to G.S. 55-98, applied to this certificate. In either event, the unlimited indorsement and delivery of the certificate by the plaintiff to Lee, or the delivery of it by her to him, together with a separate document containing a written assignment to him or a power of attorney to him for the transfer of the shares, would clothe Lee with indicia of ownership. In that event, a bona fide purchaser for value would take the shares free from any lack of actual authority in Lee to make the transfer, and a payment to him by such purchaser, without notice of the right of the plaintiff and of the lack of authority in Lee, would be a defense to a claim by the plaintiff. G.S. 55-81 (if the certificate was issued after 15 March 1941); *Castelloe v. Jenkins,* 186 N.C. 166, 119 S.E. 202 (if the certificate was issued prior to 15 March 1941). This, however, is an affirmative defense which must be pleaded and proved by the defendant, just as one claiming to be the holder in due course of a negotiable instrument must prove he has that status when it is shown that the person from whom he acquired the instrument negotiated it in breach of faith. *Clark v. Laurel Park Estates,* 196 N.C. 624, 146 S.E. 584; *Bank v. Wester,* 188 N.C. 374, 124 S.E. 855; *Moon v. Simpson,* 170 N.C. 335, 87 S.E. 118.

It appears upon the face of the complaint that Lee transferred the stock to the defendant in breach of trust. It does not appear thereon that the certificate was indorsed by the plaintiff or that she clothed Lee with indicia of ownership and it does not appear thereon that the defendant was a purchaser without notice of the defect in Lee's title or authority to sell. Consequently, the complaint, when liberally construed, states facts sufficient to constitute a cause of action and the demurrer should have been overruled.

Reversed.

MITTLE S. CONGER v. THE TRAVELERS INSURANCE COMPANY AND COLONIAL STORES, INCORPORATED.

(Filed 4 February, 1966.)

1. Insurance § 16—

"Employment" with reference to termination of a group certificate upon termination of employment refers to the status of employer and employee, and when an employee is discharged there is a severance of this relationship, even though the employee may be entitled under his contract to accumulated pay for vacation time, and such employee cannot be held an employee on vacation following his discharge.

2. Same—

Where a certificate under a group policy specifies that the certificate should terminate upon termination of the employment, with provision for conversion upon application of the employee within 31 days, and provision that the insurance under the group policy should continue for such period, *held* the certificate does not cover the death of an employee more than 31 days from his discharge, there having been no application for conversion or facts constituting estoppel.

3. Insurance § 8— Failure of employer to tender premium to insurer does not render employer liable when tender would not have kept certificate in force.

After the discharge of an employee the employer deducted from the employee's check for accumulated pay for vacation time the employee's share of the premium under a group policy. The employer did not pay the premium to insurer in behalf of the employee, but asserted the deduction was inadvertently made and tendered refund. The employee died more than 31 days after termination of the employment without applying for conversion. *Held:* Since tender of premium by the employer for the period subsequent to the employee's discharge would not have kept the certificate in force in the face of its unambiguous language, and since there was neither allegation nor evidence that the employee relied on the fact of the deduction of the premium and was thereby misled so that he failed to apply for conversion, nonsuit should have been entered.

4. Pleadings § 28—

Plaintiff's recovery must be based on the allegations of his complaint.

APPEAL by defendant Colonial Stores, Incorporated, from *Mintz, J.*, June 7, 1965, Session of WAYNE.

Plaintiff alleged alternative causes of action against The Travelers Insurance Company (Insurance Company) and Colonial Stores, Incorporated (Stores). The allegations of each cause of action are stated in *Conger v. Insurance Co.*, 260 N.C. 112, 131 S.E. 2d 889, in which a judgment sustaining demurrers and dismissing the action was reversed. Thereafter, each defendant filed answer. When called for trial, the case, upon waiver of jury trial, was submitted

for decision on the stipulated facts summarized (except when quoted) below.

A group life insurance policy issued by Insurance Company to Stores for the benefit of certain of its employees was in force at all times pertinent to decision. Subject to the terms and conditions of said group policy, Elvin H. Conger (Conger), husband of plaintiff and employee of Stores, was insured during his employment as provided in certificates of coverage issued to him by Insurance Company on September 1, 1958, in which plaintiff is named as beneficiary.

On April 3, 1961, Stores discharged Conger. Thereafter Conger performed no services for Stores and did not enter its premises. Under Stores, vacation regulations, Conger, at the time of his discharge, was entitled to "three (3) weeks of accumulated pay for vacation time"; and, at the time of his discharge, Conger was paid by Stores "for three (3) weeks of accumulated vacation time and along with the other routine deductions, Conger's contribution toward the premium on the . . . Group Life Policy in the sum of $1.90 per week or a total of $5.70 was deducted from his final check." Conger's share of the premium was not sent to the Insurance Company. Stores "contends" the deduction of $5.70 "was inadvertently made," and on January 29, 1962, tendered this amount "to the estate of . . . Conger," which tender "was declined."

Conger died May 22, 1961, of a coronary thrombosis. When discharged on April 3, 1961, he "was neither wholly disabled nor prevented by bodily injury or disease from engaging in any occupation or employment for wage or profit."

Conger made no application to the Insurance Company between the date of his discharge and the date of his death to convert his coverage under the group policy into a regular policy of life insurance.

The pertinent provisions of the group policy are set forth in the certificates issued to Conger, to wit:

Under "Termination of Insurance," the policy, in pertinent part, provides: "The insurance of any Employee covered under the group policy shall (end) when his employment with the Employer in the classes of Employees eligible for insurance thereunder shall (end); . . ."

Under "Conversion Privilege," the policy provides:

"Any Employee of the Employer covered under this group policy shall, in case of the termination of employment for any reason whatsoever, be entitled to have issued to him by the Company without further evidence of insurability, and upon application made to the Company within Thirty-one days after such termination and upon

the payment of the premium applicable to the class of risks to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance, in any One of the forms customarily issued by the Company, except term insurance, (with Permanent Total Disability Benefit equivalent to that provided hereunder,) in an amount equal to the amount of the Employee's protection under this policy at the time of the termination of his employment.

"(Extended Benefit:—) If the insurance under the group policy on the life of an Employee shall be terminated by the termination of his employment with the Employer, and the death of such Employee shall occur within Thirty-one days after such termination of insurance and before any individual policy issued in accordance with the conversion privilege herein set forth shall have become effective, the Company will pay to the Employee's beneficiary under the group policy the amount of the insurance in force thereunder on the life of such Employee at the termination of his insurance."

The provisions quoted above appear in Certificate A. The provisions of Certificate B are identical with these exceptions: (1) Under "Termination of Insurance," the word "terminate" is used instead of the word "end" in the places indicated by parentheses; and (2) under "Conversion Privilege," the words enclosed in parentheses do not appear.

On the face of the certificates issued to Conger, under "Notice to Employees," these words appear:

"If you should cease active work for any reason, you should consult your Employer immediately to determine what arrangements may be made to continue your insurance benefits in force so that you will be able to exercise any rights you may then have under the group policies as outlined in these Certificates. For further details, see the sections entitled 'Termination of Insurance' and 'Conversion Privileges.'"

The amount of the coverage in respect of death benefits provided by said policy and certificates was $8,000.00; and it was stipulated that plaintiff, if entitled to recover against either defendant, is entitled to recover $8,000.00 together with interest from May 22, 1961.

Judge Mintz entered judgment that plaintiff have and recover of Stores the sum of $8,000.00, plus interest and costs, and that plaintiff "have and recover nothing" of Insurance Company.

Stores excepted and appealed.

Roberts & Wooten and Willis A. Talton for plaintiff appellee.

Taylor, Allen & Warren and John H. Kerr, III, for Colonial Stores, Inc., defendant appellant.

BOBBITT, J. The judgment does not disclose the ground on which the court adjudged that plaintiff "have and recover nothing" of Insurance Company. Plaintiff did not appeal. Hence, the judgment is a final adjudication as between plaintiff and Insurance Company. Even so, whether plaintiff was entitled to recover from Insurance Company and, if not, the ground of Insurance Company's nonliability, has significance in determining plaintiff's right to recover from Stores. Plaintiff's alternative cause of action against Stores presupposes the nonliability of Insurance Company.

Plaintiff, in her alternative cause of action against Stores, alleges in substance, except when quoted, the following: Under Conger's employment contract with Stores, part of the insurance premium was to be paid by Conger and part by Stores. Stores deducted $1.90 per week, Conger's part, from Conger's salary checks "up to and including the final week of said employment, the period ending the 24th day of April 1961." Conger died May 22, 1961, "within 31 days after the period ended for which" Conger's portion of the premiums had been deducted from Conger's salary. If the Insurance Company is not liable to plaintiff, "because of the failure of . . . Stores . . . to remit the premiums due and deducted from . . . Conger's salary, or because of any other breach of contract by . . . Stores . . ., or for any other reason, then by reason of the wrongful and unlawful breach by . . . Stores . . . of the said contract of employment and its position of trust, the plaintiff has been damaged in the amount of $8,000.00."

The policy provides the insurance of an employee under the group policy shall terminate when his employment with the employer shall terminate. It provides the employee, upon application made within thirty-one days after the termination of his employment, may exercise the conversion privilege quoted in our preliminary statement and that the insurance under the group policy continues in force during said 31-day period. In this connection, see G.S. 58-211, captioned "Group life insurance standard provisions."

This Court has held the word "employment" as used in the phrase "termination of his employment" in a group policy of insurance refers to the *status* of the employee rather than to a contractual relationship existing between the employer and the employee; and that the word "termination" in said phrase means the end of such status, that is, a complete severance of the relationship of employer and employee. *Lineberger v. Trust Co.*, 245 N.C. 166, 170, 95 S.E. 2d 501, 68 A.L.R. 2d 1, and cases cited; *Pearson v. Assurance Society*, 212 N.C. 731, 194 S.E. 661; 44 C.J.S., Insurance § 329, p. 1265; 1 Appleman, Insurance Law and Practice § 122, pp. 171-2; Annotation, 68 A.L.R. 2d 8, 35 *et seq.*

It was stipulated that "Conger was discharged from his employment" by Stores on April 3, 1961. When "discharged from his employment," Conger's status as an employee terminated. There was a complete severance of the employer-employee relationship. Although Conger, at the time of his discharge, was entitled under his employment contract and Stores' regulations "to three (3) weeks of accumulated pay for vacation time," he was not, after April 3, 1961, an employee of Stores. There is no merit in the suggestion that Conger was an employee on vacation during the three weeks following his discharge on April 3, 1961. *Perry v. Equitable Life Assurance Society of U.S.*, 139 N.E. 2d 489 (Ohio).

As indicated, the stipulated facts establish that Conger's employment by Stores terminated on April 3, 1961, not on April 24, 1961, as stated in plaintiff's quoted allegation. Since Conger's death occurred more than thirty-one days after April 3, 1961, the date of the termination of his employment, his insurance under the group policy was not in force on May 22, 1961, the date of his death. Hence, the court was correct in adjudicating plaintiff was not entitled to recover from Insurance Company. See Annotation, 68 A.L.R. 2d 8, 29 *et seq.*

The gravamen of plaintiff's alternative cause of action is that Stores, although it deducted the sum of $5.70 from the amount due Conger at the time of his discharge, failed to remit this amount to Insurance Company. Plaintiff's position rests upon the assumption that if Stores had remitted these amounts the insurance coverage applicable to Conger would have been extended three weeks notwithstanding the termination of his employment on April 3, 1961. This assumption is erroneous. *Haneline v. Casket Co.*, 238 N.C. 127, 76 S.E. 2d 372.

In *Haneline*, the group policy provided: "The insurance of any employee covered hereunder shall terminate at the end of the policy month in which his active employment with the employer shall end." The employee's certificate provided: "This insurance shall terminate whenever the employee shall leave the service of said employer." Under the employment contract, the employer deducted from the employee's wages each quarter the employee's share of the premium and remitted it to the insurance company. Under this arrangement, the employer on March 21, 1951, deducted $3.75 from the employee's wages. The employee was discharged and his employment terminated on March 27, 1951. The employee, from the date of his discharge on March 27, 1951, until his death on May 16, 1951, made no application or request for conversion or for any other benefit under the policy. Since the policy month began March 10, 1951, it was held the insurance terminated at the end of that policy month,

to wit, April 10, 1951, notwithstanding the amount of the premium deducted from the employee's wages and remitted to the insurance company had been computed for the entire quarter ending June 10, 1951. It is noted that the insurance company in its answer tendered to the plaintiff the sum of $2.50, to wit, the unearned portion of the premium.

Absent conduct on the part of Insurance Company constituting waiver or estoppel, a tender or remittance of premiums by Stores to Insurance Company for a period subsequent to the termination of Conger's employment would not have altered the unambiguous provisions of the policy as to when Conger's insurance would expire.

A plaintiff must make out his case *secundum allegata.* His recovery, if any, must be based on the allegations of his complaint. *Andrews v. Bruton,* 242 N.C. 93, 95, 86 S.E. 2d 786, and cases cited; *Manley v. News Co.,* 241 N.C. 455, 460, 85 S.E. 2d 672, and cases cited. The complaint alleges no cause of action except as stated above.

Plaintiff, in her brief, suggests that Conger was misled by the fact that Stores had erroneously deducted the $5.70 in calculating the amount due him at the time of his discharge. However, the complaint does not purport to allege a cause of action on this ground. Nor do the stipulated facts support such a cause of action. There is nothing in the stipulated facts to the effect Conger relied in any manner on the circumstance that the $5.70 had been deducted. Nor does it appear from the stipulated facts that Conger at any time intended or desired to exercise his rights under the conversion provision.

We have considered each of the decisions cited by appellee. Suffice to say, the facts in each were quite different from the (stipulated) facts herein.

Since the pertinent policy provisions and stipulated facts do not establish plaintiff's right to recover against Stores on the alternative cause of action alleged in the complaint, plaintiff's judgment against Stores is reversed.

Consideration of the demurrer *ore tenus* to complaint filed by Stores in this Court is unnecessary.

Reversed.

RAYMOND BAHNSON O'BRIEN v. HELEN VIRGINIA EVERHART O'BRIEN.

(Filed 4 February, 1966.)

1. Divorce and Alimony § 13—

A separation agreement legalizes the separation, and in the husband's suit for divorce on the ground of more than two years' separation after the execution of the agreement the wife may not maintain that the separation was the result of his wrongful abandonment of her.

2. Same— Husband's failure to make payments for support of children is not defense to his action for divorce on ground of separation.

Where it appears in the husband's action for divorce on the ground of separation that he had made payments for the support of his children in accordance with the order theretofore entered in the cause, the wife is not entitled to introduce orders entered in her prior separate action on the separation agreement holding the husband in contempt for failure to make payments in accordance with a prior order entered in that cause, or an order entered in still another action instituted by her, decreeing that the wife was entitled to a stipulated sum under the terms of the separation agreement, such orders not having been pleaded as affirmative defenses to the husband's right to divorce on the ground of separation.

3. Divorce and Alimony § 20—

Ordinarily, a decree of divorce on the ground of separation does not destroy the wife's right to receive alimony or other benefits provided for her under prior judgment or decree. G.S. 50-11.

4. Divorce and Alimony § 13; Trial § 3—

Even though the husband is in contempt of court for failure to make payments for the support of his wife and children as required by orders entered in separate actions instituted by her, her motion for continuance of his subsequent action for divorce on the ground of separation is still addressed to the discretion of court, and when the uncontradicted evidence discloses that the husband had made all payments for the support of his children in accordance with the prior order entered in his action for divorce, the court's order in refusing to continue his action will not be disturbed.

APPEAL by defendant from *Olive, E.J.*, April 5, 1965, Civil Session of FORSYTH.

Plaintiff (husband) instituted this action July 10, 1963, under G.S. 50-6 for absolute divorce on the ground of two years separation.

Plaintiff's allegations as to (1) residence, (2) marriage on November 10, 1935, (3) separation on January 17, 1960, and continuously thereafter, (4) names and ages of the four children, were admitted in an answer filed by defendant on July 30, 1963. Defendant alleged as a "further" defense that the separation was caused solely by plaintiff's wrongful abandonment of defendant and the two minor children.

At January 18, 1965, Civil Session, defendant moved that the trial of this action be continued on the ground defendant at August 3, 1964, Civil Session had "obtained default Judgment against plaintiff for child support in the principal amount of $2,285.00," defendant asserting "that the Court in the exercise of its equity jurisdiction should decline to entertain plaintiff's cause of action until such time as the aforesaid Judgment is paid and satisfied." This motion was denied by Crissman, J., by order entered March 3, 1965, and defendant excepted.

At trial, the court admitted over defendant's objections deeds of separation dated March 7, 1960, and October 11, 1960; and the court excluded (1) certain documentary evidence proffered by defendant and (2) testimony proffered by defendant relating to what occurred on the occasion of the separation. Defendant excepted to all adverse rulings in respect of the admission and exclusion of evidence.

The court submitted the usual issues as to residence, marriage and separation. Defendant tendered, but the court refused to submit, this additional issue: "Was the separation of the parties caused by plaintiff's abandonment of defendant and her two minor children, as alleged in the Answer?" Defendant excepted.

The issues submitted having been answered in favor of plaintiff, judgment was entered dissolving the bonds of matrimony and granting plaintiff an absolute divorce from defendant. Defendant excepted and appealed.

Fred M. Parrish, Jr., Hatfield & Allman and Roy G. Hall, Jr., for plaintiff appellee.

Clyde C. Randolph, Jr., for defendant appellant.

BOBBITT, J. The separation agreements offered in evidence by plaintiff and admitted over defendant's objections were duly executed and acknowledged by plaintiff and defendant; and, in accordance with the statute then codified as G.S. 52-12, the justice of the peace who took defendant's acknowledgment, after private examination of defendant, certified that the agreement(s) was not unreasonable or injurious to her.

Both separation agreements contain this provision: ". . . Helen Virginia Everhart O'Brien and Raymond Bahnson O'Brien do agree to separate and live separate and apart from and after the 18th day of January, 1960 and that they shall continue to live separate and apart each from the other, as fully and as completely and in the same manner and to the same extent as though they had never been married . . ." The separation agreement of October 11, 1960

differs from that of March 7, 1960 only in respect of the payments the husband was required to make to the wife for her support and the support of the two minor children.

Where the husband sues the wife under G.S. 50-6 for an absolute divorce on the ground of two years separation, the wife may defeat the husband's action by alleging and establishing as an affirmative defense that the separation was caused by the husband's abandonment of his wife. *Taylor v. Taylor,* 257 N.C. 130, 125 S.E. 2d 373, and cases cited. Whether the admitted or excluded evidence proffered by defendant relating to what occurred on the occasion of the separation in January 1960 was sufficient, in the absence of the separation agreements, to require submission of the additional issue tendered by defendant and to support an answer thereto in favor of defendant need not be determined. Defendant does not attack the separation agreements but, as indicated below, has relied thereon in a separate action against her husband. "When a husband and wife execute a valid deed of separation and thereafter live apart, such separation exists by mutual consent from the date of the execution of the instrument. *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525. As long as the deed stands unimpeached, neither party can attack the legality of the separation on account of the misconduct of the other prior to its execution. *Kiger v. Kiger,* 258 N.C. 126, 128 S.E. 2d 235." *Jones v. Jones,* 261 N.C. 612, 135 S.E. 2d 554; *Edmisten v. Edmisten,* 265 N.C. 488, 144 S.E. 2d 404. The separation agreements having been entered into more than two years prior to the date of the institution of this action, the circumstances surrounding the separation in January 1960 were no longer significant and relevant in respect of plaintiff's right to obtain an absolute divorce on the ground of two years separation. Hence, the court properly refused to submit the additional issue tendered by defendant.

The documents discussed below are those proffered in evidence by defendant but excluded by the court on objections by plaintiff.

Two of these documents are orders entered in a separate action instituted August 15, 1961, by the wife (defendant herein) under G.S. 50-16 against the husband (plaintiff herein) after hearings on return of orders to the husband to show cause why he should not be adjudged in contempt for failure to make the payments for the support of his wife and two minor children as provided by an order entered in said separate action by Johnston, J., on August 20, 1961. The first of these orders, signed August 2, 1962, by Gambill, J., determined that the husband was in arrears in the amount of $535.00 and ordered that he be taken into custody upon his failure to make payment thereof. The second, signed August 28, 1963, by Olive, E.J.,

after setting forth extensive findings of fact, determined that the husband was in arrears in the amount of $1,710.00, and that he had wilfully failed and refused to make the payments required by Judge Johnston's order of August 20, 1961; and it was ordered that he be confined in the common jail of Forsyth County until he complied with Judge Johnston's said order or was "otherwise discharged according to law."

Defendant, in her answer, did not plead said orders or either of them as an affirmative defense to plaintiff's action. Indeed, her pleading contains no reference to said orders or to the separate action in which they were entered. Absent such pleading, the said orders were not relevant to issues raised by the pleadings.

G.S. 50-11 provides, with exceptions not pertinent here, that "a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce."

The order entered by Judge Johnston in said separate action on August 20, 1961, is not before us. The two orders proffered in evidence by defendant relate to the status of said separate action as of August 2, 1962, and August 28, 1963, respectively. They do not show the status of said separate action when the present action came on for trial before Olive, E.J., at April 5, 1965, Civil Session.

Judgment of absolute divorce was entered herein on April 8, 1965. The record does not disclose facts sufficient to determine to what extent, if any, defendant, in her own right, is adversely affected by the judgment of absolute divorce. In this connection, see *Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867, and cases cited. With reference to the minor children, neither the separation agreement nor the judgment of absolute divorce limits the authority of the court to require plaintiff, the father, to make such payments for their support as the court deems right and proper. *Kiger v. Kiger*, 258 N.C. 126, 129, 128 S.E. 2d 235.

As indicated, the record does not disclose what occurred in said separate action subsequent to Judge Olive's order therein of August 28, 1963. In the present action, an order was entered June 22, 1964, providing that plaintiff pay defendant the sum of $180.00 per month for the support of the two minor children, and that he pay certain fees to defendant's counsel. At the trial of the present action, plaintiff, according to his uncontradicted testimony, was paying the $180.00 per month as required by the terms of this order.

The only other excluded document is a default judgment for $2,285.00 which the wife (defendant herein) obtained against the husband (plaintiff herein) at August 3, 1964, Civil Session in *an-*

other separate action. It recites that the amended complaint filed in such action alleged the wife was entitled to the $2,285.00 "for child support under the terms of a separation agreement entered into between the parties October 11, 1960." This judgment is based on plaintiff's contractual obligations under the separation agreement of October 11, 1960, not on his legal duty to support his minor children. Payment thereof is not enforceable by contempt proceedings. It is not pleaded or referred to in defendant's answer. Apparently, the minor children would be sole beneficiaries of the judgment if and when collected. It is not relevant to plaintiff's right to obtain a judgment of absolute divorce.

We find no error in the court's rulings relating to the admission and exclusion of evidence and defendant's assignments of error relating thereto are overruled.

There remains for consideration the assignment of error based on defendant's exception to the denial by Judge Crissman on March 3, 1965, of defendant's motion that the trial be deferred "until such time as the aforesaid (default) Judgment is paid and satisfied." This motion is based solely on the said default judgment for $2,285.00. As indicated, this judgment is based solely on defendant's contractual obligation under said separation agreement of October 11, 1960. There is no basis for the contention that failure to pay said judgment constituted contempt of court.

It does not appear that defendant made any motion for a continuance when the case came on for trial before Olive, E.J., at April 5, 1965, Civil Session.

"A motion for a continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion." 4 Strong, N. C. Index, Trial § 3. Even if there were a factual basis for defendant's contention that plaintiff was in contempt of court when the present action came on for trial, a motion by defendant for a continuance would be addressed to the discretion of the trial judge. *Lumber Co. v. Cottingham,* 168 N.C. 544, 84 S.E. 864; *Finance Co. v. Hendry,* 189 N.C. 549, 555-556, 127 S.E. 629. Conceding, without deciding, that defendant's motion for a continuance was for determination by Judge Crissman rather than by the trial judge, there is no basis for a contention that his denial of defendant's motion was a manifest abuse of discretion.

While "(i)t is generally held that, where a husband institutes an action for a divorce, and the court makes an order directing him to pay temporary alimony and suit money to enable the defendant to make her defense, his neglect or refusal to obey the order *will*

warrant the court in refusing to proceed further with the case until the payment is made as directed," (our italics) Annotation, 62 A.L.R. 663, 664, the uncontradicted evidence is that plaintiff complied fully with the only order entered *in the present case* with reference to support payments and counsel fees. With reference to the separate actions in which the wife was plaintiff and the husband was defendant, it is noted (in addition to matters set forth above) that nothing indicates the husband sought affirmative relief of any kind therein.

After full consideration, the assignments of error do not show grounds for awarding a new trial.

No error.

JOHN S. COVINGTON, JR. AND WIFE, PAULINE M. COVINGTON v. CITY OF ROCKINGHAM.

(Filed 4 February, 1966.)

1. Municipal Corporations § 35—

A municipality may establish a charge for sewerage service and require all users to pay for such service whether they live within or without the corporate limits, G.S. 160-249, and such charge is not a tax, but a charge for the use of the sewer facilities of the municipality in the disposal of polluted water and sewage which drains into the disposal system of the municipality.

2. Municipal Corporations § 16—

Whether a city commits acts amounting to an appropriation of a private sewerage system connected to its sewerage disposal system must be determined in accordance with the facts of each particular case.

3. Same—

Defendant municipality exacted a charge for sewerage service upon a private company whose sewer was connected with a sewer line constructed by and running through the lands of plaintiffs and thence into the city's outfall line. *Held:* The imposition of the charge does not amount to an appropriation of plaintiffs' private sewerage system.

APPEAL by defendant from *Phillips, E.J.*, February 1965 Civil Session of RICHMOND.

Plaintiffs own and operate a service station located on their tract of land situate at the southwestern intersection of U. S. Highway No. 1 and Midway Road in what was formerly Watson Heights, a suburb of the City of Rockingham, North Carolina.

This action arose out of a series of events which began in 1948, when plaintiffs began installing a system of sewer lines on their property. The sewer lines were completed, at intervals, by plaintiffs in October 1952, at a cost of $2,240.50. Plaintiffs' sewer system was connected with the City of Rockingham's outfall or sewer line, located under U. S. Highway No. 1, which emptied, at that time, into Falling Creek.

In February 1957, the Watson Heights section was annexed to Rockingham. On 1 February 1962, the governing board of the City of Rockingham, as authorized by G.S. 160-249, established a charge for sewerage service of 50% of the water bill. All individual property owners who were water customers of the City of Rockingham were, and still are, required to pay this sewer service charge.

The defendant's outfall or sewer line under U. S. Highway No. 1, to which plaintiffs' original line was connected in May 1948 and which emptied raw sewage into Falling Creek, was connected with the City of Rockingham's sewer disposal system or plant sometime prior to 1 February 1962.

The plaintiffs permitted the Ro-Jan Motel and a towel store owned by the motel to connect with one of the sewer lines installed by plaintiffs. The plaintiffs have no financial interest in the motel or the towel store.

It was stipulated by the parties hereto that no written contract has ever been entered into by the parties for the purchase and sale of said sewer lines from the plaintiffs to defendant.

Since 1 February 1962, plaintiffs have continued to make demand on defendant for payment for the sewer lines allegedly appropriated, and tendered in their complaint an easement "of a reasonable width in order that the defendant may have the right to maintain said sewer lines * * *."

Plaintiffs seek to recover $1,684.41, the alleged depreciated value of the sewer lines, and interest on said sum from and after 1 February 1962, at the rate of 6% per annum.

The court below refused to submit but one issue to the jury, which was as follows:

> "What amount, if anything, are the plaintiffs entitled to recover of the defendant for the appropriation of the sewer lines constructed by the plaintiffs prior to the annexation of the plaintiffs' property by the defendant as alleged in the complaint?
>
> "Answer: $1684.41, plus interest at 6% until paid, from Feb. 1, 1962."

From the signing of the judgment for plaintiffs, the defendant appeals, assigning error.

Pittman, Pittman & Pittman for plaintiffs appellee.
Deane & Deane, and J. Mack Holland, Jr., for defendant appellant.

DENNY, C.J. The defendant assigns as error the refusal of the court below to sustain its motion for judgment as of nonsuit made at the close of all the evidence.

It is clear from the evidence that in May 1948 plaintiff husband constructed an eight-inch sewer line, 58 feet in length, from a manhole in Rockingham's sewer outfall under U. S. Highway No. 1, to his premises, and at the end of this line constructed a manhole on the premises of plaintiffs. From this manhole the plaintiffs ran laterals through their property aggregating 379 feet. According to plaintiffs' evidence, these sewer lines were installed for the exclusive purpose of serving plaintiffs' filling station and developing their own property. The plaintiffs maintain a trailer camp on the premises and the trailers are connected to one of the sewer lines installed by plaintiffs. Whether the plaintiffs required the Ro-Jan Motel to pay for the connection with their sewer system is not disclosed by the record.

There is no evidence tending to show that the defendant has exercised a scintilla of control over the sewer lines installed by the plaintiffs, unless the establishment of the charge for sewerage service is so construed. However, we think the tender of an easement, made in the complaint, is tantamount to an admission that the defendant, up to that time, had not exercised any control over these lines by way of maintenance or by selling and making connections thereto. The tender of the easement, according to the complaint, was made "in order that the defendant may have the right to maintain said sewer lines." These lines were not constructed within the area of proposed streets but on the private property of the plaintiffs, and, insofar as the record discloses, the property has never been subdivided or further developed.

Plaintiffs contend that by establishing a charge for sewerage service and the collection of such charge from them and the Ro-Jan Motel and the towel store, all of whose sewage passes through plaintiffs' lines into defendant's sewer system, in effect, constituted an appropriation of plaintiffs' property, and the court below so charged the jury.

A municipality may establish a charge for sewerage service and require all its water customers to pay for such service whether such

customers live within or without the corporate limits of such municipality. G.S. 160-249.

The pertinent question raised on this appeal is whether or not the defendant's establishment of a charge for sewerage service amounted to a taking of plaintiffs' property, thereby creating a liability on the part of the defendant to pay the plaintiffs for the reasonable value of the sewer lines involved. This question must be determined in light of the facts in this particular case. *Spaugh v. Winston-Salem,* 234 N.C. 708, 68 S.E. 2d 838.

In *Huntley v. Potter,* 255 N.C. 619, 122 S.E. 2d 681, Moore, J., speaking for the Court, said:

> "Where there is no contract or municipal ordinance involved and the territory served by private water or sewer lines is annexed to a municipality, the owner of the lines may not recover the value thereof from the municipality unless it appropriates them and controls them as proprietor. The bare extension of the city limits does not amount to a wrongful taking or appropriation of the lines. Maintenance as a voluntary act on the part of the city does not amount to a taking of the property. *Farr v. Asheville,* 205 N.C. 82, 170 S.E. 125."

The case of *Farr v. Asheville,* 205 N.C. 82, 170 S.E. 125, tried before a jury, and in many respects similar to the instant case, involved the question of whether there had been a taking of plaintiffs' water and sewer system. The facts relied on by the plaintiffs to show a taking were not considered sufficient to make out a case, and this Court held that the motion for nonsuit should have been allowed. The Court said:

> "* * * The city owned a water line on the western boundary of the development, and also another line on Kimberly Avenue, which is east of the Farrwood development. The Farrwood construction was made in 1923 or 1924, and the city began furnishing water through the pipes claimed by the plaintiffs and collected water rentals from users within the area. The repairing of a leak and the flushing of a dead-end was incident to furnishing water. * * * Neither does the fact that a connection was made to the Farrwood Avenue lines outside the development constitute a wrongful appropriation of plaintiffs' property. In the last analysis the plaintiff built a private water system, and for his own convenience and profit, connected it with the city system on the east and west of his development. The city immediately began to furnish water to residents in the subdivision on the completion of the system and has continued

to do so up to the time the suit was brought * * * without any change in its methods and without any assertion of ownership of the water pipes laid by the plaintiffs. * * *"

In *Manufacturing Co. v. Charlotte,* 242 N.C. 189, 87 S.E. 2d 204, there was a verbal contract that the city would pay for the private sewer system when the involved area was taken into the city. This Court held the contract was void since it was not in writing, but that the plaintiff was entitled to recover on *quantum meruit* because, as stipulated, the city had "assumed maintenance and operation thereof." In *Jackson v. Gastonia,* 246 N.C. 404, 98 S.E. 2d 444, it was stipulated that the City of Gastonia had "taken over, used and controlled * * * water and sewer lines to the same extent as if said lines had been installed by the defendant (City) originally." These and similar cases relied on by the plaintiffs are not controlling on the facts in this record.

This Court, in *Spaugh v. Winston-Salem, supra,* said:

"From an examination of the cases cited and the decisions based on the particular facts of those cases, it is apparent that no comprehensive rule emerges, and that this case and others of like nature must be considered and determined in the light of the pertinent facts presented by the record in each case."

The foregoing statement was quoted with approval in *Jackson v. Gastonia, supra.*

In the case of *Candler v. Asheville,* 247 N.C. 398, 101 S.E. 2d 470, this Court quoted with approval from the case of *City of Seymour v. Texas Electric Service Co.,* 66 F. 2d 814 (C.C.A. 5), *(certiorari* denied 290 U.S. 685, 78 L. Ed. 590) as follows:

"'* * * In owning and operating a utility plant a city acts not in a governmental but in a proprietary capacity, (but) when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the State, as regulator. It exerts not the contractual power of the city, but the sovereign power of the state.'"

In Rhyne, Municipal Law, Sewers and Drains, § 20-5, page 462, *et seq.,* it is stated:

"The power of a municipal board or body to fix charges or rates for sewer service is legislative in character (see *Taxpayers & Citizens, etc. v. Board of W. & S. Comm'rs.,* 261 Ala. 110, 73 So. 2d 97) * * *.

"It is the majority rule that sewer service charges are neither taxes nor assessments, but are tolls or rents for benefits

received by the user of the sewer system; thus, a sewer rate fixed on the basis of assessed property values is invalid.

"* * * The overwhelming weight of authority holds that sewer service charges based on the amount of water used on the premises is a reasonable and valid regulation."

In the case of *Oliver v. Water Works & Sanitary Sewer Board,* 261 Ala. 234, 73 So. 2d 552, the Supreme Court of Alabama, in considering the question of the validity of a sewer service charge, said:

"* * * There is here no assessment of a tax for the construction of sewers in whole or in part, but only a charge for the required use * * * of the facilities of the city which is a burden imposed by authority of law upon city dwellers for the privilege of so residing, to prevent impairment of health and comfort of all the city dwellers alike."

In *Patterson v. City of Chattanooga,* 192 Tenn. 267, 241 S.W. 2d 291, the Court, in considering a charge for sewerage service, said:

"* * * (T)hese charges are for special benefits received and enjoyed by all users of the sewer system and are not taxes in the sense in which we ordinarily think of taxes. * * *

"* * * Here the user of water is assessed a certain amount for the use of the sewer which under ordinary circumstances is a necessary incident for the user of water to have to dispose of the sewage and water after it is used and polluted. It is upon these users alone that the charge is made and not upon the property as a whole but as the various property owners and properties become users of water they are charged for this service measured by the quantity of metered water supplied them. * * *

"The establishment and maintenance of a sewer system by a city is ordinarily regarded as an exercise of its police power. McQuillian, Sec. 1545. 'The construction of a sewer is the exercise of the police power for the health and cleanliness of the municipality, and such power is exercised solely at the legislative will. * * *.'"

In *Carson v. Sewer Commissioners of Brockton,* 182 U.S. 398, 45 L. Ed. 1151, it is held that the adoption of an ordinance establishing a charge of 30 cents per 1,000 gallons of sewage delivered to the sewer — the quantity so delivered to be determined by the meter readings — was not a taking of property without due process of law.

With the rapid growth of our cities and towns, it is becoming more and more essential for them to construct modern disposal plants or systems for the treatment and disposal of sewage. It is no longer safe or practical to permit the emptying of large quantities of raw sewage into our creeks and rivers; such practices constitute a health hazard that is now claiming the attention of our health authorities throughout the State.

We hold that a properly adopted ordinance of a municipality establishing a sewerage service charge, is not in the nature of a tax for the use of the users' sewer facilities, but it is a charge for the use of the sewer facilities of the municipality in the disposal of polluted water and sewage which drains into the disposal system of the municipality.

Therefore, on the facts disclosed by the record in this case, we hold that the defendant has not taken over or appropriated to its own use the sewer facilities installed by the plaintiffs, and that the court below committed error in not sustaining defendant's motion for judgment as of nonsuit. The ruling on said motion and the judgment entered below are

Reversed.

MRS. AMY McCULLOH, WIDOW AND ADMINISTRATRIX OF THE ESTATE OF JOHN L. McCULLOH, DECEASED v. CATAWBA COLLEGE AND EMPLOYERS MUTUAL CASUALTY COMPANY.

(Filed 4 February, 1966.)

1. Master and Servant §§ 82, 93—

A letter from a medical expert containing an opinion as to the degree of disability suffered by claimant at a much lower percentage than testified to by another expert at the hearing, and which the employer could have brought out at the hearing, does not constitute a proper predicate for an order of the Superior Court remanding the case to the Industrial Commission for a rehearing for newly discovered evidence.

2. Master and Servant § 93—

Where the Industrial Commission's findings as to the degree of permanent disability suffered by claimant as a result of injury are supported by the testimony of an expert witness before the Commission, the findings are conclusive on appeal, and upon the death of the employee from other causes his personal representative is entitled to recover for the benefits accrued but not paid at the time of his death, G.S. 97-29, and his sole dependent is entitled to recover for the unpaid balance of the benefits for permanent disability. G.S. 97-37.

3. Master and Servant § 94—

An exception to the award of the Industrial Commission on the ground that it is contrary to law is a broadside exception and presents only whether the facts found by the Commission support the award.

APPEAL by plaintiff from *Gwyn, J.*, May 17, 1965 Civil Session of ROWAN.

Proceeding under the Workmen's Compensation Act. Plaintiff is the widow and sole dependent of the deceased employee. She is also his administratrix.

Prior to June 19, 1962, for an average weekly wage of $77.00, John L. McCulloh, 57-year-old electrician, had been employed by Catawba College for more than a year without missing any time due to illness or accident. On that day, while at work, a ladder "buckled up under him," and he fell across a chair. Although he was in great pain and unable to sleep, he continued to report for work and did not seek medical advice until June 22, 1962, when X rays revealed the fracture of three ribs on his left side. A rib support failed to lessen his pain or to permit him any sleep. On June 25, 1962, he was hospitalized with extremely high blood pressure and pneumonia. Additional X rays revealed that five additional ribs on the left had been fractured. In the hospital, he suffered a cerebral hemorrhage which affected his left arm and leg.

When McCulloh left the hospital, on July 9, 1962, his blood pressure had returned to normal. By August 23, 1962, his ribs had healed. His left arm remained weak, and he dragged his left leg. This condition never improved, nor was he ever able to return to work. On November 25, 1962, he was admitted to the Baptist Hospital at Winston-Salem for the removal of a cancerous kidney. He recovered satisfactorily from this operation and was discharged on December 5, 1962. Two days later, on December 7, 1962, following a second cerebral hemorrhage, he was readmitted. This stroke ultimately caused his death on January 6, 1963. All the doctors agreed that this second vascular accident did not result directly from his injury by accident on June 19, 1962.

By stipulation dated August 17, 1962 (about two weeks after the accident), McCulloh and defendants agreed, with the approval of the Commission, that defendants would pay him compensation at the rate of $35.00 per week for an undetermined period beginning June 20, 1962. A total of $840.00 was paid over a period of 24 weeks under this agreement. On June 17, 1963, plaintiff, as widow and administratrix of McCulloh, filed her claims for additional compensation. The case was heard on September 12, 1963, in Salisbury and on February 17, 1964, in Winston-Salem. At the September hearing,

Dr. David A. Rendleman, Jr., witness for plaintiff, testified that, in his opinion, McCulloh's pain and loss of sleep following his fall from the ladder caused an elevation of blood pressure which, in turn, caused the first cerebral hemorrhage with resulting "left-sided weakness." It was also Dr. Rendleman's opinion that, when McCulloh left the hospital on July 9th, he had suffered a 60% permanent loss of the use of his left arm and 100% loss of the use of his left leg. At the February hearing, Dr. W. H. Boyce, urologist, and Dr. Courtland H. Davis, neurologist, both of the staff of Bowman Gray School of Medicine, testified for defendant. It was Dr. Boyce's opinion that McCulloh's fall was more likely a result of preexisting central arteriosclerosis and vascular disease than a cause of it. Dr. Davis, who first saw McCulloh on November 21, 1962, was of the opinion that his arteriosclerosis was "of long standing" and that his fall on June 19th "was an aggravating feature" in the production of the thrombosis which caused his first vascular accident. Although Dr. Davis testified that he had observed McCulloh's "left-sided weakness," counsel did not ask him for his opinion as to the percentage of disability which McCulloh had suffered as a result of it. Because of the illness of defendants' regular counsel, different attorneys represented defendants at the first hearing. Between the two, however, the evidence taken at the September hearing had been transcribed.

The hearing commissioner filed his opinion on May 22, 1964. He found, in accordance with Dr. Rendleman's testimony, that McCulloh's first stroke, or vascular accident, resulted from his injury by accident on June 19, 1962; that the accident caused him to be disabled from then until January 6, 1963, the date of his death; and that the accident had caused him to sustain a 60% permanent loss of the use of his left arm and 100% loss of the use of his left leg. Based on these findings, he held plaintiff, as administratrix, entitled to compensation for McCulloh's temporary total disability from June 25, 1962, until his death on January 6, 1963, at the rate of $35.00 per week. From this award the sum of $840.00 previously paid was ordered deducted. He also held plaintiff, as widow, entitled to compensation at the rate of $35.00 per week for a period of 332 weeks beginning January 6, 1963, to cover the permanent loss of use of deceased's left arm and left leg, compensation, however, not to exceed $10,000.00. Her claim for death benefits was denied.

Defendants appealed to the Full Commission, contending that the findings were not supported by the evidence and were against its greater weight and that the conclusions of law were "erroneous." They moved "that it hear additional evidence on the question of the extent of decedent's disability." The motion was based upon a letter which Dr. Davis had written to defendants' counsel on August 19,

1964, in response to an inquiry as to the percentage of McCulloh's disability. Dr. Davis wrote: "Your letter of July 8, must be answered from records which are available to you. . . . I would estimate the impairment of function at about 25 percent of the left upper and left lower extremities." The Full Commission denied the motion for a further hearing and adopted the opinion and award of the hearing commissioner.

Defendants appealed to the Superior Court for that: (1) The Commission's "findings of fact as to permanent injury to the left arm and left leg of the claimant" are not supported by competent evidence; (2) its order is "contrary to law"; and (3) it erred in refusing "to allow defendants another hearing to produce additional medical testimony." When this appeal was heard in the Superior Court, plaintiff tendered judgment overruling each of defendants' exceptions and affirming the award of the Commission. Judge Gwyn declined to sign the tendered judgment. Instead, he treated the letter which Dr. Davis wrote counsel for defendants on August 19, 1964, as newly discovered evidence, set aside the order of the Full Commission, and remanded the cause "so that the defendants may introduce and have their additional or newly discovered evidence considered." From this order plaintiff appeals, assigning as error the refusal of the court to sign the tendered judgment and his order remanding the case for further hearing.

Spry, Hamrick and Doughton and W. Scott Buck for plaintiff appellant.

Nelson Woodson and Max Busby for defendant appellees.

SHARP, J. The first question to be considered is whether, under the facts presented, the judge had authority to grant defendants' motion for a rehearing on the grounds of newly discovered evidence.

After an appeal from an award of the Industrial Commission has been duly docketed in the Superior Court, the judge "has the power *in a proper case* to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission." *Byrd v. Lumber Co.*, 207 N.C. 253, 255, 176 S.E. 572, 573. (Italics ours.) *Accord, Moore v. Stone Co.*, 251 N.C. 69, 110 S.E. 2d 459. The burden is upon the applicant for such a rehearing to rebut the presumption that the award is correct and that there has been a lack of due diligence. He makes out "a proper case" for the granting of a new hearing upon the ground of newly discovered evidence only when it appears by affidavit:

"(1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail." *Johnson v. R. R.*, 163 N.C. 431, 453, 79 S.E. 690, 699.

Here, defendants have failed to meet requirements (4), (6), and (7) above. Dr. Rendleman had given his opinion as to the percentage of McCulloh's disability at the September 1963 hearing. This evidence had been transcribed and was available to defendants' regular counsel when Dr. Davis testified at the hearing in Winston-Salem in February 1964. At that time, counsel had every opportunity to question him on all aspects of plaintiff's claim, but Dr. Davis was not asked for his opinion as to the degree of McCulloh's permanent disability. Furthermore, the opinion which Dr. Davis expressed in his letter, that McCulloh had only a 25% disability in his left extremities, merely contradicts Dr. Rendleman's opinion that the disability was 60% and 100% respectively. Finally, Dr. Davis' opinion is not evidence of such a nature as to show that on another hearing a different result would probably be reached so that "right will prevail." Since the Commission, the ultimate fact-finding body in this case, considered Dr. Davis' letter before it denied defendants' motion based upon it, there is scant reason to believe that a different result would probably be reached if a rehearing were granted. *Moore v. Stone Co., supra.*

Before an applicant who moves for a new trial upon the grounds of newly discovered evidence may invoke the discretionary power of the Superior Court, he must meet the seven requirements set out in *Johnson v. R. R., supra. Moore v. Stone Co., supra; Sanger v. Gattis*, 221 N.C. 203, 19 S.E. 2d 625; *Bullock v. Williams*, 213 N.C. 320, 195 S.E. 791; *Byrd v. Lumber Co., supra; Crane v. Carswell*, 204 N.C. 571, 169 S.E. 160. We conclude, therefore, that the Superior Court was without jurisdiction to allow defendants' motion and that the Commission's denial of it may not be held for error. The rules of the Industrial Commission (adopted under G.S. 97-80) "relative to the introduction of new evidence at a review by the Full Commission, are in accord with the decisions of this Court as to granting new trials for newly discovered evidence." *Tindall v. Furniture Co.*, 216 N.C. 306, 311, 4 S.E. 2d 894, 896. *Accord, Hall v.*

Chevrolet Co., 263 N.C. 569, 139 S.E. 2d 857; *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799.

The next question is: Did the judge err in refusing to sign the judgment tendered by plaintiff; The answer is YES.

The Commission's findings of fact that the accident on June 19, 1962, caused deceased to sustain a 60% permanent loss of the use of his left arm and a 100% loss of the use of his left leg are indubitably supported by the testimony of Dr. Rendleman. Therefore, this finding of fact, the basis of defendants' first exception on their appeal from the Full Commission to the Superior Court, is binding upon the Superior Court and upon us. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747. Defendants' second exception, "that said order has no basis in law and is contrary to law," is broadside. It presents only the question whether the facts found support the judgment. *Worsley v. Rendering Co.* and *Sugg v. Rendering Co.*, 239 N.C. 547, 80 S.E. 2d 467.

McCulloh's right, under G.S. 97-29, to compensation "for indeterminate weeks" as a result of his fall on June 19, 1962, had been conceded by defendants, who had paid compensation for 24 of the 29 weeks which elapsed between his fall and his death. Compensation which accrues under G.S. 97-29 during the lifetime of an injured worker but is unpaid at his death becomes an asset of his estate. *Inman v. Meares*, 247 N.C. 661, 101 S.E. 2d 692. The award of compensation at $35.00 per week to the plaintiff as administratrix of McCulloh during the period between his injury and his death, with credit for the amount paid to him during his lifetime, is supported both by unchallenged findings of fact and by the law.

Under G.S. 97-31(13), (15), and (19), McCulloh was entitled to compensation for a total of 332 weeks for the loss of use of his left arm and leg. G.S. 97-37 provides that when an employee who is entitled to compensation for an injury covered by G.S. 97-31 dies from any other cause than the injury for which he is entitled to compensation, payment of the unpaid balance of compensation shall be made first "to the surviving whole dependents." Plaintiff, as his widow and sole dependent, was entitled to the full compensation, since none had been paid decedent.

The judgment of the court below is vacated, and the cause is remanded for entry of judgment overruling defendants' exceptions and affirming the award of the Full Commission.

Error and remanded.

DONALD D. JOYNER, EMPLOYEE v. A. J. CAREY OIL COMPANY, INC., EMPLOYER; EMPLOYERS MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 4 February, 1966.)

1. Master and Servant § 69—

Compensation for an employee who holds separate jobs must be based exclusively upon his average weekly wage in the employment in which the injury occurs.

2. Same—

The intent of G.S. 79-2(5) is that results fair and just to both the employer and employee be obtained in computing the amount of an award, and the statute requires that the basis of computation be that amount which will most nearly proximate the amount which the injured employee, except for the injury, would be earning in the employment in which he was working at the time.

3. Master and Servant § 68—

Where the evidence conclusively shows that the employer hired an extra driver only during his peak seasons and that some weeks of the year the job was nonexistent, the employment cannot be treated as though it were a continuous one with regular wages, and fairness to the employer requires that both the peak and slack periods be taken into consideration.

4. Same—

The evidence disclosed that an employer employed an extra driver only during his peak seasons, and the evidence further disclosed the amount that claimant and his predecessor in the job had been paid for the 52 weeks prior to the injury, and there was no evidence that this period was exceptional. *Held:* The proper method of computing compensation is to divide the amounts earned by claimant and his predecessor during the 12 months' period by 52.

APPEAL by defendants from *Clark, S.J.*, April, 26, 1965 Civil Session of LENOIR.

Proceeding under the Workmen's Compensation Act.

The material facts are not in dispute. Plaintiff, 27 years old, was regularly employed for five and one-half days per week as claims superintendent for Local Linen Service of Kinston (Linen Service) at a weekly wage of $128.00. From June 25, 1963 until August 31, 1963, he also held a part-time job with defendant A. J. Carey Oil Company, Inc. (Oil Company), driving a tanker between Kinston and Wilmington at $9.00 per round trip. On August 31, 1963, when plaintiff had been driving only about two months, he was involved in a collision. The tanker overturned and, as a result, plaintiff is permanently paralyzed from his waist down. He also received other injuries minor by comparison. The Commission found him to be totally and permanently disabled.

At the time of his injury, plaintiff had made 26 trips for defendant Oil Company: 3 in June, 8 in July, and 15 in August. In these 10 weeks he had earned $234.00. During the winter months and during July and August, when the farmers are curing tobacco, Oil Company's regular driver cannot take care of the loads, and defendant employs an additional part-time driver. Plaintiff's predecessor in this part-time job was Dan Whitehurst, who, according to the testimony of defendant's bookkeeper worked from September 1, 1962, until June 6, 1963. During this period, his total earnings, for 90 trips at $9.00 each, were $810.00. Between the time Whitehurst made his last trip and plaintiff made his first, Oil Company had no need for a part-time driver. The written record of trip schedules and amounts earned by Whitehurst which the witness filed with the hearing commissioner show a total of only 86 trips made during 26 weeks from September 6, 1962, to March 6, 1963, inclusive. If the written record is correct, there were 16 weeks during which Oil Company needed no part-time driver. If the bookkeeper is correct, only 3 weeks.

The Commission found: (1) Plaintiff's average weekly wages during 10 weeks as an employee of Oil Company were $23.40. (2) Whitehurst's average weekly wage during 26 weeks of similar employment was $31.15. (The Commission apparently accepted the bookkeeper's *testimony* as to Whitehurst's earnings and the written *record* as to the number of weeks in which the sum was earned.) (3) Combining the weeks worked (36) and wages earned ($1,044.00) by both plaintiff and Whitehurst, defendant paid an average weekly wage of $29.00 for their services. (This figure was obtained by dividing weeks worked into wages earned.) (4) Plaintiff's average weekly wage as an employee of both Linen Service and Oil Company was $151.40 ($128.00 plus $23.40). Upon these facts the Commission found that:

> "It would be manifestly unfair to the employee to take his earnings for the extra work he was doing at the time of his injury to establish his average weekly wage, since this would establish his average weekly wage at approximately one-fifth of what he was actually earning, and for this exceptional reason it is found as a fact that such a method of computation would be unfair and that it would not most nearly approximate the amount which the injured employee would be earning were it not for the injury. . . ."

Concluding as a matter of law "that plaintiff's average weekly wage prior to the admitted injury by accident was $151.40," the Commission awarded plaintiff compensation for total and permanent dis-

ability at the rate of $37.50 per week for life. The Superior Court affirmed this award. Defendants appeal, assigning as error (1) the inclusion of plaintiff's wages from Linen Service in fixing his average weekly wages for the purpose of compensation, and (2) the method by which the Commission established the average weekly wages which plaintiff earned while driving a tanker for Oil Company.

LaRoque, Allen & Cheek by G. Paul LaRoque for plaintiff appellee.

Wallace and Langley by P. C. Barwick for defendant appellants.

SHARP, J. The first question presented by this appeal is decisively answered by the opinion in *Barnhardt v. Cab Co., ante,* p. 419. When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. This case and *Barnhardt* point out a *hiatus* in our Workmen's Compensation Act which the Legislature may wish to bridge to prevent future duplication of these unhappy results.

The second question posed is whether the Commission used the correct method to ascertain plaintiff's average weekly wages from Oil Company. In determining them to have been $23.40, the Commission used the second method contained in G.S. 97-2(5). This method provides:

> "Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained."

Defendants contend that, since the oil business is seasonal, it is unfair to defendant employer to use this method because it gives plaintiff the advantage of wages earned in the "peak" tobacco-curing season without taking into account the slack periods in which the Oil Company employs no relief driver. Defendants contend that the Commission should have employed the fourth method in G.S. 97-2(5) which provides:

> "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will

most nearly approximate the amount which the injured employee would be earning were it not for the injury."

Had plaintiff been the only relief driver employed by Oil Company for the twelve months preceding his injury, he would not have worked every week. The compensation which he collects, however, — whatever the amount — will be paid every week. The dominant intent of G.S. 97-2(5) is that results fair and just to both employer and employee be obtained. Results fair and just, within the meaning of the statute "consist of such 'average weekly wages' as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury." *Liles v. Electric Co.*, 244 N.C. 653, 660, 94 S.E. 2d 790, 796.

Whitehurst's employment began September 1, 1962, and plaintiff's ended on August 31, 1963. Whether Whitehurst's employment ended on March 6th or June 6th, the evidence is that between the time it ended and plaintiff's began, Oil Company had no need for a part time or relief driver and employed none. Plaintiff and Whitehurst did the same work for the same employer and were paid the same wages. Theirs was, in effect, one continuous employment for which we have a complete record during the 52 weeks preceding plaintiff's injury. This employment is inherently part-time and intermittent. It does not provide work in each of the 52 weeks of the year; some weeks the job is non-existent. It cannot, therefore, be treated as if it were a continuous one with regular wages. Fairness to the employer requires that we take into consideration both peak and slack periods.

There is nothing in the evidence to indicate that the period from September 1, 1962, through August 31, 1963, was not a typical year. The total of Whitehurst's and plaintiff's wages during this 12-month period was $1,044.00. "Were it not for the injury," plaintiff himself would not be earning more than this sum in a normal year. Dividing this figure by 52 gives an average weekly wage of $20.08, which takes into account all the trips for which a relief driver was typically required. This is the result which defendants contend the Commission should have reached under the "exceptional reasons" method, and we are constrained to agree that it is the proper one.

Plaintiff relies upon *Liles v. Electric Co., supra,* wherein this Court held that "upon this record the 'average weekly wages' of decedents are to be computed in accordance with the second method prescribed by G.S. 97-2(e) (now G.S. 97-2(5))." In *Liles*, however, *continuous*, part-time employment was available. There, it was the *employee* who was not available for full-time employment. This

case presents the converse of that situation, for here the employee was continuously available and the *job* was not. In *Liles,* the Court held that a part-time job could not be converted into a full-time job for the purpose of compensation. By the same token, an intermittent part-time job cannot here be treated as a continuous one. From the statement of facts in *Liles,* it appears that the period of the deceased worker's employment had been the "peak season." But, as the opinion points out, the record contained no evidence as to the amount which a part-time worker, such as decedent, had earned in the same or similar employment in the locality during the 52 weeks next preceding the injury. The record in this case does contain such evidence.

The judgment of the Superior Court overruling defendant's exceptions to the award of the Commission is vacated, and this cause is remanded to the Superior Court to the end that it enter a judgment returning the case to the Industrial Commission for the entry of an award in accordance with this opinion.

Error and remanded.

EARLE L. THOMAS, INDIVIDUALLY AND D/B/A THOMAS BROKERAGE COMPANY v. FROSTY MORN MEATS, INC.

(Filed 4 February, 1966.)

1. Constitutional Law § 26; Judgments § 44—

In an action on a foreign judgment, such judgment must be given the same efficacy as it has in the jurisdiction rendering it, Constitution of the United States, Art. IV, § 1, and a duly authenticated transcript imports verity and validity with the presumption in favor of jurisdiction, and the burden is upon defendant to avoid the judgment by showing that the court rendering it had no jurisdiction as to the subject matter or of the person, or other vitiating matter.

2. Process § 13; Constitutional Law § 24—

While ordinarily no judgment *in personam* can be rendered against a defendant not personally served with summons within the jurisdiction, this rule is not absolute, and there may be a valid substitute service upon a defendant having such contacts within the jurisdiction that such service does not offend "the traditional notions of fair play and substantial justice."

3. Judgments § 44—

This action was instituted by a nonresident on a judgment obtained by him in the state of his residence against a domestic corporation. The

record disclosed that defendant corporation was personally served with process beyond the territorial jurisdiction of the courts of plaintiffs' residence. *Held:* The record does not conclusively show that the *in personam* judgment was void for want of jurisdiction, but our courts must consider the judgment roll in the proceedings in that jurisdiction in the light of its laws and court decisions to determine whether that court acquired jurisdiction of defendant corporation by substitute service.

APPEAL by plaintiff from *Martin, S.J.,* May 1965 Session of LENOIR.

Civil action instituted in Lenoir County, North Carolina, on 6 August 1964, to recover on a foreign judgment. Plaintiff is a resident of the State of New York and defendant is a North Carolina corporation with its principal office located in Kinston, Lenoir County, North Carolina.

Plaintiff alleges *inter alia* that the Supreme Court of Westchester County, State of New York, rendered judgment on 16 April 1964 in an action entitled "EARLE L. THOMAS, INDIVIDUALLY AND D/B/A THOMAS BROKERAGE COMPANY, PLAINTIFF V. FROSTY MORN MEATS, INC., DEFENDANT," as follows:

> "The Summons and Verified Complaint having been personally served on the defendant on the 24th day of January 1964, by H. C. BROADWAY, the Sheriff of Lenoir County, North Carolina, and the time of the defendant to appear and answer the Verified Complaint having expired; and the time in which the defendant could appear and answer the Verified Complaint not having been extended by stipulation or Order of Court and the defendant being wholly in default:
>
> "NOW, on motion of MORTON SINGER, the attorney for the plaintiff; it is
>
> "ADJUDGED that EARLE L. THOMAS, individually and doing business as THOMAS BROKERAGE COMPANY . . . do recover from FROSTY MORN MEATS, INC., . . . the sum of $719.60 with interest amounting to $204.25 plus $36.00 costs as taxed amounting in all to the sum of $964.85 and that plaintiff have execution therefor."

Plaintiff further alleges that no part of the judgment debt has been paid, and prays that he recover of defendant the sum of $964.85 with interest thereon from 16 April 1964.

Defendant, answering, avers that the New York court acquired no jurisdiction of defendant, no valid service of process was made upon it, defendant made no voluntary appearance in the New York court, and the said judgment is void.

When the cause came on for trial, the parties stipulated "that no payment has been made on the purported judgment . . . and that in the complaint, which was duly verified by the plaintiff, in the action against the defendant in the Supreme Court of the State of New York . . . it was stated and alleged that the causes of action sued upon arose within the State of New York."

Plaintiff introduced in evidence "a duly certified copy" of the New York judgment and rested. Defendant moved for judgment of nonsuit. The motion was allowed.

Judgment was entered as follows:

> ". . . the only evidence being offered by the plaintiff was a certified copy of the (New York) Judgment . . .; and it appearing to the court from the face of said Judgment and from the pleadings filed herein that this action was brought upon a judgment *in personam* rendered in the Supreme Court of the State of New York, Westchester County; and it further appearing to the court from the face of said judgment that service of Process upon the defendant in the action in which the Judgment of the State of New York was rendered was made . . . by the Sheriff of Lenoir County.
>
> "AND IT FURTHER APPEARING TO THE COURT, and the court so finds as a fact that no personal service of process upon the defendant has ever been made within the territorial jurisdiction of the Supreme Court of the State of New York, and that the judgment rendered by such Court without such service of process is not entitled to recognition in the courts of the State of North Carolina under the full faith and credit clause of the Constitution of the United States;
>
> "NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED, that the plaintiff take nothing by this action. . . ."

Plaintiff excepts and appeals.

Clifton W. Paderick for plaintiff.
LaRoque, Allen & Cheek for defendant.

MOORE, J. Article IV, section 1, of the Constitution of the United States commands that full faith and credit shall be given in each state to the judicial proceedings of every other state. And the acts of Congress, enacted pursuant to the power granted by that clause of the Constitution, direct that judgments shall have full faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. *Dansby v. Insurance Co.*, 209 N.C. 127, 183

S.E. 521. Judgments of other states are put on the same footing as domestic judgments. *Webb v. Friedberg,* 189 N.C. 166, 126 S.E. 508; *Marsh v. R. R.,* 151 N.C. 160, 65 S.E. 911; *Miller v. Leach,* 95 N.C. 229. When a judgment rendered by a court of one state becomes the cause of action in a court of another state and the transcript made in the state of its rendition, duly authenticated as provided by the act of Congress (Title 28, USCA, § 1738; General Statutes of North Carolina, Appendix III), is produced, it imports verity and validity. *Levin v. Gladstein,* 142 N.C. 482, 55 S.E. 371.

In challenging a foreign judgment a defendant has the right to interpose proper defenses. He may defeat recovery by showing want of jurisdiction either as to the subject matter or as to the person of defendant. *Hat Co., Inc. v. Chizik,* 223 N.C. 371, 26 S.E. 2d 871; *Casey v. Barker,* 219 N.C. 465, 14 S.E. 2d 429; *Dansby v. Insurance Co., supra.* However, jurisdiction will be presumed until the contrary is shown. *Levin v. Gladstein, supra.*

In the case at bar the defense is that the New York court had no jurisdiction of defendant. It is elementary that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, the court has no jurisdiction of the person and judgment rendered against him is void. *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26. But want of jurisdiction of the person is an affirmative defense in a suit on a foreign judgment and the burden is on defendant to establish it, unless it affirmatively appears from plaintiff's pleadings or the judgment sued on that the court had no jurisdiction of defendant. *Casey v. Barker, supra.*

Defendant contends that the New York judgment shows on its face that there was no proper and legal service of summons. The court below adopted this view and nonsuited the action. The court concluded that the New York judgment is not entitled to faith and credit in North Carolina for the reason that it shows on its face "that no personal service of process upon the defendant has ever been made within the territorial jurisdiction of the Supreme Court of the State of New York."

"It is a general rule of constitutional law that no judgment *in personam* can, consistently with due process, be rendered against a nonresident without personal service of process upon him within the territorial jurisdiction of the court in which the suit is brought, and that a judgment rendered without such service of process is not entitled to recognition in the courts of other states under the full faith and credit clause." 30A Am. Jur., Judgments, § 265, p. 329. But this rule is not absolute. There is a decided trend in favor of *in personam* jurisdiction based on substituted service or personal service beyond

the territorial jurisdiction of the forum state. Most of the states have by statute so provided in certain circumstances, and the courts have held that such statutes do not violate due process; this is especially true in actions against foreign corporations. The Supreme Court of the United States, in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) stated: "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 aganist persons not served with process within their boundaries. But just where this line of limitations 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 this connection see *Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225.

The fact that defendant, a North Carolina corporation, was served with process beyond the territorial jurisdiction of the New York court is not, nothing else appearing, sufficient to establish want of jurisdiction of defendant by the New York court, as against the principle that jurisdiction will be presumed until the contrary is shown. The validity and effect of a judgment of another state must be determined by the laws of that state. *Dansby v. Insurance Co.*, *supra*. It does not appear that the court below had before it the judgment roll and proceedings in the New York case nor that it considered the laws of New York, as interpreted by court decisions of that state, in passing upon the jurisdictional question. The basis upon which decision to nonsuit was placed, the service of summons outside the state of New York, is inconclusive in the light of the record before us. The defendant will have the opportunity, when the cause comes on again for hearing, to show, if it can, from the proceedings had in the New York court and the laws of that state that there was no legal and valid service of process.

Reversed.

STATE OF NORTH CAROLINA v. FRANK FOWLER.

(Filed 4 February, 1966.)

1. False Pretense § 1—

The crime of false pretense is statutory in this State, and the statute specifically denominates the crime a felony. G.S. 14-100.

2. Indictment and Warrant § 9—

An indictment for a felony which does not use the word "feloniously" is fatally defective unless the General Assembly otherwise expressly provides.

3. Criminal Law § 139—

The Supreme Court will review the record proper for fatal defect appearing upon its face, and therefore will arrest judgment *ex mero motu* when it appears that the conviction was upon a fatally defective indictment.

4. Criminal Law § 121—

The arrest of judgment because the indictment is fatally defective vacates the verdict and sentence and permits the State, if so advised, to proceed against the defendant upon a sufficient bill of indictment.

ON *certiorari* from *Martin, S.J.*, 4 January 1965 Special Criminal Session of MECKLENBURG.

Criminal prosecution on an indictment that charges that Frank Fowler by means of false pretenses did obtain from the North Carolina Savings and Loan Association $2,500 in money, the property of said Association, a violation of G.S. 14-100.

The defendant was represented by Leon Olive, an attorney at law who had been employed and paid by him. The defendant entered a plea of not guilty. The jury said for its verdict that Frank Fowler is guilty of the crime of obtaining goods under false pretenses as charged in the indictment.

The judgment of the court was that the defendant be imprisoned in the Central Prison at Raleigh, North Carolina, for a term of four years. From the judgment, defendant in open court appealed to the Supreme Court. By consent and in the discretion of the court, defendant was allowed 30 days within which to prepare and serve statement of case on appeal upon the State, and the State was allowed 10 days thereafter within which to serve countercase or file exceptions. Judge Martin further ordered that upon filing proper affidavits defendant is allowed to appeal *in forma pauperis.*

On 15 February 1965 the solicitor for the State, pursuant to G.S. 1-287.1, filed a notice with the court that he would move the court for an order dismissing the appeal in this case, in that no statement of case on appeal to the Supreme Court had been served upon the

State within the time allowed and that no extension of time within which to serve case on appeal had been granted. On the same date the Honorable J. Frank Huskins, judge presiding, issued an order commanding the sheriff to serve a copy of this notice upon Leon Olive, attorney for defendant, by leaving a copy of said notice with the said Leon Olive. This service of process was duly made on 17 February 1965. On 25 February 1965, Judge Huskins entered an order in which, after reciting the motion by the solicitor for the State and the service upon defendant's counsel Leon Olive, and that no statement of case on appeal had been served upon the State within the time allowed and that no extension of time within which to serve case on appeal had been granted, and further reciting that the defendant did not appear in person or through counsel to protest it, he ordered, pursuant to G.S. 1-287.1, that defendant's appeal to the Supreme Court be dismissed.

On 20 March 1965 defendant *in propria persona* filed in the Superior Court of Mecklenburg County a petition for a review of the constitutionality of his trial, in which he stated, *inter alia*, that he had paid Leon Olive to perfect his appeal to the Supreme Court and that he had not done so, and prayed the court that a lawyer be appointed to represent him in this proceeding, under the provisions of G.S. 15-219. On 26 March 1965 the Honorable Francis O. Clarkson, senior resident judge of the Mecklenburg Judicial District, entered an order appointing George J. Miller, an attorney at law, to represent defendant in his petition for a review of the constitutionality of this trial. This petition for review of the constitutionality of his trial came on to be heard on 2 April 1965 before Judge Clarkson. His counsel George J. Miller was present with the defendant, and during the hearing defendant stated to Judge Clarkson under oath in open court that he desired to withdraw his petition; that he saw no reason why he should not go ahead and serve the four-year sentence imposed by the Mecklenburg County Superior Court, for the reason that he had a concurring sentence of five years from Alamance County; that he understandingly and knowingly withdrew his petition and desired to abandon the same; and that he did not desire to prosecute his appeal to the Supreme Court of North Carolina. Whereupon, Judge Clarkson entered an order dismissing his petition.

On 2 June 1965 defendant *in propria persona* filed a petition with Judge Clarkson to reinstate his original petition for a review of the constitutionality of his trial. On 28 July 1965 the Honorable Harvey A. Lupton, judge presiding, entered a judgment denying defendant's petition, and entered an order that he be remanded to the custody

of the proper authorities and be turned over to serve his prison sentence. On the same date Judge Lupton entered an additional order appointing George J. Miller to prepare and file an application for a writ of *certiorari* with the Supreme Court of North Carolina requesting that defendant may bring up his appeal from his trial and conviction at the 4 January 1965 Session before Martin, S.J., and that the court reporter transcribe the proceedings had in the trial and furnish a copy to George J. Miller, and that the County of Mecklenburg pay her in full for transcribing the proceedings.

On 31 August 1965 this Court allowed defendant's petition for writ of *certiorari* to bring up his appeal from his conviction at the 4 January 1965 Special Criminal Session of Mecklenburg.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, and Trial Attorney J. B. Hudson, Jr., for the State.

George J. Miller for defendant appellant.

PARKER, J. In North Carolina the crime of false pretense is statutory, G.S. 14-100, and the statute specifically states the crime is a felony. *S. v. Davenport,* 227 N.C. 475, 495, 42 S.E. 2d 686, 700.

The indictment in the instant case purports to charge defendant with the crime of false pretense as defined in G.S. 14-100, yet the indictment contains no where in it the word *feloniously.* We have held repeatedly that indictments charging felonies which omit the word *feloniously* are fatally defective, unless the General Assembly otherwise expressly provides, and the judgment must be arrested. *S. v. Jesse,* 19 N.C. 297; *S. v. Purdie,* 67 N.C. 26; *S. v. Rucker,* 68 N.C. 211; *S. v. Caldwell,* 112 N.C. 854, 16 S.E. 1010 (a false pretense case); *S. v. Callett,* 211 N.C. 563, 191 S.E. 27; *S. v. Whaley,* 262 N.C. 536, 138 S.E. 2d 138; *S. v. Price,* 265 N.C. 703, 144 S.E. 2d 865.

Defendant made no motion in the trial court or in the Supreme Court to arrest the judgment in the instant case because the indictment is fatally defective, in that it omits the word *feloniously.*

The indictment is a part of the record proper. The court cannot properly give judgment unless it appears in the record that an offense is sufficiently charged. It is the duty of this Court to look through and scrutinize the whole record, and if it sees that the judgment should have been arrested, it will *ex mero motu* direct it to be done. This Court *ex mero motu* takes notice of the fatally defective indictment in the instant case, and orders that the judgment of imprisonment in the instant case be arrested. *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Thorne,* 238 N.C. 392, 78 S. E. 2d 140; *S. v. Scott,* 237 N.C. 432, 75 S.E. 2d 154.

The indictment on its face is void, and the judgment is arrested. The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment. *S. v. Rucker, supra; S. v. Caldwell, supra; S. v. Callett, supra; S. v. Scott, supra; S. v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81; *S. v. Strickland, supra; S. v. Whaley, supra;* 21 Am. Jur. 2d, Criminal Law, § 524.

Judgment arrested.

JIM RUSSELL AND SEYMOUR ETT, T/A RUSSETT SALES COMPANY v. BEA STAPLE MANUFACTURING COMPANY, INCORPORATED.

(Filed 4 February, 1966.)

1. Process § 11—

Service of process commanding the sheriff to summon a named individual, local agent for a named corporation, defendants, does not bring the corporation into court, but is service upon the named individual alone, the words "local agent" being merely *descriptio personae.*

2. Judgments § 1—

A valid judgment against a defendant can be rendered only after the court has obtained jurisdiction of the defendant in some way sanctioned by law.

3. Judgments §§ 14, 19—

A judgment by default against a defendant based upon an invalid service of process is a nullity and should be vacated upon motion made upon special appearance.

APPEAL by defendant from *Gambill, J.,* 17 May 1965 Civil Session of GUILFORD, High Point Division.

Civil action by plaintiffs, copartners of a partnership having its principal place of business in High Point, North Carolina, to recover from defendant, a New Jersey corporation organized and domiciled in New Jersey, the sum of $5,000 allegedly due for sales commissions under an agreement between the parties.

The action was commenced on 16 February 1965 by the issuance of summons by the clerk of the Superior Court of Guilford County addressed to the sheriff of Guilford County. The original summons was issued in the case of JIM RUSSELL AND SEYMOUR ETT, T/A RUSSETT SALES COMPANY v. BEA STAPLE MANUFACTURING COM-

PANY, INCORPORATED, and commanded the sheriff "to summon Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina, local agent for Bea Staple Manufacturing Company, Incorporated, defendant(s) above named," and it was so served by the sheriff of Guilford County on 18 February 1965. The copy of the original summons delivered to Clayton Eddinger by the sheriff of Guilford County commanded the sheriff "to summon Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina." At the same time service of summons was made upon Clayton Eddinger there was delivered to him a copy of the complaint. No other service of process was made.

No extension of time to answer or plead was granted, and no answer or pleading was filed within 30 days after service of summons and complaint on Clayton Eddinger. Upon motion made by plaintiffs, the assistant clerk of the superior court of Guilford County on 9 April 1965 entered judgment by default final against defendant, ordering and decreeing that plaintiffs recover from defendant the sum of $5,000 and the costs of the action.

On 21 April 1965 defendant, Bea Staple Manufacturing Company, Incorporated, made a special appearance for the purposes of this motion only, and moved that the judgment by default final rendered in this action on 9 April 1965 be set aside, for the reason that there has been no proper or valid service of process upon defendant, Bea Staple Manufacturing Company, Incorporated, on the grounds that the summons issued by the clerk of the Superior Court of Guilford County, a copy of which is attached to and incorporated in by reference in this motion, was directed to "Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina," and service was so made on Eddinger on 18 February 1965; that the summons did not command the sheriff to summon Bea Staple Manufacturing Company, Incorporated, the defendant named in the complaint, and that for failure to comply with the provisions of G.S. 1-89 service of said summons as set forth above does not confer jurisdiction upon the court as to Bea Staple Manufacturing Company, Incorporated, and the judgment rendered upon the service of process as above set forth is therefore a nullity.

On 18 May 1965 Robert M. Gambill, judge presiding, entered an order that the service of process in this action conferred jurisdiction upon the defendant, Bea Staple Manufacturing Company, Incorporated, and denied the motion to vacate the judgment by default final.

From this order by Judge Gambill, defendant appeals.

Haworth, Riggs, Kuhn and Haworth by John Haworth; and Don G. Miller for defendant appellant.

Morgan, Byerly, Post & Keziah by W. Dan Herring for plaintiff appellee.

PARKER, J. G.S. 1-89 reads in relevant part: "It [the summons] must be returnable before the clerk and must command the sheriff or other proper officers to summon *the defendant,* or *defendants,* to appear and answer the complaint of the plaintiffs within thirty (30) days after its service upon defendant, or defendants. . . ." (Emphasis ours.)

The original summons commanded the sheriff "to summon Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina, local agent for Bea Staple Manufacturing Company, Incorporated, defendant(s) above named," and was so served. The copy of the summons delivered to Clayton Eddinger commanded the sheriff "to summon Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina, defendant(s) above named."

Plemmons v. Southern Improvement Co., 108 N.C. 614, 13 S.E. 188, is directly in point. In that case the Court said:

> "The summons commanded the sheriff to summon 'A. H. Bronson, President of the Southern Improvement Company,' and it was so served. This is legally a summons and service only upon A. H. Bronson individually. *Young v. Barden,* 90 N.C. 424. The superadded words 'President of the Southern Improvement Company,' were a mere *descriptio personae,* as would be the words 'Jr.,' or 'Sr.,' or the addition of words identifying a party by the place of his residence, and the like."

The Court held that this did not make Southern Improvement Company a party to the case.

In *Jones v. Vanstory,* 200 N.C. 582, 157 S.E. 867, the plaintiff issued summonses to various counties for C. M. Vanstory, J. E. Vanhorn, Mrs. Emma B. Siler, W. C. Wicker, Lee A. Folger and others, who were designated in the summons "trustees" of Masonic and Eastern Star Home. The Court held that the statutory provisions as to service of summons on private corporations must be observed, and where individuals, directors of Masonic and Eastern Star Home, Inc., a North Carolina corporation, are served with process as trustees, it will not be effectual as service on the corporation, but only on the individuals named, and cites as authority for its holding *Plemmons v. Southern Improvement Co., supra.*

To the same effect are *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *McLean v. Matheny,* 240 N.C. 785, 84 S.E. 2d 190; and statement in McIntosh, North Carolina Practice and Procedure, 2d Ed., § 864 at p. 448. See also *Edwards v. Scott & Fetzer, Inc.,* 154 F. Supp. 41, 45 (U. S. District Court, M.D. North Carolina).

Plaintiffs in their brief state that *Lumber Co. v. State Sewing Machine Corp.,* 233 N.C. 407, 64 S.E. 2d 415, "is in point and should control this controversy." With that statement we do not agree. We have examined the original case on appeal in that action, which contains a copy of the summons. The summons commands the sheriff of Forsyth County "to summon State Sewing Machine Corporation"; this is not set forth in the Court's opinion in that case.

The original summons commanded the sheriff "to summon Clayton Eddinger, Kearns Warehouse, 518 Hamilton Street, High Point, North Carolina, local agent for Bea Staple Manufacturing Company, Incorporated, defendant(s) above named," and was so served. This constituted only service of process upon Clayton Eddinger individually, and did not constitute service of process upon Bea Staple Manufacturing Company, Incorporated, and this corporation is not a party to this action.

For a court to give a valid judgment against a defendant, it is essential that jurisdiction of the party has been obtained by the court in some way allowed by law. When a court has no authority to act, its acts are void. It appears from the face of the record proper that the court has obtained no jurisdiction over Bea Staple Manufacturing Company, Incorporated, because no service of summons has been had upon it, and the corporation has made no general appearance. It made only a special appearance for the purposes of a motion to vacate the judgment by default final entered on 9 April 1965. Consequently, the judgment by default final entered against Bea Staple Manufacturing Company, Incorporated, on 9 April 1965 is void and a pure nullity. *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239; *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311; 3 Strong, N. C. Index, Judgments, § 14; 49 C.J.S., Judgments, § 334(b). The lower court erred in denying the motion of Bea Staple Manufacturing Company, Incorporated, to vacate the judgment by default final entered on 9 April 1965, made upon its special appearance to vacate this judgment.

Reversed.

BOWMAN *v.* FIPPS AND BOWMAN *v.* POWELL.

DOCKET No. 6395, STATE OF NORTH CAROLINA, EX REL JAMES C. BOWMAN, SOLICITOR, EIGHTH SOLICITORIAL DISTRICT, PLAINTIFF v. HOWARD FIPPS AND DOZIER POWELL, DEFENDANTS,

AND

DOCKET No. 6396, STATE OF NORTH CAROLINA, EX REL JAMES C. BOWMAN, SOLICITOR, EIGHTH SOLICITORIAL DISTRICT, PLAINTIFF v. LUTHER POWELL, DEFENDANT.

(Filed 4 February, 1966.)

1. Nuisance § 10—

Where verdict of operating a public nuisance is returned solely against the lessees of the premises, order for the sale of personalty may be entered, but the court properly refrains from ordering the realty padlocked, since the proceeding is *in personam* and the lessors may not be deprived of possession unless they are parties and it is established that they knew or by due diligence should have known that the nuisance was being maintained. G.S. 19-5.

2. Nuisance § 12—

Whether an attorney's fee should be allowed from the proceeds of sale of personalty ordered by the court in a proceeding to abate a nuisance is addressed to the discretion of the court, and its refusal to allow attorney's fees will not be disturbed in the absence of a showing of abuse. G.S. 19-8.

APPEAL by plaintiff from *Clark, J.*, May 1965 Civil Session of COLUMBUS.

These two actions were instituted on March 19, 1965, by the Solicitor of the Eighth District under G.S. 19-1 *et seq.* for the abatement of a nuisance. Case No. 6395 was brought against Howard Fipps, the lessee-operator of the premises known as "State Line," or "Fipps' Place," and against Dozier Powell, the owner of the premises. Fipps' Place is located on the *west* side of Highway No. 410 about one foot north of the South Carolina line. Case No. 6396 was instituted against Luther Powell, the lessee-operator of the premises known as "State Line" or "Luther's Place," which is located on the *east* side of Highway No. 410 opposite Fipps' Place. The complaints are signed by James C. Bowman, Solicitor, and John A. Dwyer, "attorney for plaintiff."

In each case, the State alleged and offered evidence tending to show that the building and improvements on the particular premises were "used for and in connection with the illegal sale of whiskey . . . and beer." In Case No. 6395, plaintiff averred that the owner, Dozier Powell, operated the place of business known as State Line "in conjunction with Howard Fipps." Each defendant filed an answer in which he denied that his premises had been used for any illegal purposes whatever and, at the trial, each offered evidence

tending to show that his place of business was a well-conducted, small grocery store.

At the close of plaintiff's evidence, counsel took a voluntary nonsuit as to defendant Dozier Powell, and the case proceeded as to the two tenants. The following issue was submitted to the jury and answered as indicated:

> "Has the defendant Howard Fipps conducted and operated the place of business known as State Line, or Fipps' Place, in such a way as to constitute a nuisance against public morals, pursuant to G.S. 19-1?
>
> "ANSWER: Yes."

An identical issue was submitted with reference to defendant Luther Powell. It was also answered YES.

Plaintiff tendered two judgments, which the judge declined to sign. Instead, he signed one judgment which recited both issues and ordered that the personal property owned by defendants Fipps and Powell, and used by each in connection with his business, be sold as provided by G.S. 19-5; that Fipps and Powell be restrained from the operation of their respective places of business for a period of 12 months; and that the real property be "returned to the respective owners, Dozier Powell and the estate of C. M. Powell."

From the judgment entered, plaintiff appeals, assigning as error the court's refusal to sign the tendered judgments.

John A. Dwyer for plaintiff appellant.

D. Frank McGougan for Howard Fipps and Dozier Powell defendant appellees.

R. C. Soles for Luther Powell defendant appellee.

SHARP, J. The difference between the judgments tendered and the judgment which the court signed is twofold: (1) The court's judgment directed that the premises be returned to the owners; the tendered judgment declared the place of business a nuisance. (2) The court's judgment made no provision for the inclusion of attorney's fee in the costs of the proceedings; the tendered judgment directed that the costs, including a fee in the "sum of $....." for John A. Dwyer, be paid from the proceeds of the sale of the personal property of the defendants Fipps and Luther Powell.

Counsel for plaintiff stressfully contends that the operation on the premises of a nuisance as defined by G.S. 19-1 having been established, the court should have ordered "the effectual closing of

the building or place against its use for any purpose . . . for a period of one year," as provided by G.S. 19-5.

This contention is without merit, and heretofore has several times been decided against plaintiff. A proceeding to abate a nuisance is not a proceeding *in rem* against the property itself, but is a proceeding *in personam*. *Bowman v. Malloy,* 264 N.C. 396, 141 S.E. 2d 796; *Sinclair, Solicitor v. Croom,* 217 N.C. 526, 8 S.E. 2d 834. The owners of Luther's Place were never made parties to the proceeding; Dozier Powell, the owner of Fipps' Place, was originally made a party, but during the trial, plaintiff took a voluntary nonsuit as to him.

Before the court can padlock a lessor-owner's premises and deprive him of the possession of his property on account of a nuisance maintained thereon by his tenant, it must be established by verdict in a proceeding to which the owner is a party that he knew, or could by due diligence have known, that the nuisance was being maintained. *Bowman v. Malloy, supra; Sinclair, Solicitor v. Croom, supra; Barker v. Palmer,* 217 N.C. 519, 8 S.E. 2d 610; *Habit v. Stephenson,* 217 N.C. 447, 8 S.E. 2d 245.

As provided in G.S. 19-6, the court directed that the proceeds from the sale of the personal property used in connection with the established nuisances be applied to the payments of the costs of these actions. He did not include in these costs an attorney's fee, although one was requested in the tendered judgment. The allowance of a fee was a matter in the discretion of the trial judge. G.S. 19-8. See *Hoskins v. Hoskins,* 259 N.C. 704, 131 S.E. 2d 326. No abuse appears.

The judgment of the court below is

Affirmed.

EARL GOSNELL, BY HIS NEXT FRIEND, CARSON GOSNELL v. JAMES RAMSEY, A MINOR, O. G. RAMSEY, GUARDIAN AD LITEM FOR JAMES RAMSEY, AND O. G. RAMSEY.

(Filed 4 February, 1966.)

1. Negligence § 22—

An offer by defendant to pay the hospital bills incurred by plaintiff as a result of injury because the accident occurred on defendant's property, *held* not an admission of liability and properly excluded.

2. Master and Servant § 29—

In this action to recover for injuries received when the body of a dump truck on which they were working fell upon plaintiff and one of defendants, a cousin, while the boys were working on the dump truck on the farm of the other defendant, the father of the injured defendant, *held*, nonsuit was properly entered, if not upon the principle question of liability then upon the ground of contributory negligence.

APPEAL by plaintiff from *McLean, J.*, March-April 1965 Regular Civil Session of MADISON.

Civil action to recover damages for personal injuries.

Plaintiff and defendants offered evidence. From a judgment of compulsory nonsuit entered at the close of all the evidence, plaintiff appeals.

A. E. Leake for plaintiff appellant.
Clarence N. Gilbert for defendant appellees.

PER CURIAM. This is a summary of plaintiff's evidence, except when quoted: On 10 March 1964, the day he was injured, he was 18 years of age. His health was good, and he was physically strong and able to perform heavy labor. He had gone to the tenth grade in school. He grew up on a farm. His first cousin O. G. Ramsey owned a farm and operated a dairy business in Madison County. O. G. Ramsey had two sons, Stanley aged 19 years and James aged 16 years, who lived on the farm and helped him in his dairy business. O. G. Ramsey owned and had on the farm two tractors, a pickup truck, and a 1951 Model Ford two-ton dump truck. The dump truck had a dump bed, and the front of the bed would raise. O. G. Ramsey used this dump truck to haul feed for his cows.

During the last part of February 1964 he went to O. G. Ramsey's farm and asked him for a job. O. G. Ramsey told him he did not have much to do this time of year, but that he could stay around, help him work, and he would pay him a little, but could not pay him much. Following this conversation, he went to work for O. G. Ramsey at his farm and dairy, living in his home with him. O. G. Ramsey told him that he would tell him what to do and he would take orders from him, and if he was not around his 16-year-old son James would be his boss and he would take orders from him.

On 10 March 1964 he had had very little experience with tractors, and had had no experience with trucks with hydraulic dump beds, and did not know how the dump bed on such a truck operated. Neither O. G. Ramsey nor James Ramsey had explained to him

how the dump bed operated or warned him of any danger that might be involved in a dump bed. About 11 a.m. on the morning of 10 March 1964 James Ramsey told him the dump bed on his father's dump truck would not lift with a load in it, though it would lift when empty, and it would have to have some kind of thicker oil to go in it. At this time the dump truck was parked by O. G. Ramsey's home, and the dump bed was empty and down level. James Ramsey manipulated the hoist and raised the dump bed. It has two gears that hold the dump bed up. James Ramsey told him to get a bucket, get under the dump bed on its left side and hold the bucket under a bolt or plug that he was going to take out on the front of the lift and catch the oil as it drained out. He got under the dump bed across the frame as directed by James Ramsey. Then James Ramsey with a pipe wrench took out the bolt or plug on the left side of the hydraulic lift, and he held the bucket under the place where the plug was taken out and caught the oil that drained out. Plaintiff testified: "It just took a few minutes to drain the one on the left side. I'd say about 30 minutes." After he had caught all the oil that drained out on the left side, James Ramsey told him to go to the right side and do the same thing. He did so, and was still under the dump bed. James Ramsey then took out the bolt or plug on the right side and immediately the dump bed fell pinning him between the bottom of the dump bed and the frame of the truck. He testified: "As to how the bed came down, all I know is when he took the bolt out, it hit us, snap of your finger, we didn't have time to move or nothing." James Ramsey was also caught between the bottom of the dump bed and the frame of the truck. Both were seriously injured.

On the Saturday before the accident he was standing near the dump truck watching Wayne Ramsey place a new gasket in it. Wayne Ramsey told him to stay away from it, because he could get hurt.

Plaintiff alleges in his complaint that O. G. Ramsey was negligent in failing to properly instruct the plaintiff with reference to dangerous machinery, when he knew, or should have known, that the plaintiff was unfamiliar with such dangerous machinery and ignorant of how it operated and the dangers involved; in failing to furnish plaintiff with adequate supervision in view of plaintiff's age and lack of experience; and in putting plaintiff to work under the supervision of his son James Ramsey, when he knew, or should have known, that James Ramsey was young, inexperienced, and careless; and that such negligence was a proximate cause of his injuries. Plaintiff further alleges in his complaint that James Ramsey was

negligent in failing to properly supervise and instruct the plaintiff in the duties of his employment; in ordering plaintiff, when he was working under his supervision, into a position of peril; and in carelessly removing plugs and draining the hydraulic oil or fluid from the hoist or lift on the 1951 Model Ford truck and thereby causing the bed to fall upon and injure plaintiff; and that O. G. Ramsey under such circumstances is responsible under the doctrine of *respondeat superior.*

Defendants offered evidence. Plaintiff's counsel asked O. G. Ramsey on cross-examination a question to this effect: If he did not tell plaintiff's father when plaintiff and James Ramsey were in the hospital that he would pay plaintiff's hospital expenses. Defendants objected, and the trial judge directed the jury to go to their room. In the absence of the jury, O. G. Ramsey answered the question as follows: "I told Carson, Earl's daddy, at the hospital that since the boy got hurt at my home, that I was very sorry that either one of the boys got hurt, he told me that he did not have the money to pay his hospital bill, I told him that since the boys got hurt at my home, that I did not have the money either, but I would borrow the money and pay his boy's hospital bill." Plaintiff's counsel then asked O. G. Ramsey this question: "Now, I'll ask you if you did not tell him that since it happened there, that you felt responsible for it having happened?" O. G. Ramsey replied as follows: "I could have, I can't recall that, but we were both very much disturbed about the condition of these boys, they was hurt seriously." The trial judge excluded this evidence from the jury, and plaintiff assigns his ruling as error.

Plaintiff contends that O. G. Ramsey's statement, "I would borrow the money and pay his boy's hospital bill," is an admission of liability or responsibility by O. G. Ramsey. In our opinion, and we so hold, O. G. Ramsey's statements excluded by the judge, considering the surrounding circumstances, do not indicate the admission of any fault on his part or that of his son, but were a voluntary offer of assistance made upon an impulse of benevolence or sympathy and may not be considered an admission of liability or culpable causation. This is supported by our following cases: *Barber v. R. R.,* 193 N.C. 691, 138 S.E. 17; *Norman v. Porter,* 197 N.C. 222, 148 S.E. 41; *Patrick v. Bryan,* 202 N.C. 62, 162 S.E. 207; *Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577. In *Arnold v. Owens,* 78 F. 2d 495 (on appeal from the District Court of the United States for the Eastern District of North Carolina), it was held that an offer by the owner of a truck which struck a pedestrian to pay hospital expenses, of itself, is not evidence of liability. This ruling is supported by citation of numerous cases, including our own. Plain-

tiff's assignment of error to the exclusion of this evidence is overruled.

Defendants filed a joint answer in which they deny the allegations of plaintiff's complaint, deny that plaintiff was employed by O. G. Ramsey, deny that James Ramsey was foreman of his father's farm, and deny that plaintiff's injuries proximately resulted from any negligent acts or omissions on the part of either defendant. And for a first further answer and defense they allege that plaintiff, who is a blood relative of the defendants, came to O. G. Ramsey's house and asked that he might reside there as a member of the family, that plaintiff is older and more experienced than James Ramsey, and that O. G. Ramsey gave no directions or orders to plaintiff or to anyone to attempt to repair the dump truck, and that neither of the defendants had any reason to know or anticipate that the dump bed would fall. And for a second further answer and defense they allege that if plaintiff were an employee of the defendants, which they deny, then plaintiff assumed such risks as were involved in general farm work which he purported to do. And for a third further answer and defense they plead conditionally plaintiff's contributory negligence.

Defendants offered evidence in support of the allegations in their answer.

James Ramsey testified in substance: His father never designated him as foreman. He never gave orders to plaintiff. He had never changed the oil in the hoist on the dump truck before 10 March 1964. His father did not instruct him to change the oil. He does not know whether he drained any oil from the dump truck on 10 March 1964. He knows nothing about what happened that day. The dump bed fell on him on Tuesday, 10 March 1964. The next thing he remembers is waking up in the hospital on Monday following that Tuesday. He does not know what happened to him on 10 March 1964.

Plaintiff assigns as error the allowance by the court of defendants' motion for a judgment of compulsory nonsuit made at the close of all the evidence, and the judgment of nonsuit.

Considering plaintiff's evidence in the light most favorable to him, in the circumstances disclosed by the record, we are constrained to hold that the defendants' motion for judgment of compulsory nonsuit should have been sustained, if not upon the principal question of liability, then upon the ground of contributory negligence.

The judgment of compulsory nonsuit below is

Affirmed.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1966

RAY A. VEACH v. BACON AMERICAN CORPORATION AND H. J. DAVIS.

(Filed 2 March, 1966.)

1. Sales § 16—

The seller of equipment manufactured by a third party may be held liable for injuries resulting to the purchaser in the use of the machinery only if the defect causing the injury was latent, and thus not reasonably discoverable by the purchaser, and the seller had knowledge or should have discovered the latent defect and, in the exercise of reasonable care, should have reasonably foreseen that it was likely to cause injury in ordinary use, and failed to warn the buyer of such defect.

2. Appeal and Error § 51—

On appeal from the denial of judgment of nonsuit, all the admitted evidence, whether competent or incompetent, must be considered.

3. Sales § 16—

In this action by plaintiff, the purchaser of reconditioned recapping equipment, to recover for injuries received when a buffing wheel disintegrated and parts of same struck plaintiff, causing the injury in suit, the evidence *is held* sufficient to permit the jury to find that the injury resulted from a latent defect of which the seller should have had knowledge, and that plaintiff, who was without prior experience with such equipment, was not guilty of contributory negligence as a matter of law.

4. Evidence § 35—

The testimony of a nonexpert witness must be based on facts of which he has personal knowledge, and therefore he may not testify upon the assumption of the use of machinery during a given number of hours each working day after its purchase by plaintiff, as to the condition of its buffer wheels, offered in evidence, at the time of purchase, or as to why its pins, holding its parts together, broke. An expert would not be competent to give such testimony without the additional hypothesis that the exhibit had remained in the same condition from the time of the accident to the time of the trial.

5. Sales § 16—

The purchaser of equipment, suing for personal injuries resulting from a defect therein, may not contend that the seller was negligent in failing to provide a guard for the equipment, since the absence of a guard is a patent defect. Further, in this case, plaintiff's complaint failed to specify the absence of the guard as an element of negligence.

6. Trial § 33—

It is error for the court to submit in its instructions to the jury a principle of law which is not supported by allegation and evidence.

7. Sales § 14a—

Liability for breach of warranty arises out of contract, irrespective of negligence.

8. Sales § 5—

Statement by a salesman that equipment had been completely rebuilt and reconditioned cannot constitute a warranty by the seller when the subsequently written agreement specifies that the seller guaranteed, for a specified period, that the equipment was free from defect in workmanship and material when used in normal service, and obligated itself only to make good defective part or parts returned, and that such guarantee was in lieu of all other guarantees, expressed or implied.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

APPEALS by defendants and by plaintiff from *McConnell, J.*, June 7, 1965, Civil Session of FORSYTH, docketed and argued as No. 457 at Fall Term 1965.

Plaintiff alleged he was injured August 15, 1961, while "buffing" a tire of a customer of the recapping business operated by plaintiff and his partner, Raymond John McKeown, Jr., in the Town of Clemmons, N. C.; that the buffing wheel on the used buffing machine the partners had purchased from defendants "flew apart because of defective materials" and "a portion of said wheel . . . entered plaintiff's head"; that the negligence of defendants in specified particulars in connection with the sale and installation of the buffing machine proximately caused plaintiff's injuries; and that plaintiff's injuries were proximately caused by defendants' breach of their warranty "that all used equipment purchased by the plaintiff was reconditioned and repaired and in all respects in the same condition as new equipment."

Defendants, in a joint answer, denied all allegations as to negligence, warranty and breach thereof and the agency of Davis. They alleged the contract of March 11, 1961, covering the sale of equipment to plaintiff and his partner, was in writing. They pleaded, conditionally, that plaintiff's negligence in specified particulars was a proximate cause of his injuries.

Plaintiff offered evidence *tending* to show:

In "March or early April" of 1961, plaintiff and McKeown, his partner, as a part-time venture, started a tire recapping business in Clemmons, N. C. A contract dated March 11, 1961, executed by each of the partners and in the name of Bacon American Corporation by "H. J. Davis, Sales Representative," provided for the sale by the corporate defendant to the partners of the equipment listed therein for the total purchase price (payable in monthly installments) of $7,918.32. The list includes a "5 h. p. Lodi Buffer," with attachments, the listed purchase price therefor being $750.00.

In negotiations prior to the execution of said contract, when reference was made to the high cost of a new buffer, Davis stated "he had a good one, a used one that had been rebuilt and recon-

ditioned in his shop in Raleigh . . . it would be just as good . . . and was sitting in his warehouse on display." The partners did not see the Lodi Buffer until it was unloaded and installed in their place of business. At that time, Davis stated it was the Lodi Buffer "on the contract," "the one he had had reconditioned . . . (that) had been down in our warehouse" and that "it had been completely rebuilt."

While described as a Lodi Buffer, the *two* buffer wheels furnished with this equipment were manufactured by the B & J Manufacturing Company of Chicago, Illinois. In the operation of the buffer, only one buffer wheel at a time was used. *One* of the two buffer wheels is the portion of equipment directly involved.

In the operation of the Lodi Buffer, the shaft from the motor causes the buffer wheel to spin. The face of the tire is brought into contact with blades protruding from the spinning buffer wheel. Uneven and excess rubber is removed as a prerequisite to recapping a tire.

Each of the two B & J buffer wheels consisted of two circular metal plates, connected by eight metal pins, two pins for each of the four sections. Each pin passed from its terminal in the hole therefor in one plate, through each of six separators or "spacers" and through each of seven blades, to its terminal in the hole therefor in the opposite plate. In one plate, the pins were permanently imbedded ("bradded in") in the holes therefor. Ordinarily, there was no occasion to separate this plate from the pins. The other plate may be and was frequently removed from the pins in the process of inserting new blades.

While operating the buffer on August 15, 1961, plaintiff was struck and injured by a blade from the spinning buffer wheel. A customer took plaintiff to a doctor. The buffer continued to run. When McKeown arrived and cut off the motor, all of one section, blades, separators and pins, was gone with this exception: There remained in the plate where they had been permanently imbedded the ends of the two missing pins.

Exhibit 3 is the buffer wheel directly involved in plaintiff's injury. When offered and received in evidence, the separators and blades, but not the pins, in the three sections that were intact on August 15, 1961, had been removed. Exhibit 4, a complete buffer wheel, is the other buffer wheel included in the corporate defendant's sale to the partners.

Other evidence pertinent to decision will be referred to in the opinion.

At the conclusion of plaintiff's (the only) evidence, defendants moved that plaintiff be required "to elect upon which theory,

namely, warranty or negligence," he intended to proceed. Thereupon, the court "directed that that portion of the plaintiff's action based upon breach of warranty be dismissed." Plaintiff excepted and appealed, basing his appeal solely on his exception to said ruling. Plaintiff seeks consideration of his appeal only in the event this Court should reverse or award a new trial in plaintiff's negligence action.

The court overruled defendants' motion for judgment of nonsuit "as to that portion of the allegations and the evidence based upon negligence," and defendants excepted.

The court submitted, and the jury answered, the following issues: "1. Was the plaintiff injured by the negligence of the defendants, as alleged in the Complaint? ANSWER: Yes. 2. If so, did the plaintiff, by his own negligence, contribute to said injuries, as alleged in the Answer? ANSWER: No. 3. Was H. J. Davis the agent of the defendant Bacon American Corporation and acting within the scope of his agency in the sale of the Lodi Buffer and attachments to the plaintiff and his partner on March 11, 1961? ANSWER: Yes. 4. What amount, if any, is the plaintiff entitled to recover? ANSWER: $8,750.00."

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

Roberts, Frye & Booth and White, Crumpler, Powell, Pfefferkorn & Green for plaintiff.

Deal, Hutchins & Minor for defendants.

BOBBITT, J.

DEFENDANTS' APPEAL.

The partners purchased the Lodi Buffer with knowledge it was used equipment and upon receipt and installation thereof had knowledge the manufacturer of the buffer wheels (as shown on Exhibits 3 and 4) was the B & J Manufacturing Company.

As to the seller of a chattel known to have been manufactured by another, the rule has been stated as follows: "A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use." Restatement, Torts § 401. Under this rule, liability depends upon whether such seller, by the exercise of reasonable care, could have discovered the dangerous character or condition of the chattel. Restatement, Torts § 402; *Wyatt v. Equip-*

ment Co., 253 N.C. 355, 360, 117 S.E. 2d 21, and cases cited; *Cf. Swaney v. Steel Co.*, 259 N.C. 531, 538, 131 S.E. 2d 601.

If, under the indicated circumstances, the seller knows or should have discovered a latent defect in the chattel of such nature that he, by the exercise of due care, could reasonably foresee it was likely to cause injury in the ordinary use thereof, and the seller fails to warn the buyer of such defect, the seller is liable to a buyer who, without any negligence of his own, makes ordinary use thereof and is injured on account of such defect. *Douglas v. Mallison*, 265 N.C. 362, 370, 144 S.E. 2d 138, and cases cited.

Admitted evidence, whether competent or incompetent, must be considered in passing on defendants' motion for nonsuit. *Early v. Eley*, 243 N.C. 695, 700-701, 91 S.E. 2d 919, and cases cited; *Kientz v. Carlton*, 245 N.C. 236, 246, 96 S.E. 2d 14.

The evidence, much of it circumstantial in nature, was sufficient, when considered in the light most favorable to plaintiff, to permit, but not to require, the jury to find as facts: (1) That the partners had no prior experience with buffers or other equipment used in connection with recapping tires; (2) that Davis was a man of knowledge and experience with reference to such equipment and the use thereof; (3) that plaintiff, while operating the buffer, was injured when struck by a blade that flew out from Exhibit 3 as the result of the breaking of the pins that had held it; (4) that on and prior to March 11, 1961, the pins of Exhibit 3, which held the blades and separators, had become worn to such extent as to constitute a hazard to the operator of the buffer, and that an inspection thereof by a person having knowledge and experience with such equipment would have disclosed the buffer wheel in this respect was unsafe for further use; and (5) that Davis failed to exercise due care to inspect Exhibit 3 in order to determine whether it was safe or unsafe or failed to exercise due care in his inspection thereof or after inspection thereof failed to warn the partners of the danger of using Exhibit 3 in the operation of the buffer.

The evidence, under the legal principles stated above, was sufficient, in our opinion, and we so hold, to require jury determination as to whether plaintiff was injured on account of the actionable negligence of defendants.

True, there is evidence of plaintiff's contributory negligence. "When a person has knowledge of a dangerous condition, a failure to warn him of what he already knows is without significance." *Petty v. Print Works*, 243 N.C. 292, 304, 90 S.E. 2d 717, and cases cited. Plaintiff testified he had disassembled Exhibit 3 a number of times in the process of inserting new blades. Each time the pins were completely exposed except the ends permanently imbedded in

one of the plates. He had operated the buffer approximately four months. Even so, his lack of prior experience with such equipment and the assurances given by Davis as to the condition of the equipment are to be considered in determining whether plaintiff, in the exercise of due care, could and should have observed the pins were worn to such an extent that further use of the buffer wheel with these pins was dangerous. In our opinion, and we so hold, plaintiff's evidence does not establish his contributory negligence so clearly that no other reasonable inference may be drawn therefrom. *Swaney v. Steel Co., supra.*

The conclusion reached is that the issues of negligence and contributory negligence were for jury determination and that defendants' motion for nonsuit was properly overruled.

The court admitted, over objection, opinion testimony of Cecil Gladstone Mock. Mock testified he had been in the tire recapping business for eight years; and, while he was not familiar with a Lodi Buffer, he was familiar with buffer wheels similar to Exhibit 4. He was then questioned as indicated below concerning Exhibit 3. The challenged testimony must be considered in the light of testimony tending to show the facts narrated in the following paragraphs.

McKeown identified Exhibit 3 as the buffer wheel on the buffer when he arrived at the shop and cut off the motor. He testified, over objection, he "could see that the buffing wheel had flew apart and there was blades on the floor," and that glass from broken neon lights and other debris "was all over the floor." Referring to Exhibit 3, he testified the section "where the two pins are broken" was out except for the ends of the two pins imbedded permanently in the holes therefor in one of the plates. He testified that blades, some broken and others whole, were scattered around on the floor.

Plaintiff testified he stopped at the shop on his way back to the hospital some two hours after his injury; that Exhibit 3 was "on the buffer, with one section out of it"; and that he told McKeown "to take it off and keep it."

McKeown testified Exhibit 3 was not used "after the date of the accident"; that the condition of Exhibit 3 at trial was the same as when he found it after the accident except the separators and blades in three of the sections had been removed, thereby exposing the six (unbroken) pins that had held the separators and blades in these three sections; and that, on each of these pins, there were worn places or "ridges" and "those are open and visible to the naked eye." McKeown testified Exhibit 3 was in his possession from the time he found it until he delivered it to plaintiff's attorney, and this occurred "several years ago" and since then Exhibit 3 had been "in somebody's possession other than (his) own."

No missing blades, separators or pins, or fragments thereof, from the missing section, were offered in evidence. There is no evidence as to when and by whom the three complete sections, except for the pins, were removed from Exhibit 3. Nor is there evidence as to where or under what conditions Exhibit 3 has been kept since it passed from McKeown's possession several years ago.

While there is evidence the Lodi Buffer was "a trade-in," used equipment, there is no evidence as to the date of its manufacture or of its sale as new equipment. Nor does the evidence disclose by whom it had been used or the time and circumstances of its prior use.

Testimony as to worn places or ridges or notches refers either to markings on the six (unbroken) pins presently available for inspection or to the ends of the two missing pins remaining in the holes in which they were permanently imbedded and the portion of the plate in the area of these holes and portions of pins.

When plaintiff offered Mr. Mock "as an expert in the field of tire recapping equipment, and particularly buffing wheels," the court stated: "I think he can express an opinion, but I do not know I have to find he is an expert." Suffice to say, there was no finding that Mock was an expert of any kind.

Referring to Exhibit 3, plaintiff's counsel asked this question: "Assume these facts, Mr. Mock: that the wheel which you are holding had been reconditioned completely in or around March 11, 1961, *(sic)* and had been used in buffing tires every work day afternoon from 5:00 till 9:00, or approximately that length of time, and had been used all day on Saturday from March 11th till August 15, 1961; now, do you have an opinion satisfactory to yourself as to whether or not this wheel had been completely reconditioned on or about March 11, 1961?" Defendants' objection was overruled and Mock answered: "No, sir, I don't believe it had." Defendants' motion to strike the answer was denied. Over defendants' objections, Mock was permitted to point out the bases for his opinion as to the condition of Exhibit 3 on March 11, 1961.

Referring to "where two pieces of spikes . . . or pegs are still remaining in this wheel (plate on Exhibit 3)," plaintiff's counsel asked this question: "Do you have an opinion satisfactory to yourself as to what portions of these remaining pegs that are exposed on the top side, or the inside portion of it, was holding these pins together at the time it flew apart?" Defendants' objection was overruled and Mock answered: "Yes, sir. It looks like a third—it was wore two-thirds through."

In other particulars, Mock was permitted to testify, over defendants' objections, to his opinions as to the condition of Exhibit 3 on March 11, 1961, and as to what occurred on August 15, 1961, on the basis of his inspection of Exhibit 3 in June 1965 and the assumed facts set forth in the first quoted question.

On cross-examination, Mock testified: "I have not seen these exhibits (Exhibits 3 and 4) before today. I do not know what their condition was back on August 15, 1961."

In the absence of a finding or admission that the witness is an expert, the competency of opinion evidence must be considered in relation to the rules applicable to nonexpert witnesses. *Kientz v. Carlton, supra,* and cases cited. A nonexpert witness may testify only as to facts of which he has personal knowledge. *Robbins v. Trading Post, Inc.,* 251 N.C. 663, 666, 111 S.E. 2d 884, and cases cited. In gist, Mock was permitted to testify over defendants' objections as to his opinion with reference to the condition of Exhibit 3 on March 11, 1961, and with reference to why the pins broke, solely on the basis of his inspection of Exhibit 3 in June 1965, and one assumed fact, namely, that Exhibit 3 was used by the partners during the hours indicated between March 11, 1961, and August 15, 1961. This testimony was incompetent and prejudicial. Indeed, a qualified expert could have testified to his opinion concerning the condition of Exhibit 3 on March 11, 1961, and as to what caused the pins to break, if they did break, only upon the hypothesis that the jury found as facts that Exhibit 3 was in the same condition in all relevant respects when exhibited to him in June 1965 as on August 15, 1961, immediately following plaintiff's injury. Stansbury, North Carolina Evidence, Second Edition, § 137.

The court charged the jury as follows: ". . . *or if the plaintiff has satisfied you from the evidence and by its greater weight that a reasonably prudent person in the same circumstances as that of the defendants would have delivered to the plaintiff a machine of this type with a guard over it;* . . . if the plaintiff has satisfied you in any one of these aspects, and . . . that such negligence on the part of the defendants was a proximate cause of the injury resulting to the plaintiff, and if you so find by the greater weight of the evidence, it would be your duty to answer the first issue YES." (Our italics.) Defendants excepted to the italicized portion of said excerpt.

There is no reference to the absence of "a guard over it" in plaintiff's specifications of negligence. Plaintiff offered and the court admitted solely for the purpose of illustrating the testimony of witnesses Lodi Bulletin No. 288 on which is portrayed a Lodi

Buffer referred to by plaintiff as "a fair representation of the type machinery that I am talking about . . . with the exception that the guard and the dust collector shown here was not the type that we got." Plaintiff also testified the Lodi Buffer they got "did not have a guard."

Assuming, but not deciding, it was contemplated that the Lodi Buffer involved herein would be equipped with a guard of some type, the absence of such guard was a patent, not a latent, defect, and hazards proximately caused by the absence of such a guard were reasonably foreseeable. *Insurance Co. v. Chevrolet Co.*, 253 N.C. 243, 116 S.E. 2d 780, and cases cited; *Douglas v. Mallison, supra.*

Neither plaintiff's pleading nor his evidence entitled plaintiff to recover on the ground his injury was caused by defendants' negligence in respect of failure to deliver a Lodi Buffer equipped with "a guard over it." Hence, the challenged portion of the quoted instruction was erroneous.

For the reasons indicated, defendants are entitled to a new trial on the issues arising on the pleadings in respect of whether plaintiff is entitled to recover on account of the alleged actionable negligence of defendants.

PLAINTIFF'S APPEAL.

The award of a new trial on defendants' appeal necessitates consideration of plaintiff's appeal from what was in effect a nonsuit as to his alleged cause of action for breach of warranty.

A seller's liability for breach of warranty does not depend upon proof of his negligence but arises out of his contract. *Wyatt v. Equipment Co., supra; Douglas v. Mallison, supra.*

The partners, in said contract of March 11, 1961, ordered the equipment listed therein "SUBJECT TO THE TERMS AND CONDITIONS OF SALE ON REVERSE SIDE OF THIS SHEET."

Under "TERMS AND CONDITIONS OF SALE" appear, *inter alia,* the following:

"9. Seller guarantees all equipment manufactured by it to be free from defects in workmanship and material when used in normal service for a period of 90 days from date of delivery to the original purchaser, the obligation being limited to making good any part or parts which are returned to the factory, transportation charges prepaid and which, upon seller's examination prove to be defective. Buyer specifically and generally waives any and all claims against seller for loss of use of equipment or any other damage of any kind or nature. *This guarantee is in lieu of all other guarantees either*

expressed or implied and no salesman or other individuals are authorized to assume for seller any other liability in connection with the sale." (Our italics.)

While Davis' statements, nothing else appearing, would seem sufficient to constitute an express warranty, *Insurance Co. v. Chevrolet Co., supra,* and cases cited, in view of the italicized portion of the "TERMS AND CONDITIONS OF SALE," Davis' statements, being in conflict with the terms of the written agreement, do not constitute a warranty by the vendor, to wit, the corporate defendant, and are not competent as evidence of breach of warranty. Notwithstanding, as indicated above, Davis' statements with reference to the condition of the Lodi Buffer are relevant and competent as bearing upon whether plaintiff was contributorily negligent.

Our attention is called to the following notation on said contract: "$50.00 Max for Repairing Equipment." Much of the equipment sold under said contract was used equipment. There is no evidence as to what equipment was to be repaired or as to the nature of contemplated repairs. Suffice to say, the evidence to the effect the Lodi Buffer "had been" reconditioned and completely rebuilt at the time of the negotiations negates any suggestion that this notation refers in any way to it.

The conclusion reached is that the ruling involved in plaintiff's appeal, considered as a judgment of nonsuit in respect of plaintiff's alleged cause of action for breach of warranty, should be and is affirmed.

On defendants' appeal, new trial.

On plaintiff's appeal, affirmed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

VINCENT LOUIS ROMANO v. JOAN MARIE ROMANO.

(Filed 2 March, 1966.)

1. Divorce and Alimony § 22—

The rule that a custodial order affecting the person of an infant cannot be entered unless the infant is before the court applies in those instances in which the absence of the infant precludes the court from enforcing its

decree, and is subject to exception when both parties contending for custody are before the court and subject to its jurisdiction, and the decree of the court is enforceable through coercive action against the parties.

2. Same—

Plaintiff, a resident, sued in this State for divorce from his nonresident wife. The wife answered and demanded alimony, counsel fees and custody of the child of the marriage. *Held:* The court had jurisdiction to enter *pendente* allowances for her support and fees for her attorneys, and to order plaintiff to pay into court a specified sum per month for the support of the child, even though the child had never been within this jurisdiction.

8. Divorce and Alimony § 18—

An interlocutory order for support of the wife and children of the marriage *pendente lite* will be affirmed when supported by findings of fact made by the court upon competent supporting evidence.

APPEAL by plaintiff from *Copeland, S.J.*, August, 1965 Assigned Non-jury Civil Session, WAKE Superior Court.

The plaintiff instituted this action for absolute divorce. He alleged his residence is Wake County, North Carolina, and the defendant's residence is Philadelphia, Pennsylvania. The parties were married on April 27, 1957. They separated on December 10, 1963, and thereafter have lived separate and apart. One child of the marriage, Patrick Gerard Romano, was born May 15, 1964. The plaintiff alleged the child had been with its mother in Philadelphia since birth.

By answer, the defendant admitted the residence of the parties, their marriage, the birth and her custody of the child. The other allegations of the complaint were denied and by way of further defenses the defendant alleged, in great detail, her efforts, both by work in and outside the home, to make the marriage a success. She alleged in no less detail the persistent efforts of the plaintiff to disrupt and destroy the home life of the parties, and especially to mistreatment and to successful efforts to obtain and engage in employment which required his absence from home from Monday morning until Saturday night. She demanded alimony, counsel fees, and custody of the child.

By reply, the plaintiff denied in part and pleaded condonation in part, to the specifications in the further defenses. He especially challenged the authority of the court to award the defendant either the custody of the child or an allowance for its support, upon the ground the child had never been in the State of North Carolina and was not subject to the court's order.

Judge Copeland made findings of fact that the plaintiff had abandoned the defendant, had failed to support her, and was able

to do so; that he is liable for the support of the child, though the child is now in Philadelphia and has never been in North Carolina. The court awarded the defendant *pendente* allowances for her support and for her attorneys, and ordered that the plaintiff pay into the Superior Court of Wake County $100.00 per month to be paid to the defendant for the support of the child. The plaintiff excepted and appealed.

Yarborough, Blanchard, Tucker and Yarborough, for plaintiff appellant.

Tharrington & Smith by J. Harold Tharrington for defendant appellee.

HIGGINS, J. Both parties to this action were before the court for all purposes involved in the divorce proceeding. The plaintiff, a resident of this State, instituted the action against the defendant, a resident of Pennsylvania. The defendant appeared before the court in person by attorney and by filing an answer and cross action for alimony, counsel fees, and the custody of the child. The defendant admitted she had the custody of the infant in Pennsylvania; and that he had never been in the State of North Carolina.

By this appeal the plaintiff challenges the order of the Superior Court only insofar as it awards custody of the child to the defendant and orders that the plaintiff pay into court an allowance to the mother for the child's support. The sole ground of the challenge is the absence of the child from the jurisdiction of the court. The plaintiff argues here that custody is an *in rem* proceeding over which the Superior Court cannot exercise jurisdiction in the absence of the child, citing as authority *Cushing v. Cushing,* 263 N.C. 181, 139 S.E. 2d 217; *Kovacs v. Brewer,* 245 N.C. 630, 97 S.E. 2d 96; *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744; *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313.

Many cases in our reports state the general rule that in a custody proceeding the child should be before the court before any custodial order can be entered "affecting the person of the infant." This rule is based on the reasoning that the court otherwise could not enforce its decree. The reason for the rule has engendered this exception to it: "If both parties are in court and subject to its jurisdiction, an order may be entered, in proper instances, binding the parties and enforceable through its coercive jurisdiction." *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71; *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798.

In this case the father alleged the infant was in the custody of the mother in Pennsylvania. He does not ask the court to disturb that custody. Both parties being before the court and subject to its *in personam* judgments, Judge Copeland's order that the plaintiff pay an allowance to the wife for the support of the infant may be enforced against the offending party, notwithstanding the fact "the person of the infant" is not bound because of his absence from the jurisdiction. Though the infant is not bound, the parties to the action are bound. Insofar as the decree affects the "person of the infant" to his prejudice, only someone authorized to speak or act for him may complain. The effect of the decree beyond the jurisdiction of this Court, therefore, is without significance. *Cushing v. Cushing, supra.*

When the parties are before the court in a divorce proceeding " 'in which a complaint has been filed, . . . authority to provide for the custody of children of the marriage vests in the court in which the divorce proceeding is pending. (Cases cited.) Jurisdiction rests in this court so long as the action is pending and it is pending for this purpose until the death of one of the parties,' or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur." *Weddington v. Weddington, supra.*

The rationale of the rule seems to be that when both parties to a marriage are before the court in a divorce proceeding, the court may adjudicate their respective rights, duties, and obligations involved in the custody of their children, even though the children are not actually before the court. The court enforces its decrees by dealing with the offending parent since, because of its absence, the court cannot deal "with the person of the infant." Judge Copeland has ordered the father to pay into court money to feed the baby. Its needs and the father's liability to supply them are essentially the same whether the little tot is in his grandmother's lap in Philadelphia or in his mother's lap in Raleigh.

The order entered by Judge Copeland is interlocutory and may be enforced by the court's coercive power while the cause is pending before the court. The court recognizes the parties have alleged the mother has the custody. The court, by its order, recognizes that custody and provides an allowance to the custodian. *Sadler v. Sadler,* 234 N.C. 49, 65 S.E. 2d 345. The interlocutory order entered in this cause is supported by the findings of fact made by the court and the order pursuant thereto is

Affirmed.

MOORE, J., not sitting.

STATE v. EMORY JOSEPH ROUX ALIAS DAVID WILLARD.

(Filed 2 March, 1966.)

1. Criminal Law § 99—

Upon motion to nonsuit in a criminal action, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and to every reasonable inference to be drawn therefrom.

2. Criminal Law § 101—

The sufficiency of circumstantial evidence to be submitted to the jury is a question of law for the court to be determined upon the basis of whether there is substantial evidence of all material elements of the offense charged, it being the province of the jury to determine if the circumstantial evidence is such as to exclude every reasonable hypothesis except that of defendant's guilt.

3. Larceny § 7; Burglary and Unlawful Breakings § 4— Circumstantial evidence held sufficient to be submitted to the jury on the question of guilt.

The State's evidence tended to show that a jewelry store in a particular municipality had been broken into and cash and jewelry stolen therefrom. The circumstantial evidence tended to show that money taken from the store had peculiar markings and that money with such markings was found on defendant's person after the offense, that tire tracks at the scene matched the tires of defendant's vehicle, that defendant stayed at a nearby motel at the time the offense was committed, and that a matchbook from this motel was left at the scene of the crime, etc. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant's identity as the perpetrator of the offense of larceny and feloniously breaking and entering.

4. Criminal Law § 111—

It is not prejudicial error for the trial court to fail to charge the jury that it should scrutinize the testimony of accomplices when defendant's counsel makes no request for special instructions upon this subordinate feature.

MOORE, J., not sitting.

APPEAL by defendant from *Fountain, J.*, October 1959 Term of PITT.

Criminal prosecution on two indictments: The first indictment charges defendant with the larceny on 25 October 1958 of money, diamonds, rings, and Hamilton and Tissot watches and other brands of watches, all of the value of $28,000, the property of, and owned by George Lautares, John Lautares, and Pearl Lautares; the second indictment charges defendant on the same day and at the same place with feloniously breaking and entering a shop and building then occupied by George Lautares, John Lautares, and Pearl Lautares,

partners trading under the name of Lautares Brothers Jewelers, with intent to commit larceny of their personal property therein, and with attempting to open and with opening a vault, safe, and other secure places therein by the use of nitroglycerine, dynamite, gunpowder, and other explosives, and by an acetylene torch, a violation of G.S. 14-57.

By consent of defendant and the State, the two cases were consolidated for trial. Defendant was represented by Frazier Woolard, a member of the Beaufort County Bar, a lawyer employed by him. Defendant pleaded not guilty in both cases. Verdict: "Guilty as charged in both cases."

From a judgment of imprisonment in each case, to run concurrently, defendant appealed. At the November 1959 Term defendant in open court signed a statement withdrawing his appeal, and thereupon an order was entered by the presiding judge dismissing his appeal. At the October 1963 Term defendant filed with the Superior Court of Pitt County a petition seeking a review of the constitutionality of his trial at the October 1959 Term. Judge Hubbard, who heard his petition, denied defendant any relief. We issued a *certiorari* to review Judge Hubbard's final judgment. Our decision is set forth in *S. v. Roux,* 263 N.C. 149, 139 S.E. 2d 189. In our decision we found error in Judge Hubbard's judgment, and directed that defendant's court-appointed counsel, Milton C. Williamson, perfect with all reasonable promptness an appeal for defendant, an indigent person, from the judgments pronounced against him at the October 1959 Term, so that defendant can have an adequate and effective review by this Court of his trial at the October 1959 Term. All of this is set forth with particularity in our former decision and need not be repeated here.

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

Milton C. Williamson for defendant appellant.

PARKER, C.J. In the record before us the State's evidence begins on page 5 and ends on page 73. It consists of the testimony of 28 witnesses. Defendant offered no evidence. Judge Fountain's charge to the jury is set forth in 24 pages of the record. The case on appeal was agreed to by counsel. It seems manifest from reading the evidence and the judge's charge as set forth in the record that defendant's counsel and also the solicitor for the State had a full and complete trial transcript of the entire trial as taken down by the court reporter in the preparation of the case on appeal.

Defendant assigns as error the denial of his motion for a judgment of compulsory nonsuit made at the close of the State's evidence. It is hornbook law in this jurisdiction that in considering a motion to nonsuit in a criminal action the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference to be drawn therefrom. 1 Strong's N. C. Index, Criminal Law, § 99, and same section in his Supplement to Vol. 1.

The State's evidence shows the following facts: On Saturday, 25 October 1958, and prior to and subsequent to that date, John Lautares, his brother George Lautares, and their mother Pearl Lautares owned and operated as partners a retail jewelry business under the trade name of "Lautares Brothers Jewelers" at 414 Evans Street, Greenville, North Carolina. Their store fronts on Evans Street, and at the rear of the store is an alley. On the night of 25 October 1958 they owned and had in this store a large stock of mounted and unmounted diamonds, other precious stones, rings, watches, bracelets, a large number of different types of jewelry like brooches, etc., silverware, crystal, chinaware, about $1800 in money, checks received from customers, and also had in their possession watches and other jewelry received from customers for repair work. In the course of their business they accumulated gold filings and small pieces of gold cut from repairing rings, etc., and gold dust, and other pieces of old gold which were kept in a small tin can in an iron safe in the rear of their store. John Lautares kept an inventory of the watches and gold in the store, and his brother George kept an inventory of the diamonds. On the night of 25 October 1958 there was in one compartment in the safe an envelope containing twelve $100 bills, and in another compartment one $100 bill, and in another compartment $400 or $500 in five, ten, and twenty dollar bills, placed there by George Lautares, and there was also in this safe watches in envelopes left for repair by customers. The twelve $100 bills were paid to George Lautares by a customer as the purchase price of a ring. One of these $100 bills had a turned-down corner; and another one of these $100 bills had on it the Great Seal of the United States different from any Great Seal of the United States George Lautares had ever seen on a bill. About 9:15 p.m. on 25 October 1958 John Lautares opened the door of the safe and put in it their diamonds, diamond watches, diamond jewelry, and other valuable articles of jewelry, locked the safe door, spun the dial two or three times, turned the lights off in the window of the store, and left for home. When he left the front and back doors of the store were locked and bolted, and the windows at the back of the store were down and fastened securely.

Later on that night a forcible breaking and entry was made into the store by a window or door in the rear. About 9:30 a.m. on 26 October 1958 John Lautares went back to his store. At that time the outside plate on the back of the safe had been cut off, and its inside plate had been cut and ripped off, and the back of the safe was open. Back of the safe were two tanks of oxygen, an acetylene cutting torch hooked up and in operating condition, an extra cutting torch, a sledge hammer, machinist hammers, a crowbar, wrenches, a punch, a drill, a pair of regular work gloves, a cap, a gas mask, a quantity of adhesive tape, and a tarpaulin in the rear of the safe covering the back window "to cut out the glare." Around the safe was a large quantity of empty watch boxes and empty envelopes of a type used by jewelers, and also the ripped-open envelopes which had contained watches left by customers for repair. Around the safe was a book of matches having on the back "Gault's Motor Court and Restaurant; a nice place for nice people; 10 miles north of New Bern; air conditioning, television, Highway #17; phone Vanceboro 120." About three-fourths of the matches had been ignited, but were still in the book. The diamonds, watches, jewelry, money, and the accumulated gold filings and small pieces of old gold, and watches left by customers for repair, which had been in the safe, had been stolen and carried away. The tin can holding the gold filings and small pieces of old gold was left and not carried away. Among the watches stolen from the safe was "a Tissot," an Omega ladies' watch with two diamonds on each side, which the Lautareses purchased from Norman M. Morris Corporation on 17 September 1957. The number on this watch is A-7668. The Norman M. Morris Corporation is the distributor of Omega watches. The customers' checks in the safe were not taken. Cigarette lighters, cuff links, and sterling silver were stolen from the show cases; inexpensive watches and jewelry and costume jewelry were not taken. The most valuable single piece of jewelry stolen was a diamond bracelet of the value of $1,500. The value of the property stolen was about $28,000. The articles stolen would weigh between 15 and 20 pounds, and could be carried away in a small bag or box. Of the watches stolen 50 could be carried away in a man's hand. The inventories kept by the Lautareses enabled them to determine the articles stolen. No book of matches bearing the name "Gault's Motor Court" was in or near the safe when the store was closed on the night of 25 October 1958.

Gault's Motor Court is situate about 32 miles south of the city of Greenville and 10 miles north of the city of New Bern.

William Thomas Alligood, who lives in Washington, North Carolina, has known defendant about four years. He knew him by the

name of Emory Joseph Roux, and he has known that the name David Willard was connected with him. In October 1958 defendant came to his house, and during a conversation between them defendant asked him would he be willing to get a room for him at Gault's motel, and if he would defendant would pay him $100. He agreed to do as defendant requested. Alligood, recalled as a State's witness, testified as follows: "He offered me $100. Roux spent the night at my house Wednesday and he took me to work the next morning, which was Thursday morning. That was when the conversation about the $100 took place. He said he had a job to do, and he said that he had someone to go with him, but that if I could get him the room that he would keep me in mind on jobs after that one."

Clarence Gault, who operated Gault's motel, testified in substance: On the night of Thursday, 23 October 1958, a man, who gave his name as David Willard, came into his motel, registered as a guest by that name, and was assigned room No. 10. He gave the license number of his Ford automobile as Nevada C 35117. About 11:45 p.m. on 24 October 1958 the same man came to his motel, registered for the night, and was assigned a room. That was the last time he saw this man. On Saturday night, 25 October 1958, he had registered in his motel a man by the name of Thomas Alligood. He was shown State's Exhibit No. 16, which is the book of matches bearing the name of his motel, which was found near the broken-open safe of Lautares Brothers Jewelers. He purchased such matches bearing the name of his motel and placed them in the motel's rooms for advertising purposes, and did so during the month of October 1958.

On Saturday night, 25 October 1958, William Thomas Alligood and his brother Daniel came to Gault's motel. Daniel went in and rented a room, signing the register "Thomas Alligood," and paid for it. Then Thomas and Daniel went into the room. Thomas Alligood had an understanding with defendant that defendant would know what room he was in at Gault's motel by reason of the fact that he told defendant he would park his automobile in front of the room. A short time after they had entered this room, about 11:15 p.m., defendant, accompanied by a man Thomas Alligood did not recognize, came into the room. Defendant and this man who accompanied him into the room engaged in a whispered conversation. Thomas Alligood heard just these words of the conversation uttered by defendant: "Greenville" and "a jewelry store." Between 11:30 and 11:45 p.m. defendant and the man who came with him left the room. About 8:30 a.m. the following morning defendant and this man came back to the room in Gault's motel where Thomas and Daniel Alligood were. When defendant came back into the room, he was

carrying a brief case and a leather bag. Defendant made the following statement: "He said that everything was all right and that he had the darndest luck. When he had checked this place, the light was out and on this night it was on. He made a statement about a man by the name of Big Henry. Something about the jewelry and Big Henry in Providence, Rhode Island." About fifteen minutes thereafter Thomas and Daniel Alligood left the room, leaving defendant and the man with him in the room. Defendant was driving a Ford automobile which had a Nevada State license. On the following Friday, Thomas Alligood saw defendant at a filling station in Washington, North Carolina. Defendant said he had gone to Providence, Rhode Island, and had seen Big Henry. Thomas Alligood had served several prison sentences, and was out on parole at the time.

Just across the alley, about 50 or 60 feet from the rear of the store of Lautares Brothers Jewelers, is a regular street lamp. On the night of Thursday, 23 October 1958, this street light was not burning. John A. Briley of the Greenville police force reported to the desk sergeant that this light was out. The next day, 24 October 1958, Frank Hardee, an employee of the Greenville Utilities, replaced the bulb and socket in this light so that the light would burn.

As a result of information received by them, the police force of Washington, North Carolina, were on the lookout for a Ford automobile bearing a Nevada license plate No. C 35117 and a man by the name of Emory Joseph Roux or David Willard. About 12:30 p.m. on 1 November 1958 James Gillgo of the Washington police department saw a Ford automobile bearing this Nevada license tag parked in front of the Colonial Store on Market Street in Washington. Gillgo got out of the car in which he was riding, and directed the officer driving it to go to police headquarters, and tell the chief of police that he had located this car. Gillgo walked across the street to the driveway at the Colonial Store, and stood there as if he were observing traffic. In about five minutes defendant passed Gillgo, crossed the street to his automobile, put his brief case in the automobile, and got in it on the driver's side. Gillgo walked to him and told him he wanted to check his driver's license. Defendant at that time gave him a driver's license issued to a David L. Willard. Gillgo asked defendant if that was the only license he had, and defendant said it was. At that time the chief of police and officer Miller came up in a police car, and defendant was carried to the police station. The chief of police drove defendant's car to the police station. Defendant had in his pocketbook on his person twelve $100 bills and a number of five, ten, and twenty dollar bills. One

of these $100 bills had a turned-down corner; and another one of these $100 bills, to wit, $100 bill on the Federal Reserve Bank of New York, bearing the number BOO, 362919-A, had the Great Seal of the United States different from the Great Seal of the United States on the other $100 bills. Gillgo asked defendant if he would grant him permission to search his automobile. Defendant replied, "You have me; I don't see why you can't go ahead and do it." Gillgo searched his automobile. In the trunk of his car he found a canvas bag containing three sticks of dynamite, electrical dynamite fuses with wire on them, lock-picking equipment, and behind the spare tire he found a gas mask. He also found in the trunk a pair of gloves and a rope, wrenches, a metal cutting tool, a vice, some sheet metal, some keys, and one suit case. There was found in the pocket of defendant's automobile a pistol, a flashlight, a file, keys, locks, a punch, 18 skeleton keys and one lock box key.

Defendant's automobile bearing license plate Nevada C 35117 was vacuum cleaned by Gillgo and Fentress, a member of the North Carolina State Bureau of Investigation, at the police station in Washington. Fentress used a Westinghouse vacuum cleaner, the property of his wife, with new bags. R. Joseph Italien, a special agent of the Federal Bureau of Investigation attached to its laboratory in Washington, D. C., and assigned to a specific unit of the laboratory which, among other things, examines paint samples, has had special training in this work and has made thousands of such examinations. Italien received a package from the Greenville police department. From this package he examined the debris contained in the bags of the vacuum cleaner used to vacuum clean defendant's automobile. In this debris he found, among other things, a small piece of metal which he identified as white gold, a small fragment, about one-sixteenth of an inch long, the type that has all the appearance of a section that would be taken from a ring when it is reduced in size. He also found in this debris from the vacuum bags certain orange enamel paint chips which, in his opinion, could have come from the surface of the oxygen tanks found near the broken-open safe.

Jim Craft testified in substance: He is engaged in steel work, and that he uses acetylene torches in cutting steel.

Edmund G. Vivian is a special agent of the Federal Bureau of Investigation. His office is in Boston, Massachusetts. He works in Providence, Rhode Island. He first saw a ladies' watch, Omega style, Model No. A-7668, in the possession of Dominic DeCapua in Pawtucket, Rhode Island. Pawtucket is adjacent to Providence, Rhode Island. On November 18 he received this watch from Dominic De-

Capua, and forwarded it to the Federal Bureau of Investigation office in Charlotte, addressed to the agent in charge. The State introduced this watch in evidence, and Vivian identified it as the watch he received from Dominic DeCapua.

On Sunday morning, 26 October 1958, R. T. Rogerson, a member of the Greenville police department, arrived at the back of Lautares Brothers Jewelers store. At the back of this store near the corner there was one automobile track that crossed over a number of other tracks which was a little more outstanding or fresher looking than the others. He made a plaster of Paris cast of it. Afterwards in Washington, North Carolina, he took the tires off the Ford automobile bearing the license plate Nevada C 35117. This cast and these tires were examined by Lyndal L. Shaneyfelt, a special agent for the Federal Bureau of Investigation, whose duties include the examination of such items as tires and shoes and the comparison of these items to tracks and plaster casts. He testified in detail as to his training and experience in this work for many years. He testified in great detail as to the condition of one of the tires shown him and what was shown on the cast, that he placed them side by side and made a side by side comparison, marks, measurement, comparing tread design, size and all the general and specific characteristics to determine whether the tire made the impression shown by the cast, and stated: "[I]t was my opinion that this impression in this cast could have been made by this section of the tire right here." He also testified: "In order for another tire to have made this particular impression as represented by the cast, the tire would have to be the same size, same tread design, have the same wear characteristics, and this would include this rather unusual wear on this tire where it is raised—humps in it—erratic locations, it would be very unusual wear characteristics. I have not seen one in all my examinations that had the same characteristics."

The State's evidence is circumstantial. The rule in respect to the sufficiency of circumstantial evidence to carry the case to the jury is correctly stated in an excellent 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,* prove the fact in issue or which reasonably conduces to its con- 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to

> clusion 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,* 246 N.C. 73, 97 S.E. 2d 444; *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,* 262 N.C. 431, 137 S.E. 2d 812; and also as recently as the Fall Term 1965 in *S. v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64.

Considering the State's evidence in the light most favorable to it, and giving it the benefit of every reasonable and legitimate inference to be drawn therefrom, it is plain that the total combination of facts shown by the evidence shows substantial evidence of all essential elements of the felonies charged in both indictments, and is amply sufficient to carry the cases charged in both indictments to the jury. The trial judge properly overruled defendant's motion for judgment of compulsory nonsuit.

Defendant's second and last assignment of error is: "The failure of the trial judge to charge on the weight and credibility of the testimony of the accomplices, William Thomas Alligood and Daniel Franklin Alligood." Defendant contends the trial judge should have charged the jury that it was their duty to receive the testimony of accomplices with caution. Defendant represented by a lawyer employed by him made no request for a special instruction to this effect. This assignment of error is overruled upon authority of *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909.

Although there is no assignment of error to the charge set forth in 24 pages of the record, we have read it carefully, and it is a full

and accurate charge, fair to the State and fair to the defendant, and free from error.

The evidence is fully sufficient to support the verdict and the judgments imposed on defendant. In the trial below we find

No error.

MOORE, J., not sitting.

BOLEY RODGERS, ADMINISTRATOR OF THE ESTATE OF SHIRLEY FAYE RODGERS, DECEASED v. JAMES MONROE CARTER AND SOPHIA BEACHAM JACKSON.

(Filed 2 March, 1966.)

1. Automobiles § 19—

The doctrine of sudden emergency holds a person confronted with a sudden emergency to the course of conduct which a reasonably prudent person so confronted would pursue, rather than holding him to the wisest choice of conduct in such situation.

2. Automobiles § 34—

The care which a motorist must exercise when he sees or should see children on or near the highway is the care of the reasonably prudent man, but the degree of care varies with the factual situation confronting the motorist, including variations in the age of the child, whether it is attended, whether the child darts out from a place of concealment, etc.

3. Same—

The presence of a very young child on the shoulder of a highway is, in itself, a danger signal to the oncoming motorist, who must thereupon take such precautions as are reasonable under all the circumstances.

4. Automobiles §§ 41m, 46— Doctrine of sudden emergency held not raised by the evidence, and instruction thereon was error.

Where the driver's own evidence discloses that two six-year old girls were standing for some three minutes eight feet from the hard-surface, that the road was straight and unobstructed for seven-tenths of a mile, that the driver did not see the children until he was approximately 250 feet from them, at which time he observed intestate standing with her back to him, that he did not sound his horn or reduce speed, and that when intestate suddenly turned and ran across the highway he immediately applied his brakes and did everything possible to avoid the accident, *held*, the evidence does not present the doctrine of sudden emergency since the fact that defendant acted with due care after being confronted

with the emergency would not absolve him from his prior negligence if it constituted a proximate cause of the accident, and therefore it was error for the court to charge the jury upon the doctrine of sudden emergency.

5. Automobiles § 41m—

The act of a six-year old child in suddenly running onto the highway in front of a motorist's car does not insulate the prior negligence of the motorist in failing to sound his horn and reduce his speed when he saw or should have seen the child near the hard-surface, since such motorist is charged with the duty of anticipating that a six-year old child may suddenly dart into the path of an oncoming vehicle, and an intervening act cannot break the chain of causation when it is reasonably foreseeable.

MOORE, J., not sitting.

BOBBITT, J., concurring in result.

SHARP, J., and RODMAN, E.J., join in concurring opinion.

APPEAL by plaintiff from *Parker, J.*, 2 December 1965 Session of MARTIN.

This is an action for the wrongful death of a six year old child struck by the automobile of the defendant Jackson, driven by the defendant Carter, while the child was attempting to cross U. S. Highway 17, approximately a mile north of Washington, North Carolina.

The complaint alleges that Carter was driving the automobile through a thickly settled rural community at a speed greater than was reasonable under the circumstances, and was not keeping a proper lookout. It is alleged that he failed to blow his horn or give other warning or reduce the speed of the automobile as it approached the deceased child and her companion, also six years of age. It is alleged that the defendant Jackson was riding in the automobile at the time of the accident.

The answer admits that the automobile struck the child and that she died as the result of the collision but denies that Carter was negligent. It alleges that he saw the two children standing on the side of the highway to his right and that when the automobile was only one or two car lengths from her the deceased child suddenly and without warning attempted to run across the highway directly in the path of the automobile, whereupon Carter immediately applied his brakes, which were in good condition, but was unable to stop or otherwise avoid striking her.

The jury found that the child was not killed by the negligence of the defendants. From a judgment upon the verdict in favor of the defendants the plaintiff appeals, assigning as error portions of

the charge with reference to sudden emergency and with reference to the burden of proving negligence.

The plaintiff offered evidence which, if true, would tend to show: The little girl was attending kindergarten and was of normal intelligence and activity. She lived with her grandfather and, with her little companion, had been to the tobacco barn where he was curing tobacco. He went into the barn to inspect the tobacco and while he was so engaged the children left. To reach the highway from the barn it was necessary for them to go through a large white gate approximately 30 feet from the highway. This gate was found closed and fastened when the grandfather, having heard the sound of the collision, went to see what had happened. The grandfather, who was about 75 yards away, did not hear any horn blow. The accident occurred at approximately 7:10 p.m. on 10 July 1965. The automobile left skid marks on the highway beginning 75 feet before reaching the point of impact and continuing 45 feet further to the point where it came to a stop. There was a dent on the left side of the hood. The immediate area is not thickly settled. The automobile was proceeding northward at approximately 50 to 55 miles per hour, the highway being straight for seven-tenths of a mile south of the point of impact. The speed limit was 60 miles per hour. The road was concrete and in good condition. The weather was good and there was nothing to obstruct the driver's view. The child was crossing from east to west; that is, from the driver's right to his left. The pavement was 24 feet in width. The point of impact was in the northbound lane. The defendant Carter told the investigating patrolman that when he first saw the child she was running; he was approximately 100 feet from her and immediately applied his brakes. The other child remained standing on the side of the road. The patrolman found no mechanical defects in the automobile. The defendants' view of the gate would be obstructed by the growth of grass and weeds on the shoulder of the highway in the opinion of the patrolman.

Carter testified that he observed the two little girls standing 8 to 10 feet off the highway on the east side thereof when he was approximately 200 or 250 feet from them. He was then driving approximately 55 miles per hour. The girls appeared to be aware of the presence of the vehicle. He further testified that the child who was killed was then standing with her back to him facing northeast. She then turned and ran across the highway. He immediately applied his brakes, which were in good working order, and turned to the left but struck the child. He had no notice that the child intended to run out into the highway. He did not sound his horn and did not apply his brakes or slow down until he saw the child run

into the highway. He was paying attention to his driving and does not know why he did not see the children before he reached a point 250 feet from them unless it was the background of grass beyond the driveway leading to the gate.

Willie Boyd, called as a witness by the defendants, testified that he observed the accident while driving toward it from the opposite direction. He observed the children standing about 8 feet from the pavement. They had been standing there when he passed going north and were still there, three or four minutes later, after he had turned around and headed back in a southward direction.

R. L. Coburn for plaintiff.
Rodman & Rodman for defendants.

LAKE, J. Upon the issue of negligence, which the jury answered in favor of the defendants, the trial judge instructed the jury:

> "Now the defendant relies upon what we know in law as the doctrine of sudden emergency and the court instructs you that this sudden emergency is that he was confronted with something out of the ordinary suddenly and the court instructs you that a person confronted with a sudden emergency is not held to the same degree of care as in ordinary circumstances but only to that degree of care which an ordinarily prudent person would use under similar circumstances.
>
> "The standard of conduct required in an emergency, as elsewhere, is that of the prudent person. The Court further instructs you that this principle is not available to one who by his own negligence has brought about or contributed to the emergency. That means in simple language, that a person who creates the emergency or who contributes to the creation of the emergency cannot take advantage of this doctrine of sudden emergency.
>
> "The Court instructs you that one who is required to act in an emergency is not held by the law to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence similarly situated would have made."

The court then reviewed the contentions of the parties with reference to the existence of a sudden emergency.

The question now to be considered is as to whether the evidence was such as to justify any instruction upon this doctrine of sudden emergency. We conclude that it was not and that the injection of the doctrine into the charge was prejudicial to the plaintiff.

The doctrine of sudden emergency is simply that one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable man might act in such an emergency. If he does so, he is not liable for failure to follow a course which calm, detached reflection at a later date would recognize to have been a wiser choice. As Cardozo, J., said of one acting in such a situation, in *Wagner v. International Ry. Co.*, 232 N.Y. 176, 182, 133 N.E. 437, 438:

> "'Errors of judgment,' however, would not count against him, if they resulted 'from the excitement and confusion of the moment.' [Citations.] The reason that was exacted of him was not the reason of the morrow. It was reason fitted and proportioned to the time and the event."

That one was faced with an emergency before the injury occurred does not, however, necessarily shield him from liability. He must still act, after being confronted with the emergency, as a reasonable person so confronted would then act. The emergency is merely a fact to be taken into account in determining whether he has acted as a reasonable man so situated would have done. The extent to which it will excuse a departure from the care and judgment which would be required under normal circumstances will, therefore, vary with the suddenness with which the emergency developed, the seriousness of the threatened damage and other circumstances calculated to excite and confuse. The doctrine of sudden emergency, moreover, relates solely to the appraisal of conduct occurring after the emergency is observed. An emergency does not necessarily break the chain of causation so as to absolve one from liability for prior negligent conduct.

The rule is well summarized in the American Law Institute's Restatement of the Law of Torts, 2d Ed., § 296, where it is said:

> "(1) In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action.
>
> "(2) The fact that the actor is not negligent after the emergency has arisen does not preclude his liability for his tortious conduct which has produced the emergency.
>
> * * *
>
> "Where the emergency itself has been created by the actor's own negligence or other tortious conduct, the fact that he has then behaved in a manner entirely reasonable in the light of the situation with which he is confronted does not insulate

his liability for his prior conduct. Such liability is not precluded by the fact that he has acted reasonably in the crisis which he has himself brought about. It is not his reasonable conduct in the emergency which makes him liable, but his prior tortious conduct creating the emergency."

In *Brunson v. Gainey,* 245 N.C. 152, 95 S.E. 2d 514, the trial court charged the jury on the doctrine of sudden emergency in an action for wrongful death of a three year old child killed while running across the road in front of the defendant's car. A new trial was granted, this Court saying through Rodman, J.:

"One cannot, by his negligent conduct, permit an emergency to arise and then excuse himself on the ground that he was called upon to act in an emergency.

* * *

"If the peril suddenly confronting the defendant was due to excessive speed or to his failure to maintain a proper lookout, the fact that care was exercised after the discovery of the peril would not excuse the negligent conduct which was the proximate cause of the injury and damage. The court should so have instructed the jury."

In Harper & James, the Law of Torts, § 16.11, there is the following statement concerning the doctrine of sudden emergency:

"This rule will be applied even where the actor has put himself in the emergency because of some prior negligence; but in this connection one thing should be noted: the exercise of due care in an emergency will not insulate an actor from liability for the consequences of the negligence that helped to bring the emergency about. Thus even though a motorist driving at excessive speed does everything that could be done to avoid striking the child who darts out into his path, these precautions taken in the emergency (while constituting due care) will not excuse the driver from liability for the excessive speed."

The defendant's own evidence is that these two little six year old girls were standing for three or four minutes some eight feet from the pavement. Though the road was straight and his vision unobstructed for seven-tenths of a mile, Carter did not see the children until he was approximately 250 feet from them, at which time he observed the child now deceased standing with her back to him. The other child was facing him. He was then driving 55 miles per hour. He did not blow his horn and did not reduce his speed until he saw

the child run into the road, at which time he applied his brakes and tried to avoid her by turning to his left.

After the child ran into the road Carter could not have turned to his right, so as to pass behind the running child, without endangering her companion who remained on the shoulder of the road. The skid marks left by his tires indicate that he applied his brakes as soon as the child went upon the road. Thus, it cannot be said that Carter failed to act as a reasonable man would have done after the emergency arose or became acute, but the plaintiff's case does not rest upon any such contention. The plaintiff's contention is that Carter was negligent before the child ran upon the road and that this negligence continued in its causal effect, with no break in the chain of causation by an intervening, unforeseeable event.

The cases in our reports involving small children struck by automobiles upon the streets and highways are as varied in their factual situations as are the impulses and instantaneous reactions of children. Consequently, they vary in ultimate results. While the principles of law, concerning the care required of a motorist who sees, or ought to see, a small child on or near the highway, are constant, their application is difficult because the facts vary from case to case. Precautions which reasonable care demands of a motorist driving at 55 miles per hour toward a six year old child standing upon the shoulder of the road with her back to the approaching automobile, may be more than is reasonable to require of a motorist driving 40 miles per hour toward a twelve year old child standing on the shoulder and looking in the motorist's direction. When the small child is accompanied by and is apparently in the care of one much older, the situation confronting the motorist is substantially different from that which confronts him when two very young children are alone in or near the road. See *Brewer v. Green*, 254 N.C. 615, 119 S.E. 2d 610. A still different situation is presented by the child who darts out from a place of concealment, such as one who runs from behind another vehicle into the path of a motorist. See *Brinson v. Mabry*, 251 N.C. 435, 111 S.E. 2d 540.

The presence of a very young child on the shoulder of a highway is, in itself, a danger signal to the oncoming motorist, who must thereupon take such precautions as are reasonable under all of the circumstances. See *Price v. Burton*, 155 Va. 229, 154 S.E. 499; *Walker v. Jarnevich* (La. App.) 102 So. 2d 770; *Paschka v. Carsten*, 231 Iowa 1185, 3 N.W. 2d 542; Shearman & Redfield, Negligence, § 24, Supplement; 7 Am. Jur. 2d, Automobiles & Highway Traffic, §§ 441, 449, 450. It is ordinarily a question for the jury as to whether the motorist has responded to such danger signal as a reasonable man confronted with such a signal would have done. The

rule by which the jury should be guided in its deliberation is thus stated by Sharp, J. in *Wainwright v. Miller,* 259 N.C. 379, 130 S.E. 2d 652:

> "The duty the law imposes upon a motorist who sees, or by the exercise of reasonable care should see, children on or near the highway has been frequently declared by this Court. He must recognize that children have less discretion than adults and may run out into the street in front of his approaching automobile unmindful of the danger. Therefore, proper care requires a motorist to maintain a vigilant lookout, to give a timely warning of his approach, and to drive at such speed and in such a manner that he can control his vehicle if a child, in obedience to a childish impulse, attempts to cross the street in front of his approaching automobile."

The learned judge who presided at the trial of this action so instructed the jury, but he added to these instructions the above quoted remarks concerning the doctrine of sudden emergency, which were not applicable in view of the evidence presented and could well have confused the jury as to the principle by which they were to be guided in reaching their verdict. For recent decisions of this Court to the effect that the doctrine of sudden emergency has no application to a situation such as is presented upon the present record, see: *Boykin v. Bissette,* 260 N.C. 295, 132 S.E. 2d 616; *Ennis v. Dupree,* 258 N.C. 141, 128 S.E. 2d 231; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785.

Since the child was only six years of age, her running into the road could not be deemed contributory negligence and is not pleaded as such by the defendant. Neither could it be an intervening act which would break the chain of causation so as to relieve the defendant from liability for his prior negligence, if any. The act of another, intervening between the negligence of a defendant and the injury, does not break the chain of causation if such act could reasonably have been anticipated by the defendant. *Moore v. Beard-Laney, Inc.,* 263 N.C. 601, 139 S.E. 2d 879; *Riddle v. Artis,* 243 N.C. 668, 91 S.E. 2d 894; *Beach v. Patton,* 208 N.C. 134, 179 S.E. 446; *Harton v. Tel. Co.,* 141 N.C. 455, 54 S.E. 299. It is precisely because one may reasonably foresee and anticipate that a six year old child standing on the shoulder of a highway may suddenly dart into the path of an oncoming vehicle that the law imposes upon the driver the above mentioned duty of vigilance, warning and control of his vehicle.

New trial.

MOORE, J., not sitting.

BOBBITT, J., concurring in result: As I understand it, the Court holds *no* instruction as to sudden emergency should have been given because defendants' evidence discloses *as a matter of law* that their negligence was a proximate cause of the sudden emergency. If this be true, plaintiff would be entitled to a peremptory instruction in his favor on the negligence issue. In my opinion, whether defendants' negligence was a proximate cause of the sudden emergency should be submitted to and determined by the jury. In this respect, I dissent from the views expressed in the Court's opinion.

Since I am of the opinion the instructions given as to sudden emergency did not sufficiently apply the law to the facts in evidence, I vote for a new trial *on that ground.*

SHARP, J., and RODMAN, E.J., join in concurring opinion.

FRANCES BADHAM HOWARD, FANNIE BADHAM, BESSIE B. SMALL, SIDNEY BADHAM, MILES BADHAM, PENELOPE OVERTON, ALEXANDER BADHAM, CHARITY BADHAM, CHARLES BADHAM, PAULINE B. TURNER, FRANK BADHAM, SADIE B. HAWKINS, JAMES BADHAM, AND ALL OTHER HEIRS AT LAW OF HANNIBAL BADHAM, DECEASED, PETITIONERS v. LONNIE BOYCE, RESPONDENT.

(Filed 2 March, 1966.)

1. Appeal and Error § 60—

Decisions on former appeals become the law of the case in subsequent proceedings.

2. Parties § 2—

An action may be prosecuted only by the real party in interest, and an agent or an attorney in fact may not maintain an action in his own name for the benefit of his principal. G.S. 1-57.

3. Same; Judgments § 16—

A motion in the cause is the prosecution of an action within the meaning of G.S. 1-57, so that an agent or an attorney in fact has no standing to move to set aside a judgment, and the court is without jurisdiction to hear such motion.

4. Principal and Agent § 1—

An attorney in fact is one appointed by a written instrument to transact business for the principal out of court.

5. Courts § 2—

The court should dismiss an action immediately it appears the real party in interest is not before it.

6. Judgments § 8—

The common interest of heirs at law does not empower one of them to institute or settle an action relating to title on behalf of the others, and a judgment in retraxit entered in such action does not bind the other heirs in the absence of specific authority, ratification or estoppel.

MOORE, J., not sitting.

APPEAL by movant, L. Joseph Overton, from *Morris, J.*, March Term 1965 of CHOWAN.

Richard Powell and Mitchell & Murphy for movant.
Pritchett, Cooke & Burch for respondent.

RODMAN, E.J. In October 1944 a summons issued out of the Superior Court of Chowan County in an action captioned as above. The complaint, verified by Frances Badham Howard, alleged: The heirs at law of Hannibal Badham, Sr., were the owners of a tract of land in Chowan County containing 319 acres; those named as plaintiffs were the heirs at law of Hannibal Badham, Sr.; the defendant Boyce asserted title to said land; his claim of title cast a cloud on their good title. The complaint concluded with a prayer that those named as plaintiffs be adjudged the owners of the land free from any claim by defendant.

Defendant within the statutory time answered and denied plaintiffs' claim of ownership.

On July 13, 1945, the Clerk of the Superior Court, with the consent of counsel of record for plaintiffs and defendant, entered a judgment dismissing the action as upon nonsuit. The adjudication was based on recitals in the judgment that the parties had settled all material matters in controversy and "that plaintiffs disclaim any further interest" in said controversy.

In 1959 Penelope Overton and others instituted an action in the Superior Court of Chowan County again asserting they were the owners of the 319 acres described in the action begun in 1944; that defendant Boyce was in possession, claiming to be the owner; his claim constituted a cloud on their title. Boyce answered denying plaintiffs' asserted title. As an additional defense, he pleaded the judgment rendered in the action begun in 1944. At the trial, Judge McLean held the plea in bar good. He dismissed the action. Plaintiffs appealed. This Court affirmed in an opinion filed 24 February 1960. *Overton v. Boyce*, 252 N.C. 63, 112 S.E. 2d 727.

On August 10, 1960 Penelope Overton made a motion in the cause to vacate the judgment rendered in 1945, for that counsel purporting to represent plaintiffs were without authority to speak for her. Movant's brother, Alexander Badham, joined in the motion and likewise sought to vacate the judgment rendered in 1945. That motion was heard by Bone, J., at the September Term 1960.

Movants offered evidence to the effect that they had not authorized counsel to act for them in instituting the 1944 action nor in consenting to a judgment reciting that matters in controversy had been adjusted. Movants testified that they knew nothing of the institution of the action or the rendition of the judgment until sometime subsequent to 1945.

The court made no finding with respect to the authority of counsel to institute the action for movants or to consent to the judgment. It found that movants had not challenged the authority of counsel of record until the filing of the motion on August 10, 1960; that they had failed to show a meritorious claim and were guilty of laches. Based on his findings he denied the motion. Movants appealed. The appeal was heard at the Spring Term 1961 of this Court. The opinion, filed 22 March 1961, is reported 254 N.C. 255, 118 S.E. 2d 897. Justice Moore, speaking for the Court, discusses at length the law applicable to rights asserted by movants and the defenses of laches and want of merit. In concluding his opinion, he said:

> "The primary question for the court below was whether or not the attorney of record had authority from appellants to compromise and settle the matters in controversy and approve a judgment in retraxit disclaiming on their behalf any right, title or interest in the land in question. There are no findings of fact determining this question. The judgment does not purport to determine this question. The cause must be remanded for this determination and for decision on all other related questions raised. *Columbus County v. Thompson*, 249 N.C. 607, 107 S.E. 2d 302.
>
> "On the question of laches the record before us shows nothing more than considerable lapse of time and is insufficient to support the finding 'that the movants have been guilty of laches and unreasonable delay.' A further showing on this phase may be made when the motion is again heard."

On remand to the Superior Court for findings and conclusions based thereon as directed in the opinion of Moore, J., Judge Parker, presiding over the May Term 1961, found *inter alia:*

"FIFTH: That no person, other than Frances Badham Howard, named as plaintiffs, authorized Mr. J. M. Jennette, Attorney, to represent him, her or them, in the action commenced on October 26, 1944, and purportedly concluded by judgment before the Clerk of the Superior Court of Chowan County, dated July 13, 1945.

"SIXTH: That Frances Badham Howard authorized and understood the prosecution of the action purportedly determined by judgment before said Clerk of the Superior Court of Chowan County, dated July 13, 1945, to have proceeded upon the theory of sole ownership and right to possession in her under a paper writing, allegedly a deed to her father, Hannibal Badham, Jr., and under a paper writing, allegedly a testamentary devise from Hannibal Badham, Jr., her father, to her, the said Frances Badham Howard, and that she had no authority to authorize, nor did she authorize said action on behalf of any other heir or heirs of Hannibal Badham, Sr., her grandfather.

"SEVENTH: That no additional evidence on the question of laches has been offered by respondents."

Based on his findings, he concluded:

"That no person, other than Frances Badham Howard, is bound by the judgment taken before the Clerk of the Superior Court of Chowan County, dated July 13, 1945."

It was thereupon adjudged that the "judgment in this cause entered before the Clerk of the Superior Court of Chowan County on July 13, 1945, in respect to all parties plaintiff, other than Frances Badham Howard or Mrs. Martin L. Howard, be, and the same is HEREBY SET ASIDE."

Frances Badham Howard appealed from that portion of the judgment adjudging her bound by the judgment rendered by the Clerk in 1945. That appeal was heard at the Fall Term 1961. We remanded the case to the Superior Court for modification because the only parties then before the court were movants Penelope Overton and Alexander Badham and defendant Boyce. We said:

"The court, on the findings made, correctly adjudged that the judgment rendered in 1945 was not binding on movants Overton and Badham. That was the only question it was called upon to decide. It exceeded its jurisdiction by adjudging rights of parties not before it and not seeking its aid."

The Superior Court at the April Term 1962 rendered judgment in conformity with the opinion reported in 255 N.C. 712, 122 S.E.

2d 601. The judgment then rendered has not been challenged by appeal.

The legal principles enunciated in *Overton v. Boyce,* 252 N.C. 63, 112 S.E. 2d 727, and *Howard v. Boyce,* 254 N.C. 255, 255 N.C. 712, are the "law of the case." They control our decision on this appeal. Epitomized, they are:

1. No defect appeared of record in the action begun in 1944. The validity of the judgment rendered in 1945 could only be challenged by motion in the cause. *Overton v. Boyce,* 252 N.C. 63.

2. Any person specifically named as party plaintiff in the 1944 action could challenge the judgment entered in 1945 upon establishing (1) that he had not employed counsel or otherwise authorized the institution of the action, or (2) having employed counsel and authorized the institution of the action, he had not authorized his counsel to enter a judgment of retraxit. Whether parties not so bound would be barred by laches, ratification or estoppel, would depend upon the facts found. *Howard v. Boyce,* 254 N.C. 255.

3. No judgment could be entered affecting the 1945 judgment except on motion of one named as a party or successor in interest to such party. *Howard v. Boyce,* 255 N.C. 712.

More than three years after the opinion reported in 255 N.C. 712 was certified to the Superior Court, L. Joseph Overton filed a motion in which he said:

> "That he is the duly appointed Attorney in Fact for all heirs or successors to the interest of all heirs of Hannibal Badham, excepting, however, Penelope Overton and Alexander Badham; . . . that movant is the duly appointed Attorney in Fact for all persons or their successors in interest, as are listed as 'parties-plaintiff' in an action which was filed in 1944 . . .; that, specifically, movant is the Attorney in Fact for persons including Dorothy Turner Jowell, Helen Turner Jones, Geraldine Turner Edgerston, Adeline Turner Darlington, Ira B. Adams, Elnora Badham and Frances Badham Howard, and all other heirs or successors to the interest of heirs of Hannibal Badham, deceased; that instruments indicating movant's authority to act in this cause on behalf of the heirs of Hannibal Badham, deceased, or the successors of such heirs, have been duly filed and recorded in the Office of the Register of Deeds for Chowan County."

In the verification to the motion Overton avers "that he is the duly appointed Attorney in Fact for heirs of Hannibal Badham, deceased, or their successors in interest."

The hearing was had before Judge Morris at the March Term 1965. At that hearing Judge Morris found facts substantially as here stated. He adjudged that Frances Badham Howard was bound by the judgments rendered in 1945 and 1961; that counsel then appearing for movant L. Joseph Overton had participated in previous hearings; that L. Joseph Overton represents all heirs and interest in the estate of Hannibal Badham, Sr., deceased, "other than the interest of Alexander Badham, Jr. and Penelope Overton," further finding that L. Joseph Overton had been acquainted with counsel for those claiming to be heirs of Hannibal Badham since 1957. He denied the motion of L. Joseph Overton.

This litigation has been protracted. The rights of the parties should be settled, but that cannot be done until the court has before it parties who will be bound by its decrees. For nearly a century our statutory law has required every action to be prosecuted in the name of the real party in interest. G.S. 1-57. Since the enactment of that statute it has been consistently held that an agent for another could not maintain an action in his name for the benefit of his principal. *Parnell v. Insurance Co.*, 263 N.C. 445, 139 S.E. 2d 723; *Morton v. Thornton*, 259 N.C. 697, 131 S.E. 2d 378; *Insurance Co. v. Locker*, 214 N.C. 1, 197 S.E. 555; *Rental Co. v. Justice*, 211 N.C. 54, 188 S.E. 609; *Bank v. Rochamora*, 193 N.C. 1, 136 S.E. 259; *Chapman v. McLawhorn*, 150 N.C. 166, 63 S.E. 721. A motion in the cause is the prosecution of an action within the meaning of G.S. 1-57.

Webster's Third New International Dictionary defines "Attorney in Fact" as "A person appointed by another by a letter or power of attorney to transact any business for him out of court." See Am. Jur., 2d 433.

When, as here, it appears that the real party in interest is not before the court, the proceeding should be dismissed. *Utilities Commission v. Kinston*, 221 N.C. 359, 20 S.E. 2d 322; *Howard v. Boyce*, 255 N.C. 712.

Evidence introduced on prior hearings tends to show counsel who instituted the action in 1944 was employed by Frances Badham Howard, one of the heirs of Hannibal Badham; she had no authority to authorize counsel to act for the other heirs; she did not authorize her attorney to settle her claim against defendant Boyce; when her attorney did so he sent his client the amount paid for the settlement less his fee; she has never returned or offered to return

the moneys paid her for the settlement. There is no evidence to show the other parties named as plaintiffs in the 1944 action received any part of the moneys paid by Boyce.

If any of the heirs of Hannibal Badham should in their own name hereafter move to vacate the judgment rendered in 1945, the court should make full findings of fact, touching the questions of authority to bring the suit and authority to settle. The difference between authority to institute suit and authority to settle if authorized to sue may, depending on other facts, be important. If defendant asserts as defenses laches, ratification of the acts of an unauthorized agent, or estoppel, the court should make full and detailed findings on these and any other defenses.

The judgment from which the appeal is taken is vacated. The motion of L. Joseph Overton to set aside the judgment of 1945 is denied. Those who may be prejudiced by that judgment are not asking the court to act. The motion is made by an agent, not in the name of his principal, but in his own right. He has no interest in the controversy. Hence the court is without jurisdiction to act. *Howard v. Boyce,* 255 N.C. 712.

Judgment vacated.

Motion dismissed.

MOORE, J., not sitting.

STATE v. TROY VONROE PRESSLEY.

(Filed 2 March, 1966.)

1. Criminal Law § 71—

Whether a confession was freely and voluntarily made as prerequisite to its competency in evidence is to be determined by the trial court upon the *voir dire* from findings based on evidence, and when the court's findings are supported by competent evidence they are conclusive on appeal, although its conclusions of law from the facts found are not binding on the reviewing courts.

2. Same—

It is not error for the court, upon the *voir dire,* to admit in evidence defendant's FBI fingerprint record in order to show defendant's familiarity with criminal proceedings as bearing upon the voluntariness of his confession, provided the matter is heard only in the absence of the jury.

3. Same—

Where the court finds upon supporting evidence that defendant was advised of his right to counsel, his right to refuse to make any admission, that any statements he made could be used against him at the trial, his right to use the telephone, and his right to testify on preliminary inquiry, the court's action in admitting his confession in evidence will not be disturbed.

MOORE, J., not sitting.

APPEAL by defendant from *Martin, E.J.,* November, 1965 Criminal Session, BUNCOMBE Superior Court.

In this criminal prosecution the defendant, Troy Vonroe Pressley, and Harold Lawrence Cochran were indicted for the felonious breaking and entering the Dutch Boy Drive In, located on Highway No. 19-23 nine miles west of Asheville in Buncombe County.

The State's evidence disclosed that a passerby, Larry Murray, by the light of his automobile, saw the defendant Cochran rush from the front door of the Dutch Boy Drive In at about 1:00 a.m. on June 18, 1965, get in an automobile parked nearby and drive off. He saw the defendant Pressley about 50 yards away, "hitch-hiking" towards Canton. Murray notified the owner of the Dutch Boy and the officers who arrested both Cochran and Pressley.

The owner testified the plate glass front was smashed and scratches were made on the juke box "where the money is kept."

After the arrest and while the defendants were in custody, each admitted his participation in the breaking and each signed a statement containing these admissions. At the trial Cochran pleaded guilty and testified, admitting his participation and implicating Pressley. The latter objected to the introduction of his admissions upon the ground his constitutional rights were violated in procuring them while he was in custody and without a preliminary hearing, and without properly advising him as to his rights to refuse to make incriminating admissions; and for these reasons they were inadmissible in evidence against him.

The court, in the absence of the jury, conducted a preliminary inquiry and, after hearing, concluded the admissions were voluntary and admissible in evidence. During the hearing in the absence of the jury the State had the officers identify a fingerprint record from the FBI. The purpose seems to have been to show the court the defendant's experience in criminal courts and knowledge of court procedure as bearing on the voluntariness of his confession. Neither on the preliminary inquiry in the absence of the jury, nor in the trial on the merits did the defendant testify or offer evidence.

The jury returned a verdict of guilty and from the judgment thereon, the defendant appealed.

T. W. Bruton, Attorney General, Andrew A. Vanore, Jr., Staff Attorney for the State.

Sanford W. Brown for defendant appellant.

HIGGINS, J. This Court is firmly committed to the rule that a defendant's confessions of guilt must have been freely and voluntarily made before they are admissible in evidence against him at his trial. The cases establishing the rule are analyzed and discussed by this Court in *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. "When a confession is offered in evidence and challenged by objection, the court, in the absence of the jury, should determine whether the confession was free and voluntary. . . . In the establishment of a factual background by which to determine whether the confessions meet the tests of admissibility, the trial court must make the findings of fact. When the facts so found are supported by competent evidence, they are conclusive on appellate courts, both State and Federal. . . . Of course, the conclusions of law to be drawn from the facts found are not binding on the reviewing courts." *State v. Barnes, supra; State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *Watts v. Indiana,* 338 U.S. 49.

The court, upon competent evidence, found facts fully justifying the conclusion the defendant's confession was voluntary and properly admissible in evidence against him. The officer testified and the court found the defendant was advised he had the right to counsel, to refuse to answer any questions, or to make any admissions; that any statements he made could be used against him at his trial; that he had a right to use the telephone (which he did); that he had a right to testify on the preliminary inquiry. This he refused to do. During all stages of the preliminary inquiry, the trial, and the preparation and presentation of the appeal, the defendant has been represented by his court-appointed counsel of record in this case. At the time when the FBI fingerprint record was identified, the jury was absent and the fingerprint record was never before it.

A careful review fails to disclose error of law in the trial.

No error.

MOORE, J., not sitting.

STATE v. EUGENE MARVIN MYERS.

(Filed 2 March, 1966.)

1. Criminal Law § 14; Searches and Seizures § 2—

In a prosecution for breaking and entering committed in this State, the sufficiency of a search warrant issued in another state sequent to which some of the stolen goods were recovered there, is to be determined by the law of this State.

2. Constitutional Law § 30; Searches and Seizures § 2—

Decisions of state courts in regard to the requisites and sufficiency of a search warrant are subject to the overriding authority of the U. S. Supreme Court in determining the citizen's rights under the Fourth and Fourteenth Amendments to the Federal Constitution.

3. Searches and Seizures § 2—

Upon motion to suppress evidence obtained by a search warrant on the ground of the insufficiency of the warrant, the court may conduct a preliminary inquiry relating to the legality of the search.

4. Same—

Where the affidavit of a search warrant states that the affiant swears under oath that he verily believes that defendant's domicile contains stolen merchandise, without any reference to any articles taken from the building defendant is charged with breaking and entering, the warrant is insufficient and the admission of evidence of merchandise found upon such search, which had been removed from the building in question, is prejudicial error. Constitution of North Carolina, Art. I, § 15; G.S. 15-27.1.

MOORE, J., not sitting.

APPEAL by defendant from *Parker, J.*, September, 1965 Session, WASHINGTON Superior Court.

The defendant was tried upon a bill of indictment which charged the felonious breaking and entering the East Carolina Supply Company's warehouse and the larceny therefrom of certain described articles of personal property valued at $1,904.52.

Upon arraignment and before plea, the defendant moved to suppress the evidence which the Virginia officers had taken from the defendant's automobile and from his trailer as a result of a search under color of a search warrant which allegedly was issued without probable cause and in violation of the defendant's rights under the Constitution of the United States, the Constitution and laws of the State of North Carolina where the indictment was returned, and of the Constitution and laws of Virginia where the search was made. The judge refused to conduct an inquiry or to hear witnesses in support of the motion to suppress the evidence upon the ground the motion was premature and could not be entertained until the evidence was offered at the hearing on the merits.

At the trial the manager of East Carolina Supply Company testified the place of business was broken into on September 13, 1964, and certain listed articles of personal property of the total value $1,904.52 were stolen. He also testified some of these articles were returned to him on October 25, 1964, by E. M. Lloyd, special investigator for Virginia State Police. These articles were taken from the defendant's premises and from his automobile as a consequence of the officers' search. In addition to the articles identified as having been stolen from the East Carolina Supply Company, the search uncovered other articles leading to 14 prosecutions in the criminal courts of Northumberland and Lancaster Counties in Virginia. In each of the Virginia cases the search was declared illegal and the warrant which authorized it void. The search warrant in question was issued by a justice of the peace upon this affidavit: "E. M. Lloyd, investigator, has this day made oath before me that he verily believes that a certain House Trailer (describing its location) unlawfully contains contrary to law stolen merchandise (describing certain articles, but none of which belonged to East Carolina Supply Company) and that such information was received through a reliable person, or that he has reasonable cause for such belief." The warrant concluded with this command: "Search for the said merchandise."

At the trial the court admitted over defendant's objection evidence which the officer obtained as a result of the search. This evidence tended to identify certain articles found in defendant's trailer where he, his wife, and his brother lived. The evidence indicated some of the articles had been taken from the East Carolina Supply Company warehouse. From a verdict of guilty and judgment thereon, the defendant appealed.

T. W. Bruton, Attorney General, Ralph Moody, Deputy Attorney General, Andrew A. Vanore, Jr., Staff Attorney for the State.

Jones, Jones & Jones, Bailey & Bailey by Carl L. Bailey for defendant appellant.

HIGGINS, J. The defendant in this case was tried for the felonies of breaking and entering into, and larceny from East Carolina Supply Company warehouse in Washington County, North Carolina. The decisions of the Virginia trial courts suppressing the evidence and holding the search warrant void, while persuasive, are not binding on the North Carolina courts. To be competent here, the evidence must meet the North Carolina tests of admissibility. However, Virginia decisions and ours do not seem to be out of

harmony on the question of the citizen's right to be protected from unwarranted searches and seizures. The decisions of both States are subject to the overriding authority of the Supreme Court of the United States to determine the citizen's rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Aguilar v. Texas,* 378 U.S. 108; *Mapp v. Ohio,* 367 U.S. 643; *Giordenello v. U. S.,* 357 U.S. 480; *Nathanson v. U. S.,* 290 U.S. 41; *Rees v. Commonwealth,* 203 Va. 850, 127 S.E. 2d 406; *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736.

In this case, as a matter of procedure, we see no reason why the trial court, in its discretion and on defendant's motion to suppress the evidence, could not conduct a preliminary inquiry relating to the legality of the search in the same manner as the court does in determining the voluntariness of a confession.

The affidavit made by Officer Lloyd was insufficient in factual averments upon which to base a valid search warrant. North Carolina Constitution, Article I § 15, provides:

> "General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."

G.S. 15-27.1 provides:

> "No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action."

The search warrant was illegal and the evidence secured under its authority was inadmissible and should have been excluded. The defendant is awarded a

New trial.

MOORE, J., not sitting.

STATE v. THEODORE E. LYNCH.

(Filed 2 March, 1966.)

1. Robbery §§ 1, 4—

Where the indictment charges robbery at, in, and near a public highway, and the proof establishes robbery from a commercial establishment, nonsuit for variance is properly denied, since the distinction between robbery and highway robbery no longer obtains in this State, and the surplus words merely indicate, vaguely, the location of the alleged robbery, and do not result in any variance between the crime charged and the proof.

2. Same—

Since the gist of the offense of robbery is the taking of another's property by force or by the putting in fear the person in lawful possession, the fact that an indictment alleges ownership in the cashier of a store and the proof fixes ownership in the business establishment, does not warrant nonsuit for variance.

3. Criminal Law § 71—

The evidence, though conflicting, *held* sufficient to support the court's findings that defendant's confession was voluntarily made.

4. Criminal Law § 90—

Where two defendants are jointly tried without objection, the admission in evidence of the confession of one of them which is competent against the defendant making it, cannot entitle the other defendant to a new trial, even though the confession implicates him, when the court instructs the jury that the confession should be considered only against that defendant who made it.

5. Same—

Where the written confession of one defendant charging that the other was the actual perpetrator of the offense is admitted in evidence against the defendant making it, but an officer is thereafter permitted to testify that the second defendant knew that the officer had the statement and that the officer had read that part of the statement which identified the second defendant as being a participant in the robbery, the admission of the testimony must be held for prejudicial error on the second defendant's appeal, notwithstanding the court instructs the jury that the confession was to be considered only against the defendant making it.

MOORE, J., not sitting.

APPEAL by defendant from *McLean, J.*, July 1965 Session of BUNCOMBE.

Criminal prosecution on indictment charging that "Boyce Oliver Norris and Theodore Edward Lynch . . . on or about the 23rd day of June, 1965, . . . unlawfully, willfully and feloniously, at and in and near the public highway, and committing an assault upon and put in fear of life one RITA BRYANT, and by means aforesaid and by threats of violence, did steal, take and carry away from her per-

son and did rob RITA BRYANT of the sum of FORTY FOUR Dollars in money: OF THE value of Forty Four Dollars, the property of the said RITA BRYANT . . ."

Each defendant was represented by separate counsel. No motion was made that defendants be tried separately. Pleas of not guilty were entered. As to each defendant, the jury returned a verdict of "guilty of common law robbery." As to Lynch, judgment imposing a prison sentence of not less than nine nor more than ten years was pronounced. Lynch excepted and appealed.

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

B. B. Worsham for defendant appellant.

BOBBITT, J. There was plenary evidence a "colored boy" entered the Towne House Bakery, Biltmore Avenue, Asheville, apparently as a customer, on June 23, 1965, about 1:50 a.m.; that, after looking around briefly, he pulled "a neckerchief" over his mouth, pointed a "nickel-plate pistol" at Rita Bryant, age 19, who was employed as a cashier, and demanded "the money out of the cash register"; that Miss Bryant "handed him the cash drawer"; and that "he took the bills," "took around $45.00," and ran. Miss Bryant testified to the above facts but testified she did not know and could not identify the "colored boy" who committed the robbery.

Arresting officers testified Lynch, shortly after his arrest on the night of June 23rd, made statements to the effect he had committed the robbery but that he had used "a small toy gun, silver colored," and that "the lady gave him $29.00."

Appellant assigns as error the court's denial of his motion for judgment as of nonsuit. He contends there is a fatal variance between the indictment and the proof in that the indictment charges the robbery occurred "at and in and near the public highway" and that the money obtained was "the property of the said RITA BRYANT" whereas the evidence tends to show a robbery on the premises of Towne House Bakery and that the money obtained was the property of the Towne House Bakery.

"(T)he distinction between robbery and highway robbery, as to punishment and otherwise, is no longer recognized in this jurisdiction—the punishment is imprisonment in the State's prison for a term not to exceed 10 years." *S. v. Lawrence*, 262 N.C. 162, 164, 136 S.E. 2d 595. The words, "at and in and near the public highway," do not relate to essentials of the crime of robbery. These surplus words in the bill of indictment tend to indicate vaguely the location

of the alleged robbery. The evidence tends to show the robbery occurred within a business establishment on Biltmore Avenue in Asheville. There is no variance between *the crime* charged and the proof, and the variation between the surplus words and the proof is without substantial significance.

Defendant cites *S. v. Cowan,* 29 N.C. 239, decided at June 1847 Term, where, in a trial on an indictment charging "robbery *in* the highway," it was held it was not permissible to admit evidence of a robbery that occurred on a wharf *near* the public highway (a Wilmington street). Suffice to say, the present case is distinguishable in that the indictment here alleges the offense occurred "at and in *and near* the public highway." (Our italics.) This Court has upheld a conviction where the indictment charged the robbery occurred "at and near a certain highway" and the evidence showed it occurred some 50 or 75 yards therefrom. *S. v. Nicholson,* 124 N.C. 820, 32 S.E. 813.

It should be noted, as pointed out by Moore, J., in *S. v. Lawrence, supra,* that "(u)ntil a relatively recent date robbery in or near a public highway (highway robbery) was a capital offense in North Carolina. *State v. Johnson,* 61 N.C. 140 (1866); *State v. Anthony,* 29 N.C. 234 (1847)."

As to the variance with reference to the ownership of the stolen money, it is noted that "(t)he gist of the offense (robbery) is not the taking, but a taking by force or the putting in fear." *S. v. Sawyer,* 224 N.C. 61, 65, 29 S.E. 2d 34, and cases cited. As stated by Winborne, J. (later C.J.), in *S. v. Sawyer, supra:* "(I)n an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property." "It is not essential to the crime of robbery that the property be taken from the actual holder of the legal title, a taking from one having the care, custody, control, management, or possession of the property being sufficient." 77 C.J.S., Robbery § 7; 46 Am. Jur., Robbery § 9.

The court properly overruled appellant's motion for judgment as in case of nonsuit.

The only evidence tending to identify Lynch as the "colored boy" who entered Towne House Bakery and robbed Rita Bryant consists of testimony as to an oral confession by Lynch and of testimony as to an oral and as to a written confession by Norris. Evidence of persons passing in cars at or near the time of the robbery tends to show the boy or boys they saw in the vicinity of Towne House Bakery were smaller and younger than Lynch and Norris. It is noted all confessions attributed to Norris are to the effect Lynch was the actual perpetrator of the robbery and that Norris

was waiting in an alley nearby and was given part of the money.

When a witness (officer) for the State testified to the oral confession of Norris, the court, upon objection by counsel for Lynch, instructed the jury this testimony was not for consideration as to Lynch; and when he testified to the confession of Lynch, the court, upon objection by counsel for Norris, instructed the jury this testimony was not for consideration as to Norris. While the State was offering evidence, there was no objection on the ground either confession was involuntary.

After the State had rested, Lynch testified he did not enter the Towne House Bakery or have any connection with the alleged robbery; and that, although offered inducements to do so, he had made no statement that he was involved in the alleged crime. Thereafter, Norris testified to the effect he was not involved in the alleged crime and that, although he and Lynch had been together earlier in the evening, they had separated and gone different ways before the crime charged is alleged to have been committed.

Based upon evidence received in the absence of the jury, which does not appear in the record before us, the court found, in the absence of the jury, that the oral and written confessions of Norris were voluntarily made. The written confession of Norris, identified as State's Exhibit 1, was offered and received in evidence. Upon objection by counsel for Lynch, the court instructed the jury it was not for consideration as to Lynch. Norris' written confession identifies Lynch as the person who proposed and perpetrated the venture at Towne House Bakery and quotes remarks attributed to Lynch.

The State offered a rebuttal witness (officer) who testified, in the presence of the jury, as to the confession attributed to Lynch and the circumstances under which it was made. Referring to State's Exhibit 1, Norris' written confession, the solicitor asked: "This paper writing, did you have that present at the time you were talking to Theodore Lynch?" The witness answered: "Yes, sir, we did." Quoted below are the questions and answers that follow.

"Q. Did you show it to Theodore Lynch? OBJECTION—OVERRULED—EXCEPTION #7. A. No, sir, we let him know that we did have a statement. Q. Did you read it to him? A. In part. Q. Which parts did you read to him? A. As to where Norris had identified him as being with him. OBJECTION—OVERRULED—EXCEPTION #8."

The court made findings, *in the absence of the jury,* that the confession attributed to Lynch was voluntarily made. See *S. v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *Cf. Jackson v. Denno,* 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 A.L.R. 3d 1205. While

the evidence was conflicting, there was sufficient evidence to support these findings.

The testimony of Miss Bryant and the confession attributed to Lynch were sufficient to support the verdict. However, it seems probable *the written statement* of Norris was in fact the evidence which, despite the instructions given, weighed most heavily against Lynch.

Where two or more persons are jointly tried, the extrajudicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, *but only when,* the trial judge instructs the jury that the confession so offered is admitted in evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s). *S. v. Bennett,* 237 N.C. 749, 753, 76 S.E. 2d 42, and cases cited; *S. v. Arnold,* 258 N.C. 563, 573-574, 129 S.E. 2d 229; Stansbury, North Carolina Evidence, Second Edition, § 188. "While the jury may find it difficult to put out of their minds the portions of such confessions that implicate the codefendant(s), this is the best the court can do; for such confession is clearly competent against the defendant who made it. Compare: *Paoli v. United States,* 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278." *S. v. Kerley,* 246 N.C. 157, 161, 97 S.E. 2d 876.

The circumstances under which, upon timely motion, a defendant who is indicted jointly with another may be entitled to a separate trial as a matter of right where the State's evidence includes the confession of a codefendant that points directly to the guilt of the movant is not presented for decision.

While the court took precaution in many instances to give instructions that the jury was not to consider the confessions of Norris in passing upon the guilt of Lynch, there is merit in Exception #8. The court erred in admitting over objection the officer's testimony to the effect Norris in his written confession had identified Lynch as a participant in the robbery. The prejudicial effect of this erroneous ruling was accentuated by the fact the written confession of Norris was before the jury.

When all circumstances are considered, we are of the opinion and so decide that Lynch should be awarded a new trial at which his guilt or innocence will be determined by evidence against him and not by evidence incompetent as to him but devastating in its impact upon his case. It is so ordered.

New trial.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. IKE HIGGINS.

(Filed 2 March, 1966.)

1. Indictment and Warrant § 7—

When the affidavit is referred to in the warrant, they constitute one instrument in contemplation of law.

2. Indictment and Warrant § 9—

An affidavit charging defendant upon information and belief with an assault upon affiant will not be held defective, since the affiant must have had personal knowledge thereof.

3. Indictment and Warrant § 7—

Where the warrant discloses that the affiant was duly sworn before a competent official and is signed by such official, and the name of the affiant is set forth, the fact that the affiant does not subscribe the affidavit is not a fatal defect. G.S. 15-19.

4. Indictment and Warrant § 9—

The fact that a warrant for a misdemeanor uses the word "feloniously" is not a fatal defect.

5. Assault and Battery § 14—

Where the evidence discloses an actual physical assault made upon prosecutrix by defendant, nonsuit is properly denied, principles relating to a constructive assault being inapposite.

6. Criminal Law § 120—

The fact that the clerk receives the verdict of guilty as to one defendant and then the verdict of guilty as to the other before inquiring as to whether the verdict was the verdict of all, does not entitle the appealing defendant to a new trial.

7. Criminal Law § 121—

A motion in arrest of judgment may be allowed only for fatal defect appearing on the face of the record.

8. Assault and Battery § 17—

Where defendant is charged with assault on a female, he being a male over the age of 18 years, but the verdict of guilty rendered by the jury is in response to the question whether the jury found defendant guilty or not guilty to the charge of assault on a female, the verdict is a verdict of guilty of a simple assault on a female for which the punishment may not exceed a fine of $50 or imprisonment for 30 days.

9. Criminal Law § 131—

Where the judgment of the court is excessive and the cause remanded for proper judgment, defendant should be given credit for service of any part of the sentence so vacated.

MOORE, J., not sitting.

APPEAL by defendant from *Martin, S.J.*, October 1965 Session of BUNCOMBE.

Criminal prosecution on the following affidavit and warrant:

"IN THE POLICE COURT OF THE CITY
OF ASHEVILLE

"NORTH CAROLINA
BUNCOMBE COUNTY

"LELA JENKINS, on information and belief, maketh oath that on or about the 12th day of September 1965 in the City of Asheville, North Carolina, County of Buncombe, Ike Higgins did unlawfully and wilfully and feloniously assault, beat and wound one Lela Jenkins, she being a woman and he being a man over 18 years of age, contrary to the form and the statute in such cases made and provided and against the peace and dignity of the State. In violation of City Ordinance No. .....

(s) X (Lela Jenkins, typed).

"Sworn to and subscribed before me
this 12th day of September 1965.

(s) J. L. SLOOP
Deputy Clerk, Police Court.

"STATE OF NORTH CAROLINA
"TO THE CHIEF OF POLICE OR ANY OTHER LAWFUL
OFFICER OF THE COUNTY OF BUNCOMBE-GREETINGS:

"You are hereby commanded to arrest the body of Ike Higgins and him safely keep so that you have him before the Judge of the Police Court at 9 o'clock a.m. of the next immediate following day, then and there to answer the above charges set forth.

(s) J. L. SLOOP
Deputy Clerk, Police Court."

This case was heard *de novo* in the superior court upon an appeal from a conviction and judgment of imprisonment for six months by the police court of the city of Asheville.

Defendant, who was represented by his attorney Robert E. Riddle, moved to quash the warrant. The motion was denied, and defendant excepted. Defendant then entered a plea of not guilty.

The State's evidence shows the following facts: On 12 September 1965 Lela Jenkins, with her two daughters, was at a public telephone booth on Broadway Avenue in the city of Asheville. Defendant Ike Higgins grabbed her arm, pulled her away from the telephone booth, and hurt her arm. Then Ike Higgins and Crawford Graham Hatcher and two girls who were with them got into a fight with Lela Jenkins's two daughters, and assaulted them.

Defendant offered no evidence. The court's charge to the jury is not in the record.

The record before us shows the following as to the verdict:

"Upon the coming in of the jury, the Clerk of the Superior Court of Buncombe County addressed the jurors as follows:

"'Members of the Jury, have you reached your verdict? How say you as to the defendant, Ike Higgins? Do you find him guilty or not guilty as to the charge of assault on female?'

"Answer: 'Guilty'.

"Immediately thereafter, since the defendant's case was consolidated for trial with the case of STATE OF NORTH CAROLINA v. CRAWFORD GRAHAM HATCHER, Case No. 65-773, on a charge of assault with a deadly weapon, the Clerk made the following statement:

"'How say you as to the defendant, Crawford Graham Hatcher? Do you find him guilty or not guilty as to the charge of assault with deadly weapon?'

"Answer: 'Guilty of Assault on Female.'

"'Those are your verdicts, so say you all?'

"Answer: 'Yes.'"

From a judgment of imprisonment for 18 months, defendant Higgins appeals.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for the State.

Riddle and Briggs by Robert E. Riddle for defendant appellant.

PARKER, C.J. Defendant assigns as error the denial of his motion to quash the warrant. He contends the warrant should be quashed on three grounds: (1) "The affidavit is made upon information and belief but yet made by the person allegedly assaulted"; (2) "the affidavit is not signed by affiant but rather her name is typed therein"; and (3) the word "feloniously" is used when the offense charged is a misdemeanor.

The affidavit and warrant are in contemplation of law one, if the affidavit is referred to in the warrant, as in the instant case. *S. v. Davis,* 111 N.C. 729, 16 S.E. 540; *S. v. Sharp,* 125 N.C. 628, 34 S.E. 264; *S. v. Gupton,* 166 N.C. 257, 80 S.E. 989; *Moser v. Fulk,* 237 N.C. 302, 74 S.E. 2d 729.

Ordinarily, the affidavit, complaint or information is the initial step in procuring the issuance of a proper warrant. G.S. 15-19 re-

quires a magistrate, before issuing a warrant, to examine "the complainant and any witnesses who may be produced by him" on oath. G.S. 15-20 provides in relevant part: "If it shall appear from such examination that any criminal offense has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation . . . ."

Absent controlling constitutional or statutory provisions, as to whether the requisite facts may be stated on information and belief or must be stated on positive knowledge the courts are not in harmony. 22 C.J.S. Criminal Law, § 309, p. 802; *S. v. Davie,* 62 Wis. 305, 22 N.W. 411; *Ex Parte Blake,* 155 Cal. 586, 102 P. 269.

In 22 C.J.S., *ibid,* § 309, it is said: "Thus, in some jurisdictions the complaint, affidavit, or information must state the facts on complainant's positive knowledge, and where it states them on hearsay or on information and belief it is insufficient, at least where it does not state facts showing the source of information and the grounds of belief or where it does not state such facts with definiteness. In a number of states, however, an affidavit based on information and belief is sufficient." So far as the briefs of counsel show and after a diligent search by us, this seems to be a novel question of law in this jurisdiction.

The affidavit upon which the warrant here is based sets forth the facts constituting the offense, a violation of G.S. 14-33(a), (b)(3), with such accuracy and clearness that they may be easily understood by defendant Higgins, who is to answer them, and by a police court and by a judge and jury. In *S. v. Gupton, supra,* it is said: "It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form, or should charge the crime with the fullness or particularity necessary in an information or indictment." The affidavit here states the assault was made on affiant by defendant Higgins, and she must have known of her own knowledge the facts set forth in her affidavit. In our opinion, and we so hold, the affidavit here is sufficient.

G.S. 15-19 requires the magistrate, before issuing a warrant, to examine the complainant on oath. It does not provide that the signature of affiant is necessary to the validity of the complaint or affidavit. In respect to such a complaint or affidavit, this is stated in 22 C.J.S., Criminal Law, § 308, p. 801: "In some jurisdictions the signature of affiant is not necessary to the validity of a complaint or affidavit, provided the name of affiant appears, it being only necessary that he should swear to the contents thereof. In other jurisdictions it must be signed at the bottom so as to authenti-

cate the whole complaint . . . ." C.J.S. cites no North Carolina case in support of this statement.

This is said in 2 C.J.S., Affidavits, § 20: "However, according to the majority of authorities, in the absence of statute or rule of court to the contrary, a signature is not essential where the identity of affiant as such is otherwise sufficiently shown, as where he is named in the jurat or where the affidavit commences with his name. . . ." In 3 Am. Jur. 2d, Affidavits, § 15, it is stated: "In the absence of a statute or rule of court to the contrary, it is not necessary to the validity of an affidavit that it have the signature of the affiant subscribed thereto, although all the authorities and general custom recommend, as the better practice, that it be signed by the affiant."

G.S. 1-145 provides that the verification of pleadings must be by affidavit, but it does not specifically in terms or specifically require that it shall be subscribed by the affiant. In reference to The Code, § 258, which is now G.S. 1-145, the Court held in *Alford v. McCormac*, 90 N.C. 151, that an affiant is not required by our statute to subscribe the affidavit. It is sufficient if the oath be administered by one authorized to administer oaths. As far back as 1790 there was before the superior courts of North Carolina the case of *S. v. Ransome*, 2 N.C. (1 Hay) 1. The opinion of the Court delivered by Williams, J., is as follows: "A man may as well be indicted on an affidavit not signed as if it was signed. The signing is only for the sake of evidence, to prevent one man being mistaken for another; and it shows, also, that it was done with deliberation."

In the instant case the name of the affiant, Lela Jenkins, appears twice in the affidavit, and beneath her typed name appears these words: "Sworn to and subscribed before me this 12th day of September 1965. (s) J. L. SLOOP, Deputy Clerk, Police Court." Since G.S. 15-19 does not require that the signature of the affiant be subscribed to the affidavit, and since we have no rule of court or constitutional requirement to the contrary, we hold that the signature of affiant at the bottom of the affidavit is not necessary to the validity of the affidavit in the instant case, though it is the better practice that such an affidavit be signed by the affiant.

The use of the word "feloniously" in the affidavit is surplusage, and will be so treated. Its use was not necessary in charging the commission of a misdemeanor. *S. v. Hobbs*, 216 N.C. 14, 3 S.E. 2d 431; *S. v. Shine*, 149 N.C. 480, 62 S.E. 1080; *S. v. Edwards*, 90 N.C. 710.

The court properly denied defendant's motion to quash the warrant, and his assignment of error thereto is overruled.

There is no merit in defendant's assignment of error that the court erred in denying his motion for judgment of compulsory non-

suit, and this assignment of error is overruled. *S. v. Gooding,* 196 N.C. 710, 146 S.E. 806.

Defendant's assignment of error that a verdict in the instant case was improperly taken and that the court erred in failing to set it aside is without merit, and is overruled.

Defendant's assignment of error to the denial of his motion to arrest judgment is overruled. "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record." *S. v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503.

The warrant charged defendant was "a man over 18 years of age." The State's evidence does not show defendant's age. Defendant offered no evidence. The verdict of the jury was that defendant was guilty of assault on a female.

In *S. v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861, defendant testified he was 19 years old. The majority opinion states:

> "Whether defendant was over 18 years of age is a collateral matter, wholly independent of defendant's guilt or innocence in respect of the assault charged; and it would seem appropriate, as pointed out by Walker, J., in *S. v. Smith, supra* [157 N.C. 578, 72 S.E. 853], that this be determined 'under a special issue.' Unless the necessity therefor is eliminated by defendant's admission, this issue must be resolved by a jury, not by the court. *S. v. Lefler, supra* [202 N.C. 700, 163 S.E. 873]; *S. v. Grimes,* 226 N.C. 523, 39 S.E. 2d 394; *S. v. Terry,* 236 N.C. 222, 72 S.E. 2d 423. And, upon the trial of such issue, the presumption that defendant was over 18 years of age at the time of the alleged assault is evidence for consideration by the jury. *S. v. Lefler, supra; S. v. Lewis, supra* [224 N.C. 774, 32 S.E. 2d 334]; *S. v. Grimes, supra.*"

The jury's verdict has not found defendant guilty of an assault on a female, he being a male person over 18 years of age, a violation of G.S. 14-33(a), (b)(3). The jury's verdict has found defendant guilty of a simple assault on a female for which the punishment, under the provisions of G.S. 14-33(b), cannot "exceed a fine of fifty dollars ($50.00) or imprisonment for thirty days." Therefore, the jury's verdict will not support a judgment of imprisonment for 18 months.

We find no error in the trial below, except the judgment of imprisonment for 18 months. The judgment of imprisonment for 18 months is vacated, and the case is remanded to the lower court where a proper judgment within the limits prescribed by G.S. 14-

33(b) shall be entered. It would seem from the record that defendant is at liberty on bail, but if he has served any part of the sentence of imprisonment for 18 months, the Superior Court of Buncombe County in pronouncing sentence shall allow defendant credit for the time he has served in the execution of the sentence hereby vacated. *S. v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355; *S. v. Alston,* 264 N.C. 398, 141 S.E. 2d 793.

Remanded for proper judgment.

MOORE, J., not sitting.

JOHN A. BURKHEAD v. LESTER M. FARLOW AND WIFE, DOROTHY FARLOW.

(Filed 2 March, 1966.)

1. Vendor and Purchaser § 1—

Where an option to purchase is not under seal and is not supported by a valuable consideration, it may be withdrawn at any time before, but not subsequent to, unconditional acceptance.

2. Same; Frauds, Statute of § 6b—

A verbal acceptance of an option is binding on the vendor, although it would not repel the statute of frauds as to the purchaser.

3. Vendor and Purchaser § 1—

In the absence of agreement to the contrary the law implies an obligation on the part of the vendor to furnish a marketable title, and therefore acceptance of an option upon tender of a marketable title, as distinguished from a title satisfactory to the purchaser or his attorney, is an unconditional acceptance, and an acceptance of an option depending upon "title examination" implies acceptance if the title is ascertained to be marketable, and therefore is an unconditional acceptance.

4. Vendor and Purchaser § 2—

A written option to purchase, good to a specified time, was not under seal or supported by consideration. Plaintiff accepted the option, depending upon "title examination." Before examination of title was completed, but within the period limited, defendants advised plaintiff they would not sell. *Held:* Plaintiff's acceptance of the offer within the time limited was unconditional and defendants had no right thereafter to withdraw the option.

5. Same—

Where vendors state that they withdraw their option and refuse to execute deed, tender of purchase price by the purchaser is not required.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Latham, S.J.,* May 10, 1965 Civil Session of RANDOLPH, docketed in the Supreme Court as Case No. 613 and argued at the Fall Term 1965.

Action for specific performance of an alleged contract to convey real estate. It is alleged and admitted in the pleadings that defendants are seized in fee simple as tenants by the entireties of a tract of land consisting of approximately 52 acres located in Back Creek Township, Randolph County, fronting approximately 500 feet on Spero Road. The property is described by metes and bounds in paragraph III of the complaint.

Plaintiff's evidence tends to show: On or about August 15, 1961, defendants told plaintiff that they owned the 52-acre tract of land in question, and Mrs. Farlow said to plaintiff, "Why don't you buy it?" Two days later, he offered defendants $15,000.00 for this property "if they wanted to sign a contract and agreement at that time." Assenting, defendants signed the following document, which had been prepared by plaintiff:

"Option of Purchase

"We do here-by option to John A. Burkhead, a certain parcel or tract of land, lying & being in Back Creek Township, Randolph County and described as follows: App. 52 acres of land with 500 ft. more or less fronting the Spero Rd. The purchase ~~14,000.00~~ 15,000.00, payable upon delivery of deed and acceptance of Title.

"Option expires Oct. 15, 1961.

HIS—Lester M. Farlow
HER—Dorothy Farlow."

After the above memorandum was signed, plaintiff asked defendants for the deed to the property so that he could "put it in the hands of an attorney for a title check." When they gave him the deed, he told them it would be two or three weeks before the title examination could be completed, and that when it was, "the money would be available for them." Plaintiff testified: "My acceptance of this title depended on the title examination of this property." Approximately two weeks after defendants signed the instrument set out above, Mrs. Farlow telephoned plaintiff that she and her husband had decided not to sell the property. Plaintiff told her that they

had signed a binding contract which he expected them to perform. Her reply was, "We are not going to sell." At the time of this conversation, the title examination had not been completed. It was completed thereafter, and the title is acceptable to plaintiff.

At the close of plaintiff's evidence, the court allowed defendants' motion for judgment of nonsuit. Plaintiff appeals.

John Randolph Ingram for plaintiff appellant.
Miller & Beck and Coltrane & Gavin for defendant appellees.

SHARP, J. The informal "Option of Purchase" signed by defendants, the parties sought to be charged in this action, embodies the terms of the offer of sale and the names of the vendor and vendee. The adequacy of the description of the land to be conveyed is not in question here, for defendants admit in their further answer that on August 15, 1961, they executed an option to plaintiff to purchase the lands described in the complaint. See *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269; *Gilbert v. Wright,* 195 N.C. 165, 141 S.E. 577; *Norton v. Smith,* 179 N.C. 553, 103 S.E. 14. This case, therefore, involves no questions pertaining to the statute of frauds, G.S. 22-2.

The option in suit is not under seal, and it was without consideration. It was a mere offer to sell which defendants might have withdrawn at any time before acceptance. "(W)ithout a valuable consideration to support it the agreement would be a mere *nudum pactum,* and might have been withdrawn *at any* time. . . . But after unconditional acceptance there is a valuable consideration to support the contract . . ." *Timber Co. v. Wilson,* 151 N.C. 154, 156, 65 S.E. 932, 933. See *Thomason v. Bescher,* 176 N.C. 622, 97 S.E. 654. For a resume of the rules applicable to options in North Carolina, see Christopher, *Options to Purchase Real Property in North Carolina,* 44 N.C. L. Rev. 63 (1965).

Plaintiff's evidence, which must be taken as true in considering the motion for nonsuit, tends to show that at the time defendants delivered the option to plaintiff, he orally agreed to buy the property and told defendants the money would be available as soon as the title examination had been completed. "A written option offering to sell, at the election of the optionee, can become binding on the owner by verbal notice to the owner. . . ." *Warner v. W & O, Inc.,* 263 N.C. 37, 42, 138 S.E. 2d 782, 786. *Accord, Kottler v. Martin,* 241 N.C. 369, 85 S.E. 2d 314. A parol acceptance, of course, would not repel the statute of frauds and thus could not have bound the optionee.

Plaintiff's notice of acceptance was given to defendant-optionors approximately two months before the option expired, and defendants' purported repudiation occurred about two weeks after receipt of this notice. The question which this appeal presents is whether plaintiff unconditionally accepted the offer contained in the option. Defendants contend that plaintiff's acceptance was conditional in that it was made to depend upon the title examination which had not been completed at the time defendants withdrew their offer.

It is uniformly held that to consummate a valid contract an acceptance must be unconditional and must not change, add to, or qualify the terms of the offer. *Carver v. Britt,* 241 N.C. 538, 85 S.E. 2d 888. It is also the general rule that the optionee's insertion in his acceptance of a condition which merely expresses that which "would be implied in fact or in law by the offer does not preclude the consummation of the contract, since such a condition involves no qualification of the acceptor's assent to the terms of the offer." Annot., Land Sale—Offer and Acceptance—Variance, 149 A.L.R. 205, 211 (1944).

In any contract to convey land, unless the parties agree differently, the law implies an undertaking on the part of the vendor to convey a good or marketable title to the purchaser. *Richardson v. Storage Co.,* 223 N.C. 344, 26 S.E. 2d 897, 149 A.L.R. 201; *Leach v. Johnson,* 114 N.C. 87, 19 S.E. 239; *Townsend v. Stick,* 158 F. 2d 142; Annot., Marketable Title, 57 A.L.R. 1253, 1268 (1928); 55 Am. Jur., Vendor & Purchaser § 149 (1946). A marketable title is one "free from reasonable doubt in law or fact as to its validity." *Pack v. Newman,* 232 N.C. 397, 400, 61 S.E. 2d 90, 92. It "must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence." 55 Am. Jur., *op. cit. supra* § 149; 92 C.J.S., Vendor & Purchaser § 191 (1955). See Annot., 57 A.L.R., *supra* at 1282-85.

Since, in the absence of an agreement to the contrary, merchantability is implied in a contract to convey land, "the acceptance of an offer to sell land making no specifications or limitations as to title is not made conditional by including a provision requiring "marketable title." 1 Corbin, Contracts § 86 (2d Ed. 1963). Cases supporting this proposition are collected in Annot., 149 A.L.R., *supra* at 211-213 and in 1 Williston, Contracts § 78 (3d Ed. 1957), wherein it is stated:

> "Sometimes an acceptor from abundance of caution inserts a condition in his acceptance which merely expresses what would be implied in fact or in law from the offer. As such a condition involves no qualification of the acceptor's assent to

> the terms of the offer, a contract is not precluded. Thus an offer to sell land may be accepted subject to the condition that the title is good, for unless the offer expressly specifies that the offeree must take his chance as to the validity of the title, the meaning of the offer is that a good title will be conveyed."

To like effect, see illustration No. 2 to Restatement, Contracts § 60 comment *a* (1932).

Although the law implies an obligation on the part of the vendor to furnish a good or marketable title, it does not imply any obligation to furnish a title that will be satisfactory to the vendee or his attorney, or one that he will be willing to accept. The fact that the title is not satisfactory to a particular purchaser or his attorney does not necessarily mean that the title is, in fact, not marketable. 55 Am. Jur., *op. cit. supra* § 150. Therefore, an acceptance of an offer to sell land which provides that the title must be satisfactory to the buyer's attorney is a conditional acceptance; it imposes as a condition of the sale the approval of his own lawyer as distinguished from the standard established by the law. *Richardson v. Storage Co., supra. Cf. Carver v. Britt, supra;* 1 Williston, Contracts § 77 (3d Ed. 1957); Annot., 149 A.L.R., *supra* at 208-210.

The narrow question confronting us is whether the terms of plaintiff's acceptance—that when the title examination was completed the money would be available—specified any requirement other than a good or marketable title.

It goes without saying that plaintiff had a right to secure a lawyer's opinion as to the quality of the title. No prudent person would buy land without first having the title examined by a qualified title attorney. In order to give a title opinion, an abstractor must make a careful, and sometimes time-consuming, search of the public records. As Parker, J. (now C.J.) said in *Carver v. Britt, supra* at 541, 85 S.E. 2d at 891, "The looking up of a title, the drafting and execution of a deed, the time and place of payment of the purchase price are customary details in working out a real estate conveyance."

In *Richardson v. Storage Co., supra*, plaintiff not only made his acceptance of defendant's title dependent upon the approval of specified attorneys; he expressly stipulated that if these particular attorneys did not approve the title his earnest money would be returned and the transaction terminated. Plaintiff here imposed no such condition, nor did he require that the title be "satisfactory" to any particular individual or his agent "before the money would be available." For a collection of the cases discussing this latter and troublesome requirement, see Annot., Land Sale—"Satisfactory"

Title, 47 A.L.R. 2d 455 (1956). All that plaintiff required in this case was "a title check." From these words we can imply only that plaintiff would accept the title if it were ascertained to be merchantable. Of course, it will always be the attorney selected by the vendee who first gives him a title opinion. Should the abstractor's opinion be adverse, unless it has been so stipulated in the contract, his opinion is not binding upon the vendor. In a situation where the *vendor* seeks specific performance and the vendee defends on the ground that vendor's title is not good, marketability becomes a question for the court. *City of North Mankato v. Carlstrom,* 212 Minn. 32, 2 N.W. 2d 130. See 92 C.J.S., *op. cit. supra* § 191.

This case is closely analogous to *Townsend v. Stick, supra.* There, Stick (vendee) notified Townsend that he accepted his offer to sell land at the price quoted and offered to place the money in escrow "pending establishment of the title to the property." Townsend resisted specific performance on the ground that Stick had not accepted his offer unconditionally. The court held that Stick's acceptance did not modify the offer. It said, "(A)ll that was suggested was an examination of title to determine its merchantability, and it is uniformly conceded that it is implied in a contract to convey land, unless differently agreed, that the vendor will give a marketable title." *Id.* at 144. Specific performance was decreed.

We hold that, upon this record, plaintiff's acceptance of the offer contained in the "Option of Purchase" was unconditional. The option did not require payment or tender of the purchase price until defendants delivered a deed to plaintiff. The defendants having attempted to revoke the offer after acceptance and having refused to execute a deed, no tender was required of plaintiff. *Trust Co. v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367.

The judgment of nonsuit is

Reversed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

WOODROW W. OLIVER v. VIRGIL T. WILLIAMS AND THOMPSON-ARTHUR PAVING COMPANY.

(Filed 2 March, 1966.)

1. Appeal and Error § 34—

The record must show the filing date of every pleading, motion, affidavit, or other document in the transcript. Rule of Practice in the Supreme Court No. 19(1).

2. Appeal and Error § 11—

Where the unaccepted to findings of the trial court disclose that plaintiff did not note an appeal at the trial and that plaintiff did not file notice of appeal until 12 days after the rendition of the judgment, G.S. 1-279, G.S. 1-280, the Supreme Court obtains no jurisdiction of the purported appeal, and will dismiss it upon motion in writing entered at or before the argument of the appeal on its merits. Rules of Practice in the Supreme Court Nos. 16 and 36.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Gambill, J.*, 29 March 1965 Civil Session of GUILFORD, Greensboro Division. Docketed and argued as Case No. 704, Fall Term 1965, and docketed as Case No. 690, Spring Term 1966.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of the individual defendant in the operation of a truck owned by the corporate defendant, the individual defendant being an employee of the corporate defendant and at the time acting in furtherance of his employer's business.

Defendants in their joint answer denied they were negligent, and pleaded conditionally contributory negligence of plaintiff as a bar to any recovery by him.

Plaintiff and defendants offered evidence, and their counsel made arguments to the jury. The court charged the jury, and the jury retired to the jury room with the issues submitted to it. About thirty minutes thereafter the jury returned to the jury box in the courtroom, and handed to the court the issues submitted to it. The sheet of paper containing the issues and the jury's answers thereto was folded. As the court was unfolding the sheet of paper, and before it saw the jury's answers to the issues, counsel for plaintiff stated plaintiff takes a voluntary nonsuit. The court stated to plaintiff's counsel that it would not permit him to do so. Plaintiff excepted. The court then unfolded the sheet of paper and read the issues and the jury's answers thereto to the jury, and asked if that was their verdict. The jury replied in the affirmative. The jury's

verdict was that plaintiff was injured by the negligence of the defendants, as alleged in the complaint; that plaintiff contributed to his injuries by his own negligence, and left unanswered the issue of damages. Whereupon, the court on Friday, 9 April 1965 signed a judgment based on the verdict that plaintiff recover nothing from defendants and taxing him with the costs.

Plaintiff did not except to the judgment and did not appeal to the Supreme Court in open court. On Saturday, 17 April 1965, plaintiff's counsel delivered to defendants' counsel a copy of a paper writing designated "Exceptions and Appeal Entries," and defendants' counsel accepted service of this paper writing on the same day. This paper writing had nothing on it to indicate that it or the original of it had ever been filed in the office of the clerk of the Superior Court of Guilford County. The record before us does not show when plaintiff's paper writing designated "Exceptions and Appeal Entries" was filed in the office of the clerk of the Superior Court of Guilford County. On 30 April 1965 defendants' counsel accepted service of case on appeal prepared by plaintiff's counsel.

Cahoon & Swisher; J. Owen Lindley for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin for defendant appellee.

PARKER, C.J. Argument in this case in the Supreme Court was calendared for Friday, 26 November 1965.

At 11:48 a.m. on 9 November 1965 defendants filed in the office of the Clerk of the Supreme Court a petition for a writ of *certiorari* for leave to file a complete certified copy of plaintiff's document entitled "Exceptions and Appeal Entries" of which defendants accepted service on 17 April 1965, but which defendants allege in fact was not filed in the office of the clerk of the Superior Court of Guilford County until 21 April 1965. Attached to the petition is a complete copy of said document verified by the clerk of the Superior Court of Guilford County showing on its face the following words: "Filed '65 Apr. 21 PM 4:52. J. P. Shore, CSC, By..... Deputy."

On the same date and at the same time defendants filed in the office of the Clerk of the Supreme Court a written motion to dismiss plaintiff's appeal under Rules of Practice in the Supreme Court. Rules 16 and 36, 254 N.C. 783, 793, 817, on the ground that notice of appeal was not given in apt time as required by G.S. 1-279 and G.S. 1-280, and that plaintiff did not file his assignments of error in time.

At 8:35 a.m. on 26 Novmeber 1965 plaintiff filed in the office of the Clerk of the Supreme Court a reply to defendants' motion to dismiss his appeal and to defendants' petition for a writ of *certiorari* verified by J. Owen Lindley, of counsel for plaintiff. In this verified reply Lindley makes the following averments: On Saturday, 17 April 1965, Robert S. Cahoon, of counsel for plaintiff, delivered to Stephen Millikin, of counsel for defendants, a copy of plaintiff's "Exceptions and Appeal Entries," and Millikin accepted service of same as shown in the record. On the same day Cahoon delivered the original of plaintiff's "Exceptions and Appeal Entries" to him with the request that he file this document in the office of the clerk of the Superior Court of Guilford County when it opened on Monday, 19 April 1965. He delivered the original of plaintiff's "Exceptions and Appeal Entries" to a deputy clerk at the window designated for receiving such documents in the office of the clerk of the Superior Court, with the request that the same be filed and entered on the judgment docket. He does not have a present recollection which particular lady at the window received this document for filing. This document was filed in apt time, and defendants should not be entitled to take advantage of some clerical delay in stamping the filing date of the document in the office of the clerk of the Superior Court of Guilford County. A careful reading of the verified reply by Lindley shows that he did not state therein that he actually filed this document in the office of the clerk of the Superior Court of Guilford County on Monday, 19 April 1965.

The Court in conference entered an order allowing defendants' petition for a writ of *certiorari*, and on 6 December 1965 entered an order remanding the matter to the Superior Court of Guilford County, Greensboro Division, for the presiding judge to hold a hearing, after due notice to counsel, and from the evidence adduced before him to find facts with particularity as to when plaintiff filed his "Exceptions and Appeal Entries" in the office of the clerk of the Superior Court of Guilford County, and caused his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to defendants, and to file with this Court his order entered after such hearing.

The hearing was held by the Honorable Eugene G. Shaw, Resident Judge of the Superior Court residing in the city of Greensboro, and presiding judge at all times relevant to this hearing. Judge Shaw's order was entered on 18 February 1966, filed in the office of the clerk of the Superior Court of Guilford County on the same date, and filed in this Court on 21 February 1966. This is a summary of the material facts stated in his order: He issued a written notice to plaintiff's and defendants' counsel of record stating that

a hearing as ordered by the Supreme Court, a copy of which order was attached to the notice, will be held in the courtroom of the Superior Court in the city of Greensboro at 1:30 p.m. on 3 January 1966. Acceptance of service of such order was made by plaintiff's and defendants' counsel of record. At the hearing Robert S. Cahoon and J. Owen Lindley were present representing plaintiff, and Stephen Millikin was present representing defendants. Plaintiff offered as evidence the testimony of Stephen Millikin, of Joseph P. Shore, clerk of the Superior Court of Guilford County, of J. Owen Lindley, and of Robert S. Cahoon. Defendants offered as evidence the testimony of the aforesaid Joseph P. Shore, of Shore's sixteen deputy and assistant clerks employed in his office during April 1965, whose names are recited in the order, of Stephen Millikin, of defendant Williams, of Charlie Shaw, an official of the corporate defendant, the original court file on record in the clerk's office, a copy of the case on appeal in the Supreme Court, and a transcript of the evidence taken at the trial of the case prepared by the court reporter. From the evidence presented before him, Judge Shaw made the following findings of material facts: Judgment was entered in the instant case on 9 April 1965, as appears in the record on appeal. Plaintiff did not take an appeal at the trial or during the session of court during which the instant case was tried; that J. Owen Lindley testified that about 10 a.m. on Monday, 19 April 1965, he handed plaintiff's paper writing designated "Exceptions and Appeal Entries" through the main window in the clerk's office to one of the lady assistants or deputy clerks working there, but he did not have the "remotest idea" who this lady was; that throughout the entire day of Monday, 19 April 1965, according to the testimony of the clerk Shore and of deputy clerk Betty Withers, the office of the clerk of the Superior Court of Guilford County was closed and locked, by reason of the fact that Monday, 19 April 1965, was Easter Monday, a legal holiday. The court finds as a fact that plaintiff's paper writing designated "Exceptions and Appeal Entries" was not filed in the clerk's office on Monday, 19 April 1965, because the court cannot and does not accept Lindley's testimony as true that the paper writing designated plaintiff's "Exceptions and Appeal Entries" was filed in the clerk's office on Monday, 19 April 1965. The office of the clerk of the Superior Court in Greensboro was open on Tuesday, 20 April 1965. The paper writing designated plaintiff's "Exceptions and Appeal Entries" in the instant case was not filed or entered in the office of the clerk of the Superior Court of Guilford County until 4:52 p.m. on Wednesday, 21 April 1965, at which time plaintiff caused his appeal to be entered by the clerk on the judgment docket, and that the original paper writing designated

plaintiff's "Exceptions and Appeal Entries" has stamped on it by the machine located in the main office of the clerk these words: "Filed '65 Apr. 21 PM 4:52. J. P. Shore, CSC, By..... Deputy," which is the true time it was filed. There are no exceptions to Judge Shaw's findings of fact.

G.S. 1-279 provides in relevant part: "The appeal must be taken . . . from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient. . . ." G.S. 1-280 provides: "Within the time prescribed in § 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record shows an appeal taken or prayed at the trial, which is sufficient."

The case on appeal shows affirmatively that plaintiff did not take or pray an appeal at the trial. Plaintiff's "Exceptions and Appeal Entries," as set forth in the case on appeal, has nothing on it to indicate when it was filed in the office of the clerk of the Superior Court of Guilford County. The Bar's attention is again directed to Rule 19(1) as amended 1 January 1964, 259 N.C. 753, of Rules of Practice in the Supreme Court, which requires, *inter alia,* that the filing date of every pleading, motion, affidavit or other document in the transcript on appeal shall appear. *Patterson v. Buchanan,* 265 N.C. 214, 143 S.E. 2d 76.

Judge Shaw's findings of fact in his order show affirmatively that the judgment in the instant action was entered on Friday, 9 April 1965, that plaintiff did not take or pray an appeal at the trial, and that plaintiff took an appeal from the judgment on 21 April 1965, twelve days after it was rendered, and not within ten days as required by G.S. 1-279, and that plaintiff caused his appeal to be entered by the clerk on the judgment docket twelve days after the judgment was rendered, and not within ten days as required by G.S. 1-280.

When the requirements of G.S. 1-279 and G.S. 1-280 are not complied with, as here, the Supreme Court obtains no jurisdiction of a purported appeal and must dismiss it. *Walter Corporation v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313; *Aycock v. Richardson,* 247 N.C. 233, 100 S.E. 2d 379; *Mason v. Moore County Board of Com'rs.,* 229 N.C. 626, 51 S.E. 2d 6. Defendants made their motion in writing to dismiss the appeal in the instant case for noncompliance with the requirements of G.S. 1-279 and G.S. 1-280 in perfecting the appeal, at or before entering upon the argument of the appeal upon its merits, as required by Rule 16 and Rule 36, Rules of Practice in the Supreme Court, 254 N.C. 783, 793, 817.

Appeal dismissed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

STATE v. PERCY BELL FEREBEE.

(Filed 2 March, 1966.)

1. Appeal and Error § 19; Criminal Law § 154—

Exceptions which first appear in the tendered statement of the case on appeal are ineffectual.

2. Criminal Law § 86—

A motion for continuance rests in the sound discretion of the trial court, and when it appears that a medical expert has testified from his examination of defendant that defendant was able to stand trial and defendant's counsel has presented a written instrument waiving appearance and authorizing counsel to enter a plea of guilty, no abuse of discretion is shown in refusing motion for continuance.

3. Constitutional Law § 31—

A defendant may not waive his right to be present at any stage of the trial in a capital prosecution, but for a felony less than capital defendant himself may waive the right, and in a misdemeanor the right may be waived by defendant through his counsel with the consent of the court, and in such event the court may enter appropriate sentence, provided no corporal punishment, active or suspended, is imposed.

MOORE, J., not sitting.

APPEAL by defendant from *Clarkson, J.*, July 1965 Session of SWAIN.

At July 1964 Session, the grand jury returned a true bill of indictment charging that defendant on June 13, 1964, unlawfully and wilfully operated a motor vehicle upon the public highways of North Carolina while under the influence of intoxicating liquor, a violation of G.S. 20-138.

The case was calendared for trial at the July 1964 Session, the October 1964 Session and the March 1965 Session; and at each of these sessions "the case was continued for the defendant."

The case was again calendared for trial on Monday, July 26, 1965, the first day of the July 1965 Session. Defendant "was not before the Court personally." His counsel, T. M. Jenkins, Esq., and Thad D. Bryson, Jr., Esq., were present.

Counsel for defendant stated: Defendant was in his office at Andrews, N. C. In response to defendant's request, Mr. Jenkins had gone to defendant's office "to see him about this case." Defendant requested Mr. Jenkins "to see if the Court would permit counsel to waive his presence, enter a written plea of guilty to the charge as contained in the Bill of Indictment and at the same time to surrender his operator's license and abide by the judgment of the Court."

The solicitor, with the approval of the court, indicated to defendant's counsel that the procedure proposed by defendant would be acceptable. When defendant's said request was presented, "a written plea of guilty had already been signed by the defendant, with his operator's license attached," but the solicitor, upon examination thereof, was of the opinion "the plea of guilty was not in the proper form." Thereupon, counsel for defendant "dictated and presented to the Solicitor another plea of guilty which was acceptable," and advised the court "they would have the new plea of guilty signed and sworn to by the defendant and would return the same to the Court the following day, to wit: July 27, 1965."

When court convened on Tuesday, July 27, 1965, instead of presenting, signed, the written plea of guilty drafted the preceding day, Mr. Bryson, one of defendant's attorneys, announced that defendant was sick, that he was in the hospital in Andrews and could not attend court; and, based upon the physical condition of defendant, his said counsel moved for a continuance of the case. To support the motion for a continuance, Mr. Bryson called Dr. Charles O. Van Gordor of Andrews, N. C., defendant's physician, who testified as to defendant's physical condition. No ruling was then made on said motion.

When court convened on Wednesday, July 28, 1965, defendant "was called and failed and judgment *nisi, sci fa* and capias was entered." However, issuance of the capias was deferred pending examination of defendant by a court-appointed physician. An order then entered provided: (1) That Dr. William E. Mitchell, a physician of Swain County, make a physical examination of defendant and report his findings to the court; (2) that defendant submit to such examination by Dr. Mitchell; and (3) that defendant "be allowed to offer any other evidence he may have regarding his physical condition."

On July 29, 1965, Dr. Mitchell's report, sworn to and subscribed before a notary public, was submitted to Judge Clarkson. Dr. Mitchell reported he had examined defendant in the hospital in Andrews and set forth his findings and opinion as to defendant's

physical condition. No other evidence bearing upon defendant's physical condition was presented.

Judge Clarkson entered an order dated July 29, 1965, in which he found as a fact "that defendant is physically able to stand trial at this session of the Superior Court of Swain County." It was ordered that defendant "appear before this Court at 9:00 A.M. on Friday, July 30, 1965 to stand trial for the charges set forth in the Bill of Indictment . . ." After Judge Clarkson's said order had been entered and served on defendant, Mr. Bryson, on the same date, to wit, July 29, 1965, delivered in open court the following written authorization, sworn to and subscribed by defendant before a notary public on July 29, 1965, addressed to the presiding judge and to the solicitor, *viz.:*

"This will authorize my attorney, T. M. Jenkins, and T. D. Bryson, Jr., Esquire, to waive my presence at the call of the above-entitled case for disposition, and to waive my presence and enter a plea of guilty to the charges set out in the Bill of Indictment, to wit: That of operating a motor vehicle while under the influence of an intoxicant on one of the public highways of the State of North Carolina, the date of said offense being June 13, 1964.

"I likewise agree to abide by such judgment as the Court may deem fit to impose in this matter.

"I herewith surrender my operator's license being numbered 421117, for such disposition as the Court deems proper and in accordance with the laws of the State of North Carolina."

The foregoing is the document dictated by defendant's counsel on Monday, July 26, 1965, and then approved by the solicitor.

Pursuant to said authorization, Mr. Bryson, for defendant, waived defendant's presence and entered a plea of guilty of operating a motor vehicle on the public highways while under the influence of intoxicating liquor. Following the acceptance of said plea, the court heard testimony amply sufficient to support a verdict of guilty as charged.

The court, in its discretion, pronounced judgment imposing a fine of $500.00 and costs. The order for *sci fa* and capias was stricken.

The record contains this stipulation: "It is agreed by the Solicitor for the State and counsel for the defendant that during the proceedings and prior thereto trial counsel made no objections nor took any exceptions to any orders, rulings, or the judgment of the Court, and made no objection to any procedure, and that the exceptions and objections are made herein for the first time by counsel for the defendant on appeal."

The July 1965 Session adjourned on Friday, July 30, 1965. On August 3, 1965, defendant served written notice of appeal in accordance with G.S. 1-279 and G.S. 1-280. The notice contains the following: "(E)xceptions to the said judgment to be hereinafter assigned."

Originally, defendant was allowed forty-five days from August 4, 1965, to make and serve case on appeal. However, the solicitor consented to an extension of time and stipulated that the case on appeal tendered on December 4, 1965, was in apt time. Defendant's exceptions first appear in the tendered statement of case on appeal.

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

W. R. Francis, Thad D. Bryson, Jr., and Felix E. Alley, Jr., for defendant appellant.

BOBBITT, J. Defendant's purported assignments of error are not based on exceptions duly noted in apt time and are ineffectual. 1 Strong, N. C. Index, Appeal and Error § 19.

Defendant's brief asserts the "Question Involved" is: "Did the Court, in refusing to continue this case to a subsequent term, deprive the defendant of constitutional rights to which he was entitled?"

"Granting or denying a motion for continuance rests in the sound discretion of the presiding judge and his decision will not be disturbed on appeal, except for abuse of discretion or a showing the defendant has been deprived of a fair trial." *S. v. Ipock,* 242 N.C. 119, 86 S.E. 2d 798; 1 Strong, N. C. Index, Criminal Law § 86. Defendant has failed to show abuse of discretion or that he has been deprived of a fair trial.

"In the application of this fundamental principle (the right of confrontation) it has been held that in a capital felony the prisoner cannot waive his right to be present at any stage of the trial. Not only has he a right to be present; he must be present. *S. v. Kelly,* 97 N.C. 404; *S. v. Dry,* 152 N.C. 813. In felonies less than capital the right to be present can be waived only by the defendant himself *(S. v. Jenkins,* 84 N.C. 813), but in misdemeanors the right may be waived by the defendant through his counsel with the consent of the court. *S. v. Dry, supra; S. v. Cherry,* 154 N.C. 624." *S. v. O'Neal,* 197 N.C. 548, 149 S.E. 860; *S. v. Hartsfield,* 188 N.C. 357, 124 S.E. 629; *Cotton Mills v. Local 578,* 251 N.C. 218, 228-229, 111 S.E. 2d 457. True, a sentence imposing corporal punishment may not be pronounced against a defendant in his absence. *S. v. Brooks,* 211

N.C. 702, 191 S.E. 749, and cases cited. Here, the judgment pronounced imposes no active or suspended sentence of corporal punishment. The fine and costs are collectible as provided in G.S. 15-185. See *S. v. Bryant*, 251 N.C. 423, 111 S.E. 2d 591.

Since defendant has failed to show error, Judge Clarkson's judgment is affirmed.

Affirmed.

MOORE, J., not sitting.

ELSIE DAVIS, PLAINTIFF v. ANDERSON INDUSTRIES, INC., CAROLINA INDUSTRIAL MANUFACTURING CORPORATION, AND CITY OF GREENSBORO.

(Filed 2 March, 1966.)

1. Pleadings § 21.1; Actions § 12—

Judgment sustaining demurrer and dismissing the action is a final judgment which terminates the action, and therefore when such judgment is entered prior to the effective date of the 1965 amendment to G.S. 1-131, permitting one action to be instituted after judgment sustaining demurrer, the action is not then pending, and the amendment, although applying to pending litigation as well as subsequent litigation, can have no application.

2. Pleadings § 21.1; Judgments § 35—

A judgment sustaining a demurrer for failure of the complaint to state a cause of action is *res judicata* and bars a subsequent action upon substantially identical allegation, the 1965 amendment not being applicable.

3. Judgments § 38—

The trial court has discretionary power to determine defendants' plea of *res judicata* prior to trial on the merits.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Gambill, J.*, 1 February 1965 Civil Session of GUILFORD, Greensboro Division, docketed and argued as Case No. 699, Fall Term 1965, and docketed as Case No. 688, Spring Term 1966.

On 27 August 1963 the plaintiff instituted an action against these same defendants. Each of them filed an answer in that action, and

when it was called for trial each defendant demurred *ore tenus* to the complaint on the ground that it failed to state a cause of action against them, or any of them. These demurrers were sustained. After the ruling of the court sustaining the demurrers, the plaintiff then moved that a judgment of voluntary nonsuit in that action be entered. This motion was also denied and the court entered a judgment on 11 September 1964, sustaining the demurrers, denying the said motions by the plaintiff, dismissing the action and taxing the costs thereof against the plaintiff. From that judgment the plaintiff did not appeal.

The plaintiff instituted the present action on 2 November 1964. Each defendant filed an answer denying the allegations of the complaint with reference to negligence or other default by such defendant, pleading contributory negligence by the plaintiff, and also pleading, in bar of the plaintiff's right to maintain this action, the judgment dismissing the former action. The City of Greensboro further alleges in its answer that the plaintiff has not paid the costs assessed against her in the former action. In addition to their answers, the defendants, Anderson Industries, Inc., and Carolina Industrial Manufacturing Corporation, filed motions to dismiss the present action on the ground of the judgment in the first action and the failure of the plaintiff to proceed under the provisions of G.S. 1-131.

The superior court determined that the motions to dismiss and the pleas in bar should be heard prior to the trial of this action upon its merits. Upon such hearing, the court considered the pleadings and judgment in the former action, all of which were offered in evidence, and found as facts: (1) The prior action was dismissed 7 September 1964 by judgment sustaining the demurrer of the defendants for the failure of the complaint in that action to state a cause of action against the defendants, or any of them; (2) the plaintiff did not appeal from that judgment; (3) this action was instituted against the same parties on 2 November 1964, and the allegations of the complaint in this action are not materially different from the allegations of the complaint in the former action, the parties, the subject matter and the issues being the same. The court thereupon entered its judgment sustaining the respective pleas in bar and dismissing the present action. From this judgment the plaintiff now appeals, assigning as error the sustaining of the pleas in bar and the rendering of the judgment of dismissal.

The material allegations of the complaint in the first action may be summarized as follows: Anderson is the owner of a building fronting on Walker Avenue in the City of Greensboro. At the time of the occurrence in question, Carolina occupied the building as

tenant of Anderson. Ten years or more prior to the occurrence in question, the sidewalk in front of one of the truck entrances to the building was built up by placing thereon a layer of cement sloping from the entrance to the curb. This ramp made the sidewalk level conform to the level of the entrance along the length of the entrance. On its east side, and near the entrance, the ramp was two inches higher than the level of the sidewalk and extended perpendicularly above the sidewalk, the difference in level disappearing as the ramp sloped toward the curb. Each defendant knew, or should have known, of the existence of this condition for several years prior to the plaintiff's injury. It constituted a nuisance and an obstruction, rendering the sidewalk unsafe for pedestrian travel. On 1 December 1962, at approximately 8:30 p.m., the plaintiff was walking westwardly along this sidewalk. Her shoe was caught by the part of the ramp so jutting upward from the sidewalk level so that she fell and sustained serious personal injuries. The city was negligent in that it constructed, or permitted the sidewalk to be constructed, in an unsafe manner, failed to repair it and permitted it to remain in an unsafe condition when it knew, or should have known, of its unsafe and dangerous condition. The defendants Anderson and Carolina were negligent in that each permitted the sidewalk to remain in an unsafe condition and failed to repair it when it knew, or should have known, of its unsafe condition. The negligence of each of the defendants was a proximate cause of the plaintiff's injury and damage. The plaintiff gave due notice to the city and demanded compensation for her injury prior to the bringing of the action, which demand the city rejected.

The complaint in the present action, while not in the identical language of the first complaint in all of its paragraphs, differs from the first complaint only in the following respects so far as the allegations of material facts are concerned: Near the building the ramp extends three inches above the level of the sidewalk, instead of two. "Either the city or the then owner of said building" (the then owner not being identified) constructed the ramp (the former complaint stating that the city constructed it or permitted it to be constructed). The condition of the sidewalk was especially hazardous at night due to the fact that the street light was suspended from a pole, the shadow of which pole fell across the sidewalk in close proximity to the shadow thrown upon the lower level of the sidewalk by the projection of the ramp above the sidewalk level (it not being alleged that these two shadows merged together). The plaintiff was unfamiliar with this sidewalk, having never walked along it prior to her injury. The street light was "relatively dim." In his brief, counsel for the plaintiff states: "There is no claim made here that the light-

ing was insufficient or improperly placed or constructed such as the Court considered in" certain cited cases.

Harry Rockwell for plaintiff appellant.

Sapp and Sapp for defendant Carolina Industrial Manufacturing Corporation.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin for defendant Anderson Industries, Inc.

Jordan, Wright, Henson & Nichols and William B. Rector, Jr., for defendant City of Greensboro.

LAKE, J. The plaintiff relies on G.S. 1-131, as amended by Session Laws of 1965, c. 747, which reads as follows, the italicized portion having been inserted by the 1965 amendment:

> "Within thirty days after the return of the judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the Supreme Court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days' notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action, *and if there has been no appeal from the judgment sustaining the demurrer the plaintiff may, one time, commence a new action in the same manner as if the plaintiff had been nonsuited.* If the demurrer is overruled the answer shall be filed within thirty days after the receipt of the judgment, if there is no appeal, or within thirty days after the receipt of the certificate of the Supreme Court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court."

Chapter 747 of the Session Laws of 1965 was ratified 1 June 1965. Section 3 thereof provides:

> "This Act shall become effective upon its ratification, and shall be applicable to pending litigation as well as to litigation commenced thereafter."

By its terms, the amendment of 1965 applies only to litigation pending on 1 June 1965 and to litigation commenced thereafter. The plaintiff's first action was not then pending, having been dismissed by the judgment entered 11 September 1964, from which no appeal was taken. The effect of that judgment and the right of the plaintiff thereafter to commence a new action must, therefore, be determined without reference to this amendment to G.S. 1-131.

The plaintiff elected not to appeal from the judgment of 11 September 1964, dismissing her former action. The present appeal is not from that judgment and we are not required, upon this appeal, to consider any alleged error in that judgment. It is a final adjudication that the complaint in the former action "failed to state a cause of action against the defendant, or either of them." Thus, the rights of the plaintiff against these defendants on account of the matters alleged in that complaint have been adjudicated.

In *Marsh v. R. R.*, 151 N.C. 160, 65 S.E. 911, Hoke, J., speaking for the Court, said:

> "[I]t is a principle universally recognized that when a court has jurisdiction of a cause and the parties, and on complaint filed, a judgment has been entered sustaining a general demurrer to the merits, such judgment, while it stands unreversed and unassailed, is conclusive upon the parties and will bar any other or further action for the same cause."

Judgment for the defendant having been rendered upon such a demurrer, the matter set forth in the complaint is *res judicata* just as if the facts alleged in the complaint had been found by a jury and a judgment for the defendant had been entered upon such verdict with no appeal therefrom. *Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200; *Swain v. Goodman,* 183 N.C. 531, 112 S.E. 36; *Bank v. Dew,* 175 N.C. 79, 94 S.E. 708; *Johnson v. Pate,* 90 N.C. 334.

The determination of the defendants' plea of *res judicata* prior to a trial on the plaintiff's alleged cause of action in the present case was within the discretion of the trial judge. *Wilson v. Hoyle,* 263 N.C. 194, 139 S.E. 2d 206; *Jones v. Mathis, supra.*

An examination of the evidence before the court at the hearing upon the plea in bar, consisting of the pleadings and judgment in the former action, discloses that such evidence is amply sufficient to support the findings of fact set forth in the judgment from which the present appeal is taken. There is no substantial difference between the allegations of the complaint in the present action and those in the complaint in the former action. No new or different cause of action is now alleged. Consequently, the plea of *res judicata* was properly sustained.

Affirmed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

CRAWFORD *v.* REALTY CO.

JIMMIE WADE CRAWFORD, ADMINISTRATOR OF JERRY CRAWFORD ESTATE, PLAINTIFF AND B. L. PRESSLEY, ADDITIONAL PARTY-PLAINTIFF V. GENERAL INSURANCE AND REALTY COMPANY AND HOMER HOBBS, DEFENDANTS.

(Filed 2 March, 1966.)

Master and Servant § 78; Insurance § 8—

An action against insurance agents for breach of their agreement with an employer to procure compensation coverage for an employee may be maintained only by those who would have been entitled to payments had the policy been issued, and when it appears that the employee died as the result of injury received during the employment, and that the employee left a widow him surviving, such action may be maintained only by the widow, and an action instituted by the employee's administrator and the employer, who advanced the insurance premium, must be dismissed.

MOORE, J., not sitting.

APPEAL by plaintiffs Crawford and Pressley from *Campbell, J.*, August Term 1965 of HENDERSON.

This action was begun in the General County Court of Henderson County by plaintiff Crawford against named defendants by summons dated March 13, 1964. A complaint was filed when the summons issued. Thereafter, plaintiff obtained an order making B. L. Pressley an additional party. Permission was also granted plaintiff to file an amended complaint.

Pressley voluntarily made himself a party plaintiff. He asked that plaintiff have relief in accordance with the prayer of his complaint.

Defendants demurred to the complaint for failure to state a cause of action and for want of jurisdiction. The demurrer was overruled in the County Court. Defendants appealed to the Superior Court. There the demurrer was sustained. Plaintiffs excepted and appealed.

Paul K. Barnwell and Redden, Redden & Redden for plaintiff.

Prince, Jackson, Youngblood and Massagee for additional plaintiff.

Uzzell & DuMont for defendants.

RODMAN, E.J. Plaintiffs in their brief filed here contend they have alleged these ultimate facts: Jerry Crawford was on and prior to November 20, 1963, employed by B. L. Pressley. The employee was on that date killed "by accident arising out of and in the course of his employment." Plaintiff was serving as administrator

of the employee's estate by appointment by the Superior Court of Henderson County. Deceased "is survived, among others, by his wife, who is sickly and unable to earn a living for herself." Deceased employee had prior to his death an average weekly wage of $45. ". . . Jerry Crawford, and B. L. Pressley, as part of their contract of employment and for the protection of both, contracted and agreed that Mr. B. L. Pressley would obtain a contract of insurance or insurance policy which would comply with the North Carolina Workmen's Compensation Laws or Act, Chapter 97 of the General Statutes of North Carolina, and both contracted and agreed that each would accept the benefits, limitations, advantages and disadvantages provided by the said North Carolina Compensation Act, and both had agreed that the contract of insurance, for their protection, would contain the same protection and limitations as a contract of insurance required by the North Carolina Workmen's Compensation Act." Defendants, partners, are insurance agents or brokers selling workmen's compensation insurance; they contracted in June 1963 to procure for B. L. Pressley a policy of insurance "which would meet all the requirements as to liability and benefits as required by the North Carolina Compensation Act, Chapter 97 of the General Statutes of North Carolina." As consideration for defendants' contract to procure the insurance, Pressley paid defendants the sum of $587. Notwithstanding their contract, defendants failed to procure the insurance. If defendants had complied with their contract and procured compensation insurance, plaintiff Crawford would be entitled to an award of $9450, plus $400 for funeral expenses. He prays for the recovery of these sums.

B. L. Pressley, as an additional party plaintiff, filed in the General County Court a writing stating that he adopted plaintiff's complaint "as his Complaint in this action as fully as if the same were copied and fully set forth herein, and asks for the same relief as in said Complaint set forth, except that the amount paid for workmen's compensation insurance was approximately $181.60."

There is no express allegation in the complaint that Pressley had less than five employees, and because he employed less than five our Compensation Act was not applicable to his employees.

The defendants demurred for failure to state a cause of action, for that (1) it affirmatively appeared there was no privity between plaintiff and defendants and defendants would not be obligated in any way whatsoever to the plaintiff or plaintiff's intestate, and (2) that plaintiff's intestate and B. L. Pressley were subject to and bound by the provisions of the North Carolina Workmen's Compensation Act, and that any liability of the said Pressley has to date not been determined under the provisions of such act.

Plaintiff contends that the burden rests on defendant in actions in courts of law for compensation for injuries to employees to show that the jurisdiction which the courts would otherwise exercise has been ousted because the parties are subject to the provisions of the Workmen's Compensation Act; and absent an allegation that the employer had more than five employees, or has in fact procured compensation insurance as provided by G.S. 97-13(b), courts of law may proceed to determine the rights of the parties. *King v. Bringardner,* 65 S.W. 2d 673; *Consolidated Underwriters v. King,* 325 S.W. 2d 127; *Carter v. Associated Petroleum Carriers,* 110 S.E. 2d 8; Workmen's Compensation, 99 C.J.S., § 122. Since the beneficiary of a contract may maintain an action for the breach thereof, *Potter v. Water Co.,* 253 N.C. 112, 116 S.E. 2d 374, *Trust Co. v. Processing Co.,* 242 N.C. 370, 88 S.E. 2d 233, the court erred in sustaining the demurrer.

Conceding without deciding the soundness of the legal principles asserted for a reversal, it nevertheless appears on the face of the complaint that neither the plaintiff Crawford as administrator nor the additional party plaintiff Pressley has stated a cause of action. This is true because it affirmatively appears from the allegations of the complaint that neither is entitled to recover. Pressley asks for no recovery in his own right, he merely asks that plaintiff Crawford as administrator recover in accordance with the prayer of his complaint.

Our compensation statute fixes the sums which an employee is entitled to because of injuries sustained in the course and scope of his employment. If the employee die, those persons wholly dependent for support on the deceased employee are entitled to compensation to the exclusion of all other persons. G.S. 97-38(1). A widow is conclusively presumed to be wholly dependent upon the support of the employee. G.S. 97-39. Plaintiff specifically alleges that the deceased employee is survived by his widow "who is sickly and unable to earn a living for herself." Under the facts alleged the administrator would not be entitled to maintain a claim for compensation before the Industrial Commission, if the insurance policy had issued. He can not maintain an action at law for breach of a contract in which he has no beneficial interest. The sole beneficiaries of the contract alleged are those wholly dependent on the deceased employee.

Stacy, C.J., said in *Hunt v. State,* 201 N.C. 37, 158 S.E. 703: "When a statute names a person to receive funds and authorizes him to sue therefor, no one but the person so designated has the right to litigate the matter." This is of course another way of say-

ing that actions can only be maintained by the real party in interest. G.S. 1-57.

We are not called upon to decide whether an action at law could have been maintained by the widow of the deceased employee, or whether her sole remedy would be the filing of a claim with the Industrial Commission.

Affirmed.

MOORE, J., not sitting.

CITY OF KINSTON, A MUNICIPAL CORPORATION v. H. C. SUDDRETH.

(Filed 2 March, 1966.)

Damages § 6—

Where the person making an increased bid for municipal property deposits the required sum under a written contract that if he failed to comply with his bid the deposit should be forfeited as liquidated damages, and that the bidder should have no further rights in the property, and the city would be free to sell the prpoerty, *held*, the provision for the forfeit of the deposit as liquidated damages precludes the city from recovering in addition thereto any further loss sustained in the resale of the property. This result would not be affected if the forfeiture be deemed a penalty, since in this event the measure of damages is the actual loss not exceeding the penalty fixed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Parker, J.*, February 1965 Civil Session of LENOIR, docketed in the Supreme Court as Case No. 360 and argued at the Fall Term 1965.

Plaintiff appeals from a judgment sustaining defendant's demurrer to the complaint and dismissing this action. In brief summary, the complaint alleges:

In 1963, plaintiff City of Kinston (City) acquired a new City Hall. The City Council declared the old City Hall property to be surplus and advertised it for sale at public auction on September 11, 1963. At that time, Hardy-Harvey, Inc. and Fred I. Sutton became the last and highest bidders for the property at the price of $40,-100.00, subject to confirmation of the sale by the City Council. By resolution, the City Council confirmed the sale unless, prior to 5:00

p.m. on September 26, 1963, an increased bid of at least $2,000.00 should be received. It also required that the increased bid be "accompanied by a good faith deposit of $4,000.00, and a contract in form approved by the City Attorney of said City to guarantee the making of such raised bid at the resale."

Prior to the deadline, defendant raised the bid of Hardy-Harvey, Inc. and Fred I. Sutton from $40,100.00 to $42,100.00, and deposited with the City Clerk the sum of $4,000.00 and an executed contract "approved as to form by the City Attorney." It is attached to the complaint as Exhibit A. The contract provided that the City should immediately advertise the property for resale at public auction; that the sale would begin with defendant's bid of $42,100.00; and that if the sale were confirmed to him at that figure defendant would immediately pay the full purchase price. The contract contained this further provision:

> "That if the said party of the first part shall fail to so purchase and to comply with such bid, and to comply with the terms of this contract, that then the $4,000.00 so deposited with the City shall be forfeited to the City as liquidated damages, and the said party of the first part shall have no further rights therein or in said properties, and the City of Kinston shall thereafter be free to sell said properties in a manner selected by the City."

When the property was resold on October 18, 1963, defendant's bid was the only one received. He deposited with the Clerk an additional $210.00 to meet the advertised requirement that the successful bidder make a good-faith deposit of 10% of the amount of his bid. The City Council immediately confirmed the sale to defendant unless an increased bid should be filed within ten days. No such bid was filed. On November 15, 1963, defendant notified the City that he would not comply with his bid but, instead, he would forfeit his deposit of $4,210.00. The City resold the property at a third auction on December 4, 1963, at which time Fred I. Sutton, Jr. and E. W. Massey became the last and highest bidders at the price of $36,500.00, which was $5,600.00 less than defendant's bid at the second sale. No increased bid was thereafter received, and the City executed a deed to the purchasers or their assigns.

The prayer of the complaint is that the City recover of defendant $1,390.00 — the difference between the $5,600.00 "loss" and $4,210.00, the amount of defendant's deposit.

Defendant's demurrer to the complaint was sustained. When plaintiff declined the opportunity to amend, the court dismissed the action, and plaintiff appealed.

George B. Greene for plaintiff appellant.
C. E. Gerrans for defendant appellee.

SHARP, J. Defendant demurred on the ground that, in their contract, the parties had expressly fixed and limited the maximum amount of damages which the City could recover from him in the event he failed to comply with his bid; that he had the choice of performing or forfeiting; and that the City, therefore, can recover no more than the agreed amount which the parties had denominated "liquidated damages." Plaintiff's position is that the contract provision was not for liquidated damages, but for a penalty which the court will not enforce, thus permitting plaintiff to recover its *actual* damages.

At the outset, it is noted:

> "(T)he test of whether a *promise* to pay money is liquidated damages or a penalty usually arises in an action brought by the party injured to recover the agreed amount. Whether a *deposit* is liquidated damages is tested, however, by an action by the party who has broken the contract, to get the court to give back to him the money he has parted with or so much of it as remains after satisfying the loss." McCormick, Damages § 153 (1935).

The plea that a sum stipulated to be liquidated damages is in reality a penalty is ordinarily a defensive one — a shield to protect a defendant from an absurd or oppressive claim which is entirely disproportionate to the actual damage he has caused. We apprehend that it is rare indeed that a party — as here — attempts to use the plea offensively to collect damages in excess of the stipulated figure.

> "*Liquidated damages* are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs. A *penalty* is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a *punishment,* the threat of which is designed to prevent the breach, or as *security* . . . to insure that the person injured shall collect his actual damages." McCormick, Damages § 146 (1935).

Liquidated damages may be collected; a penalty will not be enforced. 22 Am. Jur. 2d, Damages § 212 (1965).

It is not necessary for us to decide whether the sum, which the parties here have so designated, is actually liquidated damages. Conceding it to be a penalty, as plaintiff contends, the result in this case will be the same. If a provision denominated liquidated damages be deemed one for a penalty, "the measure of damages is compensation for the actual loss, *not exceeding the penalty named.*" *Wheedon v. Bonding Co.*, 128 N.C. 69, 71, 38 S.E. 255, 255. (Italics ours.) It seems quite apparent that defendant intended to limit the amount of damages which could be recovered against him in the event he did not purchase the property. Whatever the City may have intended, that was the effect of the contract which it accepted.

We hold that the contract limited defendant's maximum liability to $4,000.00. Defendant voluntarily forfeited the additional $210.00 which he later deposited. Although the contract here contained no such specific stipulation, the validity of provisions limiting the maximum amount to be recovered in the event of a party's breach of contract, leaving actual damages in a lesser amount to be established, is unquestioned.

> "Contractual limitation of liability to an agreed maximum must be distinguished from a penalty or liquidated damages, though every valid agreement for liquidated damages operates as a kind of limitation. Aside from certain restrictions in the field of public utility law, chiefly relating to common carriers, if the agreed amount to which liability is limited is something more than a merely nominal sum, the validity of the provision has long been recognized." 5 Williston, Contracts § 781A (3d Ed. 1961) and cases therein cited.

The judgment of the court below sustaining the demurrer and dismissing the action is

Affirmed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

CLAUDE DAVIS LITCHFIELD v. WILLIAM HARVEY COX.

(Filed 2 March, 1966.)

Husband and Wife § 24—

Evidence tending to show that plaintiff and his wife were happily married, that after she became involved with defendant she became indifferent toward plaintiff, and that defendant supplied her with liquor and wrote her love letters, *held* sufficient to establish the three elements of an action for alienation of affections, and nonsuit was improperly allowed, and the fact that defendant and his wife continue to live in the same house affects only the credibility of his testimony.

MOORE, J., not sitting.

APPEAL by plaintiff from *Parker, J.*, October 11, 1965, Mixed Session, HYDE.

The plaintiff brought an action against the defendant for alienation of his wife's affections, and for criminal conversation. By stipulation, the action for criminal conversation was withdrawn from consideration at the close of the plaintiff's evidence. Upon the charge that the defendant alienated his, the plaintiff's, wife's affections, he offered evidence tending to show that he and his wife were married in 1952 and had resided in Engelhard, North Carolina, since that time except for brief occasions when plaintiff's work required him to be elsewhere. As a commercial fisherman he was absent for a considerable period of time during 1962, 1963 and 1964, but prior to 1962, his wife had done nothing to cause him to doubt her loyalty. He introduced into evidence three letters he had found in his wife's possession in September, 1964. All were postmarked August, 1963 and were addressed to "Mrs. Harvey Banks, General Delivery, St. Simon, Georgia." The return address on the envelope was "J. H. Banks, Morehead City, North Carolina." Mr. Ordway Hilton, an expert examiner of questioned documents, testified for the plaintiff that these letters were written, in his opinion, by a typewriter owned by the defendant, and the plaintiff's wife testified that they were received by her from the defendant while she, the plaintiff and their children were living in St. Simons, Georgia. Their contents will be referred to in the opinion.

At the close of the plaintiff's evidence, the defendant's motion for nonsuit was allowed. Plaintiff excepts and appeals, assigning error.

John A. Wilkinson by James R. Vosburg for plaintiff.
Aydlett & White for defendant.

PLESS, J. To establish a case against the defendant for alienation of his wife's affections, the law imposes upon the plaintiff, Litchfield, the burden of showing, by competent evidence, the following: "(1) That he and his wife were happily married, and that a genuine love and affection existed between them; (2) that the love and affection so existing was alienated and destroyed; (3) that the wrongful and malicious acts of the defendants produced and brought about the loss and alienation of such love and affection. *Hankins v. Hankins,* 202 N.C. 358, 162 S.E. 766." *Ridenhour v. Miller,* 225 N.C. 543, 35 S.E. 2d 611.

The mother of the plaintiff, Mrs. Bess Litchfield, testified that her son and his wife seemed to be fond of each other and it was just a happy family. The plaintiff testified "We had a happy home. She seemed to love the children and to love me * * *. In 1962 and 1963 she became very cold * * *. She was casting me aside * * *. Things got worse as time went on."

The defendant supplied the plaintiff's wife with liquor until she had a drinking problem. He wrote her that "those nights were all so nice * * *. I could not pick the best of them as they were all so perfect. I wish I were able to put on these pages the satisfaction that it gives me to know that I care for you and of being reasonable *(sic)* sure that it is being returned * * *. I am waiting and loving you."

The above excerpts from the plaintiff's evidence fully establish the three elements necessary to survive a motion for nonsuit. While it is true that the plaintiff and his "alienated" wife are still living together that affects the credibility of his evidence, but it still remains a question for the jury.

Reversed.

MOORE, J., not sitting.

MONTE M. YOUNG v. VIRGINIA SWEET.

(Filed 2 March, 1966.)

1. Contracts § 3; Landlord and Tenant § 10—

The law of contracts that an agreement relating to future undertakings must specify all of the essential and material terms and leave nothing to be agreed upon as the result of future negotiations, applies to a provision in a lease for an extension or renewal.

2. Landlord and Tenant § 10—

Provisions for a renewal of a lease with rental for the extended term to be subject to adjustment at the beginning of the extension period is void for uncertainty in regard to the material element of the amount of the rent.

MOORE, J., not sitting.

APPEAL by plaintiff from *Clarkson, J.,* October Term 1965 of SWAIN.

This is an action for damages for the asserted refusal to renew a lease as required in a rental contract. The lease from defendant and the Eastern Cherokee Tribe of Indians to plaintiff, incorporated in the complaint by reference, is dated July 15, 1959. It demises to plaintiff for a term of five years, beginning January 1, 1960, a lot and building in the Cherokee Reservation known as Cherokee Lodge, for use in selling Indian and mountain souvenirs. Lessee covenanted to pay to defendant Sweet the sum of $4,000 per annum, from which she would pay annually $800 to the Eastern Band of Cherokee Indians.

The lease was approved by the Business Committee of the Tribe and by the Superintendent of the Cherokee Agency.

Section 17, the concluding section of the lease, reads:

> "17. ADDITIONAL PROVISIONS: IT IS UNDERSTOOD THAT THE LESSEE SHALL HAVE AN OPTION TO RENEW THIS LEASE FOR AN ADDITIONAL FIVE YEARS, provided the lessee has satisfactorily complied and is current with all provisions and terms of the original lease, and gives written notice to the Lessor and the Superintendent of his election to effect the option at least three (3 months) prior to the expiration date of the original lease, with rental being subject to adjustment at the beginning of the option period."

Plaintiff alleged he had complied with all the obligations imposed on him by the lease and had in due time given notice of his intention to renew and had obtained from the Department of the Interior, Bureau of Indian Affairs, its approval of the proposed renewal; but "defendant refused to enter into negotiations with plaintiff regarding the renewal of the aforesaid lease," and forced plaintiff to surrender possession of the demised premises on December 31, 1964, the end of the original term. He alleged he had suffered a loss of $30,000 by reason of defendant's failure to renew.

Defendant demurred, asserting: (1) The court was without jurisdiction to determine the controversy because the lease covered land in the Cherokee Indian Reservation; (2) the complaint failed

to state a cause of action, in that it affirmatively appeared that the parties had not agreed on the terms on which an extension would be granted.

The court sustained the demurrer and dismissed the action.

T. D. Bryson, Jr., for plaintiff.
Parker, McGuire & Baley for defendant.

RODMAN, E.J. An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations. *Thompson-McLean, Inc. v. Campbell,* 261 N.C. 310, 314, 134 S.E. 2d 671; *Wade v. Lutterloh,* 196 N.C. 116, 120, 144 S.E. 694; *Croom v. Lumber Co.,* 182 N.C. 217, 220, 108 S.E. 735; *Edmondson v. Fort,* 75 N.C. 404.

The rule applicable to contracts in general is applicable to contracts containing a provision for an extension or renewal of a lease. Devin, J., in *Realty Co. v. Logan,* 216 N.C. 26, 3 S.E. 2d 280, quotes with approval Taylor on Landlord and Tenant as follows: "A covenant to let the premises to the lessee at the expiration of the term without mentioning any price for which they are to be let, or to renew the lease upon such terms as may be agreed on, in neither case amounts to a covenant for renewal, but is altogether void for uncertainty." The quoted section from Taylor was likewise declared the law in *McAdoo v. Callum Bros.,* 86 N.C. 419. The rule so stated accords with the conclusions reached by a substantial majority of the courts of sister states. Annotation: "Validity and Enforceability of provision for renewal of lease at rental not determined." 30 A.L.R. 572; 51 C.J.S. 596; 32 Am. Jur. 806.

Here the lease in question expressly requires an agreement as to the amount of the rental as a condition of the renewal. Plaintiff alleges there has been no agreement. Plaintiff has not stated a cause of action. This conclusion renders it unnecessary to determine whether the Superior Court had jurisdiction.

Judgment dismissing the action is
Affirmed.

MOORE, J., not sitting.

STATE v. RALPH CAMP.

(Filed 2 March, 1966.)

1. Homicide § 27—

The charge in this case on the right of self-defense *held* not subject to the construction that the jury had to find both that the killing was necessary and that defendant reasonably believed it to be so in order to sustain the defense, but, construed contextually, correctly instructed the jury on this aspect that an apparent necessity, reasonable in the light of the circumstances as they appeared to defendant, would be sufficient.

2. Criminal Law § 155—

An objection to the admission of evidence is necessary to present defendant's contention that the evidence was incompetent.

3. Criminal Law § 71—

Where the record affirmatively shows that defendant sent for officers after he had killed a man and told them about it on the way to the scene, there is nothing to indicate that his statements were not voluntary and competent.

MOORE, J., not sitting.

APPEAL by defendant from *Campbell, J.*, August 1965 Session of POLK.

The defendant was indicted for the murder of Andrew Pritchard on 26 September 1964. He admitted that he shot and instantly killed Pritchard with a rifle while Pritchard was sitting in the driver's seat of his automobile, with his feet out of the open left door thereof, the automobile being parked in the yard of the defendant's dwelling house. He contended that he shot in self-defense. The jury returned a verdict of guilty of manslaughter and the defendant was sentenced to confinement in the State Prison for a term of ten years.

The evidence offered by the State may be summarized as follows:

A neighbor of the defendant telephoned the Sheriff's office stating that the defendant had shot Pritchard and would be waiting for the officers at the neighbor's house. Upon their arrival they found the defendant holding a rifle. He immediately handed it to the officers, got in their car and went to his house with them. He told them that he had shot Pritchard with the rifle; that Pritchard had been at his house, with others, that afternoon and evening; that he and Pritchard were arguing about Pritchard's claim of ownership of the rifle; that he asked Pritchard several times to leave but Pritchard refused to do so and threatened to kill or beat the defendant; and that he, thinking Pritchard was reaching for the glove compartment of his car, shot and killed him.

Upon arrival at the defendant's house the officers found Pritchard's body lying on its back on the front seat of his automobile, with his feet out of the door on the driver's side. He was dead, with a bullet wound near the heart. (It was stipulated that the doctor who examined Pritchard, if present, would testify that the bullet wound was the cause of death.) An unlighted cigarette lay upon his chest and a cigarette lighter was beside his body at the right side. The officers found no weapon of any type upon Pritchard's body or in his automobile. Pritchard was a larger man than the defendant. The defendant showed the officers where he was standing when he shot Pritchard, this being fifteen to twenty feet from where Pritchard was sitting in the automobile. The door of the car being open, the defendant could have seen inside the car and could have seen Pritchard's body down to his hips. Prior to this occasion the defendant had been heard to say that if Pritchard did not stay away from him and leave him alone he was going to kill Pritchard.

The defendant testified in his own behalf to the following effect:

He is not married and, at the time of this occurrence, lived in the house in the yard of which it took place. On the afternoon in question, he was sitting in his house with other visitors when Pritchard knocked on the door and was invited in by the defendant. After a time Pritchard claimed to own the rifle and stated that he was going to take it, which the defendant forbade him to do except through claim and delivery proceedings, the defendant claiming the rifle was his. A quarrel resulted in the course of which there was much cursing of the defendant by Pritchard. The defendant told Pritchard to stop cursing or leave. Thereupon Pritchard walked out of the house and got in his car, which was parked in the front yard, but refused to leave the premises. The defendant and his guests, one of whom was Pritchard's brother, thereupon got in an automobile belonging to one of the guests and left to visit another friend, the defendant taking his rifle with him.

After about an hour the defendant and one of his friends returned. Pritchard was still sitting in his car in the defendant's yard. He got out of the car stating that he was going to beat the defendant, and resumed cursing. The defendant asked him to leave. Pritchard started toward the defendant whereupon the defendant pointed the rifle at him and told him to go back. Pritchard went back and got in the car. This procedure was repeated a second time. Following the second return to the car, Pritchard sat therein cursing the defendant and saying he was going to kill him. Pritchard reached over to the right side of the car and thereupon the defendant shot him. He then went to the neighbor's house and requested him to call the Sheriff.

The defendant denied having made any statement that he would kill Pritchard if the latter did not leave him alone.

B. D. Wilson, the neighbor to whose house the defendant went following the shooting, testified in behalf of the defendant to the effect that he heard Pritchard cursing and talking loudly and heard the defendant ask Pritchard to leave and Pritchard refuse to do so before he heard the shot.

The defendant assigns as error certain rulings of the court upon the admission of evidence, the failure of the court to dismiss the case at the close of the evidence, and certain portions of the charge with reference to the right of self-defense.

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

Hamrick & Hamrick for defendant appellant.

PER CURIAM. The trial judge included in his charge to the jury a full and fair review of the evidence and of the contentions of both parties concerning the matter of self-defense. He then instructed the jury as follows:

> "[T]he Court instructs you that if the defendant had a reasonable apprehension from the facts and the circumstances as they appeared to him at the time he committed the homicide that he, the defendant, would be killed or suffer great bodily harm unless he took the life of Andrew Pritchard, then under these circumstances he had the right to stand upon his right of self-defense provided he himself was not at fault.
>
> "Now, the Court instructs you that in passing upon this defense you must judge the defendant's conduct upon the facts and circumstances as they appeared to him at the time he committed the act and if you find that he had a reasonable apprehension at the time he killed Andrew Pritchard, that he, Ralph Camp, was about to lose his own life or receive great bodily harm, then the defendant had the right to kill Andrew Pritchard and would not be guilty of any crime; but the Court further instructs you that the reasonableness of the apprehension on the part of Ralph Camp is not for him to decide, but it is for you to determine from the facts and circumstances and the evidence in the case as they appeared to Ralph Camp at that time; the law in North Carolina being that a person has the right to kill in self-defense to prevent death or great bodily harm and may kill when it is necessary if he believes it to be so and has a reasonable ground for that belief, the reasonable-

ness of the belief depending upon the facts and circumstances as they appeared to the defendant at the time of the killing, but the reasonableness of the belief must be judged by the jury and not by the defendant."

The defendant now argues that the language following the last semi-colon constituted an instruction that in order to acquit the defendant on the ground of self-defense the jury would have to find both that the killing was necessary and that the defendant reasonably believed it to be so. We do not so construe the instruction, considered in its entirety as it must be.

A homicide may be excusable on the ground of self-defense even though the killing was not actually necessary. An apparent necessity therefor, reasonable in the light of the circumstances as they then appeared to the defendant, is sufficient so far as this element of the defense is concerned. *State v. Lee,* 258 N.C. 44, 127 S.E. 2d 774; *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *State v. Goode,* 249 N.C. 632, 107 S.E. 2d 70. The foregoing instruction is in accord with this principle.

As to the admission of testimony by police officers concerning statements made to them by the defendant, it is sufficient to note that no objection to the introduction of this evidence was made at the trial; there is nothing in the record to suggest that the statements were not voluntary and the record shows affirmatively that the defendant sent for the officers after the killing and told them about it on the way to the scene of it. The remaining assignments of error, relating to the admission of evidence and the failure to enter a judgment of nonsuit, are also without foundation.

No error.

MOORE, J., not sitting.

YVONNE BRYANT v. MARJORIE MARIE RUSSELL AND PAUL HOWARD RUSSELL.

(Filed 2 March, 1966.)

1. Evidence § 51—

The court properly refuses to permit an expert to answer hypothetical questions when at the time some of the material facts stated as the basis of the hypothesis are not in evidence.

2. Same—

Where an expert has left the courtroom and is not available for cross-examination, it is not error for the court to refuse to permit his answer to a hypothetical question, put in the record in the absence of the jury, to be read to the jury, regardless of whether at that time all of the facts stated in the hypothesis were properly in evidence.

3. Same—

An expert may not, on the basis of his examination of a party, give his opinion as to injuries the party had sustained in a collision some three months prior to the examination, which collision the witness did not observe.

4. Appeal and Error § 46—

The denial of a motion to set aside the verdict on the ground that it was contrary to the greater weight of the evidence will not be disturbed in the absence of a showing of abuse.

5. Trial § 37—

An exception to the statement of the contentions will not be sustained when the matter is not called to the attention of the trial court in apt time.

MOORE, J., not sitting.

APPEAL by plaintiff from *Clark, S.J.*, Regular October 1965 Session of CRAVEN.

This is an action for damages for personal injuries alleged to have been sustained by the plaintiff when the city bus, upon which she was a passenger, was struck by an automobile owned by the defendant Paul Howard Russell, and driven by the defendant Marjorie Marie Russell, his sister and alleged agent. The complaint alleges that Marjorie Marie Russell was negligent in that she drove the automobile into the intersection, where the collision occurred, without first bringing it to a stop in obedience to a stop sign erected at the intersection and facing her as she entered it. It is alleged that, as a result of the collision, the plaintiff was thrown from her seat upon the bus and injured. Each defendant filed an answer denying negligence by Marjorie Marie Russell, denying that she was the agent of the defendant Paul Howard Russell, and denying injury to the plaintiff.

The jury found that the plaintiff was injured by the negligence of the defendant Marjorie Marie Russell, as alleged in the complaint, that Marjorie Marie Russell was the agent of the defendant Paul Howard Russell, and that the amount of damages which the plaintiff was entitled to recover was $212.50. From a judgment entered in accordance with the verdict the plaintiff appeals. She assigns as error the denial of her motion to set the verdict aside on the ground that the answer to the third issue was against the greater weight of the evidence, the denial of her motion for a new

trial, a portion of the court's charge to the jury concerning the contentions of the defendants, and the action of the court in sustaining objections by the defendants to questions propounded by the plaintiff to her witness, Dr. John Baggett, a medical expert.

Dr. Baggett was the first witness called at the trial. He testified that he examined the plaintiff on 3 August 1964, which was approximately three months after the accident. He testified that she then told him that she had been involved in an automobile accident in the first week of May; that she had been knocked out of the seat of the bus when a car ran into it; that she landed on her buttocks and immediately experienced pain in her leg, lower back and neck, and that she continued to have pain at the time she came to see him. He then testified as to conditions which he observed at the time of his examination and as to treatment prescribed by him. Thereupon Dr. Baggett was asked a hypothetical question, proper in form, predicated upon the assumptions that the jury would find by the greater weight of the evidence certain facts. Upon these assumptions, the question called for the opinion of the witness as to whether or not the accident in which the plaintiff was involved on 6 May 1964 could have produced the injuries of which she complained. The court sustained an objection by the defendants on the ground that there was no evidence at that stage of the trial to serve as the basis for the question. In the absence of the jury, the answer which the witness would have given was placed in the record.

The witness was then asked, "Now, Doctor, based on your examination of this patient can you give me your medical opinion as to the injuries she sustained?" The defendants' objection was sustained.

The witness then testified briefly on cross-examination as to the plaintiff's condition as observed by him at the time of his examination. Apparently, he was then excused and was not recalled. The plaintiff then called other witnesses who testified concerning the occurrence, and she testified in her own behalf as to how it occurred and as to the injuries she sustained. At the close of the plaintiff's evidence, she moved that the answer given by Dr. Baggett in the absence of the jury to the above mentioned hypothetical question be read to the jury. The court denied this motion.

Kennedy W. Ward for plaintiff appellant.
Barden, Stith, McCotter & Sugg for defendant appellees.

PER CURIAM. In *Ingram v. McCuiston,* 261 N.C. 392, 134 S.E. 2d 705, this Court said: "To be competent, a hypothetical question may include only facts which are already in evidence or those which

the jury might logically infer therefrom." See also: *Jackson v. Stancil,* 253 N.C. 291, 303, 116 S.E. 2d 817; Stansbury, North Carolina Evidence, § 137. The hypothetical question propounded to Dr. Baggett included facts as to which there was no evidence then in the record. Consequently, the objection was properly sustained. It was also proper to deny the motion that his answer, put into the record in the absence of the jury at the time the question was originally asked, be read at the close of the plaintiff's evidence. At that time Dr. Baggett had left the courtroom and was not available for cross-examination. It is not necessary to determine whether the evidence offered by the plaintiff in the meantime would have made such a question proper had Dr. Baggett been recalled as a witness.

There was no error in sustaining the objection to the second question propounded to Dr. Baggett. It did not call for his statement of the plaintiff's condition at the time of his examination or as to what could have been the cause thereof. It called for his opinion as to the injuries she sustained in the collision which occurred three months prior to his examination of the plaintiff, which collision the witness did not observe. Stansbury, North Carolina Evidence, § 136.

The motion to set aside the verdict on the ground that the jury's answer to the issue of damages was contrary to the greater weight of the evidence was addressed to the discretion of the trial judge. *Nance v. Long,* 250 N.C. 96, 107 S.E. 2d 926; *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49; Strong, N. C. Index, Appeal and Error, § 46. His decision is not reviewable except upon a showing of abuse of discretion, which does not appear upon this record.

The record does not show that the plaintiff called to the attention of the trial judge any error in his summary of the contentions of the parties set forth in his charge to the jury. Consequently, this assignment of error can not be sustained. *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601; Strong, N. C. Index, Trial, § 35.

No other ground being advanced for the motion for a new trial, it was, presumably, based upon the above assignments of error and was, therefore, properly overruled.

No error.

MOORE, J., not sitting.

STATE v. HERMAN C. DAVIS.

(Filed 2 March, 1966.)

Criminal Law § 94—

The court's admonition to defendant's counsel while counsel was interrogating defendant as a witness, while infelicitous in the choice of words, *held* not to have prevented defendant from presenting all of his evidence or to have prejudiced defendant in the eyes of the jury.

MOORE, J., not sitting.

APPEAL by defendant from *Campbell, J.*, November 1965 Session of RUTHERFORD.

Criminal prosecution on an indictment charging defendant with the felony of first degree murder in the killing of Eurias Logan, and drawn in the language of G.S. 15-144.

The solicitor for the State placed defendant on trial for murder in the second degree or manslaughter as the facts may warrant.

Defendant represented by counsel entered a plea of not guilty. Verdict: Guilty of second degree murder.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton, Assistant Attorney General Charles D. Barham, Jr., and Staff Attorney Wilson B. Partin, Jr., for the State.

J. Nat Hamrick for defendant appellant.

PER CURIAM. The State's evidence tends to show the following facts: About 8 p.m. on 1 October 1965 defendant, Steve Myers, a 17-year old son of Margaret Copeland, and Sam Lipscombe were sitting on a couch in the living room of a house occupied by Margaret Copeland, her grandmother Dovie Whitesides, and Margaret Copeland's son Steve Myers and her 18-year-old daughter Margaret Lee Copeland, and smaller children. Eurias Logan came in and went into a back room where Margaret Lee Copeland and her illegitimate child by him were. After about five minutes Logan came back into the living room. Margaret Copeland was sitting on the arm of the couch by defendant talking over a telephone. When Logan was within about six feet of defendant, Logan pointed his finger at Margaret Copeland and began talking about the baby and some milk. Defendant asked Logan whom he was pointing his finger at. Logan replied not at him, and if he wanted to fight to go outside. Whereupon, defendant stood up and shot Logan with a pistol. Logan fell to the floor, and in about five to ten minutes was

dead. Dr. John Reece performed an autopsy on the body of Logan, and, in his opinion, Logan's death resulted from a massive hemorrhage caused by a penetrating bullet wound of the lower chest and abdomen, rupturing the lower stomach, the liver, and the aorta. Logan's hands were out of his pockets when he was shot, and he had nothing in them.

Defendant's evidence tends to show the following facts: Defendant, Steve Myers, and Sam Lipscombe were sitting on a couch in the living room of the Copeland home. Defendant testified: "We had been there three or four minutes when Eurias came in. Sam and this boy and myself and Margaret was in the living room. Margaret Lee was back in the kitchen or the back room, one; I don't know exactly which one. When Eurias came in, I spoke and he spoke back to me, and he asked me, 'What you doing down here?' and I said to him, 'The same thing you is,' just like that, and he slapped me and pointed his finger in my face, and I said, 'What you do that for?' After he slapped me, he shook his finger in my face and said if you don't like that, and cursed and told me he'd cut my throat, and I told him no, he wouldn't, either, and I shot him. He was standing about as far as from here to that desk from me, about six foot; I was standing on the floor there by the studio couch." Defendant also testified he saw a knife in Logan's hand when he shot him.

In rebuttal the State offered evidence that defendant told a deputy sheriff of Rutherford County, "Eurias Logan smacked him and he shot him," and also told him, "Well, hell, I'll shoot anybody that smacked me."

During the direct examination of defendant by his counsel, after defendant had testified as to the circumstances of his shooting Logan, as quoted above, defendant's counsel asked him: "Now, describe exactly what he said and exactly what he did that led up to the shooting; everything that you remember?" The solicitor objected on the ground he had already testified as to that. Defendant's counsel replied: "No, sir, he hasn't described it in detail." The solicitor replied: "He just told us." Then the judge said: "All right, let him repeat it over again. You sit down and let him do the talking." Then defendant's counsel said: "All right, you do the talking?" Whereupon, the judge said: "Let him do the talking. You just hush; he can talk. Go ahead." After further colloquy between the judge and defendant's counsel, the judge told defendant in substance that if he had anything different to tell about the shooting of Logan than what he had already said to tell it. Defendant replied: "I don't know anything else." Defendant assigns as prejudicial error the judge's remarks to his counsel. While the judge's remarks to defendant's counsel "you sit down" and "you just hush" were not a

felicitous choice of words, yet considering them in the light of the circumstances in which they were made, there is nothing in the record to indicate that the judge prevented defendant from presenting all of his evidence, or that there is any probability the challenged words of the trial judge had any effect upon the jury prejudicial to defendant. *S. v. Faust,* 254 N.C. 101, 118 S.E. 2d 769. These assignments of error are overruled.

We have considered all the other assignments of error by defendant, and they are too tenuous to merit discussion, and all are overruled. In the trial we find

No error.

MOORE, J., not sitting.

HARRY EUGENE ROBBINS, JR. v. NANCY GREEN ROBBINS.

(Filed 2 March, 1966.)

Divorce and Alimony § 22—

A valid order awarding custody of the child of the marriage is conclusive upon the parties and may not be modified collaterally by a petition praying that the child's custody be awarded to petitioner during a certain period.

MOORE, J., not sitting.

APPEAL by plaintiff from *Fountain, J.,* December Term 1965 of PITT.

This action was begun in Craven County on June 21, 1965. Plaintiff in his complaint, filed when summons issued, alleged: He was a resident of Craven County, defendant a resident of Wake; they were married in 1960; a child, Harry Eugene Robbins, III, was born in 1962; defendant had custody of the infant; the parties separated on May 26, 1964; the husband intended the separation to be permanent. He prayed for an absolute divorce, but did not ask for custody of the child.

Defendant in her answer alleged she had been awarded custody of the child "in an order dated July 31, 1964, signed by Judge Harry C. Martin, this order being affirmed by the Supreme Court of the State of North Carolina by a decision filed November 11, 1964, and entitled *Robbins v. Robbins.* Judge William Copeland

again affirmed custody of the child in Nancy Green Robbins by order dated December 31, 1964."

At the September Term 1965 Judge Fountain submitted appropriate issues to a jury and on the verdict then rendered entered a judgment awarding plaintiff an absolute divorce from defendant. No reference is made in the judgment to the infant or right to his custody.

On December 2, 1965, plaintiff filed with Honorable William J. Bundy, Resident Judge of the Third Judicial District, a petition praying that he be awarded custody of the infant during the Christmas holidays. Based on that petition he tendered an order requiring the defendant to deliver the infant "to the custody of the father to be taken to New Bern for a Christmas visit from 9 A.M. on December 22 to 5 P.M. on Sunday, December 26." Judge Bundy declined to sign the order as tendered, but informed counsel for plaintiff that he would sign a show cause order. On December 9, 1965, he signed an order directing defendant to appear before Judge Fountain on December 14, 1965, to show cause, if any she had, why plaintiff should not be awarded custody of the infant during the Christmas holidays. Judge Fountain was presiding over the December Term 1965 of Pitt Superior Court.

At the hearing before Judge Fountain defendant through her counsel challenged the jurisdiction of the court to make an order with respect to the custody of the child, asserting that the question of custody could only be presented by appropriate motion in the case of *Nancy G. Robbins v. H. E. Robbins,* instituted in the Superior Court of Wake County in May 1964, in which action plaintiff sought alimony and custody of the infant as provided in G.S. 50-16. Judge Fountain found that custody had been awarded to the mother by Judge Martin in July 1964. (This order was affirmed, *Robbins v. Robbins,* 262 N.C. 749, 138 S.E. 2d 632.) He further found that Judge Copeland had entered an order in the Wake County action on December 18, 1964 awarding custody to the mother. He thereupon adjudged that the action be dismissed for that "the Superior Court of Pitt County does not have sufficient jurisdiction over the parties or the subject matter of the proceeding and there does not exist sufficient change of circumstances to alter or amend the orders previously entered in the Superior Court of Wake County pertaining to the custody of the child of the parties."

Plaintiff excepted and appealed.

Charles L. Abernethy, Jr., for plaintiff.

Liles & Merriman for defendant.

PER CURIAM. The mother having sought the custody of the infant in her action instituted in Wake prior to the institution of the father's action in Craven, in which custody was not prayed for, the judgment of the Superior Court of Wake County awarding custody to the mother was conclusive and binding on the Superior Court of Craven County. G.S. 50-16. *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857; *Murphy v. Murphy,* 261 N.C. 95, 134 S.E. 2d 148; *In the Matter of: Robert Mark Ponder,* 263 N.C. 530, 139 S.E. 2d 685.

The judgment from which plaintiff appeals is

Affirmed.

MOORE, J., not sitting.

BRUCE DIXON v. WARREN COX AND WIFE, DOROTHY WHITE COX, AND PAUL CARMON.

(Filed 2 March, 1966.)

Automobiles §§ 19, 41a—

Evidence that defendant motorist was confronted with a vehicle approaching from the opposite direction, zig-zagging across the road, first on one side then on the other, that defendant slowed down and had his front wheel off the hard-surface to the right when the other vehicle crashed into his automobile, *held* insufficient to be submitted to the jury on the issue of defendant's negligence.

MOORE, J., not sitting.

APPEAL by plaintiff from *Parker, J.,* October 25, 1965 Civil Session, PITT Superior Court.

The plaintiff instituted this civil action to recover damages for personal injuries he sustained as a result of a collision between a Dodge automobile owned and being driven southwardly on N. C. Highway No. 11 in Pitt County by Paul Carmon, and a Buick owned by Warren Cox and being driven northwardly by his wife, Dorothy Cox. The collision occurred about 7:30 a.m. on August 4, 1965. The plaintiff was a guest passenger in Carmon's Dodge. He alleged his injuries were proximately caused by the joint and concurrent negligence of both drivers.

At the conclusion of the plaintiff's evidence, the court, on Carmon's motion, entered judgment of compulsory nonsuit and dis-

missed the action as to him. A mistrial was thereupon ordered as to the defendants Cox. The plaintiff excepted and appealed from the judgment in favor of Carmon.

Gaylord & Singleton by L. W. Gaylord, Jr., for plaintiff appellant.

James, Speight, Watson & Brewer by W. W. Speight for defendant Paul Carmon, appellee.

PER CURIAM. The only question presented is the sufficiency of the evidence to require the court to submit to the jury an issue of Carmon's negligence. According to the evidence of the plaintiff who was the only witness, Paul Carmon was driving south at 35 to 40 miles per hour on Highway No. 11 at 7:30 a.m. on August 4, 1964. A misty rain was falling. The surface of the highway was 20 feet wide. The shoulder on the west side was 10 to 12 feet wide, wet, and sloped downward slightly to a little ditch. The witness, in Carmon's vehicle, saw the Cox Buick approaching from the south when it was approximately 900 feet away. It "had run off the paved portion of Highway #11 on the right, or East side, and then it came back across the center line on the left side and it went back again over, actually, I don't know, how many times it zig-zagged across—it was going back and forth. . . . Carmon was on his right side of the center of the paved portion of the highway and never crossed the center line; that at the time of the accident the right front wheel of the Carmon car was off on the dirt shoulder. . . . The Carmon car had slowed down some," before the collision.

The defendant Carmon was driving 35-40 miles per hour and on his side of the road. As the Cox vehicle approached, out of control and zig-zagging across the road, first on one side—then on the other, Carmon slowed down and had a front wheel off to his right when the Cox Buick crashed into his Dodge, injuring the plaintiff. Should Carmon have gone to the wet and slippery shoulder and stopped? Or should he have slowed down, kept moving, and be in a position to evade the approaching vehicle which was visibly out of control? A still vehicle on the shoulder would be no less in danger than a moving one under the circumstances. Negligent conduct on the part of Carmon is not a permissible inference from the evidence offered. The judgment of nonsuit was proper, and is

Affirmed.

MOORE, J., not sitting.

STATE v. STERLING PEEK.

(Filed 2 March, 1966.)

Bastards § 7—

In this prosecution of defendant for wilful failure to support his illegitimate child, the court's definition of the term "wilful" *is held* without error.

MOORE, J., not sitting.

APPEAL by defendant from *Clarkson, J.*, Regular December 1965 Session of MACON.

Defendant was charged in the bill of indictment with wilful failure to support an illegitimate child born to Johnnie Collins of which he was alleged to be the father. Mrs. Tallent, who was married to Johnny Tallent after the birth of the child, testified that she dated defendant Peek from June until October 1962 and had sexual relations with him about three or four times a month from July through October 1962. The child was born 9 July 1963; Mrs. Tallent stated that Peek was the father of it. She testified further that she told him in December 1962 that she was pregnant and that he would have to support the child, and in February 1964 again saw him and demanded support for it. Defendant has contributed nothing toward the support of the child and he was indicted on this charge at the April Session 1964.

Defendant offered evidence to the effect that at the time the child was conceived the mother was associating with other boys and was promiscuous with her favors. He offered evidence of at least one witness to the effect that he had had relations with her. The defendant did not testify.

From a verdict of guilty, the defendant appeals, assigning error.

Attorney General Bruton, Staff Attorney Andrew A. Vanore, Jr., for the State.

J. Horner Stockton and Hall, Thornburg & Holt for defendant.

PER CURIAM. Defendant relies principally upon the assignment of error that the Presiding Judge did not properly define the word "wilful." However, in the charge, the court stated: " 'Willful,' as used in the statute, means intentional or without a just cause, excuse or justification, and the element of wilfulness must exist at the time the charge is laid. In order to convict a defendant under this statute, the burden is on the State to show not only that he is the father of the child, and that he has refused or neglected to support and maintain it, but further, that his refusal or neglect was willful, without

just cause, excuse or justification after notice and request for support."

Language to this effect was approved in the case of *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728 and *S. v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209.

This was purely a question for the jury and there is ample evidence to sustain the verdict rendered below.

No error.

MOORE, J., not sitting.

STATE v. CECIL DARNELL.

(Filed 2 March, 1966.)

1. Criminal Law § 143—

The unlimited right of a defendant to appeal is easily abused by an indigent defendant who may appeal without cost to himself. G.S. 15-4.1.

2. Criminal Law § 154—

An appeal is itself an exception to the judgment, presenting the face of the record for review.

3. Criminal Law § 139—

On appeal from sentence imposed upon defendant's voluntary plea of guilty to the crime charged, the Supreme Court may determine only whether error appears on the face of the record proper and whether the sentence is in excess of the statutory limit.

MOORE, J., not sitting.

APPEAL by defendant from *Martin, S.J.,* September 1965 Criminal Session of BUNCOMBE.

In a three-count bill of indictment returned at the August 1964 Criminal Session, defendant was charged with (1) the felonious breaking and entering on June 19, 1964, of a building occupied by Scott Dillingham; (2) the larceny of specified property, valued at $820.00, belonging to Scott Dillingham; and (3) the receiving of said property knowing it to have been feloniously stolen. After his arrest, defendant "jumped bond" in June 1964 and went to Florida. Upon his return to North Carolina in July 1965, he was again arrested.

At the September 1965 Term, the solicitor took a *nolle prosequi* as to the first and third counts in the indictment, and defendant, by

and through his attorney of record, Melvin K. Elias, Esquire, entered a plea of guilty of larceny of property valued at less than $200.00. When the plea was tendered, the trial judge examined defendant under oath. In answer to his questions, defendant testified that he went into Scott Dillingham's place of business and stole 26 batteries which he sold to a junkyard. He said that he had authorized his counsel to enter the plea of guilty; that he himself was pleading guilty; that the plea had not been induced by any threats or promises from any person whomsoever. He declared that he understood the charge against him and that his plea subjected him to a possible punishment of two years in prison. He further stated that he had had ample time to confer with his attorney about his case; that he was able to hear and understand the judge's questions; and that he was not under the influence of "alcohol, drugs, narcotics, or other pills." Defendant told the court that he had previously served an 8-month sentence for larceny of an automobile, a 3-5 year sentence for breaking and entering a restaurant, and an additional prison sentence for malicious damage to personal property. At the conclusion of defendant's examination, the judge accepted his plea of guilty to larceny of property valued at less than $200.00 and imposed a sentence of twelve months. Defendant, against the advice of his counsel, immediately gave notice of appeal and insisted that his appeal be perfected. The court appointed Mr. Elias as defendant's attorney "to perfect and prosecute his appeal."

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

Melvin K. Elias for defendant appellant.

PER CURIAM. "The right of appeal is unlimited in the courts of North Carolina. . . ." *State v. Beasley,* 226 N.C. 577, 579, 39 S.E. 2d 605, 606; G.S. 15-180; *State v. Grundler* and *State v. Jelly,* 251 N.C. 177, 111 S.E. 2d 1. This case is a fair example of the manner in which that unlimited right is now being perverted at the whim of those who have nothing to lose. An indigent defendant has only to say, "I appeal," and the county is required to furnish him with counsel, "transcript and records required for an adequate and effective appellate review." G.S. 15-4.1.

This record contains no assignment of error, but the appeal itself is an exception to the judgment. *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738. When a defendant voluntarily pleads guilty to a charge of crime, this Court may consider only questions of law inherent in the judgment itself. The only questions presented here are whether any error appears upon the face of the record proper, *State*

v. Jernigan, 255 N.C. 732, 122 S.E. 2d 711; *State v. Wallace,* 251 N.C. 378, 111 S.E. 2d 714, and whether the sentence was in excess of the statutory limit. Should the latter situation appear, the case will be remanded for the entry of a proper judgment. *State v. Alston,* 264 N.C. 398, 141 S.E. 2d 793; *State v. Templeton,* 237 N.C. 440, 75 S.E. 2d 243.

No error appears upon the face of this record; the punishment was one-half of the maximum permitted by law. The judgment of the Superior Court is

Affirmed.

MOORE, J., not sitting.

STATE v. ALBERT P. GILLEABEAUX.

(Filed 2 March, 1966.)

Robbery § 4—

Evidence *held* amply sufficient to overrule nonsuit in this prosecution for robbery.

MOORE, J., not sitting.

APPEAL by defendant from *Mallard, J.,* August 1965 Session of BUNCOMBE County Superior Court.

The defendant, Albert P. Gilleabeaux, and Ernest Washington Johnson were charged in a bill of indictment with highway robbery of one Stiles Young on August 8, 1965. Both defendants entered pleas of not guilty and the jury rendered verdicts of guilty as to both. From sentence imposed, the defendant Gilleabeaux appealed to the Supreme Court.

T. W. Bruton, Attorney General, Millard R. Rich, Jr., Assistant Attorney General for the Appellee.

Melvin Elias for the defendant.

PER CURIAM. The State's witness Young testified that about midnight August 8, 1965 he was on his way home and at the corner of Ora Street and Ralph Street in Asheville when "Somebody ran up and hit me on the side of the head and one put the knife on me and I told them to take all I had but don't cut me. They took my

money and my billfold out of my pocket and when it didn't have any money they threw it down and run. . . . I had about seventy-five dollars, maybe a few dollars over that (which they took) . . . The boy over there was the one with the knife (indicating defendant Johnson). Gilleabeaux went in my pocket and got my greenback money and Johnson got the silver money and during that time Johnson had the knife in his hand, holding it right behind my head. They had knocked me down and I was getting up when they had the knife on me and I told them to take my money but don't cut me."

The record contains only one exception, the failure of the Court to nonsuit the State at the close of the State's evidence. From the foregoing excerpts of the evidence elicited from the State's witness, Stiles Young, it can be seen that the exception is without merit.

Affirmed.

MOORE, J., not sitting.

STATE v. JAMES EDWARD HOPSON CASES No. 65-757, 65-758.

(Filed 2 March, 1966.)

Burglary and Unlawful Breakings § 4; Larceny § 7—

Evidence tending to show that defendant was a passenger in a vehicle driven by the owner and that articles which had been stolen from a building sequent to a breaking were found on the back floor board, *held* insufficient to be submitted to the jury on the question of defendant's guilt of felonious breaking and larceny.

MOORE, J., not sitting.

APPEAL by defendant from *Martin, S.J.*, October, 1965 Session, BUNCOMBE Superior Court.

In this criminal action, appellant James Edward Hopson and Virlon Thomas Spillars were indicted and tried for the felony of breaking into and larceny of two record players from the Black Mountain Grammar School.

The evidence disclosed the building was forcibly entered and the two players stolen on the night of September 1, 1965. Fingerprints on the broken door matched those of Spillars. On the night of the breaking the officers saw an unoccupied Ford automobile near the schoolhouse and "across the street from some homes." Later

the officers saw the vehicle being driven by Spillars with the appellant beside him. The two record players were on the back floor board. The officers testified appellant stated at the time he had no knowledge the players were in the vehicle. Each of the defendants demurred to the evidence and excepted to the refusal of the court to grant the motion. From a verdict of guilty of breaking and entering, and larceny, and a three-years prison sentence, Hopson excepted and appealed.

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

Riddle & Briggs by Bruce Briggs for defendant appellant.

PER CURIAM. Appellant was neither the owner nor the driver of the Ford in which the stolen articles were found. Evidence is lacking that he was in possession of the stolen articles. The Attorney General concedes, and properly so, that the evidence does no more than raise a suspicion of appellant's guilt and is insufficient in law to support a guilty verdict. The court should have sustained the demurrer to the evidence and directed a verdict of not guilty. The judgment of the Superior Court is

Reversed.

MOORE, J., not sitting.

STATE v. JOHNNIE COOPER.

(Filed 2 March, 1966.)

Assault and Battery §§ 8, 9—

Evidence tending to show that the victim, standing in the road some 200 feet away, threatened to kill the resident of a house, who was standing on his porch, if he came down there, that the resident did not go but that defendant and a companion walked to where the victim was standing, grabbed him, and cut him with a knife, *held* not to present the question of self-defense or defense of another.

MOORE, J., not sitting.

APPEAL by defendant from *Campbell, J.*, November 1965 Session of RUTHERFORD.

STATE *v.* COOPER.

Defendant was indicted for felonious assault (G.S. 14-32) on one Walter Griffin on May 15, 1965. The solicitor announced that "(t)he State will place the defendant on trial for Assault with a Deadly Weapon, a misdemeanor." The record shows "(t)he defendant, without the assistance of counsel, having waived same, entered pleas of 'Self-defense' and not guilty." The jury returned a verdict of "Guilty of an assault with a deadly weapon." Judgment imposing a prison sentence, with recommendation that defendant be placed on work release, was pronounced. Defendant excepted and appealed.

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

J. A. Benoy for defendant appellant.

PER CURIAM. There was plenary evidence that defendant cut Walter Griffin's right arm to such extent "(i)t took 27 stitches to sew (his) arm up."

Defendant, while admitting he cut Griffin, insists the court erred in failing to instruct the jury and apply the law with reference to his right of self-defense and his right *(S. v. Hornbuckle,* 265 N.C. 312, 144 S.E. 2d 12) to defend a third person from a felonious assault.

Evidence offered by defendant tended to show: When defendant and George Spicer, in Spicer's car, brought John Henry Buff home, Griffin was in Buff's yard, "tearing up the yard with his car." When Buff told Griffin "to get away from there," Griffin left and went "towards his home." Shortly thereafter, Griffin came back. He had a shotgun. Buff was standing on his porch. Griffin, in the road "about 200 feet away" and "cussing," told Buff: "If you come down here I'll kill you." Buff testified: "(S)o I wouldn't go down there."

Defendant and Spicer left Buff and went down towards Griffin. What occurred thereafter is described by defendant as follows: "I had a few drinks in me and I felt pretty brave, and I just went on down there . . . Well, me and George was right side by side, and we walked down there. George grabbed him and just as George grabbed him—We both grabbed him about the same time and I cut him. I cut him down across his arm. I just cut him one time. I had just a regular old straight-blade knife. . . . I carry a knife all the time." On cross-examination, defendant testified: "After the boy was cut, I was in the attic when the Sheriff came down, I was trying to get away." (Note: Griffin testified his unloaded shotgun was in his car and that defendant cut him without provocation of any kind.)

There is no evidence Griffin pointed the shotgun at Buff, defendant or Spicer. There is no evidence the shotgun was loaded. All the evidence is to the effect the shotgun was not fired.

There was no evidence defendant believed it was necessary to cut Griffin to prevent an assault on Buff or on himself or on Spicer and had reasonable grounds for such belief. Indeed, defendant did not testify he entertained and acted upon such belief. The facts in evidence did not call for instructions in legal principles relating to self-defense or to the right of a private citizen to defend a third person from a felonious assault.

While defendant's other assignments of error have been considered, none discloses error of such prejudicial nature as to justify a new trial.

It is noteworthy that defendant, while not represented by counsel at his trial in the superior court, was ably represented by counsel in connection with his appeal to this Court.

No error.

MOORE, J., not sitting.

IN THE MATTER OF THE WILL OF T. A. BROOKS, DECEASED.

(Filed 2 March, 1966.)

APPEAL by *caveators* from *Clark, S.J.*, November 1965 Special Session of BEAUFORT.

T. A. Brooks died June 26, 1964. His wife had predeceased him, and he left no lineal heirs. On July 22, 1964, the Bank of Washington, as the executor and trustee named therein, offered three attested writings for probate as the last will and testament of T. A. Brooks, The first, dated February 13, 1962, purported to be his "Last Will and Testament"; the second, dated March 6, 1962, and the third, dated October 6, 1962, were each labeled "Codicil to My Last Will and Testament dated February 13, 1962." In these writings which were probated in common form, T. A. Brooks devised all his property to the Bank of Washington in trust (1) to support and educate deserving white, "fatherless orphans" selected by the trustee, who was directed to give priority to Beaufort County residents; (2) to pay $20.00 a month to the Methodist Episcopal Church of

Washington during its existence; and (3) to pay $75.00 a month for life to each of four beneficiaries: a sister-in-law, the nurse who had attended him and his wife, and two nieces.

On January 6, 1965, twenty-one of his collateral relations filed a *caveat* in which they alleged that, at the time T. A. Brooks signed each of the probated documents, he lacked testamentary capacity because of mental weakness resulting from old age and disease. The usual issues were submitted to the jury and answered in favor of the propounder. From the judgment declaring that the paper writings proffered constituted "the true Last Will and Testament of T. A. Brooks" and admitting them to probate in solemn form, caveators appeal.

Leroy Scott and Carter & Ross for caveator appellants.

John A. Wilkinson and Rodman & Rodman for propounder appellee.

PER CURIAM. We have carefully examined the entire record and considered caveator's assignments of error, each of which relates to the admission or exclusion of testimony. In no ruling have we found any error which would justify a new trial. The clear cut issue was whether T. A. Brooks had testamentary capacity on each of the three dates he signed the paper writings offered for probate. Both propounders and caveators offered evidence, and the jury's verdict established the will. The case was tried in accordance with settled principles of law. In the trial we find

No error.

MOORE, J., not sitting.

STATE v. EUELL BALLARD GIBBS.

(Filed 2 March, 1966.)

APPEAL by defendant from *McLean, J.*, July 1965 Session of BUNCOMBE.

Defendant was tried on a two-count bill of indictment. The first count charged that defendant forged a certain check dated April

22, 1965, for $72.00, purportedly drawn by "E. Y. Ponder" on the Citizens Bank of Marshall, North Carolina, payable to the order of defendant. The second count charged that defendant uttered said check. After trial, the jury, as to each count, returned a verdict of guilty "as charged in the bill of indictment." As to each count, the court pronounced judgment imposing a prison sentence of not less than nine nor more than ten years, the two sentences to run concurrently. Defendant excepted and appealed.

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

B. B. Worsham for defendant appellant.

PER CURIAM. The State offered evidence tending to show the name "E. Y. Ponder" is a forgery; that defendant either wrote "E. Y. Ponder" or was present, aiding and abetting, when another person did so; and that defendant took the check, endorsed it and delivered it to Sams Motor Sales, Inc., which credited $50.00 on defendant's debt to it and gave defendant $22.00 in cash.

There was plenary evidence to require submission to the jury and to support the verdict as to each count. Moreover, careful consideration of defendant's assignments discloses no error deemed of such prejudicial nature as to justify a new trial or to require particular discussion.

It is noted that the prison sentences imposed are within the maximum limits provided by G.S. 14-119 and by G.S. 14-120. Whether defendant should be granted relief by way of reduction of the sentences is a matter for decision by the Board of Paroles.

No error.

MOORE, J., not sitting.

MODERN HOMES CONSTRUCTION COMPANY AND FIREMAN'S FUND INSURANCE COMPANY, PLAINTIFFS v. TRYON BANK AND TRUST COMPANY, DEFENDANT.

(Filed 9 March 1966.)

1. Pleadings § 4—

The relief to which a party is entitled is determined by the facts alleged in his pleading and established by evidence, and his assertion of an untenable legal theory as the basis for his relief is immaterial.

2. Bills and Notes § 10—

The acceptance of an instrument operates as a promise of the drawee to pay it, G.S. 25-139, while payment is the performance of that promise, which ends the negotiable life of the instrument, and the two are fundamentally different so that the payment of a check by the drawee bank cannot operate as an acceptance and cannot be the basis of liability of the bank to the payee. G.S. 25-134, G.S. 25-139, G.S. 25-144.

3. Banks and Banking § 10; Bills and Notes § 14—

The payee of a check as well as the drawer, has the right to expect the bank to pay the check in accordance with its tenor, and when the bank pays the check to an agent of the payee it is necessary to the bank's protection that it ascertain that the agent is authorized to receive payment for the payee, and the drawer has no right, as against the payee, to direct its payment to anyone else.

4. Same— Bank paying check to unauthorized agent may be held liable for conversion by payee.

The evidence was to the effect that plaintiff's agent was authorized to receive cash from plaintiff's customers (under instruction to purchase a cashier's check and remit to plaintiff) but was not authorized to cash customers' checks, that a customer issued his check payable to plaintiff, identified the agent as the payee or as a representative of the payee, and requested the bank to pay the funds to the agent, and the agent endorsed the instrument in the name of plaintiff by himself as agent, and, that the bank paid the agent in cash. *Held:* The evidence is susceptible to the inference that the drawer presented the agent as a representative and not as the person doing business under the payee's name, and therefore plaintiff payee may recover of the bank upon the theory of conversion, and nonsuit was improperly entered, although the bank may challenge plaintiff's claim that it was not bound by the agent's endorsement.

5. Trial § 21—

Conflicting inferences make a case for the jury.

MOORE, J., not sitting.

LAKE, J., dissenting.

PLESS, J., joining in dissent.

APPEAL by plaintiffs from *Brock, J.*, May 31, 1965 Schedule C Regular Session of MECKLENBURG, docketed as Case No. 294 and argued at the Fall Term 1965.

Action by the payee of a check against the drawee-bank.

The facts in this case are not in dispute. Plaintiffs' evidence: Plaintiff Modern Homes Construction Company (Construction Company) is a Georgia corporation authorized to do business in North Carolina. In the spring of 1962, it constructed a shell home for Frank S. Moore. The contract was negotiated and the house constructed under the supervision of Ray Durham, the manager of Construction Company's Greenville, South Carolina office. At that time, Construction Company had a policy issued by plaintiff Fire-

man's Fund Insurance Company (Insurance Compnay) which insured it against loss in excess of $1,000.00 as a result of an employee's dishonesty. Durham had no authority to cash or endorse checks made payable to Construction Company. He did, however, have authority to receive cash. When an account was paid to Durham in cash, his instructions were to purchase a cashier's check from a local bank and send it immediately to Construction Company's office in Columbia, South Carolina. After the completion of the house on April 21, 1962, Durham went with Moore to defendant Bank where he introduced Durham as the representative of Construction Company, which had no account with the Bank. There, Moore drew a check upon his account, payable to Construction Company, in the amount of $3,195.00, "For 'House in full.'" Durham then endorsed the check "Modern Homes Construction Company by Ray Durham." Upon the advice and at the request of its depositor Moore, defendant Bank cashed the check for Durham in the presence of Moore. Durham absconded with the proceeds. In June 1962, Construction Company advised Insurance Company of "a potential claim" against Durham growing out of this matter. Sometime before September 27, 1962, the date on which Construction Company notified defendant Bank that it had paid the check upon an improper endorsement, Moore died. His account with defendant Bank had been closed out on May 22, 1962. Plaintiff Insurance Company, under the terms of its policy, paid plaintiff Construction Company $2,195.00 in settlement of its liability for Durham's defalcation. Defendant Bank has declined to reimburse plaintiffs.

Defendant's evidence, which amplified but did not contradict that of plaintiffs', tended to show that when Durham presented the check for payment, the assistant cashier told him that the Bank "could not cash it in that condition." Moore then said, "This man is Modern Homes Construction Company, and you cash it for me," whereupon the Bank made payment to Durham.

The factual allegations in the complaint are substantially established by the evidence. In its answer, defendant Bank admits that Moore issued the check in suit, and that it paid the check. As a further answer and defense, it pleads "the laches of Construction Company" in that, although Durham cashed the check on April 21, 1962, it made no claim on defendant "for a considerable period of time after that and this action was not instituted until October 7, 1964," at which time Moore was dead and Durham had disappeared.

At the close of all the evidence, defendant's motion for judgment as of nonsuit was allowed, and plaintiffs appealed.

Hedrick, McKnight & Parham for plaintiff appellants.
Fairley, Hamrick, Hamilton & Monteith for defendant appellee.

SHARP, J. Plaintiffs aver that they are entitled to recover from defendant on either of two theories: (1) Defendant was *negligent* in paying Durham, an unauthorized person, without ascertaining whether he had authority to endorse the check and receive the proceeds, when a proper investigation would have revealed his lack of such authority; or (2) Defendant *accepted* the check when it paid it on an unauthorized endorsement. A pleader's right to recover, however, is not determined by the theories which he formulates in the complaint; he may recover upon any theory which is supported by the facts alleged and established by evidence. *Board of Education v. Board of Education,* 259 N.C. 280, 130 S.E. 2d 408.

Plaintiffs rely upon *Dawson v. Bank,* 196 N.C. 134, 144 S.E. 833, *followed in Dawson v. Bank,* 197 N.C. 499, 150 S.E. 38. In *Dawson,* without plaintiff payees' endorsement, defendant bank paid a check to a person not authorized to receive payment. The drawers of the check, operators of a tobacco auction warehouse, had authorized the bank to pay their checks to farmers without the payees' endorsements, *i.e.,* to treat the checks as bearer instruments. The trial court nonsuited the action, and this Court reversed. Speaking through Connor, J., it said:

> "The law in this State . . . is to the effect that the payee of a check cannot maintain an action upon the check against the bank on which the check is drawn, unless and until the check has been accepted, or certified by the bank. . . .
>
> * * *
>
> "'(He) must seek his remedy against the drawer, the bank being liable only to the drawer for its breach of promise to pay the check. . . . (T)here is no privity between the holder of the check and the bank, until by certification of the check or acceptance thereof, express or implied, or by any other act or conduct it has made itself directly liable to the holder.'" 196 N.C. at 136-37, 144 S.E. at 834.

The Court held that the act of the bank in receiving the check, presented for payment without payees' endorsement, paying it to an improper person, and subsequently charging it to the account of the drawer, amounted to an acceptance of the check which rendered it liable *ex contractu* to plaintiff payees. The result in *Dawson* was undoubtedly correct, but the rationale of the decision—acceptance —cannot be sustained. See Comments 7 N.C.L. Rev. 191 (1929);

25 Ill. L. Rev. 343 (1930); Note, 38 Yale L. J. 1143 (1929); Britton, Bills and Notes § 146 (2d Ed. 1961) (hereinafter cited as "Britton"); *Kentucky Title Savings Bank & Trust Co. v. Dunavan,* 205 Ky. 801, 266 S.W. 667; *Trucking Co. v. Bank,* 240 S.W. 1000 (Tex. Civ. App.). The acceptance of a check is the *promise* of the drawee to pay it, G.S. 25-139 (our codification of N. I. L. § 132), and, until that promise is made, no contractual relation exists between the drawee and the payee, G.S. 25-134 (N.I.L. § 127); *Insurance Co. v. Stadiem,* 223 N.C. 49, 25 S.E. 2d 202. Payment is the *performance* of that promise — the expected and intended end of the check. Acceptance prolongs the life of the check; payment ends it. Thus, the two are fundamentally different. Nor can the act of the bank in marking a check "paid" and charging it against a depositor's account constitute a "constructive acceptance" under G.S. 25-144 (N.I.L. § 137). This section provides that "where a drawee *to whom a bill is delivered for acceptance* destroys the same or refuses within twenty-four hours after such delivery . . . to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." (Italics ours). It contemplates a case where the bill or check is delivered to the drawee for the purpose of procuring an acceptance or certification; it was never intended to apply to an erroneous payment. Britton, § 146; 10 Am. Jur. 2d, Banks § 583 (1963).

Prior to the enactment of the Uniform Negotiable Instruments Law, a number of courts, upon the theory of acceptance, allowed recovery by the true payee of a check against the drawee bank which had paid an unauthorized endorser. See Comment, 25 Ill. L. Rev. 343 (1930) for a collection of such cases, which includes *Pickle v. Muse,* 88 Tenn. 380, 12 S.W. 919, 7 L.R.A. 93, cited in *Dawson.* Since adoption of the N.I.L., which required all except so-called "constructive acceptances" (G.S. 25-144) to be in writing (G.S. 25-129), "to consider payment to a wrongful holder an acceptance is now a view with little authority in the case, and none in the critical, material. *Aigler,* 'Rights of Holder of Bill of Exchange Against the Drawer' (1925); 38 Harv. Law Rev. 857, 878 *et seq.;* Brannan 'Negotiable Instruments Law' (4th Ed.) 852." Comment, 25 Ill. L. Rev. 343, 344. *Accord:* 9 C.J.S., Banks & Banking § 343 (1938); Britton, § 146. See *Wrecking Co. v. Citizens' Bank & Trust Co.,* 159 La. 752, 106 So. 292 and *Baltimore & O. R. Co. v. Bank,* 102 Va. 753, 47 S.E. 837. *Dawson v. Bank, supra* (decided over 29 years after this State adopted the N.I.L.) and *Chamberlain Co. v. Bank of Pleasanton,* 98 Kan. 611, 160 Pac. 1138 are among the

small number of cases adopting this view. 9 C.J.S., Banks & Banking § 343 nn. 87 & 88 (1938).

Another theory advanced to hold the drawee liable to the payee or true owner for an unauthorized payment of his check is that of money had and received. But, "just how this can result is by no means clear. Since the debiting of the check to the drawer is a nullity the bank has received no money from any source to be held for the holder. Indeed, instead of having received money, the drawee has parted with its own money." Britton, § 146. *Accord: McKaughan v. Trust Co.,* 182 N.C. 543, 109 S.E. 355. This approach has been used but scantily. See Note, 4 Ark. L. Rev. 219 (1950).

The majority of jurisdictions, both before and after the adoption of the N. I. L., have allowed the holder to recover on the theory of a conversion *of the check* when the drawee pays a check upon a forged or unauthorized endorsement. 10 Am. Jur. 2d, Banks § 631 (1963); Note, 4 Ark. L. Rev. 219 (1950); Britton, § 146 n. 2; Brannan, Negotiable Instruments Law § 189, at 1321-24 (7th Ed. 1948). The following annotations, "Payment of check upon forged or unauthorized endorsement as affecting the right of the true owner against bank," collect the cases: 14 A.L.R. 764 (1921); 69 A.L.R. 1076 (1930); 137 A.L.R. 874 (1942).

When the drawee bank takes a check without the payee's endorsement, delivers cash in the amount of the check to one unauthorized to receive its payment, and ultimately returns the check to the drawer, the bank has assumed complete control over the check, dealt with it as its own, and withheld it from its rightful owner. Such dealings constitute a tortious conversion of the check, *Kentucky Title Savings Bank & Trust Co. v. Dunavan, supra; Louisville & N. R. Co. v. Citizens' & Peoples' Nat'l. Bank,* 74 Fla. 385, 77 So. 104; *Blacker & Shepard Co. v. Granite Trust Co.,* 284 Mass. 9, 187 N.E. 53; *Hartford Accident & Indemnity Co. v. Bear Butte Valley Bank,* 63 S.D. 262, 257 N.W. 642; and the payee is entitled to recover its value. *Prima facie,* this is the face value of the paper converted. *State v. First Nat'l. Bank,* 38 N.M. 225, 30 P. 2d 728; *Survey v. Wells, F. & Co.,* 5 Cal. 124; *Bentley Murray & Co. v. LaSalle St. Trust & Savings Bank,* 197 Ill. App. 322; Brannan, *op. cit. supra* § 60 at 898.

In discussing a holder's right against the drawee bank which has paid his check under a forged endorsement, Britton poses the very question presented by this appeal:

> "Where an agent of the payee collects the check and obtains payment thereof from the drawee after signing the payee's name, is this a payment under a forged indorsement? It may

well be that it is not, for the delivery of the instrument to the drawee is not a negotiation. It is a surrender for payment. The signature of the payee's name in such case operates only as a receipt. Hence, in the supposed case, the question at issue is whether the agent had authority to collect. It is possible that such agent might be found to have authority to collect and yet have no authority to negotiate the instrument. If so, the instrument is discharged even though the agent embezzled the proceeds of the collection. The unauthorized signature of the payee is inoperative except as a receipt. If the agent did not have authority to collect the drawee would remain liable to the holder as before by having paid some one other than the holder and by asserting dominion over the instrument by returning it to the drawer." Britton, § 146 at 422.

A case on "all fours" with the facts in the case at bar is *James v. Union Nat'l. Bank,* 238 Ill. App. 159. In *James,* drawer drew his check to plaintiff in the amount of $1,625.00 (balance due on a truck), and delivered it to plaintiff's agent, F. L. Pruse. Pruse, who had no authority to endorse checks payable to his employer, endorsed the check "James & Co., F. L. Pruse," and presented it to defendant bank for payment. Defendant's cashier telephoned the drawer and said, "There is a man standing here who wants $1,625.00. Am I to give it to him? The check reads James & Co." Drawer said, "It will be all right to cash it." The bank cashed the check; Pruse took the money and absconded. In allowing plaintiff to recover the amount of the check, the Illinois court said:

"The authority of Pruse to collect the amount due did not include authority to indorse the check received for the amount due. . . . (T)he bank assumed the sole responsibility of treating Pruse as the agent of the plaintiff with authority to indorse his name upon the check and collect the proceeds. . . . It is evident that the bank sought the wrong party for information. It should have inquired of the payee to find out if Pruse was authorized to indorse the check. . . . Where a drawee bank refuses to pay a check which has not been certified or accepted, the holder's action is against the maker, but where the bank pays it and pays it without authority the bank is liable to the holder. . . . It (the check) was the property of plaintiff and while the maker might stop payment of it altogether, he had no right, as against plaintiff, to direct that it be paid to someone other than the payee or his indorsee." 238 Ill. App. at 162, 165, 166.

Relying upon *Louisville & N. R. Co. v. Citizens' & Peoples' Nat'l. Bank, supra,* the Illinois court concluded that the payee could "treat the conduct of the bank as a tort and sue in trover for conversion for the value of the check or waive the tort and sue in assumpsit." 238 Ill. App. at 166. In the *Louisville & N. R. Co.* case, defendant bank paid a check upon the unauthorized endorsement of plaintiff payee's agent. In allowing recovery, the Florida court said, "(T)he bank took the responsibility of saying that a payment to Weekly (agent) was a payment to the plaintiff." 74 Fla. at 388, 77 So. at 105. "Power or authority of an agent to endorse checks payable to the order of his principal is not to be inferred from the fact that the agent has express authority to collect moneys and receive checks for his principal." Brannan, *op. cit. supra* § 23, at 440. *Accord: Kentucky Title Savings Bank & Trust Co. v. Dunavan, supra; Doeren v. Krammer,* 141 Minn. 466, 170 N.W. 609; *Central Trust Co. v. Hahn-Jacobsen Co.,* 33 N.E. 2d 388 (Ct. App. Ohio); Annot., Agency, Endorsement of Commercial Paper, 12 A.L.R. 111, 120 (1921) supplemented in 37 A.L.R. 2d 453 (1954). A bank which deals with an agent must, to protect itself, ascertain the extent of the agent's authority. *Nationwide Homes v. Trust Co.,* 262 N.C. 79, 136 S.E. 2d 202.

The payee of a check, as well as the drawer, has a right to expect the drawee bank to pay it in accordance with its terms. Therefore, when the drawer issues a check to the order of a named payee, the payee—absent his agreement to the contrary, or any conduct on his part creating an estoppel—can assume that he has valuable paper of a particular commercial character, *i.e.,* one which will require *his* endorsement for title to pass to a taker, or for discharge to be effected by the action of the drawee in marking the check "paid" and charging it against the account of the drawer.

The case at bar is not to be confused with the situation in the "imposter cases" where the drawer, mistaken as to the identity of the person to whom he delivers a check, nevertheless intends that the procurer himself shall *take title and possession as payee.* In such cases the endorsement of the imposter will be regarded as genuine as to subsequent persons dealing in good faith with the instrument, and the bank is protected. See *McKaughan v. Trust Co.,* 182 N.C. 543, 546, 109 S.E. 355, 356; Annot., Check—Imposter—Who Bears Loss, 81 A.L.R. 2d 1367 (1962); Brannan, *op. cit. supra* § 23, at 470-480; Britton § 151; 10 Am. Jur. 2d, Banks § 638 (1963); *Cf. Keel v. Wynne,* 210 N.C. 426, 187 S.E. 571, criticized in Note, 15 N.C.L. Rev. 186 (1937).

This record does not compel the inference that when he delivered the check in question to Durham, drawer intended Durham to be the payee under the name and style of Modern Homes Construction Company. The evidence is that Moore had signed one of the corporation's construction contracts. This permits the inference that he knew he was dealing with an agent and that his representation to the Bank, "This man is Modern Homes Construction Company," was only a declaration of his mistaken belief that Durham's position with the corporation was such that he had authority to collect its commercial paper by the endorsement: "Modern Homes Construction Company by Ray Durham." If this was the purport of his declaration, it was clearly Moore's intent that title should pass to Modern Homes Construction Company, the payee named in the check, and not to Durham as an individual. Plaintiffs' Exhibit No. 3, a letter written on September 29, 1962, by the assistant cashier of the Bank to plaintiff Construction Company with reference to the transaction in question contains this statement: "On April 21, 1962 Mr. Frank S. Moore, one of our customers, before his death, brought a man, whom he introduced as *Mr. Durham, one of your representatives,* into our bank." (Italics ours.) This tends to show that the Bank knew it was dealing with the payee's agent and not an individual payee doing business under an assumed name. If drawer's statement to defendant's cashier is also susceptible to the inference that drawer thought Durham *himself* was doing business under the assumed name of Modern Homes Construction Company, this is certainly not the *only* permissible inference. See generally *Harsin Motor Co. v. Colorado Savings & Trust Co.,* 131 Colo. 595, 600, 284 P. 2d 235, 237; 9 C.J.S., Banks & Banking § 356 at 742-43 (1938). Conflicting inferences make a case for the jury. 4 Strong, N. C. Index, Trial § 21 (1961) and cases cited therein.

In this case, when Moore told defendant that Durham was Modern Homes Construction Company, had defendant required him to reissue the check naming Ray Durham as payee, it would have avoided any liability to plaintiffs and eliminated any possible discrepancy between drawer's written order, the check, and his oral instructions to the Bank. (If drawer's purpose was to obtain a receipt purporting to be that of the corporation, however, making the check to Durham would have thwarted it.) In paying a check to an agent, a bank assumes the risk that he is without authority to endorse it. A drawer has no right, as against the payee, to direct its payment to anyone else.

We adopt the reasoning in *James v. Bank, supra,* except insofar as it purports to authorize the plaintiff to waive the tort of conver-

sion and to sue in assumpsit. If recovery is to be had against the drawee bank, it must, in our opinion, be upon the theory of conversion.

Upon discovery of Durham's defalcation, plaintiff Construction Company had the option to sue defendant Bank for conversion *or* the drawer upon the original obligation. Plaintiffs have elected to sue the Bank. Assuming that plaintiffs had elected to sue the drawer; that the suit survived the issue of the authority of Construction Company's agent to collect; and that they had recovered judgment against the drawer, it is clear that drawer's conduct in advising and requesting the Bank to make payment to Durham would have estopped drawer in any subsequent suit against the Bank. It is equally clear that where a drawer has caused the drawee to incur liability for the conversion of a check by misrepresenting the authority of the endorser to collect payment, nothing else appearing, the bank would have a cause of action over against the drawer. Obviously any attempt to collect from the absconded Durham would be futile.

For the reasons stated, we hold that plaintiffs have alleged and offered evidence tending to establish defendant's liability for a conversion of the check in suit, and that the court below erred in allowing defendant's motion for nonsuit. At the trial, the Bank will have an opportunity to challenge plaintiff Construction Company's claim that it is not bound by Durham's endorsement.

Reversed.

MOORE, J., not sitting.

LAKE, J., dissenting: I agree with much that is said in the majority opinion, especially with the observations therein concerning the theory of implied or constructive acceptance set forth in *Dawson v. Bank,* 196 N.C. 134, 144 S.E. 833, and in *Dawson v. Bank,* 197 N.C. 499, 150 S.E. 38. I cannot agree, however, that the record in this case shows a conversion of the plaintiff's property by the defendant bank.

It is not necessary, upon this record, to decide whether a drawee bank, paying a check in reliance upon a forged or unauthorized indorsement of the payee's name, nothing else appearing, has converted property of the payee. I am inclined to doubt that the bank has done so. The contrary view is unquestionably supported by the authorities cited in the majority opinion. In that situation, the drawee bank has not paid pursuant to the order of its depositor and, therefore, has no right to charge the payment to his account; *i.e.,*

credit the payment upon the bank's indebtedness to the depositor. The debt of the depositor-drawer to the payee of the check has not been paid and the depositor-drawer must pay that debt and recover from the bank by demanding a recredit of his account with the amount of the unauthorized payment. The conversion theory adopted by the majority opinion may be a short cut to that ultimate result, but I doubt its soundness.

In my opinion, the conversion theory, even if sound in the situation above supposed, has no application here because, in the present case, the depositor-drawer accompanied Durham to the bank and said to the teller, "This man is Modern Homes Construction Company," whereupon the drawee bank cashed the check. When the drawer of a check tells the drawee bank, "This man now standing before you is the person I intended by the name I inserted in the check as payee," the bank, in my opinion, has the right, if not the duty, under its contract with the depositor-drawer, to pay the check to the person so identified by the depositor-drawer, whatever the true name of the person presenting the check may be. The bank, so paying the check, has the right to charge it to the depositor-drawer's account. To the extent of the payment so made, it has performed its contract with its depositor and has done no wrong to anyone else. The present plaintiff's right, if any, is against its debtor on its original claim against him.

The cases cited by the majority are distinguishable from the one at hand. In none of them did the depositor-drawer say to the drawee bank, "The man now presenting the check to you is the person intended by me as the payee." In *James v. Bank,* 238 Ill. App. 159, cited by the majority opinion, the statement to the bank was made over the telephone. The bank's inquiry was, "There is a man standing here who wants $1,625.00; am I to give it to him; the check reads James & Co." The depositor-drawer's answer was, "It will be all right to cash it." This seems to me to be an inquiry by the bank as to the genuineness of the check and an acknowledgment by the depositor-drawer that the check is genuine. It would seem that the drawer was saying, "It will be all right to cash it if he is James & Co.—that is, its authorized agent." On such facts, assuming the validity of the conversion theory, there is a decision by the bank to pay the check to someone other than the payee, or the order of the payee, and so the bank has converted the real payee's property. Here, it has not done so for it has paid the precise person said by the depositor-drawer to be the real payee intended by him. Consequently, I think the judgment should be affirmed.

PLESS, J. I join Justice Lake in his dissent. Had the bank failed to pay the check, the least it could have expected would have been the loss of the business of the drawer and the payee. And when a bank fails to pay a valid check to a payee whom the drawer properly identifies, it might well fear litigation to result.

STATE OF NORTH CAROLINA v. GEORGE WASHINGTON GOODMAN.

(Filed 9 March 1966.)

1. Parent and Child § 8—

A warrant charging defendant with wilful refusal and neglect to provide adequate support for his minor children, naming them, is sufficient to charge one of the offenses proscribed by G.S. 14-322 under the 1957 amendment to the statute.

2. Same—

The State's evidence tending to show that defendant had not worked and was drunk every day since his release from prison, and had not provided any support for his minor children, is sufficient to be submitted to the jury on the charge of wilful failure to support, notwithstanding defendant's evidence that he had worked and had given his wife the major portion of his earnings for the support of the children.

3. Assault and Battery § 14—

The State's evidence tending to show that defendant, without provocation, struck his wife with his fist and then took an alcohol bottle and beat her with it, *held* sufficient to be submitted to the jury on the charge of assault, notwithstanding defendant's evidence that his only act was to disarm his wife who had attacked him with a knife.

4. Assault and Battery § 17—

Where a male defendant testifies that he is over 18 years old and the verdict of the jury is that he is guilty of an assault on a female, he being a male over 18 years of age, supports punishment for a general misdemeanor, notwithstanding the failure of the warrant to charge that defendant is a male person over 18 years of age.

MOORE, J., not sitting.

ON *certiorari* from *Morris, J.*, August 1965 Session of NEW HANOVER.

Criminal prosecution on two warrants, one warrant numbered 8993 charging defendant on 31 July 1965 with unlawfully and wilfully neglecting and refusing to provide adequate support for his children, Robert Lee Goodman, age 12, Carolyn Jean Goodman,

age 11, and Alanda Goodman, age 6, a violation of G.S. 14-322, and the other warrant numbered 8910 charging defendant on 16 June 1965 with unlawfully and wilfully assaulting Mattie Goodman with a deadly weapon, to wit, an alcohol bottle, and by beating her with his fists about the head and face, heard *de novo* on appeal from a conviction and judgment on each warrant in the recorder's court of New Hanover County.

In the superior court defendant was represented by W. G. Smith, a member of the New Hanover County Bar, who was apparently employed by defendant. By consent of defendant and the State the two cases were consolidated for trial. Plea: Not guilty. Verdict: On the warrant charging wilful neglect and refusal to provide adequate support for his children, guilty; on the warrant charging assault and battery, not guilty as to assault with a deadly weapon, but "guilty to assault on a female, he being a male over the age of 18 years."

The judgment of the court was that defendant be imprisoned for 18 months on the verdict of guilty on the charge set forth in warrant numbered 8993, and the judgment of the court was that defendant be imprisoned for 12 months on the verdict of guilty of assault on a female, he being a male over 18 years of age, this sentence to begin at the expiration of the sentence imposed in warrant numbered 8993.

From the judgments of imprisonment defendant appealed in open court to the Supreme Court. During the August Session, to wit, on 12 August 1965, the court, upon motion of W. G. Smith, allowed him to withdraw as counsel of record for defendant.

On 27 August 1965 defendant by his attorney R. M. Kermon filed in this Court a petition for a writ of *certiorari* in which it is alleged in substance that defendant on 23 August 1965 employed R. M. Kermon, a member of the New Hanover County Bar, to perfect his appeal in the instant case to the Supreme Court; that defendant on 17 August 1965 paid the court reporter to prepare for him a trial transcript of the evidence and the court's charge, but the court reporter by reason of prior commitments has been unable to prepare the trial transcript; that appeals from the Fifth Judicial District (New Hanover County is in the Fifth Judicial District) must be docketed in the Supreme Court by 10 a.m. Tuesday, 24 August 1965; and he prays that this Court allow his petition for a writ of *certiorari* to docket his appeal at a later date. Defendant's attorney apparently was unaware of Rule 5, Rules of Practice in the Supreme Court, 254 N.C. 783, 787, which provides that the appeal in the instant case could be docketed in the Supreme Court within 60 days from the last day of the August 1965 Session at

which it was tried. The Attorney General did not oppose defendant's petition for a writ of *certiorari*. This Court in conference on 7 September 1965 allowed defendant's petition for a writ of *certiorari* and ordered the appeal in the instant case to be heard at the end of the call of appeals from the Eleventh and Nineteenth Districts, on Tuesday, 9 November 1965, and succeeding days.

On 12 October 1965 defendant filed a motion to extend the time for docketing his appeal in the Supreme Court upon the ground that due to the delay of the court reporter in furnishing him with a trial transcript that he had been unable to meet with the solicitor of the district to settle the case on appeal in time for it to be docketed so that it could be heard at the end of the call of appeals from the Eleventh and Nineteenth Districts, and he prayed that this Court continue the case to the Spring Term of the Supreme Court. This Court in conference on 13 October 1965 allowed defendant's motion and the case was set for argument and was heard at the Spring Term 1966 when appeals from the Fifth District were called, to wit, Tuesday, 1 March 1966, and succeeding days.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

R. M. Kermon for defendant appellant.

PARKER, C.J. The General Assembly at its Regular 1957 Session, Chapter 369, 1957 Session Laws, rewrote G.S. 14-322 to read as follows:

> "If any husband shall wilfully abandon his wife without providing her with adequate support or if any father or mother shall wilfully neglect or refuse to provide adequate support for his or her child or children, whether natural or adopted, whether or not he or she abandons said child or children, he or she shall be guilty of a misdemeanor; and such wilful neglect or refusal shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen (18) years."

It is manifest that a wilful neglect or refusal by a father or mother to provide adequate support for his or her child or children, whether natural or adopted, is now an offense under the present G.S. 14-322, whether or not the child or children has or have been abandoned by the father or mother. Consequently, the warrant in the instant case alleging the wilful refusal and neglect of defendant to provide adequate support for his three children named therein of the ages of 12, 11, and 6 is sufficient. The 1957 rewriting of G.S.

14-322 would change the result in *S. v. Lucas,* 242 N.C. 84, 86 S.E. 2d 770; *S. v. Outlaw,* 242 N.C. 220, 87 S.E. 2d 303; and *S. v. Smith,* 241 N.C. 301, 84 S.E. 2d 913, which were decided in 1954 and 1955, insofar as they apply to the offense against children.

The State's evidence tends to show the following facts: Mattie Goodman and defendant were married in 1948. (Defendant, testifying in his own behalf, says they were married in 1958.) Defendant is the father of Robert Lee Goodman, age 12, Carolyn Jean Goodman, age 11, and Alanda Goodman, age 6, begotten by him upon the body of Maggie Goodman. In May 1965 defendant returned to his home in Wilmington after serving a prison sentence in the State's prison. From then until the taking out of the warrant against him for nonsupport of his children on 31 July 1965, he has provided no food, no money, and no support at all for his three children. He has not worked, and was drunk every day. His children have been supported by payments from the Welfare Department. When defendant first returned to his home from prison, he lived with his wife and his children, but then moved to another place in Wilmington. On the night of 16 June 1965 he and Mattie Goodman were living in the same house, and on that night defendant beat her on the face, head, and body with his fists, and then took an alcohol bottle off the dresser and beat her on the body with it. She did nothing to provoke the attack, and was in bed at the time.

Defendant's evidence is to this effect: He is 42 years old. Since his release from prison on 29 May 1965 he has run a chain saw in the pulpwood and lumber business and makes about $45 a week. From his earnings he has given his wife $35 a week for her support and for the support of his three children. On the night that his wife charged him with assaulting her, she took a knife for cleaning fish, about six or eight inches long, out of a top drawer at the top of the bed, and he knocked it out of her hand before she opened it. He did not hit her with his fists or hit her with any bottle. At that time the nonsupport warrant had not been taken out against him.

Defendant assigns as error the denial by the court of his motion "for a judgment of not guilty" on both warrants, made at the close of all the evidence. The State's evidence was sufficient to carry the case to the jury on both warrants, and the court properly overruled defendant's motion "for a judgment of not guilty."

Defendant's assignments of error as to a statement made by counsel for the private prosecution, and as to a statement made by the court and as to the charge of the court are all entirely without merit, and require no discussion.

The warrant charging the assault and battery on Mattie Goodman does not allege that defendant is a male person over 18 years

of age. However, defendant testifying in the case as a witness for himself said: "I am 42 years old." The verdict in the assault case was: "Guilty to assault on a female, he being a male over the age of 18 years." Defendant's admission as to his age and the verdict warrant punishment as for a general misdemeanor. *S. v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861; *S. v. Smith,* 157 N.C. 578, 72 S.E. 853.

In the trial below we find no error sufficiently prejudicial to disturb the verdict and judgments below.

No error.

MOORE, J., not sitting.

STATE v. LAWRENCE PRESSLEY.

(Filed 9 March 1966.)

1. Criminal Law § 71—

Notwithstanding there is no evidence tending to vitiate a confession at the time it is admitted in evidence, if its involuntariness becomes apparent thereafter from testimony of a State's witness, it should be stricken on motion.

2. Same—

Where it appears that prior voluntary statements made by defendant have thoroughly implicated him in the commission of crime and caused the filing of charges, the fact that a later statement, not necessary to complete the prior confession, may have been induced by the promise of leniency if the goods stolen were recovered, does not vitiate the prior confession, the stolen goods not having been recovered or introduced in evidence.

MOORE, J., not sitting.

APPEAL by defendant from *Campbell, J.,* October 1965 Session of TRANSYLVANIA.

Defendant was put to trial upon a bill of indictment charging him and three others with breaking and entering the building occupied by the V. F. W. Club, Inc. and with the larceny of specified property valued at more than $200.00.

The only evidence was that offered by the State. It tended to show: The premises of the V. F. W. Club, a corporation, are located about one mile south of Brevard. On the morning of July 26, 1965, employees discovered that the lock on the front door of the Club building had been pried from the brown metal door facing and

that two slot machines, worth $750-$1,000 and containing about $70 in coins; 25 pints of whiskey; 7 cases of beer; and $45-$50 in bills had been taken away. To connect defendant with the theft, the State relied upon his statements to Deputy Sheriff Edwin Owen. When these statements were offered in evidence, defendant objected to the admission of "any purported confession." Whereupon, the judge conducted an examination in the absence of the jury to determine the admissibility of the proffered statements.

According to the evidence adduced upon *voir dire,* Owen and Bud Sitton, another deputy sheriff of Transylvania County, went to Georgia in response to a call from Sheriff Burke of Lyons, Georgia. There, defendant, Red Lance, Steve Lance, and Frank Barton (the four persons named in the bill of indictment) were in jail. Before the North Carolina officers arrived, defendant had made a statement to Sheriff Burke implicating himself in the V. F. W. Club larceny. After the arrival of the Transylvania officers, defendant made a full confession to them of his complicity in the crime. Defendant was informed of his right to counsel, but he refused the services of an attorney. His confession was not induced by any threats or promises; it was freely and voluntarily made. He waived extradition and, upon his return to North Carolina, he signed a written confession.

On the *voir dire,* counsel for defendant cross-examined the State's witness but declined the opportunity to offer any evidence bearing upon the voluntariness of defendant's alleged confession. Upon the testimony before him, the judge found that the statements which defendant had made to Owen, both in Georgia and in North Carolina, were freely and voluntarily made after he had been informed of his constitutional rights. No objection or exception was entered to this finding.

The jury was then recalled and Owen testified that, in the absence of his three companions, defendant made the following statement in the presence of Sheriff Burke, Deputy Sheriff Sitton, and himself: On the night of July 25, 1965, defendant and the other three men named in the bill of indictment were riding around in his automobile, drinking "white whiskey." The two Lance men requested that defendant drive them to Florida. He refused because he had no money, but when they offered to furnish gas, oil, and liquor, he consented. The four then drove to the vicinity of the V. F. W. Club. Defendant and Red Lance remained in the car while Steve Lance and Frank Barton made two trips to the Club. On their first return, they brought back beer; on the second, two slot machines from which they obtained $73.00 in coins. Next, defendant drove to Barkley Bridge where Barton and Steve Lance took the slot machines

from the automobile and went toward the river, stating that no one would ever again see the machines. The men then drove to Lyons, Georgia, where Sheriff Burke arrested them. At that time, they had 7 cases of beer, 22-25 pints of whiskey, and $53.00 in silver. All of this property had been taken from the V. F. W. Club in Brevard. In defendant's automobile, the officers also found a hammer and a small crowbar which "had the same color of paint that was on the V. F. W. Club door," but "the paint was never tested."

Steve Lance, Frank Barton, and Red Lance returned to North Carolina with the officers. Defendant told the officers that if they would permit him to drive his own car (which was then stored) back to North Carolina, he would show them where the slot machines were. Defendant was permitted to drive his car back. Upon his return, he took the officers to the river, but the slot machines were never found.

On cross-examination, counsel for defendant asked Owen if, either in Georgia or Brevard, he had told defendant that it "would go easier with him if he would turn State's evidence and sign a statement." The officer's reply was: "I told him if he would tell me where the goods was at and I got the stuff back, it would go easier on him, yes sir." When Deputy Sheriff Owen made this statement, there was no motion to withdraw the alleged confession from the consideration of the jury. With the completion of Owen's testimony the State rested its case, and defendant moved for a nonsuit. The motion was overruled, and defendant also rested. Because of a defect appearing upon the face of the bill of indictment, the court of its own motion quashed the count charging breaking and entering and submitted the case to the jury only upon the count charging larceny. The jury returned a verdict of guilty of larceny of property of a value of more than $200.00. From a sentence of imprisonment, defendant appeals.

T. W. Bruton, Attorney General, Millard R. Rich, Jr., Assistant Attorney General for the State.

Hamlin, Ramsey & Monday for defendant appellant.

SHARP, J. The preceding factual statement reveals evidence plenary to overrule defendant's motion of nonsuit. His other assignments of error are either unsupported by exceptions in the record or otherwise fail to comply with the rules of this Court. Defendant says in his brief that after the court had held his confession to be admissible in evidence, he deemed any further objection to it futile. Nevertheless, his first assignment of error is that the judge erred in admitting his alleged confession.

Where the voluntariness of a confession is challenged, this Court has not been inclined to dispose of the question on procedural grounds. *State v. Anderson,* 208 N.C. 771, 182 S.E. 643. The general rule is that, "the admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in evidence at a later stage of the trial. *S. v. Richardson,* 216 N.C. 304, 4 S.E. 2d 852; *S. v. Alston, supra* (215 N.C. 713, 3 S.E. 2d 11)." *State v. Rogers,* 233 N.C. 390, 396, 64 S.E. 2d 572, 576-77. Therefore, if a defendant has evidence tending to show that his confession was involuntary, it behooves him to produce it upon the *voir dire. State v. Alston, supra.* To the rule as stated in *State v. Rogers, supra,* there is an exception: When, after the alleged confession has been received in evidence, its involuntariness becomes apparent from the testimony of a *State's witness,* it should be stricken *upon motion. State v. Anderson, supra.* In *State v. Thompson,* 224 N.C. 661, 664, 32 S.E. 2d 24, 26, Denny, J. (later C.J.), said: "The defendants objected to the admission of the confessions, but declined the offer of the trial judge to have their voluntariness determined in the absence of the jury. The objection to the admission of these confessions comes too late unless their involuntariness appears from the State's evidence." Similar statements appear in *State v. Richardson, supra,* and in *State v. Alston, supra,* cases not coming within the exception.

We do not think, however, that the evidence would bring this case within the exception to the rule enunciated in *State v. Anderson, supra,* even if defendant had moved to strike the confession at the conclusion of Owen's testimony. So far as the record discloses, the Transylvania officers had not suspected defendant of participation in the larceny charged until after they received the call from Sheriff Burke. Defendant makes no contention that his statement to Sheriff Burke, made before the North Carolina officers arrived, was involuntary or that the Georgia officer offered him any inducement to confess a crime committed outside his jurisdiction. The evidence engenders the logical deduction that defendant had fully implicated himself in the V. F. W. Club larceny by his statements to Deputy Sheriffs Owen and Sitton, in Sheriff Burke's presence, *before* Owen told defendant he could make it easier on himself by telling them where the slot machines were. The confession, therefore, was not in consequence of this suggestion of leniency; the suggestion itself shows that the officers already had the confession. The purpose of the promise of leniency was to retrieve property which defendant had previously admitted stealing. A promise of leniency renders a confession involuntary only if the confession is so connected with the inducement as to be the consequence of it. 23 C.J.S.,

Criminal Law § 825 (1961); 20 Am. Jur., Evidence § 497 (1939).

Defendant made the proposition that he would take the officers to the "goods" if he were permitted to drive his car back. The officers kept their part of the bargain; the defendant was either unable or unwilling to keep his. The record does not disclose whether it was in North Carolina or in Georgia that Owen told defendant it would be easier on him if they "got the stuff back." Neither the State nor defendant saw fit to clarify the time and place at which the statement was made, but—whether it was made in Georgia or in North Carolina—, the officers wrung nothing whatever from defendant by this "inducement." Had defendant led them to the slot machines after Owen made this representation to him, he might have argued with more logic that the *machines* were thereby rendered inadmissible in evidence. Since, however, they were not found, it does not appear that Owen's unauthorized offer of leniency could have prejudiced defendant in any way.

The record discloses no oppression of defendant and no violation of his constitutional rights. He was represented by counsel of his own choosing and convicted after a fair trial.

No error.

MOORE, J., not sitting.

STATE v. ALBERT FOWLER.

(Filed 9 March 1966.)

Larceny § 3—

Where the indictment charges the larceny of $200 or less and does not charge that the larceny was from a building by breaking and entering, or by any other means of such nature as to make the larceny a felony, the indictment charges only a misdemeanor, and a sentence on the count in excess of two years must be vacated and the cause remanded for proper judgment.

MOORE, J., not sitting.

APPEAL by defendant from *Morris, J.*, August 1965 Criminal Session of NEW HANOVER.

Defendant was tried on the first and second counts of a three-count bill of indictment. The jury returned a verdict of guilty (1) of feloniously breaking and entering a certain building occupied by

one J. M. McLamb, as charged in the first count, and (2) of larceny of personal property of J. M. McLamb as charged in the second count.

Judgment, imposing a prison sentence of six years and three months, was pronounced on the verdict on the first count; and judgment, imposing a prison sentence of ten years, was pronounced on the verdict on the second count, this sentence to commence upon expiration of the sentence on the first count.

Defendant excepted and appealed.

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

John F. Crossley for defendant appellant.

PER CURIAM. Defendant was represented at trial and is represented on appeal by court-appointed counsel.

The only evidence was that offered by the State. The evidence consists of McLamb's testimony that his building was broken into and entered and his money stolen and the testimony of a deputy sheriff as to defendant's admission he was one of the three participants in the commission of the crimes of which he was convicted.

While defendant's counsel objected to the officer's testimony on the ground the confession was involuntary, a hearing was conducted in the absence of the jury in which the officer did and defendant did not testify; and, in the absence of the jury, the court made findings, which were supported by evidence, that defendant's confession was in fact voluntary.

While each of defendant's assignments of error relating to events occurring during the trial has been considered, none discloses error of such prejudicial nature as to warrant a new trial.

However, we are constrained to hold the court erred in respect of the judgment pronounced on the verdict on the second count.

Under G.S. 14-72, as amended, the larceny of property of the value of $200.00, or less, is a misdemeanor. However, G.S. 14-72, as amended, does not apply when "the larceny is from the person, or from the dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering." In instances where G.S. 14-72 as amended does not apply, the larceny, as at common law, is a felony without regard to the value of the stolen property. *S. v. Cooper,* 256 N.C. 372, 380, 124 S.E. 2d 91, and cases cited.

Here the second count charges the larceny of $128.34 in cash. It contains no allegation the larceny was from a building by break-

ing and entering or by other means of such nature as to make the larceny a felony. Hence, the crime charged is a misdemeanor for which the maximum prison sentence is two years.

In cases where all the evidence tends to show the alleged larceny was from a building by breaking and entering, technical difficulties will be avoided by including an allegation to this effect in the (separate) larceny count.

The foregoing leads to this conclusion: As to the first count, the judgment of the court below is affirmed. As to the second count, the judgment of the court below is vacated and the cause is remanded for the entry of a new judgment based upon defendant's conviction of the (simple) larceny of property of the value of $200.00 or less, to wit, a misdemeanor.

First count, judgment affirmed.

Second count, judgment vacated, remanded for new judgment.

MOORE, J., not sitting.

STATE v. JOHNNIE GATTISON.

AND

STATE v. BOBBY GATTISON.

(Filed 9 March 1966.)

Constitutional Law § 31—

Where, during the testimony of a witness, the prosecution asks for and receives permission to withdraw the witness, to be recalled later, but closes its case without recalling the witness, defendant, if he wishes to assert his right to cross-examine the witness, must request the court to have the witness return to the stand, and when he fails to do so, he may not assert that he was deprived of his constitutional right of confrontation. Constitution of North Carolina, Art. I, § 2.

MOORE, J., not sitting.

APPEAL by defendants from *Fountain, J.*, November, 1965 Session, NEW HANOVER Superior Court.

In these criminal prosecutions the defendant Johnnie Gattison, in three cases, and Bobby Gattison, in two cases, were indicted for felonious assaults. The cases were consolidated and tried together.

During the trial the State called as its first witness G. W. Davis of the Wilmington Police Force, who testified as to conditions he found at the "Spider Web" where the trouble occurred. His testi-

mony included admissions made by Johnnie Gattison. At this juncture the prosecution asked for and received permission from the court to withdraw Officer Davis, to be recalled later in the trial. The officer was not recalled, though he remained in court. Both the State and the defendants rested, the latter without offering evidence and without requesting the court to order Davis returned to the stand for cross-examination. The defendants' motions for directed verdicts of not guilty were allowed as to the felonies charged in the indictments, but overruled as to the included charges of assaults with deadly weapons. The jury returned verdicts of guilty of the non felonious assaults. The defendants moved that the verdicts be set aside and a new trial ordered because of failure of the State to recall Officer Davis, then in arrest of judgment based upon the same reason. The motions were overruled. From the judgments imposed, the defendants appealed.

T. W. Bruton, Attorney General, Charles D. Barham, Jr., Assistant Attorney General, Wilson B. Partin, Jr., Staff Attorney for the State.

Burney & Burney by John J. Burney, Jr., for defendant appellants.

PER CURIAM. The defendants, by their assignments of error, questioned (1) the sufficiency of the evidence to make out cases of assault with deadly weapons, and (2) the right of the State to close its case without recalling the witness Davis for cross-examination. The sufficiency of the evidence is challenged in the brief but not on the oral argument. The evidence was ample to make out cases of assaults with deadly weapons.

A defendant on trial for a criminal offense has a fundamental right to cross-examine the prosecution's witnesses who testify against him. The right is guaranteed by Article I, Section 2, of the North Carolina Constitution. Denial of the right is without doubt reversible error. However, in this case has there been a denial of the right? The prosecution withdrew the witness Davis without objection and with the clear implication that he would be recalled for further testimony. In this situation the defendants were not required to object, or waive the cross-examination because they had a right to assume that the opportunity to cross-examine would be afforded when Davis was again on the stand. However, when the State closed, or sought to close, its case without recalling Davis, who was in court, all the defendants had to do was to request the court to have Mr. Davis returned to the stand for cross-examination. However, the

defendants, too, closed their cases without requesting opportunity to cross-examine Mr. Davis. This request, no doubt, Judge Fountain would have honored. The defendants elected to gamble with the jury. The gamble failed to pay off.

No error.

MOORE, J., not sitting.

STATE v. JOE T. HART.

(Filed 9 March 1966.)

Criminal Law § 131—

Where cases are consolidated for judgment, such judgment cannot exceed the maximum for any one offense.

MOORE, J., not sitting.

APPEAL by defendant from *Falls, J.*, July 12, 1965 Criminal Term of CLEVELAND.

Defendant was charged in six warrants with issuing a worthless check to persons named and for the amount specified in each of the warrants, misdemeanors, G.S. 14-107. He was found guilty in the Recorder's Court on each charge. A prison sentence of six months was there imposed in each case. Defendant appealed to the Superior Court. There the cases were "consolidated for trial and judgment." Defendant then entered a plea of guilty to each charge. The court thereupon adjudged that the defendant be imprisoned "in the common jail of Cleveland County for a period of 36 months." Defendant excepted and appealed.

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

Joseph M. Wright for defendant.

PER CURIAM. When the cases were consolidated for judgment the court could not impose a sentence in excess of the punishment authorized upon conviction or plea of guilty of any one of the crimes charged, *State v. Massey*, 265 N.C. 579, 144 S.E. 2d 649.

The judgment imposing prison sentence of 36 months is vacated.

The case is remanded for sentence not in excess of that allowed by law.

Judgment vacated.

Remanded for proper sentence.

MOORE, J., not sitting.

STATE v. MELVIN CLOER.

(Filed 9 March, 1966.)

Assault and Battery § 12—

In a prosecution for assault, it is error for the court to place the burden upon defendant to prove self-defense.

MOORE, J., not sitting.

APPEAL by defendant from *Falls, J.*, August 30, 1965 Criminal Session GASTON Superior Court. The defendant was charged in a warrant with an assault on Robert David Mitchell on August 4, 1965. Upon his conviction in the Municipal Court of Gastonia, he appealed to the Superior Court and upon trial before a jury was found guilty of the charge.

In support of his plea of not guilty, the defendant testified that he acted in self-defense after having been attacked by Mitchell.

The court charged the jury "Applying the principle of self-defense which the Court just read to you, apply that to the evidence in this case; and if you find that—And the defendant is not required to satisfy you of any right of self-defense beyond a reasonable doubt. The only thing he is required to do is to satisfy this Jury that what he did was in self-defense of himself."

Upon his conviction, sentence was imposed and the defendant appealed.

Attorney General Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State.

Frank P. Cooke and Tom D. Efird for the defendant appellant.

PER CURIAM. The defendant was not charged with murder, but an assault. It was error to place on him the burden of proving that

he acted in self-defense. *S. v. Sandlin,* 251 N.C. 81, 110 S.E. 2d 481 and cases there cited.

The defendant is entitled to a
New trial.

MOORE, J., not sitting.

ANNIE MAE G. SMITH v. ADDIS PITTARD CATES.

(Filed 9 March, 1966.)

APPEAL by plaintiff from *Cowper, J.,* December 1965 Session of DUPLIN.

Action *ex delicto* to recover damages for personal injuries allegedly caused by the actionable negligence of defendant in the operation of his automobile which struck plaintiff, a pedestrian.

The defendant in his answer denied that he was negligent, and conditionally pleaded contributory negligence of plaintiff as a bar to any recovery by her.

Plaintiff and defendant offered evidence, and the following issues were submitted to the jury and answered as appear:

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

"Answer: No.

"2. Did the plaintiff by her own negligence contribute to her injuries?

"Answer: .....

"3. What amount, if any, is the plaintiff entitled to recover of the defendant?

"Answer: ....."

From a judgment upon the verdict that plaintiff recover nothing from defendant, and that defendant recover the costs of the action from plaintiff, plaintiff appeals to the Supreme Court.

George R. Kornegay, Jr. and Henson P. Barnes for plaintiff appellant.

Rivers D. Johnson, Jr., for defendant appellee.

PER CURIAM. The jury, under application of settled principles of law, found as its verdict that plaintiff was not injured by the

negligence of defendant as alleged in the complaint. A careful examination of plaintiff's assignments of error discloses no new question or matter requiring extended discussion. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment will be upheld.

No error.

MOORE, J., not sitting.

PETE WALL PLUMBING COMPANY, INC. v. BRUCE HARRIS.

(Filed 23 March, 1966.)

1. Trial § 21—

On motion for involuntary nonsuit, defendant's evidence which is favorable to plaintiff or tends to clarify or explain plaintiff's evidence and which is not inconsistent therewith is properly considered, but defendant's evidence at variance with plaintiff's evidence or which tends to contradict or impeach testimony presented by plaintiff must be ignored.

2. Election of Remedies § 4—

If a party, with knowledge of his rights and of the facts and without imposition or fraud on the part of his adversary, prosecutes one remedial right to final judgment, he is thereafter barred from prosecuting an inconsistent remedial right, even though he fails to secure final satisfaction in the prior action.

3. Same—Subcontractor recovering from owner on contract is barred thereafter from asserting his contract was with main contractor.

Where a subcontractor, with knowledge of its rights and the facts in respect to identity of the person or persons with whom it has contracted, and without imposition or fraud in regard to such identity, elects to sue the owners of the premises to recover for labor and material furnished and to enforce its lien therefor on the theory that its contract was with the owner, and prosecutes such action to final judgment, such subcontractor is thereafter barred from resorting to the inconsistent remedy that its labor and materials were furnished under a contract with the main contractor or supervisor of construction. There being no contention or evidence of fraud in regard to the identity of the person or persons with whom the subcontractor dealt, the fact that the supervisor took a deed of trust prior to the beginning of the construction and misrepresented to the subcontractor that it had taken no security, cannot constitute such inequitable conduct as to preclude the supervisor from asserting the doctrine of election of remedies.

4. Appeal and Error § 23—

An assignment of error to the exclusion or admission of evidence must disclose the questions sought to be presented without the necessity of going beyond the assignment.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Farthing, J.*, July 1965 Civil Session of GUILFORD, Greensboro Division.

Civil action instituted on 23 April 1963 in the Greensboro Municipal County Court, Civil Division, to recover from defendant the sum of $2,569.72 for heating and plumbing and extras furnished and installed, pursuant to an alleged contract entered into between plain-

tiff and defendant on 15 February 1961, in a house defendant as a general contractor built for Robert Alston on a lot owned by Robert Alston in the city of Burlington, which amount due by contract is unpaid, heard on appeal by defendant from a judgment in plaintiff's favor in the Greensboro Municipal County Court, Civil Division. Docketed and argued as Case No. 700 Fall Term 1965, and docketed as Case No. 689 Spring Term 1966.

Defendant in his answer filed 17 May 1963 denies that there was any contract between plaintiff and himself, and alleges that he was acting as agent for Robert Alston under authority given him by Alston, that the contract alleged in plaintiff's complaint was signed "Robert Alston by Bruce Harris," that any extras not mentioned in the contract were ordered without his (defendant's) knowledge, and that he is not indebted to plaintiff in any amount.

On 7 July 1963 plaintiff filed an amendment to its complaint, in which it alleges in substance: During the negotiations leading up to the consummation of the contract between it and defendant, defendant told it that he as a general contractor was to receive no payments from Alston until the house had been completely built, and when that had been done the house would be financed, and he (defendant) would be paid, and then he would pay plaintiff for its work, and that he (defendant) had taken no security for himself. That unknown to plaintiff defendant on 2 February 1961 had secured from Robert Alston and wife a deed of trust on the land on which the house was to be built by defendant, securing a note payable to defendant in the sum of $9,000, due five months after date, and duly recorded in Alamance County on 3 February 1961. The Alstons received no consideration for the execution and delivery of the note and deed of trust. The note and deed of trust were procured by defendant in pursuance of a scheme to defraud plaintiff and other subcontractors out of payment for the performance of their subcontracts; that such scheme contemplated the foreclosure of the deed of trust and a claim by defendant that he had no liability because such subcontracts were made directly with the Alstons. Robert Alston in February 1961 did the brick masonry for the house built on the premises of his wife and himself. That Robert Alston was completely unknown to plaintiff, except for defendant's statement to plaintiff that Alston was a Negro bricklayer who worked for him. That plaintiff had no contract of any kind with Alston. In pursuance of his fraudulent scheme defendant caused the deed of trust to be foreclosed on 11 July 1962 and at the foreclosure sale the defendant purchased the house and lot for the price of $10,760; that the final account of the trustee and foreclosure showed disbursements of the proceeds of sale as follows: to defendant $7,500, and to

J. C. Harris Lumber Company $3,260. As a consequence of the aforesaid fraudulent scheme of defendant, liens and judgments against the Alstons were filed by a dozen firms in the sum of about $18,000, representing labor and materials used in the construction of the residence, and all of these remain unpaid; that the statements made by defendant to plaintiff that he (defendant) had taken no security for the work he was doing in the construction of the house and that he would pay plaintiff for the performance of its contract when completed were known by defendant to be false, and were intended to deceive the plaintiff; and that the plaintiff relied upon such representations, was deceived thereby, and has suffered damage in the sum of $2,569.72.

On 5 August 1964 defendant filed an amended answer to the amended complaint, in which in substance he alleges: He denies that he had any contract with plaintiff to pay plaintiff for installing plumbing and heating in the Alston residence, and he denies that he told plaintiff he had taken no security for himself. Defendant entered into a contract with Robert Alston and wife to build a house for them. He was to furnish labor in the construction of their house and supervise its construction, for which he was to receive a fee of 10% of the costs incurred in the construction of the house. Robert Alston and wife were to pay for all labor and materials furnished to them by defendant, and as security gave him a deed of trust in the sum of $9,000, payable in five months. He denies that he said anything to give plaintiff any assurance that he would in any way be personally liable for any sums due plaintiff from Alston and wife. He admits the foreclosure sale under the deed of trust of the Alston premises, and alleges that he paid to himself $7,500 from the purchase price on the construction of the home under his contract, and paid to J. C. Harris Lumber Company, which had filed a first lien, the sum of $3,260. Robert Alston and wife advised him they were going to secure a loan from the North Carolina Mutual Life Insurance Company when the house was completed, and that they would then pay all bills for the construction of their house from the proceeds of the loan; that the insurance company did not make any loan to Alston and his wife, and for that reason Alston and his wife were unable to finance their house, which resulted in the foreclosure of the deed of trust by defendant. As a further defense defendant alleges in substance: Plaintiff never contacted defendant at any time concerning any amount due by him to plaintiff, and the first knowledge defendant had of the fact that plaintiff was seeking to hold him liable was when he was served with a copy of the summons and complaint in this action, more than two years after the alleged date of the contract. Plaintiff caused to be

filed in the office of the clerk of the Superior Court of Alamance County, North Carolina, a notice of lien against Robert Alston and his wife, which lien is recorded in Lien Book 4, at page 560, wherein plaintiff alleged as follows: "The material and labor on account of which this lien is claimed was furnished to and performed for the said owners by the said claimant under and pursuant to the terms of two entire and indivisible contracts made and entered into by the said claimant and the owners on the 15th day of February, 1961, by the terms whereof, the said claimant furnished said materials and performed certain labor in the erection of the building upon the lands on which the above mentioned building is located, and the said owners contracted and agreed to pay for the same the sum set out in Exhibit 'A' hereto attached and made a part of this notice of lien." In consequence of filing said lien plaintiff sued Robert Alston and wife in the Superior Court of Alamance County, North Carolina, and recovered judgment against them for the sum of $2,937.43; the said complaint alleged a contract with the Alstons, and at no time did plaintiff ever allege that defendant was indebted to plaintiff in any sum. Defendant again specifically denies that he is indebted to plaintiff in any sum, but even if he were, which is again denied, plaintiff has elected to sue Robert Alston and wife, wherein he alleges a specific contract with them, and defendant alleges that plaintiff has elected and that he is bound by his election, and that he is now estopped from making any claims against defendant, and defendant pleads this as a bar to any recovery by plaintiff in this action.

This is a summary of the testimony of J. O. "Pete" Wall on direct examination. His company, of which he is president, is the plaintiff, and it is in the heating and plumbing business. In February 1961 his company, by himself, and defendant entered into a contract by the terms of which his company was to furnish and install in a house being constructed for Robert Alston by defendant the heating for a price of $989, the plumbing for a price of $1,097, and that when the house was completed defendant would secure a loan on it and pay his company for its material and work done from the proceeds of the loan. At that time he did not know Robert Alston. Defendant told him Robert Alston was a brickmason, who worked for him. Defendant told him the house was a $28,000 job. As his company's work according to the contract neared completion, defendant asked his company to furnish some extras, an electric dishwasher, etc., which his company furnished and installed in the house at a cost of $483.72. His company finished the work on 4 October 1961, pursuant to its contract with defendant. Defendant has never paid his company anything for the furnishing and in-

stallation of the heating and plumbing and the extras in the house. In 1962 Robert Alston was living in the house. He never knew anything about defendant having a deed of trust on the house until after the instant action was instituted, when he was told of the deed of trust and its foreclosure by his present attorney of record.

This is a summary of Pete Wall's testimony on cross-examination: The defendant told him he was building a house for Robert Alston; he never told him he was an agent for Robert Alston. Neither he nor any agent of his company had any conversation with Robert Alston about his company furnishing and installing any heating and plumbing in the house defendant was building for Alston. When shown a paper writing marked Defendant's Exhibit #2, he identified it as a copy from his company's files of a proposal dated 15 February 1961 and addressed by his company to "BUILDERS: Mr. & Mrs. Robert Alston — Burlington. Job and Location: Alston — Burlington," and stating "We agree to furnish and install a Forced Hot Air Heating System in the new residence that you are construction *(sic)* as follows: . . ." Then follows a description of the System, and the following: "PRICE: $989.00. Payment: 50% when roughed. Balance upon completion. J. O. "PETE" WALL PLUMBING Co. By....." His company sent the original of this proposal to Bruce Harris: it did not send it to Robert Alston. He is suing defendant in this lawsuit to recover $989 for the same work. When shown a paper writing marked Defendant's Exhibit #3, he identified it as a copy from his company's files of a proposal dated 15 February 1961 and addressed by his company to "BUILDERS: Mr. & Mrs. Robert Alston — Burlington. Job and Location: Alston — Burlington," and stating "We agree to furnish and install plumbing in the new residence that you are constructing as follows. . . . PRICE: $1,097.00." He testified: "This $1,097.00 is for the plumbing contract on the Robert Alston home, and is the same work I am suing for today." His corporation filed a notice of lien against Robert Alston and his wife on 4 October 1961 in Alamance County Superior Court. He was shown a document marked Defendant's Exhibit #4, which is a complaint in a civil action in the Superior Court of Alamance County brought by plaintiff here against Robert Alston and wife, Catherine D. Alston, as defendants. As to this paper marked Defendant's Exhibit #4, he testified as follows:

> "As to Defendant's Exhibit #4, which you hand me and ask me if it is not a duplicate of what I signed on September 4, 1962, I really don't know — honestly — if I go to you as my attorney I trust you, I depend on you to protect me in any way

you see fit, that's the reason I would call on you to begin with. The instrument you hand me fits our job and the materials, but I do not recall ever seeing this. I went to Attorney Moseley I believe, about bringing a lawsuit against Robert Alston. As to whether I asked my attorney to prepare a notice of lien against Robert Alston, and went to the attorney's office and signed any papers he prepared for me, I just don't recall. The best I recall I explained the situation to him the best I knew it at that time and the best that I know now, and as I told you a while ago I left it entirely up to him to do what was supposed to be done about it. As to whether or not I deny signing papers he prepared for me, any paper that I find my signature on I will say that I did sign it and I haven't said that as yet this morning. As to whether I told him what to put into these papers, I did not — that's the reason I called him. I probably showed him my contract. I don't know as I did, I must have had some conversation with him. I did hire Mr. Moseley to file a lawsuit. I do not know whether we got a judgment on that lawsuit or not. I do not have a copy of the judgment in my files.

"The other exhibits attached to Defendant's Exhibit #4 are familiar to me and I recognize all the materials and I would say they are copies of our invoices, and I suppose they were furnished to our attorney for attachment to this lawsuit in Alamance County. As to Defendant's Exhibit #6, entitled 'Judgment', which you hand me, its a possibility I have seen this paper but I cannot recall. As to the total figure on the judgment, I suppose that figure would total up exactly what we have here. I'm not denying that I didn't take him those figures now. I sued Bruce Harris on April 23, 1963, and employed Mr. Rockwell to bring this suit for the identical thing for which I am now suing *(sic)* Mr. Alston."

Before closing its case, plaintiff announced in open court that it is proceeding in this action on the basis of a contract between itself and Bruce Harris for the furnishing of plumbing and heating work which it alleges it has performed and for which it has not been paid; that although allegations in the complaint may constitute an action in fraud and deceit, the plaintiff waives the tort and proceeds on the contract in this case.

This is a brief summary of the testimony of defendant Bruce Harris: He never at any time entered into any contract with plaintiff concerning the Alston job. He was never billed for the Alston job, and first learned that plaintiff was trying to hold him responsible for this job when the deputy sheriff served papers on him in

this case several years later. He never contracted to purchase any material that went into the Alston home other than material that came from Harris Lumber Company. The amount of the bill of the Harris Lumber Company was $5,316.70. He was supervisor of the construction of the Alston home; what he means by supervision was looking after it, seeing that things were put in the right places according to the specifications. For that he was to get a fee of 10% of the costs of the construction.

This is a summary of the testimony of Robert Alston for defendant: In February 1961 he had started the brick work on the foundation of a house he was building for himself and his wife. Pete Wall came up and told him Bruce Harris (defendant) told him that he (Alston) was building a house and that he (Pete Wall) would like to get a contract on the plumbing. He told Wall he would let him do it if he would give him the right kind of price. Wall stayed about forty-five minutes that day. He never saw Wall again though he talked to him over the telephone. When he found out what Wall's bid was later from defendant, he told defendant to sign a contract for him. He was sued by plaintiff. He recognized a copy of the complaint. He did not file any answer to it. He received a copy of the notice of lien on his property from plaintiff through the mail. The plaintiff has never been paid its bill for $2,937.43 by him. He lives in the house now.

The defendant offered in evidence, among other documents, a document marked Defendant's Exhibit #4, which is a complaint, with exhibits attached to it, filed by Pete Wall Plumbing Company as plaintiff against Robert Alston and wife, Catherine D. Alston, as defendants, in the Superior Court of Alamance County. This complaint alleges in substance, except when quoted:

> "3. That on or about the 15th of February, 1961, the defendants entered into an entire and indivisible contract with the plaintiff, whereby the plaintiff was to furnish certain materials and perform certain labor for the defendants in connection with the construction of a dwelling house upon certain land belonging to the defendants and hereinafter described; that in accordance with said contract plaintiff furnished to the defendants certain materials and performed certain labor for which the defendants agreed to pay the sum of $2,937.43, as per itemized statement attached hereto and marked 'Exhibit A'; that said materials were furnished to the defendants between February 28, 1961, and October 4, 1961.
>
> "4. That said materials were furnished and labor performed in the construction of a dwelling house upon a certain parcel of

land in Burlington Township, Alamance County, North Carolina, then and now owned by the defendants, and described as follows: [Description omitted.]

"5. That the defendants failed, neglected and refused to pay for said materials and labor; that pursuant to the constitution and laws of the State of North Carolina providing for laborers' and materialmen's liens, the plaintiff filed notice of lien in the office of the Clerk of the Superior Court of Alamance County on March 5, 1961, said notice of lien being recorded in Lien Docket 4, page 560; that a copy of said notice of lien is attached hereto as 'Exhibit B'; that said notice of lien was filed within six months from the last day upon which said materials were furnished."

That there is now due plaintiff by defendants the sum of $2,937.43 with interest, which is unpaid. Wherefore, plaintiff prays for judgment against defendants for the sum of $2,937.43, with interest until paid; that this judgment be declared a lien on the property described in the complaint from and after 28 February 1961. It purports to be signed by Moseley and Edwards by J. Halbert Conoly, attorneys for plaintiff, and it purports to be verified on 4 September 1962 by J. O. Wall, who states he is president of plaintiff. Attached to this complaint marked Exhibit A is an invoice from plaintiff addressed to Robert Alston setting out with particularity the plumbing and heating materials furnished and installed by it in the Alston house. Attached to this complaint marked Defendant's Exhibit #5 — "Exhibit B" is a notice filed in the office of the clerk of the Superior Court of Alamance County that Pete Wall Plumbing Company, Inc., is claiming a laborer's and materialman's lien against defendants Robert Alston and wife in the amount of $2,937.43 upon the property described in the complaint, which is also described in the notice, for the heating and plumbing system placed in the Alston house by plaintiff. This elaborate notice is in due form and we omit the details. Defendants also offered in evidence as Defendant's Exhibit #6 a copy of a judgment rendered in the Superior Court of Alamance County on 26 March 1963 in the case of Pete Wall Plumbing Company, Inc., against Robert Alston and wife, Catherine D. Alston, in which case defendants filed no answer. This judgment orders and decrees that plaintiff have and recover from defendants the sum of $2,937.43 with interest until paid, and that said judgment is hereby declared to be a lien against the property described in plaintiff's complaint, and that said lien against said property dates from the 28th day of February, the date upon which

plaintiff first furnished labor and material under the indivisible contract heretofore referred to in the complaint.

At the close of all the evidence, upon motion of defendant, the court entered judgment of compulsory nonsuit, dismissing plaintiff's action and taxing it with the costs. From this judgment plaintiff appeals.

Harry Rockwell for plaintiff appellant.
W. L. Shoffner and Spencer B. Ennis for defendant appellee.

PARKER, C.J. Plaintiff and defendant offered evidence. "In ruling upon a motion for an involuntary judgment of nonsuit under the statute after all the evidence on both sides is in, the court may consider so much of the defendant's testimony as is favorable to the plaintiff or tends to clarify or explain evidence offered by the plaintiff not inconsistent therewith; but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by the plaintiff." *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

Considering plaintiff's evidence in the light most favorable to it, and considering only so much of defendant's evidence as tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, these facts clearly appear: Plaintiff furnished and installed in a new house being constructed on land owned by Robert Alston and wife, Catherine D. Alston, a hot air heating system and plumbing and extras, and when the cost of this material and labor was not paid for, it filed notice of a laborer's and materialman's lien on the premises, and instituted an action against Robert Alston and wife, Catherine D. Alston, in the Superior Court of Alamance County to recover from them the cost of such labor and material furnished in the amount of $2,937.43 with interest, and to have the judgment declared a lien on the property described in its complaint, upon the theory, as alleged in its complaint:

> "3. That on or about the 15th of February, 1961, the defendants [Robert Alston and wife, Catherine D. Alston] entered into an entire and indivisible contract with the plaintiff, whereby the plaintiff was to furnish certain materials and perform certain labor for the defendants in connection with the construction of a dwelling house upon certain land belonging to the defendants and hereinafter described; that in accordance with said contract plaintiff furnished to the defendants certain materials and performed certain labor for which the defendants agreed to pay the sum of $2,937.43, as per itemized statement

attached hereto and marked 'Exhibit A'; that said materials were furnished to the defendants between February 28, 1961, and October 4, 1961."

Plaintiff employed a reputable and able lawyer, Mr. Moseley, to institute this suit. Defendants Alston filed no answer. Plaintiff prosecuted this action to judgment, and the judgment entered therein by the Superior Court of Alamance County orders and adjudges as follows:

"1. That the plaintiff have and recover of the defendants the sum of Two Thousand Nine Hundred Thirty-seven and 43/100 Dollars ($2,937.43) with interest thereon from the 4th day of October, 1961, until paid;

"2. That said judgment be and the same is hereby declared to be a lien against the property described in plaintiff's complaint and that said lien against said property dates from the 28th day of February, 1961, and the date upon which the plaintiff first furnished labor and materials under the indivisible contract heretofore referred to."

When plaintiff employed Mr. Moseley to institute this action against Robert Alston and wife, it was in possession of every available fact out of which any implication was drawable as to the person or persons with whom it contracted to furnish the material and do this work. There is no evidence at all that any fraud or imposition was perpetrated on plaintiff by anyone in respect to the identity of the person or persons with whom it contracted. Plaintiff deliberately took the position that its contract was with Robert Alston and wife.

When plaintiff did not collect its judgment against the Alstons, and without discovering anything thereafter in respect to the identity of the person or persons with whom it contracted, it employed different counsel and instituted the instant action against defendant Harris on the theory, as alleged in the complaint in the instant case, that it and defendant Bruce Harris "entered into a contract whereby the plaintiff was to install the plumbing and heating in a residence being constructed by the defendant for one Robert Alston. . . ." Pete Wall, president of plaintiff, testified in the instant case: "I sued Bruce Harris on April 23, 1963, and employed Mr. Rockwell to bring this suit for the identical thing for which I am now suing *(sic)* Mr. Alston." It seems manifest that this sentence contains a typographical error and that what the defendant testified to is, "I sued Bruce Harris on April 23, 1963, and employed Mr. Rockwell to bring this suit for the identical thing for which I sued Mr. Alston."

In *Pumps, Inc. v. Woolworth Co.*, 220 N.C. 499, 17 S.E. 2d 639, the Court said: "Furthermore, where a claimant elects to file notice of a lien on the theory that material was furnished to a subcontractor he is estopped under the doctrine of election of remedies from thereafter asserting that such material was sold direct to the owner. *Lumber Co. v. Perry,* 212 N.C. 713, 194 S.E. 475."

In *Lumber Co. v. Perry,* 212 N.C. 713, 194 S.E. 475, the second headnote in our Reports states:

> "Conceding that plaintiff's evidence established that plaintiff materialman entered into a contract for the sale of materials direct to defendant owner, the evidence also established that after plaintiff learned that the dwelling had been constructed under contract for a turnkey job, plaintiff gave notice as a subcontractor and thereby asserted a lien on the property under C.S. 2437. *Held:* By electing to assert a lien as a subcontractor under C.S. 2437, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnisher under C.S. 2433, and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontractor or material furnisher to the contractor."

The case of *Scholl v. Baynes,* 125 Misc. 114, 210 N.Y.S. 153, affirmed 220 App. Div. 755, 222 N.Y.S. 894, is apposite. In that case the Court held that plaintiffs, who sued wife for work performed on the theory that she was the principal, with the knowledge of every available fact from which any implication was drawable, could not, after failing to collect on judgment, sue husband on the theory that wife acted as his agent. In 210 N.Y.S. 153 the court said: "It seems to a majority of this court to be quite plain that, under the well-established doctrine of election applicable to such cases as this, the plaintiffs conclusively staked their hopes and rested their chances upon the claim that the wife contracted as principal, and not as agent."

It seems to be the general rule that where a party, with knowledge of his rights and of the facts and without imposition or fraud on the part of his adversary, prosecutes one remedial right to judgment or decree, whether the judgment or decree is for or against plaintiff, such prosecution of the action to judgment or decree is a decisive act which constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights. It has been held that the rule is the same, even though plaintiff fails to secure full satisfaction by means of the remedy adopted. *United States v.*

Oregon Lumber Co., 260 U.S. 290, 67 L. Ed. 261; 28 C.J.S., Election of Remedies, § 14; 18 Am. Jur., Election of Remedies, § 20.

Plaintiff, with knowledge of its rights and of the facts in respect to the identity of the person or persons with whom it contracted, and without imposition or fraud on the part of its adversary in respect to the identity of the person or persons with whom it contracted, having elected to institute a civil action against Robert Alston and his wife to recover for labor and materials furnished and installed in a new house being constructed on their land and to enforce a laborer's and materialman's lien on the house, on the theory that such labor and material were furnished and installed pursuant to a contract between it and Robert Alston and his wife, and having prosecuted such action to a judgment in its favor for all it prayed for in its complaint against the Alstons, such action by plaintiff constitutes a conclusive election of remedy barring plaintiff from thereafter resorting to the inconsistent remedy that such labor and material were furnished under a contract with Bruce Harris, defendant here.

Plaintiff contends that defendant, by taking a deed of trust from the Alstons securing their note to him and foreclosing the deed of trust, and buying in the property and from the proceeds paying himself and Harris Lumber Company and leaving it with nothing, and by representing to it that he (Bruce Harris) was taking no security for himself, was guilty of inequitable conduct which bars him from asking the aid of a court of equity to bar its right to maintain its instant action upon the doctrine of election of remedies. Even if Harris is guilty of inequitable conduct as contended by plaintiff, as above stated, plaintiff has no evidence that Harris was guilty of any inequitable conduct, or of any imposition or fraud, in respect to the identity of the person or persons with whom plaintiff contracted to furnish and install a hot air heating system and plumbing and extras in the new house being constructed on the Alstons' premises. Plaintiff's contention is untenable.

Plaintiff's assignments of error to the exclusion and admission of evidence fail to comply with our Rules, because they, and all of them, do not disclose the questions sought to be presented without the necessity of going beyond the assignments of error themselves to the record, and such failure to comply with the Rules does not present the exceptions for review. *Balint v. Grayson*, 256 N.C. 490, 124 S.E. 2d 364. However, we have gone through the record, and

prejudicial error does not appear in the admission and exclusion of evidence.

The judgment of compulsory nonsuit below is

Affirmed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 23 March, 1966.)

1. Statutes § 5—

The objective of statutory construction is to ascertain the legislative intent, and to this end the words of a statute will be construed in accordance with their meaning at the time of enactment.

2. Taxation § 26—

A franchise tax is imposed for the privilege of engaging in business in this State, the amount of tax varying with the nature and magnitude of the privilege taxed, its expected financial return, and the burden on the State in regulating, protecting and fostering the enterprise.

3. Same—

The word "rentals" as used in G.S. 105-120(b), imposing a tax upon the gross receipts of telephone companies, *is held* to refer to the "rentals" of telephones pursuant to the company's public utility services for which the franchise tax is imposed, and does not include rentals charged electric power companies and others for the use of its poles, this being consonant with the history of the statute and its purport.

4. Taxation § 23—

Tax statutes are to be strictly construed against the State and in favor of the taxpayer.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Mallard, J.*, May 1965 Special Nonjury Session of WAKE, docketed in the Supreme Court as Case No. 522 and argued at the Fall Term 1965.

Action instituted by Southern Bell Telephone and Telegraph Company under the provisions of G.S. 105-266.1 and G.S. 105-267 to recover franchise taxes, with interest, paid to the Commissioner of Revenue. The original defendant, William A. Johnson, having resigned as Commissioner of Revenue, the present Commissioner, I. L. Clayton, has been substituted for him.

Plaintiff, in the course of its business of transmitting messages by telephone, utilizes wires strung on poles. With 42 other utilities and municipalities plaintiff has entered into contracts which provide for the joint and reciprocal use of each other's poles to support wires, cables, and attachments. In 20 of the contracts, the annual pole rent is $1.00 per pole; in the other 22, $3.00 per pole. In practice, the party making the excess usage of the other's poles makes an annual adjustment payment. During the 12 quarters ending June 30, 1963, plaintiff collected $587.00 in pole rent. After deducting the pole rent due it, plaintiff paid out $1,215,927.50 for excess pole usage.

In filing its franchise tax returns for this period, plaintiff included in its base the net receipts, the $587.00, actually received under these pole rental agreements. It also included, without having intended to do so (presumably as the result of an error in bookkeeping), $19,848.00 of pole rent credits. Thereafter, the Commissioner, purporting to act under G.S. 105-120, assessed additional taxes in the amount of $49,884.95. This assessment was made upon the rentals to which plaintiff was entitled for the use of its own poles by others but which had been credited against the amounts owed others for its excess usage of their poles. Plaintiff paid the assessment under protest and demanded refund. The demand was refused. Plaintiff also demanded refund of $1,190.99, plus interest, representing tax on the $19,848.00 which, it alleges, should never have been included in the franchise base. The Commissioner denied this claim, also, and plaintiff instituted this action to recover the sum allegedly paid by mistake and the tax assessment paid under protest.

The parties waived a jury trial and stipulated that all procedural prerequisites had been properly performed in apt time. Upon the undisputed facts, Judge Mallard entered judgment that plaintiff was entitled to recover the sums paid, with interest, in accordance with its prayer for relief. Defendant appeals.

Joyner & Howison for plaintiff appellee.

Attorney General Bruton, Deputy Attorney General Abbott for defendant appellant.

SHARP, J. Are poles rentals charged by a telephone company to electric power companies and other users of its poles includable in its franchise tax base? The answer to this question must be found in G.S. 105-120, the pertinent portions of which follow:

"Franchise or privilege tax on telephone companies.—(a) Every person, firm, or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this State, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the Commissioner of Revenue a quarterly return, verified by the affirmation of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, license or privilege tax herein imposed.

(b) An annual franchise or privilege tax of six per cent (6%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this State. *Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina,* whether such business in the course of transmission goes outside of this State or not. . . ." (Emphasis added.)

In construing a statute, the Court's "aim is to discover the connotation which the legislature attached to the words, phrases, and clauses employed, (thus) the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the statute must be construed as it was intended to be understood when it was passed." 50 Am. Jur., Statutes § 236 (1944); *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484.

Specifically, the dispositive question here is whether, by its use of the italicized words in paragraph (b) above, the Legislature intended to limit *rentals* to those directly connected with taxpayer's business, *i.e.,* receipts from local exchange service, or whether it intended the franchise tax base to be the Company's gross receipts from rentals of *every* kind, without limitation. The Commissioner contends: (1) that *gross receipts* mean total collections from *all* sources before any deductions, and that "no amount of semantics

can get around the meaning of 'gross receipts' unless otherwise limited"; (2) that the tax levied by G.S. 105-120 is for the privilege of exercising a monopolistic franchise and should be construed in favor of the taxing authority. Plaintiff contends that the language of the statute and its legislative history disclose the intent of the Legislature to include in gross receipts only rentals paid for the use of telephones, *i.e.,* local exchange service.

Franchise taxes are imposed for the privilege of engaging in business in this State. G.S. 105-114. The amount of the tax varies with "the nature and magnitude of the privilege taxed, the relative financial returns to be expected of the business or activities under franchise, and the burden put on government in regulating, protecting and fostering the enterprise. . . ." *Power Co. v. Bowles,* 229 N.C. 143, 147, 48 S.E. 2d 287, 290. The ordinary commercial corporation pays a franchise tax which approximates $1.50 per thousand of capital or plant value used in North Carolina. G.S. 105-122(d). For the privilege of engaging in the *telephone business,* a telephone company pays 6% of its gross receipts as specified in G.S. 105-120.

Telephone companies are not engaged in the business of renting either real estate or utility poles. Such rentals, when they occur, are purely incidental arrangements. The income of a telephone company comes from service charges for the transmission of messages by telephones which remain the property of the company. The customer "rents" the telephone in his home or place of business. For a monthly sum (now fixed by the North Carolina Utilities Commission), he may make unlimited local calls. Tolls for long distance calls are extra.

The predecessor of the North Carolina Utilities Commission, the North Carolina Corporation Commission, was established by N. C. Public Laws 1899, ch. 164. Section 2 of that Act empowered and directed the Commission "(11) to make just and reasonable rates of charges for the *rental of telephones.*" (Italics ours.) The language, "rental of telephones" or "rental of telephone," was carried forward in every codification of these laws until the enactment of Chapter 1165 of the Session Laws of 1963. This Act repealed G.S. 62-122, which had authorized the Utilities Commission to fix rates and charges for specifically named utilities. For G.S. 62-122, the 1963 Act substituted G.S. 62-130, which, in general terms, directed the Commission to establish just and reasonable *rates* for all utilities. Thus, at the time sections (a) and (b) of G.S. 105-120 were enacted by Public Laws of 1939, ch. 158, § 207, the word *rental,* when used in connection with telephone companies, ordinarily referred to the rental of the telephone itself. Charges similar to these rentals

(as the orders of the Commission reveal) were monthly charges for special equipment such as outdoor sets, hand telephones, and extra lengths of cord for desk sets. Today, extra charges are made for colored sets, "push-button dialing," amplifiers, and other accouterments.

Receipts from local exchange telephone rentals, other similar charges, and intrastate tolls have always been considered a part of the franchise tax base. They account for the greater part of the Company's income; incidental revenue from pole leases, an infinitesimal part. We think the Legislature used the word *include* in the sense of "shall consist of." It was used, not to broaden the tax base, but to exclude from the base interstate tolls. We hold, therefore, that the word *rentals,* considered in its context, means local exchange rentals. To hold that the word *include,* as used in G.S. 105-120(b), is the equivalent of "also embrace," would mean that the Legislature added the major portion of the Company's income (rentals from local exchanges, other similar charges, and intrastate tolls) to a miniscule part of it, such as pole rents. That such was the legislative intent seems most improbable.

"Tax statutes are to be strictly construed against the State and in favor of the taxpayer." *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 211, 69 S.E. 2d 505, 511. *Commonwealth v. Repplier Coal Co.,* 348 Pa. 372, 35 A. 2d 319. Had the Legislature intended to tax the telephone companies upon receipts other than revenues obtained from the services they were obligated to furnish the public, we think it would have specifically imposed the tax upon gross receipts *from any and all sources whatsoever* except those expressly exempted.

This was the conclusion reached by the U. S. Court of Appeals for the District of Columbia in *Chesapeake & Potomac Tel. Co. v. District of Columbia,* 325 F. 2d 217. Under a statute which levied a franchise tax on public utilities of "4 per centum on . . . gross receipts, from the sale of public utility commodities and services within the District of Columbia," the taxing authority assessed additional taxes on the plaintiff, based on amounts received by the plaintiff for services rendered to other telephone companies. It appeared that the plaintiff's equipment, etc., served as the central exchange for parts of Maryland and Virginia, and for the District itself. The plaintiff was directly compensated for such services by the Maryland and the Virginia franchise holders. The Court of Appeals was of the opinion that the tax imposed was "an excise tax on the privilege of furnishing franchised public utility services. . . ." and that plaintiff must include in gross receipts only those amounts re-

ceived from services which it was *obligated* to perform under its franchise. The court said:

> "(W)hen a public service company supplies services or facilities to another public utility company in the same field for the sole purpose of enabling the latter company to serve its customers more efficiently, such services are not 'public utility commodities or services' within the meaning of our statute, and thus are not subject to the gross receipts tax." *Id.* at 222.

As the court also pointed out, this construction encourages utilities to make greater use of each other's facilities, thereby reducing the cost of their services to the public. In addition to this economic benefit, there is an aesthetic one — it reduces the number of poles cluttering the streets and highways.

We hold that plaintiff's receipts from the pole rental contracts in question are not subject to the franchise tax imposed by G.S. 105-120. The judgment of the Superior Court is

Affirmed.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration or decision of this case.

SAYLES BILTMORE BLEACHERIES, INC. v. WILLIAM A. JOHNSON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 23 March, 1966.)

1. Statutes § 5—

Words of a statute will be given their generally accepted meaning unless manifestly contrary to the legislative intent.

2. Taxation §§ 26, 28c—

A textile finishing plant engaged in processing by mechanical and chemical means, for a fee on a contractual basis, unfinished textile goods owned by others into finished textile goods with qualities and characteristics different from those of the unfinished material, *is held* engaged primarily in manufacturing so that its income liability is measured by G.S. 105-134(6)a rather than by subsection f of that statute, and is engaged in manufacturing within the purview of G.S. 105-122 for the purpose of computing its franchise tax liability.

3. Taxation § 36—

A taxpayer contending that an additional assessment of income tax is invalid is not required to proceed under G.S. 105-134(6)g, but may pay the tax under protest, make proper demand for refund and, upon refusal, bring suit under G.S. 105-267.

MOORE, J., not sitting.

APPEAL by defendant, Commissioner of Revenue, from *Martin, S.J.*, August 1965 Session of BUNCOMBE.

Plaintiff, a Rhode Island corporation operating in this State, paid income taxes for 1957, 1958 and 1959 in accord with its interpretation of the taxing statute, G.S. 105-134, and franchise taxes for 1958 and 1959 in accord with its interpretation of the taxing statute, G.S. 105-122.

In April 1961 W. A. Johnson, then Commissioner of Revenue, notified plaintiff of a proposed assessment of income and franchise taxes, basing the proposed assessment on his interpretation of the taxing statutes. Plaintiff protested the proposed assessment. A hearing was had. The Commissioner held plaintiff liable for additional taxes and interest accrued. Plaintiff paid under protest the taxes assessed and interest accrued thereon. Within thirty days thereafter, it made written demand for refund. The Commissioner refused to refund any part of the sum paid. On May 6, 1964, plaintiff instituted this action pursuant to provisions of G.S. 105-267.

I. L. Clayton, the present Commissioner of Revenue, has entered his appearance as a party defendant.

The parties stipulated facts necessary for a determination of the controversy. The stipulated facts necessary for a decision are stated in the opinion.

Van Winkle, Walton, Buck and Wall and Herbert L. Hyde for plaintiff.

Attorney General Bruton and Deputy Attorney General Abbott for defendant.

RODMAN, E.J. Plaintiff asserts it is engaged in manufacturing, hence its income tax liability is measured by G.S. 105-134(6)a. Defendant asserts liability must be determined by the use of the single factor of gross receipts as required by subsection f. If plaintiff is principally engaged in manufacturing, it was not liable for the income tax assessment.

The parties stipulated:

"5. During all of the years 1957, 1958 and 1959 the plaintiff was engaged in the State of North Carolina in operating a

textile finishing plant and in finishing textile goods owned by others, on a contractual basis. The finishing of textile goods is an integral part of the operation of converting raw material (consisting of greige goods, dirty and unusable, as they come from the weaving mills) into finished textile goods which are fit for use, with qualities and characteristics not possessed in the greige, unfinished form. In finishing goods the plaintiff performed upon such unfinished materials the following operations:

(a) *Singeing* — The removal of hairy or fuzzy surface of the cloth by gas flame;

(b) *Removal of Sizing* — a chemical process for removal of starches used for sizing, which is placed in the goods by the weaver in order to make fibers less brittle and to increase the weaving efficiency; the operation consists of changing the starches to sugar which can then be dissolved and relatively easily removed;

(c) *Scouring or boiling* —
  (i) White goods, boiled under high pressure in an autoclave or kier, to destroy motes (specks of dirt and fragments of dead cotton) and pectin (a natural gum or wax);
  (ii) Colored goods, repeated scouring with water and detergents at a temperature of about 160 deg.

(d) *Bleaching* — in case of white goods, use of peroxide or chloride, including a number of rinsings performed in varying ways.

(e) *Mercerizing* — impregnation with caustic, with the fabric placed, while wet, on a tenter frame to give correct and uniform width and to apply tension during process of rinsing and drying, resulting in an added silky lustre, and making the fabric more workable, stronger and more receptive to dyes.

(f) *Finishing and dyeing* —
  (i) White goods — go into mangles with bluing added to give exactly the shade of white desired by customer, exact materials used affecting the finished quality;
  (ii) Dyed goods — different methods used to get desired color when dry;
  (iii) Both kinds — varying finishing operations and

procedures to give required softness, stiffness or whatever finish wanted, resin finishes, etc.

(g) *Calendering* — at various points, to give required surface, smooth, rough embossed, soft or stiff. Operations are performed upon certain goods in such a way as to create the following finished fabrics:

(i) *Corduroy* — its creation basically and principally involves a mechanical operation (combined with other steps in finishing) resulting in a desirable cotton fabric having a piled surface, raised in cords, ridges or ribs.

(ii) *Plisse'* — a cotton crepe material, crinkled by mercerizing in stripes (achieved by the application of chemical process) to give somewhat the same effect achieved in seersucker by the weaving operations.

(iii) *Crease-resistant goods* — treatment during the various stages of finishing — converting ordinary rough, easily crumpled goods into a fine, smooth fabric which resists creasing.

(iv) Non-shrinking goods — again, converted to this condition by various treatments in the operation of finishing.

(v) *Lawns and organdies* — mechanically these two fabrics are the same construction when they come from the weaver and they can take either of two courses to the finished goods state — lawns wind up, however, as very soft sheer fabrics while organdies wind up as permanently stiff fabrics completely resistant to subsequent softening — when the finishing is completed lawns and organdies are two entirely different fabrics.

When courts are called upon to interpret legislative intent, the words selected by the Legislature should be given their generally accepted meaning unless it is manifest that such definition will do violence to legislative intent. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E. 2d 880; *Seminary v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528.

Webster defines the word "manufacture" as: "Something made from raw materials by hand or machinery; . . . the process or operation of making wares or other material or products by hand or machinery; . . . a productive industry using mechanical power and

machinery; . . . the act or process of making, inventing, devising, or fashioning." "Manufacturing" is defined as: "(1) to make (as raw material) into a product suitable for use (the wood . . . is manufactured into fine cabinetwork). (2) to make from raw materials by hand or machinery." "Manufacturer" is defined as: "an employer of workers in manufacturing; the owner or operator of a factory; . . . one who changes the form of a commodity, or who creates a new commodity." Other lexicographers agree with the Webster definitions. Bouvier's Law Dictionary, Rauls Revision; 55 C.J.S. 672.

It is sometimes difficult to draw the line marking a change from a raw material to a finished product. The subject is dealt with at length in *In Re Rheinstrom & Sons Co.*, 207 F. 119; *Assessors of Boston v. Commissioners of Corporations and Taxation*, 84 N.E. 2d 129; *Central Trust Co. v. George Lueders*, 221 F. 829; *Commonwealth v. Meyer*, 23 S.E. 2d 353; *Commonwealth v. Peerless Paper Specialty*, 25 A. 2d 323; *Moore v. Farmers Mutual Mfg. & Ginning Co.*, 51 Ariz. 378, 77 P. 2d 209.

The business of manufacturing an article is essentially different from that of selling the article after it has been manufactured. *Caffee v. City of Portsmouth*, 128 S.E. 2d 421. As said in *Bedford Mills v. U. S.*, 59 F. 2d 263: "There are many manufacturers who do not themselves make all the elements that go into their finished products, but have them made by others. . . . If A conceives the possibility of applying to gray goods a finishing process which will convert the rough, unfinished gray goods into an article of commerce different from ordinary gray goods, and in virtue of such an idea a new form of textile is placed upon the market, it seems to us that A is as much a manufacturer under the tax law as if he himself performed the physical labor of creating the product. It is true, generally speaking, we would say B. and C whose combined efforts produced the finished product, are manufacturers. . . ."

The parties have stipulated and the court has found as a fact that plaintiff "was engaged . . . in operating a textile finishing plant and in finishing textile goods owned by others, on a contractual basis. The finishing of textile goods is an integral part of the operation of converting raw materials . . . into finished textile goods which are fit for use, with qualities and characteristics not possessed in the greige, unfinished form. . . . Operations are performed upon certain goods *in such a way as to create the following finished fabrics:*" Then follows an enumeration of five different kinds of goods, each having different characteristics.

Plaintiff under the facts stipulated is a manufacturer as that

word is generally understood. We hold that plaintiff is principally engaged in the manufacture of tangible personal property. The mere fact that it receives a fixed stipend for changing the raw material into a finished product does not change its business from that of manufacturing. It follows that plaintiff's income tax was properly computed by it as provided in G.S. 105-134(6)a, and not under subsection f of that statute, as defendant contends.

The statute, G.S. 105-122, making plaintiff subject to a franchise tax is substantially similar to the statute relating to income taxes. The State does not challenge the correctness of plaintiff's computation of its franchise tax if in fact it was a manufacturer. Having so held, it follows that the assessment of an additional franchise tax was invalid.

The assessment of additional income and franchise taxes was an illegal assessment.

Plaintiff does not and has not sought relief under the provisions of G.S. 105-134(6)g. Its position is and has been that the assessment was an invalid assessment. It paid the tax under protest, made proper demand for refund, and when the State declined to refund, it brought suit. It followed strictly the statute, G.S. 105-267, authorizing the recovery of taxes illegally assessed.

Affirmed.

MOORE, J., not sitting.

ARCHIE P. AUSTIN, PETITIONER v. LEONEL BRUNNEMER, RICHARD J. BRYANT, HARVEY H. ELMORE, SR., J. BART HALL, RUSSELL H. STEPP, R. W. THORNBURG AND DR. W. L. WOODY, MEMBERS OF THE BOARD OF ADJUSTMENTS OF GASTON COUNTY PLANNING & ZONING COMMISSION, AND CHARLES McGINNIS, ZONING ADMINISTRATOR, RESPONDENTS.

(Filed 23 March, 1966.)

1. Counties § 2.1—

Certiorari to review the proceedings and order of a county Board of Adjustment gives the Superior Court jurisdiction to review the proceedings for error of law and to give relief against arbitrary, oppressive action or abuse of authority.

2. Same—

Where a zoning ordinance prohibits construction or use of any building in the zoned area except those specifically permitted or authorized, a

business not so specified is prohibited in the zone, notwithstanding that other portions of the ordinance make no provisions in regard to such use.

3. Same—

The Superior Court, on *certiorari* from the denial of a building permit for a prohibited use, may order the issuance of the permit only if the applicant has changed his plans from a prohibited use to one that is permitted, and the proposed structure otherwise conforms to the zoning requirements.

4. Same—

Where a zoning ordinance specifically authorizes the Board of Adjustment to permit a variance from the terms of the ordinance in its discretion, subject to specific limitations, upon a showing of special conditions upon which a literal enforcement of the ordinance would result in undue hardship, the Board of Adjustment has authority to allow a proper variance in its discretion without change in or modification of the ordinance, and denial of such application on the ground that the intended use violates the ordinance and that no sufficient reason had been shown why the Board should modify the ordinance, requires remand for consideration of the application by the Board in the exercise of its discretion rather than as a strict legal right.

MOORE, J., not sitting.

APPEAL by respondents from *Falls, J.*, October 11, 1965 Civil Session, GASTON Superior Court.

The petitioner originated this proceeding on March 19, 1965, by "application and request to the Board of Adjustment to grant a special exception and variance in the Zoning Ordinances of Gaston County," and to order the building inspector to issue a permit (which he had refused) to the end that the petitioner may erect a concrete body repair shop and garage on his lot located in Wilkinson Boulevard and Interstate 85 Zoning District of Gaston County. The lot is located in Zone N-1 (neighborhood use) and borders on Zone H-1 (highway use). The Board of Adjustment denied the application, refused to grant a variance permit, and sustained the building inspector upon the ground the intended structure and use violated the zoning ordinances.

On *certiorari*, the Superior Court reviewed and reversed the decision of the Board of Adjustment and ordered that the permit issue. The respondents excepted and appealed.

Gaston, Smith & Gaston by Harley B. Gaston, Jr., Hollowell and Stott by Grady B. Stott for respondent appellants.

Brown & Brown by Joseph G. Brown; Frank P. Cooke for petitioner appellee.

HIGGINS, J. This controversy involves the petitioner's application for a permit to erect a building to be used as "a garage and body shop on the lot located in Zones H-1 and N-1 of Wilkinson Boulevard and Interstate Highway 85 Zoning District in Gaston County." The petitioner bought the lot on January 31, 1964, and began grading and preparing the lot for the building. The zoning ordinance became effective April 1, 1964. The building inspector declined to issue the permit on the ground the intended use of the building violated the zoning ordinance. The petitioner made application to the Board of Adjustment "to grant a special exception and variance" upon the ground he had purchased the lot, had begun developing it before the effective date of the ordinance, had expended large sums of money in buying, grading, and fencing the lot upon which he had erected a sign, "Future Home of Austin's Body Shop,"; that a literal enforcement of the zoning ordinance would result in undue hardship.

In passing on the petitioner's application for the variance permit, "The Board of Adjustment being of the opinion that the building permit applied for is contrary to the zoning ordinance . . . and no sufficient reason having been shown why . . . the zoning ordinance should be modified so as to authorize the issuance of said permit, the order of the building inspector is approved and the building permit applied for is denied."

The petitioner applied for and obtained from the Superior Court a writ of *certiorari* to review the proceedings and the order of the Board of Adjustment. The writ brought before the court the duty to review the proceedings. *Chambers v. Board of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211; *Winston-Salem v. Coach Lines,* 245 N.C. 179, 95 S.E. 2d 510; *Belk's Department Store v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897. As a result of the review in the Superior Court, the trial judge (among others) made these findings and conclusions:

> "(7) That the zoning ordinance nowhere contains a classification for an automobile paint and body repair shop, such as the type sought to be built by the petitioner. That the provisions of H-1, in which the petitioner's property lies, contains no provisions for the construction and maintenance of such enterprise, nor does it anywhere in the ordinance spell out under any classification the right of the petitioner to operate and maintain the said business. That the operation of an automobile paint and body repair shop is not an unlawful enterprise and is not a nuisance *per se.* That the petitioner's application for an automobile paint and body repair shop is a part of certain law-

ful uses which are enumerated in H-1 and N-1, and the Court is of the opinion that the zoning ordinance should be construed liberally."

The trial court ordered the inspector to issue the permit "unless other cause for denial is apparent and not considered in this hearing."

The zoning ordinances prohibit the construction or use of any building in the zoned areas except those which are specifically permitted or authorized. The application for a building permit must designate its planned use. When it appears that the intended use violates the ordinance, the permit should be denied. If the proposed builder changes the plans for the use from one that is prohibited to one that is permitted, a permit upon the permitted use should be issued, provided the building otherwise conforms to the zoning requirements:

"DIVISION 2. ZONING ADMINISTRATION.

Section 77. Building Permits.

"No building, structure or sign or any part thereof shall be erected, added to or structurally altered, nor shall any excavation for such building or structure be commenced until a building permit therefor has been issued by the Zoning Administrator."

See *Mitchell v. Barfield,* 232 N.C. 325, 59 S.E. 2d 810.

The zoning ordinances were passed by the Board of Commissioners of Gaston County under the authority of Article 20-B, codified as G.S. 153-266.10, and succeeding sections. The Board of Adjustment was established under G.S. 153-266.17. Any changes in the zoning regulations can be made only by the Board of Commissioners. The Board of Adjustment is authorized to hear and decide appeals from administrative officials charged with the duty of administering the ordinances. The ordinance provides:

"Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of adjustment shall have the power, in passing upon appeals, to vary or modify any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done." *In Re Pine Hill Cemeteries,* 219 N.C. 735, 15 S.E. 2d 1.

The Board of Adjustment found the building inspector refused

to issue the permit for which the petitioner had applied and that the zoning ordinance does not provide for the erection of an automobile paint and body shop, and sustained the action of the inspector in refusing the permit.

The Superior Court found on the record that the zoning ordinance nowhere contained a classification for an automobile paint and body repair shop "which is not an unlawful enterprise and not a nuisance *per se*"; that the operation of such a shop is a lawful one and that the permit should issue. The court's order that the permit should issue as a matter of right contravenes the general theory of zoning. The zoning boards act under legislative authority to make rules and regulations in the interest of public morals, health and safety. "The decisions of the board are final, subject to the rights of the courts to review errors in law and to give relief against its orders which are arbitrary, oppressive, or attended with manifest abuse of authority." *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1; *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Pue v. Hood,* 222 N.C. 310, 22 S.E. 2d 896.

The trial court committed error in finding the petitioner's intended use of his property as a paint and body repair shop was not in violation of N-1 and H-1, and is not prohibited under the zoning ordinances; and that the petitioner was entitled to the permit as a matter of right. The judgment is erroneous, and is reversed.

The Board of Adjustment likewise was in error in denying the permit because the zoning ordinance did not provide for the erection of a building to be used as a paint and body repair shop. By the nature of the application the petitioner concedes the ordinance does not specifically permit a building for the intended use. The petitioner stressfully contends, however, that a strict enforcement of the ordinance would impose a great hardship on him; that he selected the location, bought the lot, planned the building, and advertised its purpose and location before the zoning ordinance became effective; and while his plans had not been carried out to the extent which would entitle him to complete them as a nonconforming use, nevertheless, under the variance provision of the ordinance, these and other facts justify the granting of the permit. *In Re Tadlock,* 261 N.C. 120, 134 S.E. 2d 177; C.J.S., Vol. 101, Zoning, § 192, p. 954.

Section 72(b) of the zoning ordinance empowers the Board of Adjustment:

> "To authorize upon appeal in special cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforce-

ment of the provisions of the ordinance will result in undue hardship, and so that the spirit of this ordinance shall be observed and substantial justice done in considering all proposed variances to this ordinance, the board shall before making any finding in a specific case first determine that the proposed variance will not constitute any change in the zoned boundaries shown on the zoning map and will not impair any adequate supply of light and air to the adjoining properties or materially diminish or impair established property values within the surrounding area or in any respect impair the public health, safety, morals, and general welfare."

The Board of Adjustment denied the permit on the ground the building for the intended use violates the ordinance and that no sufficient reason is shown why the Board should modify the ordinance in this instance. To grant a variance as contemplated by § 72(b) does not require any change in or modification of the ordinance. The provision for the variance is as much a part of the zoning ordinances as any other provision. Within the limitation of § 72(b) the Board of Adjustment, in its discretion may grant the permit without violating the zoning ordinances or without modifying them if, in the judgment of the Board, the showing is sufficient. So long as the Board of Adjustment stays within the framework of § 72(b) its actions are within the law. The Board should pass on the application as a matter of discretion rather than of strict legal right.

The judgment entered in the Superior Court is reversed and the cause is remanded to the Superior Court which in turn will remand the proceedings to the Board of Adjustment to pass on the application for a variance permit, in its discretion.

Remanded with directions.

MOORE, J., not sitting.

IN THE MATTER OF R. A. SIMMONS, GUARDIAN OF ERNIE ALGERNON SIMMONS, INCOMPETENT.

(Filed 23 March, 1966.)

1. Insane Persons § 2—

The clerk of the Superior Court, in the exercise of his probate jurisdiction, has power to remove the guardian of an incompetent for causes

enumerated in the statute, G.S. 33-9, and the clerk's order of revocation upon findings supported by evidence that the guardian had neglected the ward, failed to maintain the ward in a suitable manner, that animosity existed between the guardian and his ward, and that the guardian was one of the ward's next of kin and could thereby benefit from the ward's estate after the ward's death, etc., *held* sufficient to support the clerk's order of revocation.

2. Same—

In the absence of other matters of which the court has jurisdiction, the Superior Court has no power to appoint a general guardian for an incompetent.

3. Same; Courts § 6—

On appeal to the Superior Court from order of the clerk removing the guardian of an incompetent for cause, the jurisdiction of the Superior Court is derivative and it may review the record only for errors of law committed by the clerk, since the provisions of G.S. 1-276, requiring a *de novo* hearing, apply only to civil actions and special proceedings and not to an order for removal of a guardian by the clerk in the exercise of duties formerly pertaining to judges of probate.

MOORE, J., not sitting.

APPEAL by R. A. Simmons from an In Chambers order entered on September 16, 1965, by *Cowper, J.*, in the Superior Court of SAMPSON County.

The incompetent, Ernie Algernon Simmons, aged 42 years, by his duly appointed Next Friend, filed a verified petition before the Clerk of the Superior Court of Sampson County, asking that the incompetent's guardian, R. A. Simmons, be removed. The petition alleged: (1) R. A. Simmons was appointed guardian on September 22, 1960, and "acquired the assets of the incompetent's estate . . . valued at $26,000.00 in real estate and $25,500 in personal property." (2) The net income for the years 1961 through 1964, inclusive, as reported by the guardian was: 1961, $24,654.12; 1962, $9,556.62; 1963, $5,855.19; and 1964, $3,398.50. Here quoted verbatim are other allegations of the petition:

"VI. That during the same period the accounts filed by said guardian reflect expenditures for the welfare and maintenance of his ward in the total sum of $5,246.22. . . .

"That included in the totals set forth above are expenditures in the amount of $1,799.33 for a truck, $340.00 for a refrigerator, and $103.00 for a television set. That the majority of the remaining amount was delivered to Millie Kate Simmons as allowance for providing the ward with room and board for a part of the period covered.

"IX. That by virtue of the allegations set forth herein, it is specifically alleged that the fiduciary has neglected to maintain his ward in a manner suitable to his degree.

"X. That by reason of these and other causes, in addition to the matters set out above, the said Ernie Algernon Simmons, incompetent, will suffer irreparable damage by reason of the neglect of the guardian if the Court fails to remove said guardian in accordance with North Carolina General Statutes, Section 33-9."

Pursuant to notice to the guardian, the clerk of the Superior Court conducted a hearing on July 29, 1965. The respondent appeared in person and by counsel, who entered a demurrer *ore tenus* to the petition. The clerk overruled the motion; whereupon the respondent filed answer. The clerk made notes summarizing the evidence at the hearing. In the summary of the respondent's testimony the following appears: "Did not go to see Al while he was in the hospital. Never called any of the family inquiring about how Al is. . . . Has done nothing to help Al since 1964. . . . and intending to keep anyone else from handling this estate." At the conclusion of the hearing the clerk made findings of fact, among them the following:

"VI. That since the initiation of the guardianship the reports and direct evidence from witnesses, including the guardian, clearly establish the fact that the guardian has expended very little for the support and maintenance of his ward. It appears that the primary expenditure was the sum of $75.00 monthly for some period of time made payable to the ward's mother to compensate the mother for the room and board of the ward. That this arrangement required the ward to remain in his mother's home under conditions that were far from favorable to his best interests and welfare. It was further established that during the two-year period prior to said hearing the ward has had little or no benefit from his estate, regardless of the fact that he has needed assistance at many times.

"VIII. That the evidence clearly established, even from the testimony of the guardian, that strong animosity exists between the guardian and his ward. That this animosity and personal feeling also exists between the ward and his mother, and this situation is highly detrimental to the ward's estate. That the guardian testified that he had expended no funds whatsoever for the benefit of his ward since January of 1965, and has made no effort to inquire as to the health and well-being of said ward since that date. That the evidence established

that the guardian has never discussed with his ward any financial needs and has not communicated with him for a long period of time. That in view of these circumstances the ward has found it necessary to live with various members of his family for several months."

"That the said fiduciary has failed and neglected to maintain his ward in a manner suitable to his degree . . . that a conflict of interests between R. A. Simmons, as guardian, and R. A. Simmons, individually, exists.

"X. The Court further found as a fact that the guardian and his mother are the nearest kin of said ward and could therefore benefit from the ward's estate after his death."

In addition to the notice of the appeal, the clerk sent to the judge the pleadings, the guardian's returns, the notes summarizing the evidence of the witnesses at the hearing, and the order of removal entered thereon. The record does not indicate that any transcript of the evidence, other than the clerk's summary, was taken at the hearing, or that either party made any request for such transcript.

Before Judge Cowper the respondent renewed his demurrer, which the court overruled, and the respondent thereupon made these motions: (1) That the court hear the cause *de novo*. (2) That the court hear additional evidence material to the controversy. (3) That the cause be remanded to the clerk to hear additional evidence and to find additional facts.

"Each of the motions made by the guardian and set out above was denied by the Court; and the Court ruled that its jurisdiction over the matter was derivative only, and that the appeal of the matter would be heard by the Court in its appellate capacity by review of the record as produced by the Clerk of the Superior Court.

"After review of the record from the Clerk of Superior Court and argument of counsel, the Court found that the facts recited in the judgment entered by the Clerk supported said judgment and its conclusions under the terms of N. C. G.S. 33-9";

The court concluded:

"(3) That the findings of fact related in the judgment entered by the Clerk support the judgment and its conclusions and that the same is hereby affirmed, and said cause is remanded to the Clerk of Superior Court for compliance with the judgment dated August 30, 1965."

The respondent excepted and appealed.

J. Russell Kirby; Warren & Fowler by Miles B. Fowler for guardian-appellant.

Joseph B. Chambliss for incompetent ward, appellee.

HIGGINS, J. Before the Clerk of Superior Court appoints a guardian, he must "inform himself of the circumstances of the case . . . ," and "commit the guardianship . . . as he may think best for the interest" . . . of the incompetent. G.S. 33-7. The clerk has power "on information or complaint" to remove the guardian and revoke his letters for a number of causes: "(3) Where the fiduciary . . . neglects to . . . maintain the ward . . . in a manner suitable to his degree, . . . (4) Where the fiduciary would be legally disqualified to be appointed administrator . . ." G.S. 33-9. In the absence of other matters of which the court has jurisdiction, the Superior Court has no power to appoint a general guardian. *Moses v. Moses,* 204 N.C. 657, 169 S.E. 273; *In Re Estate of Styers,* 202 N.C. 715, 164 S.E. 123.

The clerk found from the guardian's reports that the net income from the ward's estate dwindled from $24,654.12 in 1961 to $3,398.50 in 1964; and that the total expenditures for the period were $5,236.22, of which $1,799.33 was for a truck, $340.00 for a refrigerator for the respondent's mother, and $103.00 for a television set. The remainder was paid for board and room for the ward. The hearing was conducted on August 30, 1965. The appellant, according to the clerk's notes of his testimony, admitted he did not go to the hospital to see Al and did not make any inquiries and had done nothing to help Al since 1964; that he intended to keep anyone else from handling the estate.

Likewise, according to the notes made by the clerk at the hearing, Mr. Honeycutt, a cousin of the guardian and the ward, who were brothers, testified Al went to the hospital, was disabled for four or five weeks, and for more than four months thereafter lived with the witness who received no pay during the disability and after that only $10.00 per week. Mrs. Honeycutt testified that the mother visited Al once during that time and R. A., not at all.

The clerk found that the guardian and the mother are the ward's next of kin and would benefit from the ward's estate at his death; that the guardian is not interested in the ward's welfare, avoids him when called on to assist, has neglected to maintain the ward in a manner suitable to his degree.

The records and summary of the evidence warrant the clerk's findings which are sufficient to support the order of removal. The defendant contends that G.S. 1-276 applies and that the appeal re-

quired the judge to hear the controversy *de novo,* hear evidence, or remand to the clerk for further findings. These contentions are not sustained. Appeals under G.S. 1-276 are confined to civil actions and special proceedings. The decisions are plenary that the removal of a guardian is neither. The distinction is this: In civil actions and special proceedings the clerk acts as a part of the Superior Court, subject to general review by the judge. In appointment and removal of a guardian the clerk performs "duties formerly pertaining to judges of probate." In the appointment and removal of guardians, the appellate jurisdiction of the Superior Court is derivative and appeals present for review only errors of law committed by the clerk. *In Re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526; *Moses v. Moses, supra; Edwards v. Cobb,* 95 N.C. 4. In exercising the power of review, the judge is confined to the correction of errors of law. The hearing is on the record rather than *de novo. In Re Sams,* 236 N.C. 228, 72 S.E. 2d 421, citing many cases. In *Sams* the judge heard the appeal, apparently *de novo,* and affirmed the clerk. This Court affirmed upon the ground "there was no exception or objection to the *de novo* hearing in the Superior Court, and upon the record as presented no prejudicial error is made to appear." In the cases in which this Court has held the judge may review the appeals from the clerk *de novo,* these cases involved other matters which are not exclusively of a probate nature. The other matters convert the controversy into a civil action or a special proceeding reviewable under G.S. 1-276. *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365; *Windsor v. McVay,* 206 N.C. 730, 175 S.E. 83; *Wright v. Ball,* 200 N.C. 620, 158 S.E. 192.

In this case, as in *Sams,* error of law does not appear. The judgment entered in the Superior Court is

Affirmed.

MOORE, J., not sitting.

ROBERT G. WEBB, ADMINISTRATOR OF THE ESTATE OF JAMES ROBERT BUNN, II v. EDWARD WILLIAMS FELTON AND CAROLINA COACH COMPANY.

(Filed 23 March, 1966.)

1. Automobiles § 41d—

The failure of a bus driver to blow his horn in apt time before attempting to pass a boy on a bicycle, who was obviously unaware of the overtaking vehicle, is evidence of negligence. G.S. 20-149(b).

2. Negligence § 26—

Nonsuit on the ground of contributory negligence may be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes defendant's affirmative defense that no other reasonable inference or conclusion can be drawn from it.

3. Automobiles § 32—

The operation of a bicycle upon a public highway is governed by the rules governing motor vehicles insofar as the nature of the vehicle permits. G.S. 20-38(ff).

4. Same—

Ordinarily, a bicyclist, before turning from a direct line of travel, is under duty to ascertain that the movement can be made in safety, and to signal his intention to do so when other vehicles may be affected.

5. Automobiles § 42h—

Evidence permitting the inference that defendant's bus was traveling downhill with its motor idling, that a boy on a bicycle, traveling in the same direction, was on his right side of the road, apparently oblivious of the bus behind him, that the bus driver veered to his left, and as the bus came nearly abreast, pressed hard on the accelerator in attempting to pass the bicycle, and that the bicyclist, upon hearing the sudden noise close behind him, reflexively turned left, *held*, in the aggregate to disclose a situation constituting an emergency, and the act of the bicyclist in so turning without signal into the path of the bus does not constitute contributory negligence as a matter of law.

MOORE, J., not sitting.

APPEAL by plaintiff from *Bundy, J.*, October 1965 Civil Session of WILSON.

Action for wrongful death.

These facts are admitted in the pleadings: Robert Bunn, II (Robert), died about 4:35 p.m. on June 4, 1964, as the result of a collision between the bicycle he was riding and a bus owned by defendant Carolina Coach Company and operated by defendant Felton in the course and scope of his employment by defendant Coach Company. Both bus and bicycle were proceeding south on U. S. Highway 301. At the place of collision, half a mile south of Kenly, the highway is a two-lane asphalt road, approximately 20 feet wide, which runs generally north and south. There is a slight hill about 300 yards north of the point of collision and another about 300 yards south of the point of collision. Between the crests of the two hills the highway is straight.

Plaintiff alleges that the bus-bicycle collision and the resulting death of plaintiff's intestate were proximately caused by the negligence of defendants in that, *inter alia*, Felton failed to drive the bus to the left side of the highway and to pass at least two feet to

the left of the bicycle; that he failed to keep a proper lookout; and that, having failed to give any audible warning of his intention to pass, he suddenly accelerated the bus, causing its engine to roar, just as he attempted to go around the bicycle. Defendants deny these allegations and aver that Robert, who had been riding near the right edge of the pavement, suddenly and without warning turned to his left directly across the path of the bus and into the northbound lane of the highway.

The evidence, taken in the light most favorable to plaintiff, tends to establish these facts: June 4, 1964, was a clear, warm day. As the bus topped the northern hill, the driver and some of his passengers saw Robert, aged 15, riding his bicycle on the right-hand side of the road about two feet from the edge of the asphalt. He was then about halfway down the hill. An automobile traveling north was near the bottom of the southern hill. Although the bus was rapidly overtaking the bicycle, the driver never sounded his horn to signal his intention to pass the boy. As it traveled downhill, the bus engine "idled" smoothly and made very little noise. When the driver was only 10-20 feet behind Robert, he "mashed down on the accelerator" — "showered down on it"; the engine "roared outloud," and Felton turned the bus "astraddle the center line." (The northbound car had passed.) Up to that time Robert had continued on the course in which he was first observed; he had never looked back, nor had he given any signal of his intention to turn left. When "the bus roared," Robert cut to his left. The bus driver applied brakes about the time he hit the boy. The impact occurred some distance north of a dirt road which intersects No. 301 near the bottom of the hill, 600 feet south of the north crest.

When the investigating officer arrived, he found Robert's body lying in the middle of the dirt road, 10-12 feet east of the pavement. The bicycle was on the east shoulder, 6-8 feet north of the dirt road. In the center of the highway, 40-50 feet north of this road and about 75 feet from the body (and 35-40 feet from the bicycle) was broken glass from the left headlight of the bus. There were no marks on the highway. Defendant Felton told the patrolman that as he came over the hillcrest he saw the boy operating his bicycle near the edge of the pavement; that he moved his bus "over toward the center of the road" to avoid striking him; and that the boy then cut across in front of the bus. Felton did not tell the patrolman that he ever blew his horn.

The area was a 55 MPH speed zone; the bus was traveling about 45 MPH when it crested the hill. Robert was an intelligent, healthy young man who did well in school. He would soon have been an Eagle Scout.

At the close of plaintiff's evidence, defendants moved for a judgment of nonsuit. The motion was allowed, and plaintiff appealed.

Wiley L. Lane, Jr., and Gardner, Connor & Lee for plaintiff appellant.

William L. Thorp, Jr., for defendant appellees.

SHARP, J. The failure of the bus driver to blow his horn in apt time before attempting to pass the boy on his bicycle — a boy who had not looked back from the time the bus driver had first sighted him 150 yards ahead — was a violation of G.S. 20-149(b), and evidence of negligence. *Tallent v. Talbert,* 249 N.C. 149, 105 S.E. 2d 426. Defendants concede that the trial judge allowed their motion for nonsuit upon the theory that Robert was guilty of contributory negligence *per se* in that, without giving any signal of his intention to do so, he veered suddenly from a direct line of travel when such a movement could not be made in safety. G.S. 20-154.

Nonsuit on the ground of contributory negligence may be allowed only when a plaintiff's evidence, taken in the light most favorable to him, so clearly establishes the defendant's affirmative defense that no other reasonable inference or conclusion can be drawn from it. 4 Strong, N. C. Index, Negligence § 26 (1961). Do the circumstances disclosed by plaintiff's evidence establish thus conclusively that Robert was guilty of a violation of G.S. 20-154, and that such violation was a proximate cause of the collision which resulted in his death? The answer is No.

Except as to those provisions which by their nature can have no application, the operation of a bicycle upon a public highway is governed by the rules of the road applicable to motor vehicles. G.S. 20-38(FF); *Harris v. Davis,* 244 N.C. 579, 94 S.E. 2d 649; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565. Therefore, under ordinary circumstances, it is the duty of a bicyclist, before turning from a direct line of travel, to ascertain that the movement can be made in safety, and to signal his intention to make the movement if the operation of any other vehicle will be thereby affected. The evidence here is susceptible to the following inferences: (1) Robert was oblivious to the bus behind him; (2) the bus driver should have realized this; (3) Robert had not intended to turn from his line of travel; and (4) his movement to the left was an involuntary one, caused by the unexpected and startling noise of an accelerating motor 10-20 feet behind him. In the aggregate, these are emergency, not ordinary, circumstances.

In *Southwestern Freight Lines v. Floyd,* 58 Ariz. 249, 119 P. 2d 120, plaintiff *F,* a 12-year-old girl, was riding as a guest on a bi-

cycle being operated at dusk by plaintiff *S*, a 16-year-old girl, in the outside lane for northbound traffic on a four-lane highway. They came upon the parked truck of defendant *N* and passed it. After they had proceeded 75-100 feet, the truck started up and followed directly behind them with its lights burning. When the truck was 15 feet behind them, *S* said, "That truck is going to hit us." She turned to the left, toward the inside lane, and ran into the truck of defendant *SW*, which was in the act of passing *N*. Defendant *SW*'s truck had given no audible notice of its approach. Both plaintiffs recovered judgment against both defendants. In sustaining the recovery, the Arizona court said:

> "That the operator of the bicycle, when she saw or heard the Northcutt truck 15 or 20 feet behind her, should be reasonably expected to continue on her course, unexcited, and take the chance she would not be run down, is hardly in accordance with human experience. One would rather expect her to become panicky and instantly seek some way of escape. That she failed to adopt a safe or the safest course, or to give statutory signals under section 66-111, does not relieve the defendant. It has long been settled that a party having given another reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages." *Id.* at 257, 119 P. 2d at 124.

Greenberg v. Conrad, 220 Ill. App. 508, was a case in which the plaintiff's intestate Thomsen, an adult riding a bicycle on a street in Waukegan, was struck from behind and killed by the defendant's automobile. Evidence for the plaintiff tended to show that the defendant first sounded his "gong" when the automobile was just upon Thomsen and his bicycle, at which time the defendant "speeded up." Thomsen turned to the left and was run down. In sustaining a judgment for the plaintiff, the court said:

> "It is clear from all the evidence that Thomsen first learned of the approach of this automobile behind him when the gong first sounded when the automobile was right upon him. . . . 'It has long been settled, that a party having given another reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm.' . . . We are of opinion that the evidence warranted the jury in finding that the rule is applicable to the facts in this case, and that it was a question of fact for the jury whether Thomsen was acting with due care under the circumstances of

the sudden danger which confronted him, and that the jury were warranted in finding that he was not guilty of contributory negligence." *Id.* at 512-13.

As defendant Felton approached Robert on his bicycle, "a special hazard" existed. Felton might reasonably have apprehended that the bicyclist was oblivious of his approach and that he might be startled into involuntary action by a sudden and frightening noise behind him. It was, therefore, both Felton's common-law and statutory duty to use due care not to endanger him. G.S. 20-140; G.S. 20-141(c); G.S. 20-174(e); G.S. 20-149; *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462; *Tarrant v. Bottling Co., supra.* One of those duties was to signal his approach in time to afford Robert a reasonable opportunity to avoid the danger from the passing bus. "This warning signal must be given to the driver of the vehicle in front in reasonable time to avoid injury which would probably result from a left turn or a crossing over the center of the highway to the left by the vehicle in front." *Boykin v. Bissette,* 260 N.C. 295, 298, 132 S.E. 2d 616, 619. In the absence of such warning, knowledge that he is about to be passed may not be ascribed to the operator of the forward vehicle. *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730. The fact that the engine of the overtaking vehicle is noisy, or even that it is carrying a rattling load, will not relieve a driver of his duty to give in apt time the warning required by statute. *Devcchio v. Ricketts,* 66 Cal. App. 334, 226 Pac. 11; 60 C.J.S., Motor Vehicles § 326(c) (1949).

We hold that plaintiff offered plenary evidence of defendants' actionable negligence and that it was for the jury to say whether Robert was guilty of negligence which was a proximate cause of his tragic death.

The judgment of nonsuit is

Reversed.

MOORE, J., not sitting.

RAYMOND LOUIS VANN v. VANILLA HAYES, ADMINISTRATRIX OF THE ESTATE OF BILLY RAY HAYES, DECEASED; CAROLYN RUTH HAYES, TIMOTHY MURPHY AND WILLIAM THOMAS MURPHY.

(Filed 23 March, 1966.)

1. Automobiles § 46—

The evidence tended to show that one defendant's vehicle struck the other defendant's vehicle, which was standing on the hard surface on its left of the highway. There was no evidence as to how long the stationary vehicle had been stopped when the accident occurred. *Held:* An instruction in regard to the duty of a motorist in stopping upon the highway first to ascertain that the maneuver can be made in safety and an instruction in regard to requirements as to lights in operating a car on the highway at nighttime, are erroneous as charging on principles of law not supported by any view of the evidence.

2. Trial § 33—

It is prejudicial error for the court to charge the law on abstract principles not properly raised by the pleadings and not supported by any view of the evidence.

3. Automobiles § 37—

Testimony of a witness that he did not see any headlights burning on defendant's stationary vehicle is without probative force when the witness further testifies that he never was in a position from which he could have seen the lights on the front of the vehicle had they been burning.

4. Evidence § 15—

A showing that a witness was in a position to hear or see or would have heard or would have seen is a prerequisite to the admissibility of negative evidence that the witness did not hear or see.

5. Automobiles § 52—

The owner may be held to derivative liability only in the event that the negligence of the driver is properly established.

MOORE, J., not sitting.

APPEAL by defendants Hayes from *Morris, J.*, August-September Session 1965, NEW HANOVER.

The uncontroverted evidence shows that Billy Ray Hayes was sitting in a 1961 Chevrolet which was stopped in front of the home of the plaintiff, Raymond Louis Vann, on the North — or wrong — side of paved highway 1108. It was 8:30 p.m. on October 4, 1963 and dark. The highway was straight and level for "at least half a mile." The evidence did not disclose how long the car had been stopped at that point before the accident nor the circumstances under which it was stopped. As the plaintiff Vann was walking toward the Hayes car and was about twelve feet from it, the defendant Murphy, driv-

ing his car west at about fifty miles per hour, struck the Hayes car and then the plaintiff, causing injury.

The Hayes vehicle was registered with the N. C. Department of Motor Vehicles in the name of defendant Carolyn Ruth Hayes at the time of the accident. Defendant Carolyn Ruth Hayes testified the automobile had been purchased by Billy Ray Hayes with his own money, but had been registered in her "name because Billy Ray didn't have a driver's license." A canceled check evidencing the purchase price of the automobile and signed "Vanilla Hayes or Billy Hayes" as joint makers was introduced into evidence. Defendant Carolyn Ruth Hayes denied the existence of any agency relationship with defendant Billy Ray Hayes.

Billy Ray Hayes died pending the trial and Vanilla Hayes, as administratrix of his estate was made a party to this action.

Defendants Murphy offered no evidence.

The jury found the plaintiff to have been injured by the negligence of defendant Billy Ray Hayes; that defendant Billy Ray Hayes was the agent of defendant Carolyn Ruth Hayes; that plaintiff was not injured by the negligence of defendant Timothy Murphy; and that plaintiff should recover $4000 of defendants Hayes.

From the signing of the judgment, defendants appeal, assigning error. The plaintiff Vann did not appeal.

George Rountree, III, Elbert A. Brown, attorneys for the Plaintiff Appellee.

W. G. Smith, Attorney for Defendant Appellants.

PLESS, J. The court charged the jury "if you find from the evidence and by its greater weight, the burden being upon the plaintiff, that the defendant, Billy Ray Hayes, stopped the automobile he was driving on the hard surface, or main traveled portion of the road without first ascertaining the same could be done with safety to others then and there present and being upon said highway, that would constitute negligence, and if you find from the evidence and by its greater weight, that the defendant Hayes was negligent in this respect, and you further find by the greater weight of the evidence that such negligence was a proximate cause of injury to the plaintiff, if any you find he sustained, you would answer the first issue 'yes'." Previously the court had read N. C. G.S. § 20-154 and the quoted portion of the charge was referring to the provisions of that statute.

Since there was no evidence as to when the car had been stopped nor the conditions under which it was stopped, this portion of the charge is subject to a valid exception for the reason that it was

purely conjectural. There was no evidence to justify or support the quoted instructions, and "an instruction about a material matter not based on sufficient evidence is erroneous. In other words, it is error to charge on an abstract principle of law not raised by proper pleading and not supported by any view of the evidence." *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62. Our Court has said "it is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury" and "* * * an instruction about a material matter not based on sufficient evidence is erroneous." *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 558 and many cases therein cited. "An instruction not based on evidence is erroneous in that it introduces before the jury facts not presented thereby, and is well calculated to induce them to suppose that such state of facts in the opinion of the Court is possible under the evidence and may be considered by them." 53 Am. Jur. § 579, pp. 455-456.

The Court further charged: "* * * (I)f you find from the evidence and by its greater weight that the defendant Billy Ray Hayes, operated a 1961 Chevrolet automobile upon the highway in the nighttime without lights in violation of General Statute 20-124, such would constitute negligence, and if you further find from the evidence and by its greater weight that his negligence in this respect was a proximate cause of the collision and resulting injury to the plaintiff, if any he sustained, you would answer the first issue 'yes'."

The record contains no evidence of Billy Ray's operating the car in the nighttime, so this too, is an abstract proposition of law not supported by any view of the evidence.

The court also charged that during night hours "there shall be displayed upon such vehicle one or more lamps projecting a white or amber light visible under ordinary atmospheric conditions from a distance of 500 feet from the front of such vehicle, and projecting a red light visible under like conditions from a distance of 500 feet from the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicle when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person from a distance of 200 feet upon such highway."

The plaintiff had offered only negative testimony with regard to lights on the car; that is, the witness Jerry Newkirk, over the objections of the defendants Hayes, testified that he did not see any lights on the Hayes car but he also testified that if they were on he didn't see them, that he only saw the Hayes car for about 20 sec-

onds while he was 200 yards away, that he could not see the road in front of the Hayes car, that he was about two blocks away from it, that he never got in front of the Hayes car or on the side of it before the impact and never did bring himself within the 500 feet mentioned in General Statute 20-134 and never did put himself in a position from which he could have seen headlights on the front end of the Hayes car, and that he could not say of his own knowledge whether there were headlights on because he didn't see them.

With respect to negative evidence, that is, that one did not see nor one did not hear, it was meaningless if the non-seeing or non-hearing are equally consistent with the occurence of the events themselves. The showing that a witness was in a position to hear or see or would have heard or would have seen is a prerequisite to the admissibility of negative evidence that the witness did not hear or see. In the absence of such preliminary showing negative testimony does not possess sufficient probative force to require its submission to a jury, *Johnson & Sons, Inc. v. R. R.*, 214 N.C. 484, 199 S.E. 704; *Setzer v. Insurance Co.*, 258 N.C. 66, 127 S.E. 2d 783, nor, in our opinion, to sustain an affirmative finding.

The instructions relating to the liability of Carolyn Ruth Hayes are subject to some question but since they may not arise at a subsequent trial, we deem it unnecessary to discuss them. Since she could be held only in the event that the negligence of Billy Ray Hayes was properly established, we hold that the errors relating to Billy Ray Hayes relieve her of responsibility under the present verdict.

For the reasons stated, we are of the opinion that the defendants, Billy Ray Hayes and Carolyn Ruth Hayes, are entitled to a

New trial.

MOORE, J., not sitting.

CAROLYN SMITH PASSMORE v. JOHNNY CARROLL SMITH AND FLOYD L. CARROLL.

AND

VICKIE LYNN PASSMORE, BY HER NEXT FRIEND, PAUL G. SYLVESTER v. JOHNNY CARROLL SMITH AND FLOYD L. CARROLL.

AND

JOANN HUMPHREY, BY HER NEXT FRIEND, PAUL G. SYLVESTER v. JOHNNY CARROLL SMITH AND FLOYD L. CARROLL.

(Filed 23 March, 1966.)

1. Trial § 45—

The action of the court in reducing the amount of damages with the consent of plaintiffs is not prejudicial to defendants.

2. Automobiles § 54g—

One defendant's admission of the ownership of the vehicle driven by the other requires the submission of the issue of agency to the jury, G.S. 20-71.1, but when the only positive evidence relating to agency is that offered by defendants tending to show that the driver was on a purely personal mission at the time of the collision, the owner is entitled to an instruction that the jury should answer the issue of agency in the negative if they should find the facts to be as the positive evidence tends to show, and this without special request therefor. Whether the driver was using the vehicle with mere consent of the owner is irrelevant to the issue of agency.

3. Appeal and Error § 54—

Where there is no prejudicial error relating to the negligence of the driver of the vehicle and the sole prejudicial error relates to the issue of agency of the owner, the Supreme Court may grant a partial new trial on the issue of agency without disturbing the verdict against the driver.

MOORE, J., not sitting.

APPEALS by defendants from *Cowper, J.*, November 15, 1965, Civil Session of ONSLOW.

These three civil actions grow out of a collision that occurred December 19, 1964, about 3:35 p.m., in Onslow County, south of Jacksonville, on U. S. Highway No. 17. Plaintiff Carolyn Smith Passmore, driving her husband's Rambler station wagon, was accompanied by her children, plaintiff JoAnn Humphrey, age 12, and Vickie Lynn Passmore, age 5. Defendant Johnny Carroll Smith, the sole occupant, was driving the Ford car of his stepfather, defendant Floyd L. Carroll. Both cars were traveling north. The collision occurred when Smith was overtaking and attempting to pass the Rambler station wagon.

In Mrs. Passmore's case, the pleadings raised issues of negligence, agency, contributory negligence and damages. In the case of each child, the pleadings raised issues of negligence, agency and damages.

The three cases were consolidated for trial. In each case, the jury answered all issues in plaintiff's favor and awarded damages as follows: In Mrs. Passmore's case, $1,500.00; in JoAnn Humphrey's case, $1,500.00; and in Vickie Lynn Passmore's case, $2,000.00. Judgments were entered against both defendants. In Mrs. Passmore's case, judgment for plaintiff for $1,500.00 was entered. In JoAnn Humphrey's case, judgment for plaintiff for $500.00 was entered. The judgment recites: "And it appearing to the Court that the attorneys for the plaintiff have submitted a Judgment voluntarily reducing the amount of the verdict to $500.00." In Vickie Lynn Passmore's case, judgment for plaintiff for $1,000.00 was entered. The judgment recites: "And it appearing to the Court that the attorneys for the plaintiff have submitted a judgment voluntarily reducing the amount of the verdict to $1,000.00."

Defendants excepted to each judgment and appealed. The three appeals are before us on a consolidated record.

Ellis, Hooper, Warlick & Waters for plaintiff appellees.
Joseph C. Olschner for defendant appellants.

BOBBITT, J. There was ample evidence to take the case to the jury on all issues raised by the pleadings in the three cases.

Defendants' assignments of error relating to the negligence issues, the contributory negligence issue in Mrs. Passmore's case, and the issues as to damages, do not disclose prejudicial error. While all have been considered, these assignments do not present questions of such nature as to merit particular discussion.

Apparently, plaintiffs' counsel and the court considered the damages awarded each child excessive. The record tends to support that view. Suffice to say, the voluntary reduction of their recoveries as established by the judgments tendered by their counsel was not prejudicial to defendants.

In each case, the second (agency) issue is worded as follows: "2. Was the defendant, Johnny Carroll Smith, operating the automobile owned by the defendant, Floyd L. Carroll, as the agent of Floyd L. Carroll at the time of the collision alleged in the complaint?"

It is alleged in each complaint that, at the time of the collision, Smith was operating the Ford "with the express consent and permission" of Carroll, the owner, and "was acting . . . as agent for . . . Carroll and within the course and scope of his employment and about the business of . . . Carroll." Defendants' denial of these allegations raised the quoted second (agency) issue.

There is neither allegation nor evidence that Smith was Carroll's

agent under the family purpose doctrine. Plaintiffs seek to establish Carroll's liability for Smith's negligence under the doctrine of *respondeat superior.*

By virtue of the provisions of G.S. 20-71.1, Carroll's admitted ownership of the Ford was *prima facie* evidence of Smith's agency and required submission of the second issue. The issue was for jury determination notwithstanding the only positive evidence relating thereto was that offered by defendants tending to show Smith was on a purely personal mission at the time of the collision. In such case, the owner, without request therefor, is entitled to an instruction, *related directly to the evidence in the particular case,* that it is the jury's duty to answer the agency issue, "No," if they find the facts to be as the positive evidence offered by the owner tends to show. *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295; *Chappell v. Dean,* 258 N.C. 412, 417-418, 128 S.E. 2d 830. Compare: *Jyachosky v. Wensil,* 240 N.C. 217, 226-227, 81 S.E. 2d 644; *Skinner v. Jernigan,* 250 N.C. 657, 664-665, 110 S.E. 2d 301.

Uncontradicted evidence offered by defendants tends to show: Smith, age 24, lived in Wilmington, N. C., part of the time and part of the time in the home of his mother and stepfather in Jacksonville, N. C. He had never driven Carroll's car on any prior occasion. Nothing had been said between Smith and Carroll with reference to requesting or granting permission for Smith to drive the car. Carroll was not present when Smith drove the car from the Carroll home and had no knowledge Smith was using the car on this occasion. On the occasion of the collision, Smith was driving the car to the Shelby Variety Store "(t)o lay away some stuff for (his) little boy for Christmas."

Defendants excepted to the court's instructions relating to the second (agency) issue. Included in these instructions is the following: ". . . if . . . Smith was operating the vehicle with consent and authorization of the owner, then the owner would be responsible in damages." Whether the Ford car was being operated by Smith with Carroll's knowledge, consent or authorization is not determinative as to Carroll's liability for Smith's negligence. Under the doctrine of *respondeat superior,* Carroll is liable for Smith's negligence only upon allegation and proof that Smith was the agent of Carroll and that this relationship existed at the time and in respect of the very transaction out of which the injury arose. *Whiteside v. McCarson, supra,* and cases cited.

The court did not instruct the jury it would be their duty to answer the second issue, "No," without regard to whether Smith was operating the Ford car with Carroll's consent, express or implied, if they found that, on the occasion of the collision, Smith was using the

Ford car solely for a mission of his own, namely, going to the Shelby Variety Store "(t)o lay away some stuff for (his) little boy for Christmas." Without request therefor, Carroll was entitled to an instruction to this effect.

Defendants have failed to show error in respect of the negligence issues, the contributory negligence issue in Mrs. Passmore's case, and the issues as to damages. The verdicts, as to these issues, will stand as between each plaintiff and both defendants. The second (agency) issue in each case is set aside on account of the indicated error in the charge. This issue has no bearing upon Smith's liability. It relates solely to Carroll's liability for the negligence of Smith. As to all matters relating to the negligence issues, the contributory negligence issue in Mrs. Passmore's case and the issues as to damages, Carroll has had a trial free from prejudicial error. He is entitled to a partial new trial in each case, that is, a new trial on the agency issue. *Whiteside v. McCarson, supra,* and cases cited.

The result: As to defendant Smith, the trial and judgments are upheld. In each case, as to defendant Carroll, the jury's answer to the second (agency) issue and the judgment are set aside and a partial new trial is ordered. Upon such new trial, the sole issue for determination will be whether Smith, on the occasion of the collision, was the agent of Carroll and then and there acting within the scope of his agency. If the answer is, "No," plaintiffs cannot recover from defendant Carroll; but if answered, "Yes," plaintiffs will be entitled to judgments for the amounts it was adjudged they should recover in their respective judgments against Smith.

As to defendant Smith, no error.

As to defendant Carroll, partial new trial.

MOORE, J., not sitting.

IRVIN RAY QUINN AND WIFE, LAURA QUINN v. ROWENA THIGPEN AND VIOLA QUINN, GUARDIAN AD LITEM FOR NORMA RAY QUINN, MINOR, AND COLON KELLY QUINN AND WIFE, DOTTIE QUINN.

(Filed 23 March, 1966.)

1. Vendor and Purchaser § 4; Registration § 1—

One who has a contractual right to compel another to convey is, upon the recordation of the contract, accorded the same protection as a grantee in a recorded deed.

2. Boundaries § 9—

A contract obligating the vendor to convey a 20-acre tract in a named township, the contract being executed in a county embracing such township, together with a stipulation that the lands referred to were identical with those described in a certain deed duly registered at a specified page and book, *held* a sufficient description to permit location by parol.

3. Trial § 6—

Pretrial stipulations duly entered into by the parties are binding upon them.

4. Vendor and Purchaser § 4; Husband and Wife § 11—

A separation agreement making a division of personal and real property between the parties and providing that the tract of land alloted to the husband should be his for the term of his natural life and at his death the said land should be conveyed or devised or should vest in fee simple in the children of the marriage, *is held* to impose a contractual obligation on the husband to vest a fee simple title in the children at or prior to his death, which contract the children may enforce as the third party beneficiaries.

MOORE, J., not sitting.

APPEAL by Guardian *Ad Litem* from *Hubbard, J.*, in Chambers in DUPLIN on October 16, 1965.

This action as originally instituted sought to compel Rowena Thigpen to purchase and pay for a tract of land in Limestone Township, Duplin County. Plaintiffs alleged a written contract binding them to sell and convey the land in fee simple for $14,000, tender of a deed sufficient to comply with their obligation under the contract, and defendant's refusal to accept the deed and pay the purchase money.

Defendant answered admitting the contract and tender of a deed sufficient in form to convey an estate in fee, but which, she averred, would not convey an estate in fee because, by written agreement between male defendant and his former wife, male defendant had limited his estate in the land to one for his life, with a vested right in remainder in Colon Kelly Quinn and Norma Ray Quinn. Colon Kelly Quinn and his wife, Dottie Quinn, and Norma Ray Quinn were by order of court made parties defendants. Because of their minority, Viola Quinn was appointed as guardian *ad litem*.

Viola Quinn as guardian *ad litem* filed an answer in which she alleged: Irvin Ray Quinn and Viola Quinn, husband and wife, in 1955, 1956 and 1957 executed separation agreements, therein agreeing to live separate and apart and to a division of all of the properties owned by them.

The parties waived a jury trial. They stipulated facts, *inter alia*, that Irvin Ray Quinn and his wife, Viola Quinn, had in 1955,

1956 and 1957 executed the separation agreements, copies of which were attached to the guardian *ad litem's* answer.

Each agreement provided the parties should from the date of the agreement live separate and apart. Each contained an article designated as Fifth, reading:

> "FIFTH: The parties hereby agree as a mutual division of their property, that Viola J. Quinn, party of the first part, the wife, shall have as her own in fee all . . . (enumerated articles of personalty) and said wife shall hold and own in fee a 30 acre tract of woodland in Limestone Township, to have and to hold unto her said Viola J. Quinn and her heirs and assigns forever in fee simple. That husband Irvin Ray Quinn shall own and have in fee . . . (personalty) and shall have during the term of his natural life a certain farm containing 20 acres, in Limestone Township, and at his death said lands shall by him be conveyed, devised, or shall vest in fee simple in his said children Colon Kelly Quinn and Norma Ray Quinn and their heirs and assigned *(sic)* in fee forever, to have and to hold the same to them and their heirs and assigns forever."

The parties also stipulated:

> "9. It is further stipulated and agreed that the lands set forth and referred to in the complaint are the same and identical lands set forth and described in a deed from Dunnie Lanier to Irvin Quinn, dated January 12, 1937, and recorded in Book 394, at Page 228, Duplin County Registry, and being the same lands referred to in these Stipulations, which is the only real property owned by said Irvin Ray Quinn in Limestone Township, Duplin County, North Carolina, on the date of said deeds of separation, namely, the 22nd day of August, 1955; the 30th day of March 1956; and the 6th day of November 1957."

A specific description by metes and bounds of the land described in the contract to convey and the pleadings is also stipulated.

In addition to stipulating facts, it was stipulated that the court should, acting as a jury, answer issues formulated by the parties, as follows:

> "1. Do the deeds of separation, marked Exhibit "B-1"; "B-2"; and "B-3" of the stipulations, vest in Colon Kelly Quinn and Norma Ray Quinn a remainder in fee simple subject to the life estate of the plaintiff, Irvin Ray Quinn, in the lands referred to in the complaint and described in Paragraph Two of the stipulations?

"2. Are the plaintiffs entitled to specific performance against the defendant, Rowena Thigpen, under the contract of purchase designated as Exhibit "A" in the stipulations?"

The court answered the first issue No, and the second issue Yes.

Based on the facts stipulated and the court's answers to the issues formulated by the parties, the court adjudged Colon Kelly Quinn and Norma Ray Quinn had no interest in the lands referred to in the complaint, and the plaintiffs were entitled to specific performance of the contract by the defendant Rowena Thigpen. To this judgment the guardian *ad litem* and the minors excepted and appealed.

Russell J. Lanier for plaintiffs, appellees.
Henry L. Stevens, III, for defendant appellant.

RODMAN, E.J. One who has a contractual right to compel another to convey is, upon the recordation of the contract, accorded the same protection as a grantee in a recorded deed. G.S. 47-18; *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528, 3 A.L.R. 2d 571; *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218; *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186. Here, the instrument under which the minors claim was recorded prior to the contract between plaintiff and defendant Thigpen. The only question for determination is, did the separation agreements under which the minors claim create an enforceable right to vest title in an adequately described parcel of land at or prior to the father's death?

We consider first the adequacy of the description. If the description of the property which plaintiff, Irvin Ray Quinn, husband and father, acquired free of claims of his wife, is limited to the words "one White truck and Brown trailer and . . . a certain farm containing 20 acres in Limestone Township," there would be merit in the plaintiffs' contention that the contract would not suffice to describe any property, and hence could not be specifically enforced. But these are not the only words used to describe the property to be conveyed. The parties, husband and wife, when they signed the agreements of separation expressly stated that they intended to divide their properties. The wife received, in addition to the 30 acres of woodland, household and kitchen furniture and a 1954 Plymouth automobile. The husband received a truck, trailer, trucking equipment, and the 20-acre farm. The deed bears the caption "Duplin County." The real estate is said to be in Limestone Township. It is a fair inference that the real estate is in Limestone Township in Duplin County. Additionally, the parties stipulated: "(T)he lands

set forth and referred to in the complaint are the same and identical lands set forth and described in a deed from Dunnie Lanier to Irvin Quinn, dated January 12, 1937, and recorded in Book 394, at page 228 . . . which is the only real property owned by said Irvin Ray Quinn in Limestone Township, Duplin County, North Carolina, on the date of said deeds of separation, namely, the 22nd day of August, 1955; the 30th day of March 1956; and the 6th day of November, 1957."

Since husband and wife were dividing all of their properties and they owned only one 20-acre farm in Limestone Township, the description given in the separation agreements was sufficient to permit location by parol. The description is sufficient for a binding contract to convey. *Self Help Corporation v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889, and cases there cited; *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269, and cases there cited.

The parties have stipulated that the lands described in the contract between plaintiff Irvin Ray Quinn and defendant Thigpen is the identical 20 acres described in the separation agreements. That stipulation is binding. *Burkhead v. Farlow,* 266 N.C. 595, 146 S.E. 2d 802.

The only question left for determination is: Did the separation agreements contain a provision binding on the father to vest title to the 20-acre farm in his children, minor defendants?

The separation agreements do not purport to convey an estate in remainder to the minor children, but they do impose a contractual obligation on the father to vest a fee simple title in his children at or prior to his death. If this contract had been made between father and child, there could be no doubt about the right of a child, a party to the contract, to enforce a conveyance at the time it was agreed title should vest. *Clark v. Butts,* 240 N.C. 709, 83 S.E. 2d 885; *Chambers v. Byers,* 214 N.C. 373, 199 S.E. 398; *Fawcett v. Fawcett,* 191 N.C. 679, 132 S.E. 796.

The separation agreements by express language make the children beneficiaries of those contracts. As such, they have vested rights and can maintain an action for a declaration of those rights. *Potter v. Water Co.,* 253 N.C. 112, 116 S.E. 2d 374; *Brown v. Construction Co.,* 236 N.C. 462, 73 S.E. 2d 147; *Chambers v. Byers, supra;* Annotations: 2 A.L.R. 1193, 33 A.L.R. 739, 73 A.L.R. 1395; 17A C.J.S., Contracts, § 519(3). The equitable right which the minor defendants have to require, at the time agreed upon, specific performance of their father's contract to vest title in them relieves the defendant Thigpen from any obligation to purchase.

Reversed.

MOORE, J., not sitting.

HORTON *v.* REDEVELOPMENT COMMISSION.

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

(Filed 23 March, 1966.)

1. Appeal and Error § 60—

The decisions of the Supreme Court on prior appeals constitute the law of the case in respect of the questions then presented and decided, both in the subsequent proceedings in the trial court and on subsequent appeal.

2. Same; Municipal Corporations § 4—

Where a prior appeal holds that the taxpayers of the municipality were entitled to enjoin the prosecution of the urban redevelopment plan set forth unless and until the plan was modified so as to eliminate a specified feature thereof, *held*, upon the elimination of the specified feature the court should adjudge that the prayer for injunctive relief be denied. Such judgment would not preclude property owners from attacking the modified plan on grounds relating to their status as property owners, or preclude plaintiffs from instituting another action in the event defendants should act in violation of the former decisions of the Supreme Court.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Gambill, J.*, Regular May 17, 1965, Civil Session of GUILFORD, High Point Division, docketed and argued as No. 686 at Fall Term 1965.

Taxpayers' action for injunctive relief.

Reference is made to the preliminary statements and opinions in our decisions in connection with the three prior appeals in this case: (1) 259 N.C. 605, 131 S.E. 2d 464; (2) 262 N.C. 306, 137 S.E. 2d 115; and (3) 264 N.C. 1, 140 S.E. 2d 728.

Our decision on third appeal was filed March 17, 1965, and certified to Guilford County on March 29, 1965. Thereafter, motions were made by plaintiffs and by defendants for "judgment in conformity with the decision (opinion) of the Supreme Court." A hearing was held May 3, 1965. On May 19, 1965, Judge Gambill entered judgment which, after quoting that portion of the opinion of Rodman, J., on third appeal following the words, "(w)e conclude" (264 N.C. p. 10), continues as follows:

"AND IT FURTHER APPEARING TO THE COURT, and the Court finding as a fact that on 26 March 1965 the defendant Redevelop-

ment Commission of High Point eliminated from the Redevelopment Plan the acquisition of an easement over the Southern Railway right of way and the proposed covering of the railroad tracks in downtown High Point, which modification of the Redevelopment Plan was approved by the City Council of High Point on 2 April 1965, and that a second modified cooperation agreement was entered into between the City of High Point and the Redevelopment Commission under date of 2 April 1965, which agreement approved the deletion from the Redevelopment Plan of the proposed project for covering the Southern Railway tracks and reflected the reduced project costs resulting from the abandonment of the track-covering portion of the Plan, and that said modifications have been approved by the United States of America and High Point College;

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED *that the Commission and High Point have modified the Plan to meet statutory requirements as interpreted in the decisions of the Supreme Court of North Carolina, and the judgment heretofore entered by the Honorable Allen H. Gwyn as of 28 August 1964, filed on 2 September 1964, is hereby modified to conform with said opinion of the Supreme Court of North Carolina filed 17 March 1965.*" (Our italics.)

Plaintiffs excepted and appealed.

Harriss H. Jarrell for plaintiff appellants.

Knox Walker and Haworth, Riggs, Kuhn & Haworth and Jordan, Wright, Henson & Nichols for defendant appellees.

BOBBITT, J. The decisions of this Court on prior appeals constitute the law of this case in respect of the questions then presented and decided, both in the subsequent proceedings in the trial court and on the present appeal. *Collins v. Simms,* 257 N.C. 1, 125 S.E. 2d 298; *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864.

Affidavits offered by plaintiffs at the hearing before Judge Gambill relate to questions presented and decided on the former appeals.

On third appeal, this Court held, in substance, that defendants should be restrained unless and until the Redevelopment Plan was modified so as to eliminate therefrom all provisions relating to the Pedestrian Plaza. Judge Gambill, on sufficient documentary evidence, found as a fact the Redevelopment Plan had been so modified. As a result of the elimination of the estimated cost of the Pedestrian Plaza from the estimated total cost of the project, the plan was modified so as to reduce proportionately the amount to be provided by the City of High Point by local grants-in-aid and

revenues derived from sources other than taxation or a pledge of its credit.

We are of opinion, and so decide, the italicized portion of the judgment should be stricken and in lieu thereof the following should be substituted, *viz.:* "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's prayer for injunctive relief in respect of the Redevelopment Plan as modified April 2, 1965, be and is denied, and that this action be and is dismissed." It is ordered that the judgment be and is so modified, and that the judgment as so modified be and is affirmed.

Questions decided on former appeals *include* the following:

1. A municipality may be enjoined from spending the money derived from taxes and from levying taxes and issuing bonds for an urban redevelopment project unless and until such project is approved by a majority of the qualified voters of such municipality.

2. Plaintiffs sue in their role as general taxpayers of the City of High Point. The one plaintiff who owns property within the redevelopment area asserts no special rights deriving from said ownership.

3. Conflicts in evidence presented questions of fact rather than issues of fact; and the factual findings herein "are not binding on one not now a party." (264 N.C. p. 4.)

4. Owners of property in the redevelopment area are not precluded from attacking the Redevelopment Plan as modified on grounds relating to their status as property owners rather than as general taxpayers.

The decision that plaintiffs as general taxpayers are not now entitled to enjoin defendants from proceeding in accordance with the Redevelopment Plan as modified on April 2, 1965, does not preclude plaintiffs from instituting another action in the event defendants should act in violation of the decisions of this Court in this case.

Modified and affirmed.

MOORE, J., not sitting.

RAYMOND CECIL, ADMINISTRATOR OF THE ESTATE OF LARRY STEPHEN CECIL v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD.

(Filed 23 March, 1966.)

Appeal and Error § 3—

The allowance of a motion to strike portions of the complaint is not immediately appealable but may be reviewed only by *certiorari*. Rule of Practice in the Supreme Court No. 4(a)(2). Such motion does not admit the truth of the allegation sought to be stricken for the purpose of the hearing on the motion to strike or otherwise. The allowance of a motion to strike is appealable only when it is to strike a cause of action, a plea in bar, or a defense in its entirety, amounting to a demurrer or the granting of a plea in bar.

MOORE, J., not sitting.

APPEAL by plaintiff from *Walker, Special Judge,* August 16, 1965, Session of GUILFORD, High Point Division, docketed and argued as No. 690 at Fall Term 1965.

The allegations of the complaint, exclusive of the prayer for relief, are as follows:

"1. Plaintiff Raymond Cecil is a resident of Davidson County, North Carolina, and is the duly qualified and acting administrator of the Estate of Larry Stephen Cecil.

"2. Defendant, High Point, Thomasville, and Denton Railroad (hereinafter referred to as 'Railroad') is a North Carolina Corporation, with its principal office and place of business in the City of High Point, Guilford County, North Carolina.

"3. On or about the 6th day of March 1965, at approximately 10:20 o'clock P.M., plaintiff's intestate, Larry Stephen Cecil, was operating a 1964 Chevrolet automobile in a northerly direction on Rural Paved Road 1619, as said road approaches its intersection with the tracks owned and maintained by defendant Railroad, at a point approximately four and one-half miles south of the City of High Point, in Randolph County, North Carolina. As deceased neared the grade crossing, he was operating said vehicle in a reasonable and prudent manner, at a safe rate of speed and on his own right side of the road. *There was no adequate sign, electric signal or other warning device to apprise traffic approaching from the south on said highway of the presence of the dangerously obscured grade crossing;* and although plaintiff's intestate applied his brakes at the instant the tracks and train, having been obscured by densely wooded areas and embankment, came into his line of vision, *there was insufficient time within which to bring the car to a stop before the train approaching from his right crashed into it,* said collision resulting in the death of plaintiff's intestate, on March 6, 1965.

"4. The wrongful death of plaintiff's intestate was due to, caused and occasioned by, and followed as the direct and proximate result of the negligent and unlawful acts and omissions of defendant Railroad which said acts and omissions, taken either separately or in their entirety, were the sole and proximate cause of the plaintiff's intestate's death, said acts and omissions being hereinafter more specifically set forth:

> Rural Paved Road 1619 is an open country road, with a posted maximum speed of 55 miles per hour. As said road approaches the aforementioned grade crossing from the south, it is on a downgrade; and it is bordered on both sides by embankments and dense woods. Neither defendant's tracks, nor any train approaching thereon, nor any light on any train is visible to traffic moving north on said road until the driver is approximately 75 feet from the tracks, *and plaintiff alleges that this terrain rendered the crossing extremely dangerous, said conditions constituting a blind crossing. Defendant prior to said occasion had been notified and warned, by various civic groups and individuals, and by a prior similar accident, that there were insufficient warning devices for said crossing. Notwithstanding, defendant negligently failed to erect any cross-arm sign, reflecting sign, electric flashing sign, electric cross-arms, bells or any other warning device commensurate with the ultra-hazardous character of said grade crossing.*

"5. Plaintiff's intestate, Larry Stephen Cecil, was born on or about the 8th day of July 1946. At the time of his wrongful death, as hereinabove set forth, he had completed his 18th year, and was a healthy individual with a life expectancy of 51.34 years. By reason of the wrongful, careless and unlawful acts and omissions of the defendant as hereinbefore set forth, plaintiff's intestate was killed, all to the plaintiff's damage in the sum of $200,000.00."

After a hearing on defendant's motion therefor, the court, "in its discretion," entered an order (1) striking from the complaint the portions thereof italicized above, and (2) allowing plaintiff twenty days "in which to amend his complaint so as to conform to this order."

Plaintiff excepted and appealed.

Schoch, Schoch & Schoch for plaintiff appellant.
Lovelace & Hardin for defendant appellee.

BOBBITT, J. Each paragraph of defendant's motion to strike is directed to a specific portion of the complaint; and the court's

order, in each of seven paragraphs, strikes a specific portion of the complaint. Plaintiff's purported appeal from the order must be dismissed for failure to comply with our Rule 4(a)(2). Rules of Practice in the Supreme Court, 254 N.C. 785; *Williams v. Denning,* 260 N.C. 540, 133 S.E. 2d 148.

In the decisions on which plaintiff bases his contention that Rule 4(a)(2) does not apply, the motion was to strike a pleading *in its entirety* for failure to state a cause of action or defense, such as a motion to strike in its entirety a further answer and defense, *Jewell v. Price,* 259 N.C. 345, 348, 130 S.E. 2d 668, and cases cited, or a plea in bar, *Housing Authority v. Wooten,* 257 N.C. 358, 363, 126 S.E. 2d 101, or a "Further Amendment to the Prior Amended Complaint and Amendment to Amended Complaint," *Johnson v. Johnson,* 259 N.C. 430, 437, 130 S.E. 2d 876, or a cross action for contribution, *Etheridge v. Light Co.,* 249 N.C. 367, 106 S.E. 2d 560. Such a motion to strike, in substance a demurrer, admits for the purpose of the hearing thereon the truth of the factual allegations of the challenged pleading.

Here, plaintiff did not demur to the complaint or move to strike it in its entirety. As indicated, it moved to strike each of several specific portions. Its motion to strike does not admit the truth of any of plaintiff's allegations for the purpose of the hearing on the motion to strike or otherwise. An immediate appeal would present to this Court for review the court's ruling in respect of each stricken portion of the complaint. Under Rule 4(a)(2), the court's rulings were subject to immediate review only by *certiorari.*

It is noted that plaintiff, if so advised, may seek leave to amend his complaint so as to allege additional facts.

Plaintiff urges that we reconsider on the present record that portion of the opinion in the *Akers* case, *R. R. v. Motor Lines,* 242 N.C. 676, 89 S.E. 2d 392, relating to the significance of G.S. 136-20. A critical discussion thereof appears in 41 N.C.L.R. 296 *et seq.* Suffice to say, we are not disposed to consider whether the ruling in *Akers* relating to G.S. 136-20 should be affirmed, modified or overruled except upon a proper appeal and in the context of a fully developed factual situation.

Appeal dismissed.

MOORE, J., not sitting.

B. W. PARSONS v. JOSEF K. GUNTER AND GUNTER AND COOKE, INC., A CORPORATION.

(Filed 23 March, 1966.)

1. Limitation of Actions § 17—

Upon defendant's assertion of a pleaded statute of limitations, plaintiff has the burden of overcoming the plea.

2. Limitation of Actions § 8—

Plaintiff declared on an agreement under which he and the individual defendant would divide profits from the sales of a certain mechanism and, if a patent could be obtained, would jointly own the patent, and prayed for an accounting of the profits derived from sales and an adjudication that defendants hold in trust a one-half interest in the patent issued to the individual defendant and assigned by him to the corporate defendant. *Held:* The action is for breach of contract and not one to establish a constructive or resulting trust, and therefore the action is barred after three years from defendant's categorical denial of plaintiff's rights. G.S. 1-56.

MOORE, J., not sitting.

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

APPEAL by plaintiff from *Pless, J.*, November 8, 1965, Schedule A, Civil Session of MECKLENBURG.

This action was begun September 21, 1964. Individual defendant is hereinafter referred to simply as "Gunter"; corporate defendant, Gunter and Cooke, Inc., is hereinafter referred to merely as "corporate defendant."

Plaintiff alleges: He and Gunter in April 1959 agreed they would work jointly to develop a machine known as a "cotton card drive" incorporating Gunter's idea for the construction of the machine; if they were successful, each would pay one-half of the expenses of producing the machine; each would receive one-half of the profits from sales of the machines; and if the idea could be patented they would own jointly any patent issued for the construction of a machine incorporating Gunter's idea; as a result of the joint efforts of plaintiff and Gunter they developed a marketable cotton card drive for use in the textile industry; subsequent to the contract between plaintiff and Gunter, Gunter caused corporate defendant to be formed for the purpose of manufacturing and marketing the machine developed by plaintiff and defendant Gunter, and corporate defendant has manufactured and sold and is presently manufacturing and selling many of the machines; Gunter is an officer and principal stockholder of corporate defendant; corporate defendant was fully informed of the contract between plaintiff and Gunter; Gunter and corporate defendant have realized large profits from the

sale and use of said machine; in September 1960 Gunter, without notice to plaintiff, applied to the U. S. Patent Office for a patent covering the machine which plaintiff and defendant developed; the Patent Office in October 1961 issued a patent to Gunter; in November 1961 Gunter, without the knowledge or consent of plaintiff, assigned the patent to corporate defendant.

Based on his allegations, plaintiff prayed for an accounting of the profits derived from sales of the machines and an adjudication that defendants hold a one-half interest in the patent in trust for the plaintiff.

Defendants admitted: Corporate defendant was created at the instance of Gunter, a majority stockholder therein, for the purpose of taking an assignment of any patent which might be issued to Gunter; a patent was issued and assigned as alleged by plaintiff. They alleged plaintiff was not entitled to any portion of the profits derived from the sale of the machines incorporating Gunter's idea, nor was plaintiff the owner of any right in the patent issued to Gunter and by him assigned to corporate defendant.

Defendants base their defense on these factual allegations: Plaintiff was in 1959 and prior thereto an employee of T. B. Woods Sons Co. (hereinafter Woods). Woods was engaged in making and selling card drives competitive with machines incorporating Gunter's idea. Because of this conflict of interest, plaintiff agreed he would leave Woods' employment. He agreed that he would keep confidential Gunter's idea as to how drives should be constructed. He did not leave Woods' employment; to the contrary, he remained with Woods and sought as Woods' employee to prevent the profitable marketing of machines incorporating Gunter's idea, and furnished Woods detailed information about Gunter's idea for the construction of a card drive machine. They alleged any contractual relationship existing between plaintiff and Gunter terminated late in 1959 or early 1960. They pleaded the 3-year statute of limitations in bar of any recovery.

A jury trial was waived. The parties stipulated that the card drive incorporating Gunter's idea was sold at a profit by Gunter and Cooke beginning with the 10-months period ending October 31, 1961, and that it continued to have profits from sales during the years 1962, 1963, 1964 and 1965.

At the conclusion of plaintiff's evidence defendants moved for judgment of nonsuit. Before ruling on the motion the court found as a fact "that the card drive was marketable and sold by Gunter and Cooke from January 1960 on, and that in May 1960 the defendant Josef K. Gunter breached the contract theretofore entered between

him and the plaintiff, . . ." Based on this finding the court concluded as a matter of law that plaintiff's cause of action was barred. Defendants' motion was allowed.

Ervin, Horack, Snepp & McCartha and William E. Underwood, Jr., for plaintiff appellant.

Nye, Winders & Mitchell for defendants, appellees.

RODMAN, E.J. Plaintiff's sole exception and assignment of error is to the rendition of the judgment. He does not challenge the finding of fact that the contract was breached in May 1960. That finding is based on plaintiff's testimony that "he (Gunter) was forming Gunter and Cooke Company to sell these drives. This was not in keeping with our agreement made April 3, and so I saw that these drives would be beyond my control if he went out with Gunter and Cooke Corporation just to sell them."

Thereafter some machines were sold by defendants. Plaintiff and Gunter had a conference in Charlotte in May 1960 with respect to these sales. Plaintiff demanded an accounting of the proceeds derived from these sales. After a discussion of the differences between the parties, plaintiff "expressed to him (Gunter) my displeasure in his selling these drives, which wasn't in keeping with our original agreement, and also I asked him where I stood in the matter — that is, in the Gunter & Cooke thing I didn't want any part of. He said that there was not enough room for both of us in selling these card drives." Plaintiff then inquired what his position would be if he should terminate his employment with Woods. Whereupon Gunter replied: "There is still no room for you in the sale of these card drives."

When defendants asserted the statute of limitations as a defense, plaintiff had the burden of overcoming the plea. *Jewell v. Price,* 264 N.C. 459, 142 S.E. 2d 1; *Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548; *Speas v. Ford,* 253 N.C. 770, 117 S.E. 2d 784.

Plaintiff's evidence established the fact that Gunter in January and May told plaintiff, in language which could not be misunderstood, that Gunter had disclaimed any obligation which plaintiff could assert based on the contract for the utilization of Gunter's idea for the cotton card drives. This disavowal started the statute of limitations to run. *Bennett v. Trust Co.,* 265 N.C. 148, 143 S.E. 2d 312; *Solon Lodge v. Ionic Free Lodge,* 245 N.C. 281, 95 S.E. 2d 921; *Sheppard v. Sykes,* 227 N.C. 606, 44 S.E. 2d 54; *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83; *Booth v. Hayde,* 307 S.W. 2d 227.

More than three years elapsed after plaintiff was put on notice of Gunter's disavowal of any obligation to plaintiff and the institution of this action. The right to maintain the action is barred. G.S. 1-52.

We find nothing in the evidence to support plaintiff's contention that the applicable statute is 10 years, G.S. 1-56, because defendants are trustees of a constructive or resulting trust. The evidence does not establish any confidential relationship and reliance on that relationship by plaintiff. To the contrary, the evidence coming from his own lips is to the effect that he was during the entire period seeking to defeat a successful use of Gunter's idea.

The judgment is

Affirmed.

MOORE, J., not sitting.

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

STATE v. ADRIAN HENRY SELLERS.

(Filed 23 March, 1966.)

1. Criminal Law § 159—

Exceptions not brought forward and assigned as error or discussed in defendant's brief are deemed abandoned. Rule of Practice in the Supreme Court No. 19(c).

2. Criminal Law § 121—

Arrest of judgment does not lie for variance between the indictment and the proof, since arrest of judgment may be allowed only for fatal defect appearing upon the face of the record proper.

3. Criminal Law § 23—

Unawareness at the time of entering a plea of *nolo contendere* of asserted error in connection with conviction under a prior indictment in a companion case is insufficient ground for nullifying the plea of *nolo contendere.*

4. Criminal Law § 9; Robbery § 4—

Evidence tending to show that defendant collaborated with another in planning and setting the stage for a robbery and in escaping with the stolen money, and waited and watched, armed with a pistol, near enough to the scene to render aid if necessary, establishes defendant's constructive

presence when the robbery actually occurred and renders him guilty as a principal in the second degree.

MOORE, J., not sitting.

APPEALS by defendant from *Mintz, J.,* December 1965 Special Criminal Session of NEW HANOVER.

The defendant appeals from judgments imposed pursuant to two separate indictments for armed robbery. The first indictment charges that on 21 November 1965 he, with force and arms, in New Hanover County:

> "[U]nlawfully, willfully, and feloniously, having in his possession and with the use and threatened use of firearms, * * * to wit: a pistol which he pointed at victim whereby the life of Ann Bryan was endangered and threatened, did * * * unlawfully, willfully, forcibly, violently and feloniously take, steal, and carry away $1,000 in money and a 1956 Chrysler automobile of the value of $2,000.00 from the presence, person, place of business, and residence of Ann Bryan * * *"

The second indictment is identical except the alleged victim was James Richard Rouse, the date of the alleged offense was 11 November 1965, and the property alleged to have been taken consisted of a brief case and books of the value of $20.00.

Through court appointed counsel, the defendant entered a plea of "not guilty" to the first (Bryan) indictment. The case was tried and the jury returned a verdict of "guilty." Thereupon, the defendant, through his counsel, entered a plea of *nolo contendere* to the charge of common law robbery to the second (Rouse) indictment, which plea was accepted by the State and by the court.

The court sentenced the defendant to confinement in the State's Prison for a term of not less than 14 nor more than 17 years in the first (Bryan) case, and to confinement therein for a term of not less than 9 nor more than 10 years in the second (Rouse) case, the latter sentence to run concurrently with that in the first (Bryan) case. No notice of appeal was then given.

After his commitment to the State's Prison, the defendant, in person, wrote to the presiding judge stating that he thereby gave notice of appeal in both cases. The court thereupon reappointed the trial counsel to represent the defendant upon these appeals. The only assignments of error are stated in the case on appeal as follows:

> "In the trial of the defendant in Docket No. 9391 [the Bryan case], no exceptions were noted in the record with ref-

erence to matters deemed of sufficient importance to constitute reversible error. In the absence of such exceptions in the record, the defendant respectfully prays that this appeal be taken as constituting an exception to the judgment, bringing up the record for review by this Court for error appearing on the face thereof. In thus excepting to the judgment, the defendant moves that said judgment be arrested and a new trial granted for that the indictment was not supported by the evidence and the verdict and judgment were founded upon evidence not in support of the indictment, for the reason that the indictment charged the defendant specifically with pointing a pistol at Ann Bryan, thereby threatening and endangering her life, by means of which money and property were taken from her, whereas all of the State's evidence tended to show that said act or acts were committed by one Thomas Yopp and that the defendant Sellers at most only aided and abetted the said Thomas Yopp in the commission of said crime * * *

"In Docket No. 9393 [Rouse case] * * * the defendant entered a plea of *nolo contendere* to common law robbery only upon recommendation of assigned counsel and immediately following the defendant's conviction as aforesaid in Docket 9393 [apparently Docket 9391 — the Bryan case — intended] at which time the defendant was unaware of the error and implications thereof in the record of the case in which he had been tried and convicted and stood in fear of a second conviction on a similar charge. Accordingly, the defendant moves for arrest of judgment imposed upon him in this case for that his plea of *nolo contendere* was not made with a full understanding of its meaning and effect upon his rights * * *"

At the trial of the first (Bryan) case the defendant offered no evidence. That offered by the State consisted, in part, of statements made by this defendant to a deputy sheriff, who was his uncle by marriage, which statements the court, in accordance with the evidence, found were voluntarily made. It was amply sufficient to show:

Mrs. Bryan, a merchant, upon returning home from her store late at night, 21 November 1965, was robbed of the day's receipts, approximately $1,000, and of her Chrysler automobile. To reach her home from the store she had to drive along a paved highway and then upon a dirt road running through a wooded area, approximately half a mile. When she drove into her yard and before she could get out of the car, a man approached, saying, "Give me your money and car keys or I will kill you." A struggle ensued in which Mrs. Bryan was severely beaten upon the head, and a pistol (ap-

parently the weapon with which she was struck) was fired over her head into the interior roof of her car. Thereupon, she surrendered the car key and the man drove away with the car and her money. She saw only one man, who was masked.

On the night in question, the defendant and one Tommy Yopp, together with a woman companion, pursuant to plans made by the defendant and Yopp to rob Mrs. Bryan upon her return to her home from the store, traveled in the defendant's Cadillac car to a point on the paved highway, near the dirt road leading to her house. Leaving the woman in the car with instructions as to her assignments, the two men, each armed with a pistol, walked to Mrs. Bryan's home and cut the telephone wire. Then, pursuant to their plan, the defendant, knowing Mrs. Bryan might recognize him if he remained, left Yopp at her house and walked back about halfway to the highway, at which point he was to wait, and did wait, so as to "be there just in case there was any trouble." When Mrs. Bryan's car approached along the dirt road, he stepped into the woods to avoid being recognized. Yopp took the money and the car from Mrs. Bryan as above described, and picked up the defendant on the way out to the highway. There they abandoned the Bryan car, got in the defendant's car with their woman companion, and returned to the apartment occupied by Yopp and her, the defendant driving his car. There the defendant and Yopp divided the money the next day, the defendant getting half of it.

The facts with reference to the second (Rouse) case are not set forth in the record.

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

Joshua S. James for defendant appellant.

PER CURIAM. The exceptions noted in the record are deemed abandoned since none of them has been brought forward as an assignment of error or discussed in the defendant's brief. Rule 19(3); Rule 28; *State v. Bittings,* 206 N.C. 798, 175 S.E. 299. However, we have examined them. We agree with his counsel that none of them relates to any reversible error.

The defendant's motion in arrest of judgment is denied in each case. Such a motion may be allowed only on the ground of a defect appearing upon the face of the record proper, which does not include the evidence introduced at the trial. Variance between indictment and proof is not ground for granting a motion in arrest of judgment. Defects which appear only by aid of evidence cannot be

the subject of such a motion. *State v. Kimball,* 261 N.C. 582, 135 S.E. 2d 568; *State v. Reel,* 254 N.C. 778, 119 S.E. 2d 876; *State v. Williams,* 253 N.C. 337, 117 S.E. 2d 444; *State v. McKnight,* 196 N.C. 259, 145 S.E. 281.

The plea of *nolo contendere* in the second (Rouse) case supports the judgment and sentence therein as sufficiently as a conviction or plea of guilty would have done. *Mintz v. Scheidt,* 241 N.C. 268, 84 S.E. 2d 882; *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695. There is no suggestion of similarity between the facts of the two cases. Even if there were reversible error in the first (Bryan) case, the significance of which defendant did not then understand, this would not nullify his plea of *nolo contendere* in the second or render defective the judgment and sentence imposed upon the basis of such plea.

Furthermore, we have reviewed the entire record and we find no such error in the first (Bryan) case. The evidence is ample to show the offense charged. The defendant and Yopp determined to rob Mrs. Bryan and went to her home together for that purpose, each armed with a pistol. Together they cut the telephone wire. Pursuant to plan, the defendant withdrew to a point en route to their get-away car to wait there "just in case there was any trouble." He was the owner and driver of the get-away car. They divided the stolen money equally — their own appraisal of the part he played in the robbery.

"When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty." *State v. Horner,* 248 N.C. 342, 103 S.E. 2d 694. The defendant not only collaborated with Yopp in planning and setting the stage for the robbery and in escaping with the stolen money, but also waited and watched, armed with a pistol, near enough to the scene to render aid if needed. Thus, he was constructively present when the robbery actually occurred and is guilty as a principal in the second degree. *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5; 21 Am. Jur. 2d, Criminal Law, § 121; 22 C.J.S., Criminal Law, § 86; Wharton, Criminal Law, 12th Ed., § 256. As such, the act of Yopp in pointing the pistol at Mrs. Bryan and firing it is deemed the act of the defendant. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241; *State v. Knotts,* 168 N.C. 173, 83 S.E. 972.

No error.

MOORE, J., not sitting.

CORA LEE FARROW, ADMINISTRATRIX OF THE ESTATE OF ARTHUR R. FARROW, JR., DECEASED v. CHARLES BAUGHAM AND KATHRYN BAUGHAM.

(Filed 23 March, 1966.)

1. Automobiles § 38—

While it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of the accident, his testimony as to his conclusions from these facts, such as that one of the vehicles had either stopped or was barely moving at the time of impact, is incompetent and is properly excluded.

2. Automobiles § 41a—

Negligence is not presumed from the mere fact that plaintiff's intestate was killed in a collision, and when the testimony and the physical facts at the scene leave in speculation the determinative facts as to the order the vehicles entered the intersection and as to their directions and turnings, nonsuit is properly entered, since the burden is on plaintiff to offer evidence permitting a legitimate inference of negligence from established facts.

MOORE, J., not sitting.

APPEAL by plaintiff from *Morris, J.*, September 1965 Civil Session of NEW HANOVER.

Action for wrongful death resulting from a three-car collision.

These facts are not disputed: Marstellar and Sixteenth Streets in Wilmington, each 32-36 feet wide, intersect at right angles. The intersection is uncontrolled, and the speed limit is 35 MPH. About 12:05 a.m. on January 1, 1965, defendant Charles Baugham, aged 17, was operating a 1964 green Oldsmobile, which his mother, defendant Kathryn Baugham, provided for the use of her family. Traveling on Sixteenth Street, he approached its intersection with Marstellar Street. Janice Starling was a passenger in the Baugham car. At the same time, Douglas Jackson, driving a white automobile west on Marstellar Street, was also approaching the intersection. Mrs. Wendy Tinga was with him. Plaintiff's intestate, Arthur R. Farrow, Jr., in a white Chevrolet, was likewise approaching this intersection. A collision occurred in the intersection; the three cars were severely damaged and Farrow was killed.

Plaintiff alleges that her intestate Farrow approached and entered the intersection "facing east"; that Baugham, traveling northwardly at an excessive rate of speed, without keeping a proper lookout, and without having his automobile under proper control, failed to yield the right of way to Farrow, who had entered the intersection first, and crashed into the side of Farrow's vehicle, fatally injuring him.

Police officer Marion L. Hodges, who had four years experience on the Wilmington Police Force, arrived on the scene shortly after midnight. Police officer Malcomb Bryan made a further investigation at 8:00 a.m. Hodges testified:

> "I found the Jackson car somewhat north of the intersection in this position up against a wire fence on the northwest corner. . . . The other two vehicles were located in the intersection . . . in this manner, they were facing somewhat in a southwesterly direction, and the Jackson car approximately northwest. . . . I found marks somewhat on the southeast part of the intersection. The marks started here. One set went to the Farrow car, and the other went to the Baugham car. . . . I have put an 'X' on the diagram to illustrate the point at which the marks began, and that mark . . . is in the southeast quadrant of the intersection . . . southerly from the center line of Marstellar St. . . . I didn't find any marks leading up to the Jackson car."

The witness placed small model cars upon a blackboard drawing to illustrate his testimony. He found Farrow, who was dead or dying, lying on the pavement to the east of his car.

The Farrow car was badly damaged from the right front wheel forward; its floorboard had buckled forward inside the car. The Jackson car was damaged over the left front wheel but not as extensively as the Farrow car. The Baugham automobile had an indentation backward in about the center of the hood; the entire front was demolished. On the left side of the Jackson vehicle there was green paint from the front to the center of the left door; on the right side of the Farrow car, there was green paint from the front to the center of the right door.

Officer Bryan testified:

> "There were two distinct marks in the intersection. . . . There were two scrape-outs of asphalt, half-moon shaped; one here and one here, and there were clear tire marks similar to the way it appears on the blackboard. . . . (The witness put a small zero on the board to indicate where the gouge marks were.) These half-moon spirals led in a southeast direction, as to each of the gouge marks, and extended back, I think, in this direction to the southwest corner. The skid marks end east of the center line on Sixteenth Street and north of the center line of Marstellar. . . . This star on the diagram stands for the impact area."

The day after the collision Baugham told Officer Hodges that he was going *north* on Sixteenth Street but that "he could not remember a thing about the accident; that it was as if the accident had never happened." Later, upon an adverse examination, Baugham testified that he was traveling *south* on Sixteenth Street. Jackson testified that he was traveling west on Marstellar Street. He recalled that he came to the Sixteenth Street intersection but said he remembered nothing further. Neither Mrs. Tinga nor Miss Starling testified.

Over the objection of defendants' counsel, Officer Hodges testified that from his investigation he "fixed the direction of the Baugham car as north on Sixteenth Street, and the Farrow car on E. Marstellar." Counsel for plaintiff then asked Hodges this question: "Based upon your investigation and the physical damage to the Farrow and Baugham automobiles, which you have testified to, and the marks in the intersection, did you determine whether or not the Farrow car was moving or sitting still at the time of the collision?" Defendants' objection was sustained. Had the witness been permitted to answer, he would have said: "I determined that the Farrow car was either stopped or barely moving at the time of the accident."

At the conclusion of plaintiff's evidence, defendants' motion for judgment of nonsuit was allowed, and plaintiff appealed.

Addison Hewlett, Jr. and Marshall & Williams for plaintiff appellant.

James, James & Crossley for defendant appellees.

PER CURIAM. Plaintiff assigns as error the exclusion of Officer Hodges' "determination" that the Farrow car was either stopped or barely moving at the time of the accident. This evidence was properly excluded.

> "A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require." *Shaw v. Sylvester,* 253 N.C. 176, 180, 116 S.E. 2d 351, 355.

Considering *all* the evidence which the trial judge admitted (as we are required to do in considering a motion for nonsuit, *Frazier v. Gas Co.,* 248 N.C. 559, 103 S.E. 2d 721), and, considering it in the light most favorable to the plaintiff, the evidence still leaves

"too many unknowns and imponderables" to permit the jury to consider it. Assuming, as plaintiff has alleged, that Farrow was going east and that Baugham was going north, the latter had the right of way unless Farrow was already in the intersection when Baugham approached. G.S. 20-155(a). Was Farrow already in the intersection when Baugham approached it? The evidence gives us no answer. Where in the intersection did the impact occur? The record discloses that, without objection, Officer Bryan put a star on the blackboard diagram to indicate "the impact area." In making his ruling, the trial judge had the benefit of this information; we do not. No copy or photograph of the blackboard drawing accompanied the case on appeal. See *Reynolds v. Hayes*, 256 N.C. 732, 125 S.E. 2d 18. Appellees' brief contains the statement that "the Farrow and Baugham cars ended up on the southwest corner." We have no way of knowing where they "ended up," for, without the map, we cannot locate either "here" or "there." The record does disclose that marks which led to the Farrow and Baugham cars began in the southeast quadrant and led off in a southwesterly direction. If we assume that the impact occurred in the southeast quadrant, it is difficult to see how the two cars, going east and north respectively, came to rest in the southwest quadrant. Could the Farrow car, having approached from the west, been attempting to make a left turn in the intersection to go north on Sixteenth Street? Or, having approached from the north, was it attempting to make a left turn in order to go east on Marstellar? And what was the role of the Jackson car in the collision? No marks led to it. Plaintiff's theory is that the Farrow vehicle, traveling east, was struck by Baugham, going north, and that Jackson, traveling west on Marstellar, then collided with Baugham and perhaps Farrow. We may speculate at length on the manner in which this collision occurred, but evidence is lacking. Negligence is not presumed from the fact that plaintiff's intestate was killed in the collision. Plaintiff must offer evidence "sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts." *Williamson v. Randall*, 248 N.C. 20, 25, 102 S.E. 2d 381, 386.

The judgment of involuntary nonsuit entered below is

Affirmed.

MOORE, J., not sitting.

STATE v. MILTON JAMES FORD, JR.

(Filed 23 March, 1966.)

1. Criminal Law § 112—

Ordinarily, objection to the statement of the contentions and to the court's review of the evidence must be made before the jury retires.

2. Same—

When the court states defendant's contention that if he were guilty the State would have also prosecuted his minor accessory, it will not be held for prejudicial error that the Court states the opposing contention supported by evidence, that the accessory would be dealt with in the juvenile court and that the minor had only done what the older defendant had told him to do.

3. Larceny § 10—

Where the indictment charges simple larceny of property of a value less than $200, G.S. 14-27 does not apply and sentence of five to seven years must be vacated, notwithstanding defendant's conviction on a prior count of breaking and entering and notwithstanding the sentences on the counts are made to run concurrently.

MOORE, J., not sitting.

ON *certiorari* from *Burgwyn, E.J.,* 6 September 1965 Schedule "C" Criminal Conflict Session of MECKLENBURG. On 9 October 1965 defendant filed in this Court a petition for a writ of *certiorari* to give him additional time to serve his statement of case on appeal on the State, due to the fact that the court reporter was unable by reason of prior engagements to deliver to him a transcript of the trial. This Court in conference on 20 October 1965 allowed his petition, and ordered that the case be heard at its regular time at the Spring Term 1966, and allowed him additional time in which to serve statement of case on appeal on the solicitor. This case was docketed as Case No. 268 Fall Term 1965, and docketed and argued as Case No. 247 Spring Term 1966.

Criminal prosecution upon an indictment containing two counts: The first count charges that defendant on 28 May 1965, with intent to commit larceny therein, did feloniously break and enter a dwelling house occupied by Otto Withers, where chattels, money, and valuable securities were kept, a violation of G.S. 14-54; and the second count charges defendant on the same day with the larceny of a strong box containing $150 in money, the property of Otto Withers.

Defendant, represented by his counsel Charles V. Bell, a member of the Mecklenburg County Bar, entered a plea of not guilty. Verdict: Guilty of a felonious breaking and entry as charged in the

indictment, and guilty of the larceny of property of a value of less than $200 as charged in the indictment.

From a judgment on each count that defendant be imprisoned for a term of not less than five years nor more than seven years, said sentences to run concurrently, defendant appealed to the Supreme Court.

It appearing to the court that defendant was indigent, the court appointed Charles V. Bell to perfect his appeal and to appear for him in the Supreme Court, and also entered an order allowing defendant to appeal *in forma pauperis.*

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Charles V. Bell for defendant appellant.

PER CURIAM. The State's evidence showed the following facts: On 28 May 1965 Otto Withers lived with his wife in a frame house with seven rooms at 2207 Fairway Lane in the Brookhill vicinity near Tremont Avenue in the city of Charlotte. The house has seven rooms and windows in just about every room. The windows have screens. On that day Otto Withers had in his house an iron safe which contained his valuable papers and $150 in cash money consisting of a $100 bill and $5 and $10 bills, which he was keeping for emergency purposes. This safe was about three feet by two feet and weighed about 100 or 125 pounds. A man could lift it. About 8 a.m. on this day Withers and his wife left his home to go to work. Before he left he locked the doors and windows of his house. He had in his pocket the keys to his safe, which was locked, and when he left home that morning his $150 in money was in the safe.

On this morning after Otto Withers and his wife had left his home, Ida Louise Massey, a young girl in the third grade, who lived in the neighborhood of the Withers' house, who had not gone to school that day and who was playing in the neighborhood, saw defendant go to a window in the Withers' home. Defendant had a golf club. He hit a screen over one of the windows with the golf club, stuck his hand in the screen, and pulled the screen off. Defendant then placed a stool by the window, got on it, pulled the window up, and went inside the house. She saw him throw stuff out the window, and throw a safe out the window. He picked up the safe and carried it in the direction of a branch nearby. A boy called "June Bug," who is about 14 years old, was standing around a branch bank playing golf with 10 or 12 children. When defendant was getting ready to go in the house, he called June Bug from across the parkway. Ida

Louise Massey testified: "First when he was getting ready to go in the house, when I heard them talking, say — told June Bug to go over there and stand by the road and tell him if anybody was coming so he could get out of the house and so if somebody was coming he would know when to get out of the house." June Bug did not go in the house.

Otto Withers was called to his home by police about noon on this day. When he arrived at his home, he saw that the screen over the window facing the branch had been torn out, a fan mounted in the window had been knocked out, and the window was open just as high as it would go. There had been taken from his home five suits of clothes, his wife's portable radio, a camera, and his safe. Later he saw his safe in a branch near his house. The lock had been battered out, and the door of the safe prized open. In the safe was his pocketbook, but his $150 in money, which was in the safe when he left home, was not in it.

A police officer of Charlotte picked up June Bug, who had with him a set of golf clubs. The police turned him over to the Youth Bureau. They do not know if he was ever tried in the juvenile court.

Defendant, testifying in his own behalf, denied that he had entered the Withers' home. On cross-examination defendant admitted that he had been tried and convicted for stealing in 1960 and again for stealing in 1964.

Defendant makes no contention that the State's evidence was insufficient to carry the case to the jury. Defendant has one assignment of error and that is to the part of the charge which will be set out below. The court charging the jury instructed it in substance, as a part of defendant's contentions, that the defendant contended the jury ought not to convict him on the evidence of this little girl, Ida Louise Massey. He contends that while she is not dishonest that she could be mistaken about her identification of himself as being the man who entered the house through the window and who carried the safe away after it was thrown out on the ground, contending that June Bug, the little boy 14 or 15 years old, who was partly guilty has not been tried in the court here, and that had he been guilty he would have been tried, and the defendant contends the jury should consider that as some evidence that there is some doubt about his guilt, because June Bug has not as yet been tried. Immediately after stating that contention of defendant, the court charged as follows, which defendant assigns as error: "While the State contends in answer to that that June Bug is an infant, so far as the law is concerned, below the age acceptable for prosecution for crime except in the juvenile court of the State and would be

tried down there and punished if guilty, some punishment meted out to them *(sic)*, if found guilty. The State contending that June Bug was a little boy just 15 years old, while the defendant is a man apparently much older and that the little boy only did what he was told to do by the defendant and not what is known as voluntarily doing it himself, lead into it by a man older than himself."

As a general rule, objections to the statement of contentions and to the review of the evidence must be made before the jury retires, or they are deemed to have been waived. *S. v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876. There is nothing in the record before us to indicate that the defendant made any objection to this statement of his contentions by the trial judge. The judge's statement of defendant's contentions in part as stated above, and his statement of the State's contentions in reply thereto, do not show the statement of a material fact not shown in the evidence, because the State's evidence affirmatively shows that June Bug was turned over to the Youth Bureau. The challenged part of the charge in stating the State's contentions in answer to the defendant's contentions as set forth above is, in our opinion, not erroneous, but if error it is not sufficiently prejudicial to disturb the verdict and judgment below on the verdict of guilty on the first count in the indictment. The case of *S. v. Revis,* 253 N.C. 50, 116 S.E. 2d 171, upon which the defendant relies, is factually distinguishable, in that, *inter alia,* the court charged that evidence elicited from defendant on cross-examination for the purpose of impeachment was evidence offered by defendant, and stated that defendant made certain contentions thereon.

The jury found defendant guilty of the larceny of property of the value of less than $200, a misdemeanor. G.S. 14-72 does not apply because the second count in the indictment does not allege that the alleged larceny was committed pursuant to a felonious breaking and entry. It was error for the judge to impose upon the conviction of larceny as alleged in the second count in the indictment a prison sentence of five to seven years, and it is hereby vacated. *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. It is true that the sentence imposed on the conviction on the larceny count was to run concurrently with the sentence imposed on the conviction on the felonious breaking and entry alleged in the first count in the indictment, but the larceny sentence is not authorized by law. Under the circumstances here, it would seem unjust for the State to pray judgment on the larceny count because the trial judge was of the opinion that the judgment on that count should run concurrently with the judgment on the other count.

In the trial below we find no error, except the judgment on the

verdict of guilty on the larceny count is in excess of that authorized by the statutory maximum, and is vacated.

No error, except judgment on larceny count vacated.

MOORE, J., not sitting.

STATE v. JOHN EDWARD SMITH.

(Filed 23 March, 1966.)

1. Burglary and Unlawful Breakings § 7—

A person who breaks or enters a building with intent to commit the crime of larceny is guilty of a felony regardless of whether he succeeds in stealing property or whether he actually steals property of a value not exceeding $200; it is only when the indictment and evidence disclose that the breaking or entering was with the intent to steal specific identifiable property of the value of $200 or less that the offense is a misdemeanor. G.S. 14-54.

2. Larceny § 7—

The fact that the indictment charges defendant with larceny of property from a specified person and the evidence discloses that such person was not the owner but was in lawful possession at the time of the offense, there is no fatal variance, since the unlawful taking from the person in lawful custody and control of the property is sufficient to support the charge of larceny.

3. Larceny § 10—

Where defendant is convicted of breaking and entering and of larceny of property of the value of $200 or less, and the counts are consolidated for judgment, the fact that the sentence exceeds the maximum for a misdemeanor does not entitle defendant to a vacation of the judgment, the sentence being supported by the conviction of breaking and entering.

MOORE, J., not sitting.

APPEAL by defendant from *Latham, Special Judge,* September 13, 1965, Special Criminal Session of MECKLENBURG.

Defendant was prosecuted on two bills of indictment. In No. 45-104, a two-count bill, the first count charged defendant with feloniously breaking and entering a certain building occupied by Carolina Ruling & Binding Company, a corporation, and the second count charged defendant with the larceny of personal property, to wit, a certain pistol, of the value of $25.00, "of the goods, chattels and moneys of one Archie Griggs." In No. 45-103, the indictment

charged defendant with felonious assault upon Archie Griggs. It was alleged the crimes were committed in June 1965.

Defendant, when arraigned and at trial, was represented by Beverly H. Currin, Esq., court-appointed counsel. Defendant entered pleas of not guilty. The jury returned verdicts of guilty as charged in each count of No. 45-104 and a verdict of guilty of assault with a deadly weapon in No. 45-103.

In No. 45-104, the two counts were consolidated for judgment; and judgment imposing a prison sentence of not less than seven nor more than nine years was pronounced. In No. 45-103, judgment imposing a prison sentence of two years was pronounced, the sentence in No. 45-103 "to be served concurrently" with the sentence in No. 45-104.

Defendant excepted and appealed.

After the entry of said judgments, defendant's notice of appeal, and the signing of appeal entries, an order was entered relieving Mr. Currin from further duties under his appointment as counsel for defendant. The appeal was perfected by defendant's present counsel.

Attorney General Bruton and Staff Attorney Vanore for the State.

Don Davis for defendant appellant.

PER CURIAM. The State's evidence, in brief summary, tends to show that defendant on June 3, 1965, at night, broke and entered the building of Carolina Ruling & Binding Company, Charlotte, N. C., which consisted of offices, an area where employees operated the equipment, and warehouse space; that defendant came upon, shoved and knocked down Griggs, age 75, a night watchman; and that defendant seized and appropriated to his own use Griggs' pistol, fired a shot in the floor in close proximity to Griggs and fired another shot while he was making his way out of the building. Defendant's testimony tends to show he was in Plainsville, New Jersey, not in Charlotte, North Carolina, in June 1965.

There was ample evidence to support the verdict of guilty of felonious breaking and entering as charged in the first count of No. 45-104. Since the *accomplished* larceny relates solely to a pistol valued at $25.00, defendant contends there is no evidence he broke or entered with the intent to commit a felony. The contention is without merit.

Under G.S. 14-54, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he

does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent or whether, if successful, the goods he succeeds in stealing have a value in excess of $200.00. In short, his criminal conduct is not determinable on the basis of the success of his felonious venture.

The doctrine of *S. v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745, cited by defendant, has no application unless it appears affirmatively from the indictment and evidence that the breaking or entering was with intent to steal specific identifiable property of the value of $200.00 or less and no other property.

Defendant contends the second count of No. 45-104 should have been dismissed for fatal variance between the indictment and the proof. In the indictment, the ownership of the pistol is laid in Griggs. The evidence is that the daughter of Griggs is the owner of the pistol and that the pistol when stolen was in the custody and under the control of Griggs. The special interest of Griggs as bailee was sufficient to obviate a fatal variance. *S. v. Law,* 228 N.C. 443, 45 S.E. 2d 374; *S. v. MacRae,* 111 N.C. 665, 666, 16 S.E. 173; *S. v. Powell,* 103 N.C. 424, 432, 9 S.E. 627; *S. v. Allen,* 103 N.C. 433, 9 S.E. 626, and cases cited.

Defendant's assignments do not purport to point out any specific error relating to his conviction of assault with a deadly weapon under the indictment in No. 45-103. Nor do we perceive error in defendant's conviction on said indictment.

The crime charged in the second count was the (simple) larceny of property of the value of $200.00 or less, a misdemeanor for which the maximum sentence is two years. See *S. v. Fowler, ante,* 667, ... S.E. 2d ..... However, no separate sentence based on defendant's conviction of larceny as charged in the second count of No. 45-104 was pronounced. Defendant's conviction of felonious breaking and entering as charged in the first count of No. 45-104 fully supports the judgment in No. 45-104 imposing a prison sentence of not less than seven nor more than nine years. It is noted that the sentence imposed by judgment pronounced in No. 45-103 is "to be served concurrently" with the sentence in No. 45-104.

No error.

MOORE, J., not sitting.

EULAND RANDOLPH HOLLAND v. LISTON MALPASS D/B/A LISTON MALPASS WHOLESALE AUTOMOBILE PARTS COMPANY.

(Filed 23 March, 1966.)

1. Negligence § 37b—

A proprietor is not an insurer of the safety of his invitees but is only under duty to use reasonable care to keep his premises within the compass of the invitation safe for use by customers, and what constitutes due care in a given situation depends upon the nature of the business and the normal use of like areas in such establishments.

2. Negligence § 37c—

An invitee is required to use reasonable care for his own safety commensurate with the normal activities of the establishment he visits.

3. Negligence §§ 37f, 37g—

Evidence that an experienced mechanic and garageman brought an automobile part to another garage for work and adjustment, that prior to injury he had traversed the aisle in question several times, that the aisle was well lighted, and that on the occasion causing the injury he fell over a "stiff-knee" jack which had in the interim been placed or slid into the aisle, *held* insufficient to be submitted to the jury on the issue of negligence and to disclose contributory negligence as a matter of law, since such incident was usual and should have been expected in the ordinary course of business at such establishment.

MOORE, J., not sitting.

APPEAL by plaintiff from *Cowper, J.*, September 1965 Session of SAMPSON.

Plaintiff alleges that on 23 September 1963, he was an invitee upon the premises of the defendant in the City of Clinton, whereon the defendant operates a garage for the repair of motor vehicles and parts thereof. He alleges he sustained injuries when he fell over a "stiff-knee," which is a type of jack, and which he alleges was negligently placed by an employee of the defendant in a narrow aisle or passageway.

The defendant, in his answer, denies that the plaintiff was invited into the portion of the premises where the accident occurred. He further denies all allegations of negligence by him or his employees and, as a further defense, pleads contributory negligence by the plaintiff.

Evidence offered by the plaintiff, in addition to that relating to the nature and extent of his injuries, tends to show:

Plaintiff, now 52 years of age, has been an automobile mechanic all of his adult life. For two months prior to his fall he had operated his own one-man garage. For four months before that he worked for the defendant in the same garage where this accident occurred and he was familiar with the premises.

On the occasion in question he carried a cylinder head to the defendant's garage to have work done on it. With this in his arms, he walked directly to the area in which he was subsequently injured. Customers generally and normally go into all parts of the garage, but on this occasion he observed no other customers in that portion of it.

Depositing the cylinder head on the work bench, at which two employees of the defendant were working, he told them what he wanted done to it. He then retraced his steps, along the passageway in question, to the entrance to the parts department. He went into the parts department to purchase some items which he needed for his own garage and remained therein, conversing with the employees there, for some 45 minutes. He then walked back along the same passageway to the bench where his cylinder head was being repaired and remained there talking to the men who were working on it for another 15 or 20 minutes. One of them inquired about some bushings needed for the valve cores. Thereupon, the plaintiff turned to go get them from the parts department, which would necessitate his walking again along the same passageway. As he turned, and before stepping forward, he stumbled over the "stiff-knee," fell and sustained a serious injury to his knee.

A "stiff-knee" is standard garage equipment, being a type of jack with four legs extending out from a base. It has many uses, including insertion under an automobile to hold it up while a mechanic works under it. Plaintiff, from his experience as a garage mechanic, knew how this item of equipment was used and handled in such a garage. As he expressed it: "When you are working in a garage and all this clanging and racket going on in your mind, you are talking to somebody about something you want done, a lot of things happen that you don't know about. I did not hear the 'stiff-knee' slide across the floor. I know as a garage mechanic that people do slide 'stiff-knees' out from under cars; they slide them around and they get out." The "stiff-knee" was not in the passageway during any of his previous trips along it. He did not see or hear it placed or slid into the aisle behind him as he stood at the work bench talking to the two men who were working on his cylinder head. During this 15 minute interval he observed no one else in the vicinity.

The passageway was a space 6 to 8 feet wide between garage machinery and the work bench on one side and motor vehicles under repair on the other side. The area was well lighted with windows, skylights and artificial lighting. Objects on the floor were readily discernible.

At the close of the plaintiff's evidence, the court granted the defendant's motion for judgment of nonsuit, from which judgment the plaintiff appeals.

James F. Chestnutt for plaintiff appellant.
Butler & Butler for defendant appellee.

PER CURIAM. After the plaintiff's evidence is taken as true, all reasonable inferences favorable to him are drawn therefrom and the whole is viewed in the light most favorable to him, it still falls short of being sufficient to show a cause of action in his favor against the defendant. The judgment of nonsuit was, therefore, proper.

Assuming, as we must upon this motion, that the plaintiff was invited by the defendant to go into the portion of the garage where the accident occurred, the defendant did not thereby become an insurer of the plaintiff's safety while there. *Aaser v. Charlotte,* 265 N.C. 494, 144 S.E. 2d 610; *Jones v. Pinehurst, Inc.,* 261 N.C. 575, 135 S.E. 2d 580; *Sossaman v. Chevrolet Co.,* 257 N.C. 157, 125 S.E. 2d 403.

The proprietor of a business establishment must use reasonable care to keep his premises, including aisles and walkways, safe for use by customers invited to use them. *Aaser v. Charlotte, supra; Harrison v. Williams,* 260 N.C. 392, 132 S.E. 2d 869; *Norris v. Department Store,* 259 N.C. 350, 130 S.E. 2d 537.

What constitutes reasonable care depends upon the nature of the business and the normal use in such business establishments of like areas. See: *Pierce v. Murnick,* 265 N.C. 707, 145 S.E. 2d 11. Walk spaces past work benches and around vehicles under repair in a busy automobile garage are not infrequently used as places for the temporary deposit of tools, equipment and parts. It is not reasonable to expect or require the same care to keep these areas free from obstruction as would be reasonable in the case of an aisle of a store, whose customers are invited to walk somewhat casually along as they inspect and make selections from merchandise displayed on the counters or shelves so as to attract and hold their attention.

The plaintiff's evidence fails to suggest any action by the defendant or his employees creating a hazard which one walking in the work space of a repair garage should not reasonably expect and watch for. It also shows that the plaintiff, an experienced garage worker, failed to look before he stepped where he should have anticipated some obstruction was likely. Had he done so he would have seen the "stiff-knee" in the well-lighted space. The invitee must

also use reasonable care, commensurate with the normal activities of the type of establishment whose invitation he accepts.

Affirmed.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. ROBERT CLARENCE MALPASS.

AND

STATE OF NORTH CAROLINA v. WILLIAM FRANKLIN TYLER.

(Filed 23 March, 1966.)

1. Criminal Law § 156—

An assignment of error to the failure of the court to charge the jury more fully as to an aspect of the case, and to apply the law to the evidence adduced thereon, should set out defendant's contentions as to what the court should have charged.

2. Criminal Law § 106—

A charge on the defense of alibi that in order to sustain a conviction the State is required to prove beyond a reasonable doubt that defendant was present at the time and place the offense was committed and that defendant participated in its commission is sufficient.

MOORE, J., not sitting.

APPEAL by defendants from *Morris, J.*, August 1965 Criminal Session of NEW HANOVER.

Defendants were charged separately in two identical bills of indictment with the crime of common-law robbery, and the cases were consolidated for trial.

Evidence for the State tended to show: About 10:00 p.m. on Tuesday, May 18, 1965, David J. Nealy had prepared for bed at his home in Wilmington. He went into his living room to cut off the lights and saw the two defendants standing inside the front door. They felled him with blows about the head from a round object 8-10 inches long, and both "stomped" him as he lay on the floor. Defendants took his wristwatch from his arm, and his trousers containing his pocketbook with $52.00 in it, "went with them." As a result of this attack, Nealy was hospitalized until the following Sunday. Evidence for defendants tended to show that each was elsewhere from 8:00 p.m. until midnight on May 18, 1965. The jury

found both defendants guilty. From judgments imposing identical prison sentences, each appeals.

Attorney General Bruton, Deputy Attorney General Lewis, and Charles M. Hensey, Staff Attorney for the State.

George Rountree, III, for Robert Clarence Malpass, defendant appellant.

A. A. Canoutas for William Franklin Tyler, defendant appellant.

PER CURIAM. Defendants' only assignment of error is "that the Trial Court erred in failing to instruct the jury more fully as to the defendants' defense of alibi, and further, in failing to apply the law of alibi to the facts adduced in evidence of this case." This assignment of error fails to comply with the rules of this Court. "An assignment based on failure to charge should set out the defendant's contention as to what the court should have charged." *State v. Wilson,* 263 N.C. 533, 534, 139 S.E. 2d 736, 737. Notwithstanding, we have examined the charge in its entirety and find that the judge instructed the jury in accordance with the rule laid down in *State v. Spencer,* 256 N.C. 487, 489, 124 S.E. 2d 175, 177. An alibi is simply a defendant's plea or assertion that at the time the crime charged was perpetrated he was at another place and therefore could not have committed the crime. As the court fully explained to the jury, in order to convict either defendant of the robbery charged, the State was required to prove beyond a reasonable doubt that he was present at the time and place it occurred and that he participated in it. Such proof, of course, would demolish an alibi. The evidence in this case was simple; the issue, clear-cut. Did either one, or both, of the defendants perpetrate the crime, or was the robbery victim mistaken in his identification? The jury could not have been misled or confused by the charge.

No error.

MOORE, J., not sitting.

STATE v. JOHN C. BENNETT.

(Filed 23 March, 1966.)

Constitutional Law § 32—

The appointment of counsel for a defendant charged with a misdemeanor is within the sound discretion of the presiding judge, and no abuse of discretion is shown in this case in the refusal to appoint counsel for a certified public accountant fined $25.00 upon conviction of a misdemeanor.

MOORE, J., not sitting.

APPEAL from *Houk, J.*, November 1st. 1965, Schedule "B", Criminal Superior Court, MECKLENBURG County.

The Charlotte City Code, Section 13-13, makes it unlawful for any person to commit a breach of the peace . . . or for any person to disturb the good order and quiet of the city by fighting . . . using profane, boisterous and indecent language. The penalty is imprisonment of not more than thirty days or a fine of not more than $50.00. The defendant was charged with violating this ordinance on October 14, 1965. He was convicted in the Charlotte Recorders Court on October 22, 1965 and was ordered to serve thirty days in jail, suspended on the condition he pay a fine of $25.00 and the costs. He appealed and on November 8, 1965 was tried in the Superior Court and upon conviction and judgment pronounced thereon, assigned errors and appealed to the Supreme Court.

John C. Bennett, in propria persona, for the defendant.

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

PER CURIAM. The defendant makes nine assignments of error but in his brief says "I am not familiar with the law on trial procedure and I am; therefore, unable to comment on these exceptions," referring to exceptions five through nine inclusive. In Rules of Practice in the Supreme Court, Section 28, 254 N.C. 810, these exceptions are "taken as abandoned" but we have, nevertheless, given them consideration and find no substantial error.

The remaining exceptions, one to four, relate to the defendant's request that the court appoint counsel for him and the court's refusal to do so. There is no sufficient showing that the defendant is indigent since it appears that the defendant is a certified public accountant, drives his own car, and has an income of "about" $3,000.

The North Carolina General Statutes 15-4.1 says ". . . the judge may, in his discretion appoint counsel for an indigent defendant charged with a misdemeanor if, in the opinion of the judge, such

appointment is warranted." By the action of the trial judge in denying the defendant's request that counsel be appointed for him, the judge demonstrated that in his opinion such an appointment was not warranted, and in this we concur. This was a petty misdemeanor and was tried in the Superior Court because the defendant refused to pay a $25.00 fine. The evidence of his guilt was impressive and he could have had little hope of being acquitted in the Superior Court even with the assistance of the most astute counsel.

We do not conceive it to be the absolute right of a defendant charged with a misdemeanor, petty or otherwise, to have court-appointed and-paid counsel. To hold differently would mean that one charged with overtime parking could require the state to provide counsel at many times the expense of the trivial fine involved.

The Statute with reference to the appointment of counsel for indigent defendants charged with misdemeanors leaves the matter to the sound discretion of the presiding judge. Some misdemeanors and some circumstances might justify the appointment of counsel, but this is not true in all misdemeanors. The facts of an individual case would determine the action of the court and it is not intended that anything in this opinion shall restrict or require the appointment of counsel in any given case.

We find

No error.

MOORE, J., not sitting.

AETNA CASUALTY AND SURETY COMPANY v. PETROLEUM TRANSIT COMPANY, INC.

(Filed 23 March, 1966.)

1. Corporations § 2—

Where a foreign corporation has complied with the statutory requirements for domestication it is not required to file with the Secretary of State the certificate prescribed by G.S. 55-138, nor is it required to notify the Secretary of State of its principal office in this State.

2. Venue § 2—

Where the evidence is sufficient to support the court's findings that plaintiff, a nonresident corporation, had domesticated in this State and had brought the action in the county in which it maintained its principal

place of business here, denial of defendant's motion for change of venue will not be disturbed. G.S. 1-82.

MOORE, J., not sitting.

APPEAL by defendant from *Houk, J.*, November 22, 1965, Schedule "B" Session of MECKLENBURG.

This is an appeal from an order denying defendant's motion for change of venue.

Plaintiff, on July 22, 1965, caused summons, for defendant, to issue from the Superior Court of Mecklenburg County, directed to the Sheriff of Robeson County.

The complaint alleged: Plaintiff is a corporation organized under the laws of Connecticut, engaged in writing general casualty insurance business; it it duly authorized and has for many years been engaged in the business of writing insurance in North Carolina; its principal office in this state is in Charlotte; defendant is a corporation organized under the laws of this state; its principal office is in Robeson County; defendant is indebted to plaintiff in the sum of $4,815 for premiums on insurance written for defendant at its request.

Defendant in apt time moved for an order transferring the cause to Robeson County for trial. The basis for the motion is an allegation that plaintiff, a foreign corporation, has never domesticated in North Carolina.

The Clerk heard defendant's motion. He found plaintiff, a nonresident insurance company, had complied with the provisions of G.S. 58-150, and was authorized by the Commissioner of Insurance to do business in this state; it has for many years maintained its principal office in North Carolina at 222 S. Church Street, Charlotte, N. C. Based on his findings, he denied the motion to remove.

Defendant appealed to the Superior Court. There the judge made findings substantially as made by the Clerk. He denied the motion to remove. Defendant appealed.

John H. Small for plaintiff appellee.
J. C. Sedberry and F. D. Hackett for defendant appellant.

PER CURIAM. The proper venue for an action instituted by a foreign corporation domesticated in this state is in the county in which it maintains its principal place of business. G.S. 1-82; *Crain & Denbo v. Construction Co.*, 250 N.C. 106 (112), 108 S.E. 2d 122.

For the purpose of establishing domestication in the manner required by G.S. 58-150, plaintiff offered in evidence certification by the Commissioner of Insurance that plaintiff had complied with each

and every provision of Article 17, Chapter 58, of the General Statutes. This certificate was sufficient to support the court's finding that plaintiff had domesticated in the manner required for foreign corporations engaged in writing insurance. Plaintiff did not, as defendant contends, having complied with the statute relating to domestication of foreign insurance corporations, have additionally to file with the Secretary of State the certificate required by G.S. 55-138; nor was it, as defendant contends, required to notify the Secretary of State of the location of its principal office in this State. *Crain & Denbo v. Construction Co., supra* (110). "The location of the principal office and place of business of a corporation is a fact." *Noland Co. v. Construction Co.,* 244 N.C. 50 (52), 92 S.E. 2d 398.

There was plenary evidence to support the court's finding that plaintiff's principal place of business was located at 222 S. Church Street in Charlotte.

The judgment denying defendant's motion to remove is Affirmed.

MOORE, J., not sitting.

MAE HAYNIE v. BETTY MAE QUEEN.

(Filed 23 March, 1966.)

APPEAL by defendant from *Falls, J.,* August 2, 1965 Civil Jury Session of GASTON.

Plaintiff instituted this action on February 4, 1964, to impress a trust on an undivided half interest in a lot on Auten Street in Gastonia. The lot is specifically described in the complaint. To support a claim of beneficial ownership in an undivided half interest in the lot and a building erected thereon, she alleged: Prior to October 31, 1957, plaintiff and defendant agreed to purchase the lot in question and to erect a home thereon; each would furnish half of the purchase price and pay half of the cost of erecting the building. Pursuant to this agreement plaintiff paid to the defendant $500, one-half of the purchase price of the lot; defendant purchased the lot and took title to the whole in her name; thereafter a residence was erected on the lot; plaintiff paid her half of the cost of erecting the residence; plaintiff and defendant occupied the premises as co-tenants from the date of purchase until February 1964, when defendant evicted plaintiff.

Defendant denied the property was purchased pursuant to an agreement with plaintiff and denied plaintiff's allegation that she had contributed any sum for the purchase of the lot or the erection of the building thereon. She admitted plaintiff had lived in the house from the time it was constructed, paying for such occupancy and for board the sum of $9.00 per week.

To determine the rights of the parties the court submitted issues answered by the jury as follows:

"1. Was there an agreement between the plaintiff, Mae Haynie, with the defendant, Betty Mae Queen, now Pearman, for the purchase of a lot and the construction of a house on Auten Road as co-owners, as alleged in the Complaint?

ANSWER: Yes.

"2. Did the plaintiff, Mae Haynie, pay to the defendant, Betty Mae Queen, one-half the purchase price for the land and one-half the cost for the construction of the home, as alleged in the Complaint?

ANSWER: Yes.

"3. If so, is the plaintiff the owner of and entitled to a deed conveying a one-half undivided interest in the property described in the Complaint?

ANSWER: Yes."

Judgment was entered adjudging plaintiff the owner of an undivided half interest in the property in controversy. Defendant appealed.

Childers and Fowler and Bob W. Lawing for plaintiff, appellee.
Mullen, Holland & Harrell for defendant, appellant.

PER CURIAM. Defendant's claim of prejudicial error is based on an asserted failure to comply with G.S. 1-180, in that (1) the court failed to explain the law and (2) expressed an opinion as to what the facts were.

Issues 1 and 2 presented pure questions of fact for decision. The court in unequivocal language informed the jury it could not answer either of those issues in the affirmative unless plaintiff had established the facts as alleged by her by clear, strong and convincing testimony, and if plaintiff had failed to carry that burden of proof, it would answer the first and second issues No. The charge was sufficient.

When the jury answered the first two issues in the affirmative, the answer to the third issue followed as a matter of law. *Fulp v. Fulp,* 264 N.C. 20, 140 S.E. 2d 708; *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289.

There is nothing in the charge which in our opinion constitutes an expression of opinion as to how the jury should answer the issues submitted to them.

No error.

MOORE, J., not sitting.

STATE v. WILLIE LEE HOPKINS.

(Filed 23 March, 1966.)

APPEAL by defendant from *Campbell, J.,* October 4, 1965 Criminal Session, MECKLENBURG Superior Court.

In this criminal prosecution the defendant was tried for the felony of armed robbery and the forcible taking of $900.00 from the cash drawer of Morris E. Trotter & Son Realty Company, a sole proprietorship owned by James E. Trotter. The robbery was effected by the use of a pistol and by threatening and endangering the life of Joseph W. Terrell, the employee in charge.

The defendant, through counsel, moved to quash the indictment. He excepted to the court's order overruling the motion and entered a plea of not guilty.

The State offered evidence that the defendant and three others entered the Realty Company's place of business described in the indictment. One of the party, in the presence of all, announced, "This is a robbery," and at the point of a pistol compelled Terrell and Mr. Blackwell, also present, to lie upon the floor while the four ransacked the establishment and took approximately $900.00 from the cash drawer. The witness Terrell positively identified the defendant as being present and participating in the robbery. Mr. Blackwell, the other witness present, was not able to identify any of the parties.

The defendant testified he was in Washington at the time of the robbery and knew nothing about it. He offered the evidence of Freddie Lee Norman, James Jacob Clinton, and Howard Grier, all of whom testified they participated in the robbery, had been tried, and were now serving time for the offense. Each stated the defendant was not present. Some of their statements to the officers tended

to show each had made a statement implicating Willie Lee Hopkins or Bill Hopkins, or Hawkins. There was evidence tending to support the defendant's contention that he was in Washington at the time of the holdup and other evidence tending to show that he was in Charlotte, where it occurred. From the verdict of guilty and judgment thereon, the defendant appealed.

T. W. Bruton, Attorney General, Millard R. Rich, Jr., Assistant Attorney General for the State.
Lila Bellar for defendant appellant.

PER CURIAM. The defendant finds fault with the jocularity on the part of the court during the preliminary proceedings before the selection of the jury. The lighter vein in which the court expressed its rulings on the preliminary motions is not shown to be prejudicial. The offense of robbery with firearms is properly alleged. The State's evidence is positive in the identification of the defendant as one of the participants. The defendant and the three who are serving time for having taken part in the robbery testified the defendant was not a participant. The conflict in the evidence with respect to the presence and participation of the defendant presented a question for the jury. Under proper instructions from the court the jury found the defendant guilty.

No error.

MOORE, J., not sitting.

CARL R. WILLIAMS, WHRENS CASEY WILLIAMS, AND MINORS. SAMUEL E. WILLIAMS, III, AND LINDA WILLIAMS, BY THEIR NEXT FRIEND, F. C. PASCHALL *v.* NORTH CAROLINA STATE BOARD OF EDUCATION, NORTH CAROLINA WILDLIFE RESOURCES COMMISSION AND THE STATE OF NORTH CAROLINA.

(Filed 30 March, 1966.)

1. Appeal and Error § 16—

Upon the granting of *certiorari*, the case is before the Supreme Court in all respects as on appeal.

2. State § 4; Quieting Title § 1—

A complaint alleging that plaintiffs are the owners of a described tract of land by record title and that the State claims an interest therein by virtue of a specified registered deed, that plaintiffs have a superior title,

and that the State's claim constituted a cloud on plaintiff's title, ***held*** sufficient to state a cause of action to quiet title, G.S. 41-10, and such action may be maintained against the State under the provisions of G.S. 41-10.1.

3. Adverse Possession § 12.1—

The State of North Carolina and its political subdivisions may acquire title by adverse possession to the same extent as an individual. G.S. 1-38 and G.S. 1-40 apply to any legal entity and not only to an individual.

4. Adverse Possession § 21—

In an action against the State to quiet title, allegations in the answer asserting acquisition of title under color of title by seven years' adverse possession and by adverse possession for more than twenty years under known and visible boundaries, and allegations that plaintiffs were estopped from asserting title by permitting the State to remain in open, notorious, and adverse possession of the *locus* for more than twenty years, set up a valid defense and motion to strike same is properly denied.

5. Limitation of Actions § 2—

Where the State and its agencies are asserting no rights deriving from their governmental status, they may assert defenses based on statutes of limitation.

6. Adverse Possession § 20—

Since proof of legal title to lands raises the presumption that the owner has been in legal possession thereof within twenty years before commencement of the action, it is not necessary that the complaint in a real action allege such possession within the twenty-year period, but allegations in the answer that plaintiffs had not been in possession within the twenty-year period should not be stricken on motion when defendants claim title by adverse possession. G.S. 1-39, G.S. 1-42.

7. Adverse Possession § 21—

In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading G.S. 1-56 upon the assertion that plaintiffs' action accrued more than ten years prior to the commencement of the action, and that their cause of action for trespass accrued more than three years prior to the commencement of the action, G.S. 1-52, are properly stricken as irrelevant, there being no claim of damages for trespass.

8. Limitation of Actions § 16—

The pleading of statutes of limitation having no relevancy to the facts controverted in the pleadings is properly stricken.

MOORE, J., not sitting.

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

ON *certiorari*, granted on defendants' petition, to review order entered by *Morris, J.*, at September 6, 1965, Session of PENDER, docketed and argued as No. 209 at Fall Term 1965.

Action under G.S. 41-10 and G.S. 41-10.1 to quiet title.

Plaintiffs, in amended complaint, alleged: They are the owners and seized in fee of a certain tract of land in Pender County described by metes and bounds and referred to as being "(o)n the East side of the Northeast branch of Cape Fear River above the mouth of Hollyshelter Creek, including part of the upper Hollyshelter Pocoson," and as containing 29,184 acres. Defendants claim an estate or interest therein by virtue of a purported deed recorded in Book 125, page 47½, Pender County Registry. The claim of defendants "is valid neither in law nor fact for the reason that the said land was granted by the State of North Carolina, and plaintiffs acquired title by *mesne* conveyances through that grant"; that plaintiffs and defendants claim said land under a common source of title and plaintiffs have the superior title; and that said claim of defendants to an estate or interest in said land adverse to the plaintiffs is a cloud upon plaintiffs' title thereto.

Defendants, State of North Carolina and two of its agencies, namely, its Board of Education and its Wildlife Resources Commission, filed a joint answer. They admit the deed recorded in Book 125, page 47½ (which is not otherwise described in either pleading), is "a part of the record title of the defendants." They deny plaintiffs have any estate or interest in any portion of the land described therein. Except as stated, defendants deny the essential allegations of the complaint.

For a further answer and defense, defendants allege they own in fee simple a tract of land in Pender and Duplin Counties described by metes and bounds and referred to as "the Angola Bay Wildlife Management Area and known locally as the Angola Bay Refuge." They allege plaintiffs' claim, if any, to any portion of the tract of land described in their further answer and defense is invalid and should be so adjudged and removed as a cloud on defendants' title thereto.

In paragraphs 3, 4, 5, 6, 7 and 9 of their further answer and defense, defendants plead, in bar of plaintiffs' right to maintain this action, the matters set forth and discussed in the opinion.

Plaintiffs moved to strike all of paragraphs 3, 4, 5, 6, 7, 8 and 9 of defendants' further answer and defense on the ground they "are irrelevant . . . and evidence in support of these allegations would be incompetent . . . on the trial of this action, and . . . plaintiffs would be prejudiced . . . if said . . . irrelevant and incompetent allegations are allowed to stand . . ."

After a hearing on plaintiffs' said motion, Judge Morris entered an order striking all of paragraphs 3, 4, 5, 6, 7 and 9 of defendants'

further answer and defense, but denying plaintiffs' motion in respect of paragraph 8 thereof.

Defendants excepted to said order and to the further order of Judge Morris that defendants' remedy for immediate review was by petition for *certiorari.* Defendants did file petition for *certiorari* which, as indicated above, was granted by this Court.

Moore & Biberstein, Rountree & Clark and Wells & Blossom for plaintiff respondents.

Attorney General Bruton, Assistant Attorney General Icenhour, Staff Attorney Ray and Corbett & Fisler for defendant petitioners.

BOBBITT, J. *Certiorari* having been granted, the case is now before us in all respects as on appeal. *Products Corporation v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587. Whether *certiorari* was a prerequisite to an immediate appeal is now academic.

The 1957 Act (Session Laws of 1957, Chapter 514), now codified as G.S. 41-10.1, provides: "Trying title to land where State claims interest.—Whenever the State of North Carolina or any agency or department thereof asserts a claim of title to land which has not been taken by condemnation and any individual, firm or corporation likewise asserts a claim of title to the said land, such individual, firm or corporation may bring an action in the superior court of the county in which the land lies against the State or such agency or department thereof for the purpose of determining such adverse claims. Provided, however, that this section shall not apply to lands which have been condemned or taken for use as roads or for public buildings."

The allegations of plaintiffs and defendants set forth in our preliminary statement clearly imply that defendants have not "taken by condemnation" the tract of land described in the complaint. This being true, plaintiffs herein, by virtue of G.S. 41-10.1, are entitled to institute an action against defendants under G.S. 41-10. See *Shingleton v. State,* 260 N.C. 451, 133 S.E. 2d 183.

Plaintiffs herein do not allege they are either in or out of possession. Nor do they allege that defendants have trespassed upon their land. They assert they own the lands described in the complaint in fee simple and that defendants are asserting an adverse claim thereto. These allegations are sufficient to meet the minimum requirements of G.S. 41-10. *Barbee v. Edwards,* 238 N.C. 215, 221, 77 S.E. 2d 646, and cases cited.

As indicated above, it appears from the allegations of both plaintiffs and defendants that defendants do not assert they have condemned the property. Nor do defendants assert ownership by

virtue of their right of eminent domain or other attribute of sovereignty. Defendants' claims to ownership are based solely on rights and defenses available to private litigants in like circumstances.

We consider now whether the court erred in striking all or any of paragraphs 3, 4, 5, 6, 7 and 9 of defendants' further answer and defense.

In paragraphs 3 and 4, defendants alleged they had acquired title by adverse possession for more than seven years under color of title and by adverse possession for more than twenty years under known and visible boundaries. Whether these paragraphs should have been stricken involves the same question, namely, whether the State or its agencies may acquire title to real property by such adverse possession.

"The public may obtain title by adverse possession to that which it has occupied during the full statutory period. It would seem, however, that the acquisition of such title would have to be through a public or governmental entity rather than the unorganized public. Clearly, title by adverse possession may be acquired by the United States, or by a state, county, city, or other governmental entity. It is generally held that a municipal corporation is not deprived of the benefit of continuous adverse possession of land because of the public character of its corporate franchise, but that it may acquire title by adverse possession the same as an individual." 3 Am. Jur. 2d, Adverse Possession § 139; 2 C.J.S., Adverse Possession § 6; 5 Thompson on Real Property, 1957 Replacement, § 2555. Decisions supporting the quoted statement and cited texts include the following; *Lincoln Parish School Board v. Ruston College,* 162 So. 2d 419 (La.), *certiorari* denied, 164 So. 2d 354, and cases cited; *Attorney General v. Ellis,* 84 N.E. 430 (Mass.), and cases cited; *Eldridge v. City of Binghamton,* 24 N.E. 462 (N.Y.); *State v. Stockdale,* 210 P. 2d 686 (Wash.); *State v. Vanderkoppel,* 19 P. 2d 955 (Wyo.); *Stephenson v. Van Blokland,* 118 P. 1026 (Or.); *Foote v. City of Chicago,* 13 N.E. 2d 965 (Ill.).

As pertinent to the last sentence in the above quotation from American Jurisprudence 2d, the author cites, *inter alia,* the decision of this Court in *Raleigh v. Durfey,* 163 N.C. 154, 79 S.E. 434, in which the defendant-purchaser questioned the title of the plaintiff-seller (City of Raleigh) to "the market-house property . . . situated in the center of Exchange Place." It was admitted that the City of Raleigh had a perfect paper title to all of the property except a portion thereof covered by part of the market-house building. In affirming a judgment for plaintiff, which upheld its title and right to convey, this Court, in opinion by Brown, J., said: "It is admitted that

the plaintiff has been in undisputed actual adverse possession under known and visible lines and boundaries of the entire land and property for sixty years, occupying the same and collecting the rents. Upon these facts it would seem to be plain that plaintiff has acquired an absolute title to the property. One of the methods of acquiring title to land is by adverse possession. *Mobley v. Griffin,* 104 N.C. 112. We know of no reason or authority by which a municipality is excluded from that rule and rendered incompetent to acquire title by that method."

The quoted excerpt from the opinion of Brown, J., in *Raleigh v. Durfey, supra,* is quoted with approval by Walker, J., in *Cross v. R. R.,* 172 N.C. 119, 124, 90 S.E. 14, and by Clarkson, J., in *In the Matter of Assessment against R. R.,* 196 N.C. 756, 759, 147 S.E. 301. In the first cited case, it was held that a railroad company could acquire title to land by adverse possession. In the last cited case, it was held that a municipality could acquire title to a street located upon the right of way of a railroad company by adverse possession and use thereof for such purpose.

In *Browning v. Highway Commission,* 263 N.C. 130, 139 S.E. 2d 227, Denny, C.J., after pointing out the differences between the facts in that case and those in *Kaperonis v. Highway Commission,* 260 N.C. 587, 133 S.E. 2d 464, said: "In our opinion, the evidence in the *Kaperonis* case was sufficient to have established a right of way by prescription, had the Commission not theretofore purchased the right of way from his predecessors in title."

The following is an excerpt from the opinion of Avery, J., in *S. v. Fisher,* 117 N.C. 733, 738, 23 S.E. 158: "As a rule the right to the easement in a public highway is acquired either by dedication, the exercise of the power of eminent domain, or user . . . Where the public claims title to the easement by user, however, the burden rests upon the State or its agencies, such as towns, . . . to show title by adverse possession."

Our decisions, as well as *dicta,* are in accord with the rule stated in the quotation from American Jurisprudence 2d. Paraphrasing the language of Brown, J., in *Raleigh v. Durfey, supra,* we know of no authority or reason by which the State of North Carolina or its agencies are excluded from the right to assert title by adverse possession when the circumstances would permit a private litigant to do so.

We have not overlooked plaintiffs' contention that defendants may not acquire title by adverse possession, with or without color of title, because G.S. 1-38 and G.S. 1-40 refer to a "person" or to "persons" and use the pronoun "he." We are of opinion and so hold that the General Assembly intended that these statutes should apply

to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto.

As to paragraphs 3 and 4, the order of the court is reversed.

"Unless it is provided otherwise by a valid statute, statutes of limitation are available to the state or government when sued with its consent in its own courts." 53 C.J.S., Limitations of Actions § 15(b); 34 Am. Jur., Limitation of Actions § 392; *Cowles v. The State,* 115 N.C. 173, 20 S.E. 384. Where, as here, the State and its agencies are asserting no rights deriving from their governmental status, we are of opinion, and so decide, that rights and defenses based on statutes of limitations are available to them to the same extent they are available in like circumstances to private litigants.

With these principles in mind, we turn now to a consideration of plaintiffs' motion as related to paragraphs 5, 6 and 7.

In paragraph 5, defendants alleged that neither plaintiffs nor those under whom they claim were seized or possessed of any of the lands described in defendants' further answer and defense within twenty years before the commencement of this action.

It has been held that G.S. 1-39, on which said plea is based, and G.S. 1-42, are to be construed together. When so construed, the rule, as stated by Ashe, J., in *Johnston v. Pate,* 83 N.C. 110, is as follows: "(I)t is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action." This statement is quoted with approval in *Conkey v. Lumber Co.,* 126 N.C. 499, 503, 36 S.E. 42, and in *Elliott v. Goss,* 250 N.C. 185, 188, 108 S.E. 2d 475. See also, *Barbee v. Edwards, supra,* where *Conkey v. Lumber Co., supra,* is cited with approval.

While its legal significance may not be determined until the development of the evidence at trial, defendants were entitled to interpose the plea set forth in paragraph 5. As to paragraph 5, the order of the court is reversed.

In paragraph 6, defendants alleged the cause of action, if any, of plaintiffs or their predecessors in title accrued more than ten years prior to the commencement of this action, and pleaded G.S. 1-56. Facts constituting a basis for this plea are not alleged.

In paragraph 7, defendants alleged the cause of action, if any, of plaintiffs or their predecessors in title, "by virtue of a trespass,"

accrued more than three years prior to the commencement of this action, and pleaded G.S. 1-52. Obviously, the complaint does not purport to allege a cause of action for trespass. Facts constituting a basis for this plea are not alleged.

"A plea of the statute of limitations, although perfect in form, is demurrable where the plea is irrelevant and constitutes no defense." *Dunn v. Dunn,* 242 N.C. 234, 238, 87 S.E. 2d 308, and cases cited. Here, the relevancy of the statutes of limitations pleaded in paragraphs 6 and 7 does not appear from any facts alleged in the pleadings or from any contention set forth in the briefs. As in *Dunn,* under similar circumstances, error in striking paragraphs 6 and 7 has not been made to appear. Hence, as to paragraphs 6 and 7, the order of the court is affirmed.

In paragraph 9, defendants alleged: "That by reason of the lapse of time and laches of the plaintiffs and their predecessors in title, and their failure to allege or assert any pretended claim to the said premises, and in permitting and allowing the defendants and their predecessors in title to continue the possession, use and occupancy thereof openly, continuously and undisputedly for more than 20 years last past under claim or right and color of title and ownership, the plaintiffs or their predecessors or anyone claiming by, through or under them are now estopped from asserting any right, title, claim, or interest therein adverse to the defendants; and such neglect and laches are specifically pleaded in bar of plaintiffs' right to maintain this action."

The gist of paragraph 9 is that defendants have acquired title by adverse possession as alleged. No evidential facts are alleged that might be prejudicial to plaintiff. Hence, while paragraph 9 may be subject to criticism as redundant, we are of opinion that, in order to avoid confusion or uncertainty, the same disposition should be made with relation to paragraph 9 as was made with relation to paragraphs 3 and 4. Accordingly, as to paragraph 9, it is our opinion, and we so hold, that the order of the court should be and is reversed.

The result: With reference to paragraphs 3, 4, 5 and 9, the order of the lower court is reversed; and with reference to paragraphs 6 and 7, the order of the lower court is affirmed.

Reversed in part and affirmed in part.

MOORE, J., not sitting.

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

R. G. LAUGHRIDGE, ADMINISTRATOR OF THE ESTATE OF WILLIAM J. LOWERY, DECEASED, SADIE L. LOWERY, WIDOW, LINDA A. LOWERY, MINOR DAUGHTER, MARY DONNA LOWERY, MINOR DAUGHTER, WILLIAM J. LOWERY, JR., MINOR SON, OF WILLIAM J. LOWERY, DECEASED, EMPLOYEE, PLAINTIFFS V. SOUTH MOUNTAIN PULPWOOD COMPANY, INC., EMPLOYER; THE TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS.

(Filed 30 March, 1966.)

Master and Servant § 47—

Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Act, G.S. 97-13(b), and such policy covers its executive officers, G.S. 97-2(2), notwithstanding an attempted agreement that only a single nonexecutive employee should be covered, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. G.S. 97-4.

MOORE, J., not sitting.

APPEAL by defendants from *Anglin, J.*, September-October 1965 Session of CLEVELAND.

Proceeding under Workmen's Compensation Act (Act), G.S. Chapter 97, submitted upon stipulated facts summarized, except when quoted, as follows:

South Mountain Pulpwood Company, Inc. (Pulpwood Company), a North Carolina corporation, was incorporated May 30, 1960, and since July 4, 1960, has been engaged in the business of buying and selling pulpwood. On and prior to January 13, 1964, its capital stock consisted of one hundred shares, of which Selby A. Keller (Keller) owned fifty shares and William J. Lowery (Lowery) owned fifty shares. Its board of directors consisted of Keller and Lowery and their wives. No compensation was paid for serving as directors. Keller was president and treasurer. Lowery was vice-president and secretary. The only person employed by Pulpwood Company other than Keller and Lowery was William H. Garrett (Garrett). Garrett performed such duties as were assigned to him by said officers.

On or about April 5, 1963, Russell W. Boring (Boring), a stepson of Lowery, was a duly licensed insurance agent. In the course of his employment by Cleveland Insurance Agency, Inc., of Shelby, North Carolina, Boring solicited the sale to Pulpwood Company "of a policy of insurance to afford protection to the corporation for exposure to liability under the Workmen's Compensation Act."

At the direction of Lowery, the premium applicable to Pulpwood Company for the workmen's compensation insurance coverage was

computed by excluding the compensation of the officers of the corporation and including only the compensation paid to Garrett, and after being informed of the rate, Lowery and Keller discussed the same with Boring and then instructed him to have the workmen's compensation coverage issued to Pulpwood Company so as to insure Garrett only.

Based upon the instructions received from Lowery and Keller, a request was made to The Travelers Insurance Company (Insurance Company) by Boring as agent for said Insurance Company to issue a policy affording workmen's compensation insurance coverage for Pulpwood Company, and under date of April 9, 1963, Insurance Company issued its policy to Pulpwood Company to afford such coverage for a one year term and charged and received therefor a premium based and computed only upon the compensation being paid by Pulpwood Company to Garrett.

Prior to the sale of the workmen's compensation insurance to Pulpwood Company, Boring had not sold workmen's compensation insurance to any of his other customers, and Boring was not familiar with the provisions of the Act relative to prescribed procedures for acceptance or rejection of the Act.

On and prior to January 13, 1964, Lowery and Keller as officers and employees of Pulpwood Company did not execute and file with the North Carolina Industrial Commission a notice of rejection of the Act on Industrial Commission Form 5, or any other form, and did not post a notice of either acceptance or rejection of the Act at the principal office and place of business of Pulpwood Company.

On January 13, 1964, Lowery sustained an injury by accident arising out of and in the course of his employment with Pulpwood Company and, as a result of the injury sustained by him in said accident, Lowery died on January 16, 1964.

On and prior to the date of his death, Lowery was regularly employed by Pulpwood Company and was being paid compensation by Pulpwood Company at the rate of $7,800.00 annually.

Additional stipulated facts relate solely to the identity of the persons entitled to receive such compensation, if any, as might be awarded. No exceptions having been taken with relation thereto, a statement of these facts is omitted.

Upon the foregoing facts and his conclusions of law, the Hearing Commissioner, Honorable Forrest H. Shuford, II, awarded compensation to plaintiffs.

It is noted that Commissioner Shuford, after quoting relevant statutory provisions, stated: "It would further appear that defendant employer would be liable to defendant insurance carrier for the payment of workmen's compensation insurance premiums based

upon the payroll of defendant employer, including the officers of defendant employer, and that defendant employer and its insurance carrier would be liable to dependents of deceased employee for the payment of compensation."

The Full Commission overruled defendants' exceptions and affirmed the award; and, after hearing in superior court on defendants' appeal from the Full Commission, Judge Anglin entered judgment overruling defendants' exceptions and affirming the award. Defendants excepted and appealed from said judgment.

Hamrick, Mauney & Flowers for plaintiff appellees.
Boyle, Alexander & Carmichael for defendant appellants.

BOBBITT, J. G.S. 97-13(b) in pertinent part provides: "This article shall not apply . . . to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, except that any employer without regard to number of employees, . . . who has purchased workmen's compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this article from the effective date of said policy and his employees shall be so bound unless waived as provided in this article."

G.S. 97-2(2) in pertinent part provides: "Every executive officer elected or appointed and empowered in accordance with the charter and by-laws of a corporation, other than a charitable, religious, educational or other non-profit corporation, shall be an employee of such corporation under this article." This provision was made a part of the Act by Chapter 1055, Session Laws of 1955.

G.S. 97-6 provides: "No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by this article, except as herein otherwise expressly provided."

An employer with five or more employees is presumed to have accepted the provisions of the Act. G.S. 97-3. Such employer's purchase of workmen's compensation insurance is to protect his existing compensation liability. Ordinarily, an employer with less than five employees is exempt from the Act. However, when such employer at his election voluntarily purchases workmen's compensation insurance, he accepts all provisions of the Act. G.S. 97-13(b). In such case, the policy he purchases both creates and protects his compensation liability; and thereafter such employer and his employees are

bound by the provisions of the Act unless, prior to any accident resulting in injury or death, notice to the contrary is given "in the manner (therein) provided." G.S. 97-3. The manner in which such notice is to be given is prescribed in G.S. 97-4.

The findings disclose it was intended by Keller and Lowery, the executive officers and stockholders of Pulpwood Company, and by Boring, an employee of Insurance Company's Shelby agency, that Insurance Company was to issue a policy that would bring Garrett within the provisions of the Act and protect Pulpwood Company's compensation liability to Garrett; and that it was not intended that either Keller or Lowery would be brought under the Act. Whatever their intent, they could make no agreement that would operate to relieve Pulpwood Company of any obligation created by the Act except as therein otherwise expressly provided. G.S. 97-6. The Act does not contemplate or permit the issuance of workmen's compensation insurance to cover an employer's liability in respect of one or more named employees and no others. A void contract will not work an estoppel. *Bolin v. Bolin,* 246 N.C. 666, 669, 99 S.E. 2d 920, and cases cited; 17 Am. Jur. 2d., Contracts § 232; 17 C.J.S., Contracts § 279(c). Notwithstanding interested parties may have acted in misapprehension thereof, the legal effect of the purchase and issuance of the policy in accordance with the provisions of G.S. 97-13(b) must be the basis of decision.

The policy issued by Insurance Company to Pulpwood Company, now before us by stipulation as an addendum to the record, was in full force and effect in January 1964 when Lowery was fatally injured. It contains no reference to Keller, Lowery or Garrett. Notwithstanding the "Total Estimated Annual Premium" of $81.72 is based on "Estimated Total Annual Remuneration" of $3,200.00, presumably the amount of Garrett's estimated remuneration, the policy, as required by G.S. 97-13(b), obligates the Insurance Company "(t)o pay promptly when due all compensation and other benefits required of the insured by the workmen's compensation law."

It is noted that the policy contains provisions for the audit by the Insurance Company of Pulpwood Company's books and records and for adjustment and settlement of premium based on the premium earned during the policy period.

Under G.S. 97-13(b), *from the effective date of the policy,* Pulpwood Company was conclusively presumed during the life of the policy to have accepted the provisions of the Act, and its employees were so bound "unless waived as provided in this article." Keller and Lowery, by virtue of the quoted provision of G.S. 97-2, were

employees of Pulpwood Company. Absent affirmative action by Keller and Lowery to exempt themselves from the Act, they continued, as such employees, to be subject to the provisions of the Act.

G.S. 97-4 in pertinent part provides: "The notice (of nonacceptance of the provisions of the Act) shall be in writing or print, in substantially the form prescribed by the Industrial Cimmission, . . . and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. *A copy of the notice in prescribed form shall also be filed with the Industrial Commission.* In any suit by an employer or an employee who has exempted himself by proper notice from the application of this article, a copy of such notice duly certified by the Industrial Commission shall be admissible in evidence as proof of such exemption." (Our italics.)

The quoted language of G.S. 97-4 applies more appropriately to nonacceptance by a person who is employed by a corporate employer but is not an executive officer thereof. Such employee must give notice of nonacceptance to his employer *and* file a copy thereof with the Industrial Commission.

Here, Keller and Lowery were the executive officers and stockholders of Pulpwood Company. Conceding formal notice of nonacceptance by these men as employees to themselves as executive officers of Pulpwood Company was unnecessary to exempt them from the Act, we are of opinion, and so decide, that they could exempt themselves from the Act only by giving notice to the Industrial Commission of their election and decision to do so. It is unnecessary to consider the form and manner of such required notice. Here, neither Keller nor Lowery filed notice of nonacceptance *in any form* with the Industrial Commission. In fact, no action of any kind was taken by Keller or Lowery to exempt himself from the provisions of the Act. Hence, we conclude that both Keller and Lowery were employees and under the Act in January 1964 when Lowery was fatally injured.

We have considered each of the decisions cited by defendants. None is deemed authoritative or persuasive in relation to the questions presented by this appeal. In our view, decision must be based on provisions of *our* Workmen's Compensation Act.

For the reasons indicated, the judgment of the court below is affirmed.

Affirmed.

MOORE, J., not sitting.

VERLON T. WELLS, ADMINISTRATOR OF THE ESTATE OF GARY ALLEN WELLS, DECEASED v. ZACK ROYCE BISSETTE.

AND

VERLON T. WELLS v. ZACK ROYCE BISSETTE.

(Filed 30 March, 1966.)

1. Evidence § 55—

Where a defendant testifies as a witness in his own behalf in refuting plaintiff's allegations and evidence in regard to negligent acts committed by him, it is competent for defendant to show his good character by general reputation as affecting his credibility as a witness, and while the court has the discretionary power to limit the number of character witnesses in order to keep the scope and volume of the testimony within reasonable bounds, it is error of law for the trial court to refuse to permit defendant to offer the testimony of any character witness.

2. Appeal and Error § 3; Trial § 53—

Action of the trial court in setting aside the verdict for error of law is appealable, but when defendant has testified in his own behalf in refuting the allegations and evidence of negligence on his part, the trial court properly sets aside the verdict for error of law when it has excluded all testimony of character witnesses offered to prove defendant's good character as affecting his credibility.

MOORE, J., not sitting.

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

APPEAL by plaintiffs from *Hubbard, J.*, April 1965 Civil Session of WILSON, docketed and argued as Case No. 292 Fall Term 1965, and docketed as Case No. 285 Spring Term 1966.

Two civil actions arising out of the injury and death of Gary Allen Wells, a two-year-old child, consolidated by consent for trial. The first action is to recover damages for the alleged wrongful death of a two-year-old child allegedly caused by the actionable negligence of the defendant in the operation of an automobile; the second action is by the father of the child to recover medical and funeral expenses incurred by him because of his child's death.

Defendant in his answer to the first action admits that plaintiff's intestate suffered fatal injuries in an accident in which he was struck by an automobile operated by defendant, but denies that he was negligent in the operation of his automobile. Defendant in his answer to the second cause of action admits that plaintiff's son suffered severe and extensive personal injuries which later caused his death when he was struck by an automobile operated by defendant, but denies that he was negligent, and pleads contributory negligence on the part of the father of the child.

The plaintiffs and the defendant introduced evidence. The jury found by its verdict that the infant Gary Allen Wells was fatally injured by the negligence of the defendant as alleged in the complaint, and that his administrator is entitled to recover for his death damages in the amount of $12,000, and that Verlon T. Wells is entitled to recover for expenses incurred in the treatment of injuries to his infant son the sum of $60.

Upon the coming in of the verdict, defendant through his counsel made a motion to set the jury verdict aside and for a new trial for the following error of law committed in the course of the trial, to wit, that after the defendant had testified as a witness in his own behalf, the court, upon motion of the plaintiff, excluded testimony of two of defendant's witnesses, who, if permitted, would have testified that one had known defendant for life and the other for fifteen years, that they knew defendant's general character and reputation in the community in which he lived, and that it is excellent, according to one witness, and good, according to the other, which evidence was offered for the purpose of supporting his (defendant's) credibility as a witness. The court entered an order in which, after reciting that it was of the opinion that it had committed an error of law prejudicial to defendant in excluding this evidence, it set the verdict aside and ordered a new trial.

From this order setting the verdict aside and ordering a new trial, plaintiffs appeal.

Narron, Holdford & Holdford by Talmadge L. Narron for plaintiff appellants.

Gardner, Connor & Lee by Cyrus F. Lee for defendant appellee.

PARKER, C.J. Plaintiffs assign as error the order of Judge Hubbard setting the verdict aside as a matter of law on the ground above stated, and ordering a new trial.

A trial judge may set a verdict aside "as a matter of law for errors committed during the trial, and from this order the aggrieved party may appeal." *Ward v. Cruse,* 234 N.C. 388, 67 S.E. 2d 257.

In brief summary, both complaints allege Gary Allen Wells, a two-year-old child, was struck by an automobile owned and operated by defendant on a curve at an intersection of Rural Paved Road #1964 and Rural Paved Road #1960 about three miles north of Sims. The home of the child was located on one corner of the intersection. At the time of and just prior to the impact, defendant was driving his automobile at a high rate of speed as he rounded

the curve and approached the intersection and home of the child. Defendant was traveling in a southerly direction on Rural Paved Road #1964. As defendant approached the intersection, the child was crossing the intersection from the west side of the Rural Paved Road on which defendant was traveling and was walking toward his home on the east side of said road. The weather was clear, the road was dry, and the defendant had an unobstructed clear view of the intersection and the child who was in the road walking toward his home. By reason of defendant's operating his automobile at a high rate of speed into the intersection, he caused the front of his automobile to strike the child with great force inflicting injuries resulting in the child's death. The specific acts of negligence on defendant's part proximately causing the collision and injuries to the child resulting in death are: (1) He failed to keep a proper lookout; (2) he failed to keep his automobile under proper control; (3) he operated his automobile at a high rate of speed as he approached the intersection in the curve of the road, in violation of G.S. 20-141(c); (4) he operated his automobile at an unlawful rate of speed, in violation of G.S. 20-141(b)(4); (5) he operated his automobile in a careless and reckless fashion, in violation of G.S. 20-140; and (6) after he saw, or should have seen, the child crossing the highway, he negligently failed to bring his automobile under such control as to avoid striking the child.

Defendant in his answers in both cases denies that he was negligent, and further answering the complaints alleges in brief summary: Defendant was operating his automobile over and along Rural Paved Road #1964, proceeding in a southerly direction at a lawful rate of speed and in a careful and prudent manner. When he was coming around a curve to his right and approaching the intersection of said road with Rural Paved Road #1960, he saw the child Gary Allen Wells stepping out in front of his automobile from about the center of Rural Paved Road #1960. Faced with this sudden emergency, he immediately applied his brakes, and made every effort to avoid striking the child who was walking directly out in front of his automobile. In the sudden emergency thus created and as a result of the surface conditions of the road, defendant's automobile skidded to its left, and notwithstanding defendant's efforts to avoid striking the child, the right headlight of his automobile struck the child.

Evidence was offered by plaintiffs and defendant in support of their respective (conflicting) allegations.

Defendant having testified in the instant cases as a witness in

his own behalf, it is competent to show his general reputation as affecting his credibility as a witness. This Court has held in many decisions that such evidence in civil actions is competent for such purpose, and exclusion of such evidence offered for such purpose is prejudicial. *Lorbacher v. Talley,* 256 N.C. 258, 123 S.E. 2d 477; *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443; *Morgan v. Coach Co.,* 228 N.C. 280, 45 S.E. 2d 339; *Kirkpatrick v. Crutchfield,* 178 N.C. 348, 100 S.E. 602; *Lumber Co. v. Atkinson,* 162 N.C. 298, 78 S.E. 212; *Jones v. Jones,* 80 N.C. 246; Stansbury, North Carolina Evidence, 2d Ed., § 50. See also *March v. Harrell,* 46 N.C. 329.

In *Lorbacher v. Talley, supra,* Bobbitt, J., wrote for the Court: "When a party testifies, it is competent to show his general reputation as bearing on his credibility as a witness." In *Nance v. Fike, supra,* Bobbitt, J., speaking for the Court, made a similar statement. In *Morgan v. Coach Co., supra,* Stacy, C.J., speaking for the Court, said: "The defendant G. E. Gibbs, offered four witnesses who, without objection, testified to his good character in the community where he lives, and in the court's charge, reference was made to this evidence as follows: 'Character evidence is substantive evidence; that is, it is basic evidence; not only substantive evidence but it also bears on his credibility as a witness,' etc. This, of course, was erroneous as the case is one in tort based on alleged negligence. The issues are civil, rather than criminal, in character, and the evidence was competent only as affecting the defendant's credibility as a witness." In *Kirkpatrick v. Crutchfield, supra,* Clark, C.J., speaking for the Court, said: "The twelfth assignment of error is because the court charged the jury that, 'The evidence of good character of the plaintiff and defendant and the other witnesses is not substantive evidence, but is corroborative evidence for the purpose of better enabling the jury to pass upon the truthfulness of the witness whose character is proven to be good.' This is elementary law in civil actions."

The number of persons that a party who testifies in a civil action, such as in the instant cases, will be permitted to call to the witness stand to testify as to his general reputation as bearing on his (the party's) credibility as a witness, is necessarily a matter which rests in a large measure in the sound discretion of the trial judge. The rationale of such rule is to keep the scope and volume of such testimony within reasonable bounds. *Gibson v. Whitton,* 239 N.C. 11, 17, 79 S.E. 2d 196, 201.

Plaintiff's assignment of error above stated is overruled. The

order of Judge Hubbard setting the verdict aside as a matter of law and ordering a new trial is

Affirmed.

MOORE, J., not sitting.

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

HELEN D. BATTLE, ADMINISTRATRIX OF THE ESTATE OF BERNARD L. BATTLE, DECEASED v. LANGLEY TAYLOR CHAVIS.

(Filed 30 March, 1966.)

1. Automobiles § 45; Negligence § 10—

The doctrine of last clear chance does not apply if, under the circumstances, defendant does not have the time and means to avoid injury after he has seen or should have seen plaintiff or intestate in a perilous situation and apparently inadvertent to the danger or unable to extricate himself therefrom.

2. Automobiles § 41l—

While a motorist is under duty to keep a proper lookout and to anticipate the use of the highway by other traffic and travelers, he is not required to anticipate that a pedestrian will be lying or sitting upon the highway in his path of travel.

3. Same—

The evidence tended to show that defendant was traveling some 35 miles an hour upon an asphalt highway, that in traversing the crest of a hill he dimmed his lights for oncoming traffic, and that after traversing the next 200 feet, and while his lights were still deflected, he struck intestate who, dressed in dark clothes, was sitting on the highway. *Held:* The evidence discloses that defendant did not have time and means after he discovered, or should have discovered, intestate's perilous position to have avoided striking intestate.

4. Same—

Negligence is not presumed from the mere fact that a pedestrian was struck by defendant's vehicle, and plaintiff has the burden of showing negligence and that such negligence caused injuries resulting in death, and not leave in speculation whether intestate died from such injuries or from alcoholism or epileptic seizure.

MOORE, J., not sitting.

BATTLE *v.* CHAVIS.

APPEAL by plaintiff from *Bundy, J.*, September 20, 1965 Session, NASH Superior Court.

Bernard L. Battle died January 25, 1963 and this action was brought by his administratrix to recover for his alleged wrongful death due to the negligence of the defendant.

The plaintiff's evidence tended to show that on January 25, 1963 about 10 o'clock p.m., the defendant, Chavis was operating his 1956 Chevrolet car on rural paved road No. 1613. It had been raining that night and there was some fog in "low bottom" places on the highway. About the crest of a hill the defendant met a car traveling in the opposite direction and dimmed his lights for passing. At this point he was about 200 feet from the scene of the accident and was proceeding downhill. Before he had returned his lights to bright and was about 130 feet from the deceased, Mrs. Inez Bryans, who was riding on the front seat with the defendant said, "Lord, Langley, there's a box in the road, what's that in the road?" On his adverse examination which was introduced by the plaintiff, defendant replied "'I don't know. * * * That's a man,' but by that time we had hit him. * * * I didn't know what it was until I hit it." Defendant stopped his car within a yard after he hit the deceased. He further testified that he was traveling at a speed of about 35 miles per hour, that the surface of the road was black-top asphalt, that the deceased person was sitting in the highway "about halfway between the white line and the (right) side of the hard surface road;" that he had on dark clothing and his head was "dropped * * * down on his chest." The deceased had one scar or injury on his forehead and died that night. Plaintiff's evidence showed that Battle was in a grocery store nearby about 8 o'clock that night, that he began "trembling all over like a man with a heavy chill, shaking backwards and forwards." About 9:30 o'clock that night he was taken from the store to his home by one Charlie Lloyd.

Dr. L. P. Armstrong testified for the plaintiff that he had treated Battle for ten or twelve years for epilepsy; that "(a)fter Battle had an epileptic seizure his mind would not be clear," and that, in his opinion, Battle had had an epileptic seizure on the night of his death. Another witness for the plaintiff testified that when he was in the store that the deceased "looked like a man about two-thirds drunk."

The deceased had died when the officers came to investigate the accident and no autopsy was held to determine the cause of his death.

Upon the conclusion of the plaintiff's evidence, the defendant

moved for judgment as of nonsuit and the motion was allowed. Plaintiff appeals, assigning errors.

Spruill, Trotter & Lane by DeWitt C. McCotter, III, Attorneys for plaintiff appellant.

Fields & Cooper and Leon Henderson, Jr., by Milton P. Fields, Attorneys for defendant appellee.

PLESS, J. In her brief the plaintiff concedes that in order to prevail she must do so on the doctrine of last clear chance. In *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150, the court sets forth the four elements of the last clear chance doctrine which must be established before a pedestrian may recover against the driver of a motor vehicle. "Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him." (Citing numerous cases).

It is debatable that the evidence would permit the submission of the case to the jury upon the first two elements but, in our opinion, the plaintiff cannot prevail upon the third requirement "that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it." The plaintiff's evidence showed that the defendant had met and passed an oncoming car about the crest of a hill some 200 feet from the scene of the accident and that in passing he had dimmed the lights of his car. The accident occurred within a few seconds thereafter and before the defendant had come back to bright lights. He was driving at a speed of some 30 to 35 miles per hour and his lights and brakes were in good working order. The plaintiff's evidence further showed that the pavement at this point was black-top asphalt, that the deceased

was dressed in dark clothing and that he was not seen by the defendant nor his passengers until he was approximately 130 feet from the decedent. At a speed of 30 miles per hour, it would take less than three seconds to traverse this distance and, allowing for reaction time to apply his brakes, we cannot hold that the defendant was negligent in being unable to stop before striking the deceased.

The doctrine contemplates a last "clear" chance, not a last "possible" chance to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively. *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109.

"A driver of an automobile may anticipate that other travelers will be using the highway and he should be on the lookout for them. However, it would seem to be too much to require him to anticipate the highway would be used as sleeping quarters." *Barnes v. Horney,* 247 N.C. 495, 101 S.E. 2d 315. We are of the opinion that the dark clothes of the deceased blending into the background of the black pavement made it unreasonable to expect the defendant, even though driving at a slow rate of speed, to be able to see the deceased in time to avoid striking him.

A jury could have found that the deceased was not negligent and that his position on the highway was due to an epileptic seizure. In this event, the doctrine of last clear chance would not be applicable. However, for the reasons stated in regard to it, we do not feel that the evidence would permit a finding of actionable negligence on the part of the defendant.

We have considered the plaintiff's evidence of an experiment showing that the deceased could have been seen for 200 feet with bright lights and 130 feet if they were dimmed. Even if the conditions approximated those of the night in question, which is doubtful, we are still of the opinion that actionable negligence of the defendant has not been shown.

The cause of death of the deceased is left to conjecture. No autopsy was held and the deceased had only one scar or blow on his forehead, although apparently a very serious one. Whether it was inflicted by the car the defendant had just passed or by the defendant's car, the evidence does not disclose. The evidence does not reveal whether he died from a blow, acute alcoholism or epileptic seizure. "No negligence is presumed from the mere fact that plaintiff's intestate was run over, and killed by the defendant." *Shinault v. Creed,* 244 N.C. 217, 92 S.E. 2d 787.

We are of the opinion that the defendant's motion to dismiss the action as in case of nonsuit was well taken.

Affirmed.

MOORE, J., not sitting.

RACHEL ANN RIMMER WILSON, MINOR, AND REBECCA LOU RIMMER, MINOR, BY THEIR GUARDIAN, RAYMOND H. WILSON, PLAINTIFFS v. C. L. PEMBERTON, TRUSTEE; T. E. STEED; ELIZABETH RUDD RIMMER AND HER HUSBAND, HERBERT MARSHALL RIMMER, DEFENDANTS, AND WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF T. E. STEED, ADDITIONAL DEFENDANT.

(Filed 30 March, 1966.)

1. Guardian and Ward § 4—

Sale or mortgaging of an infant's property may be ordered only on application of his duly appointed guardian, and a guardian *ad litem* may not be authorized to do so.

2. Same—

In a proceeding to sell a minor's property the court should direct the disbursement of the funds and should find that sale or mortgage of the minor's real estate will materially promote the interest of the minor.

3. Same—

The mother of minor children owned a life estate and, subject to an intermediate life estate of a minor child, owned the remainder in the tract of land in question. Pursuant to a special proceeding instituted by the mother, a guardian *ad litem* for the minor children was appointed, and the mother conveyed her remainder to her minor children, and a deed of trust was executed by the guardian in behalf of the minors to pay off a lien and debts created for the benefit of the mother. *Held:* All proceedings pursuant to the order in the special proceeding are void and the deed of trust executed by the guardian *ad litem* on the minors' interest is a nullity.

4. Same—

Where a remainder is conveyed to minors, one of whom owns a life estate, for the purpose of obtaining their execution of a deed of trust to pay off a lien and debts created by the grantee, and the mortgage is void for failure to comply with G.S. 33-31, the deed to the minors will also be set aside and the parties put in *statu quo ante*.

MOORE, J., not sitting.

PARKER, C.J., and BOBBITT, J., concur in result.

APPEAL by plaintiffs from *Johnston, J.*, February Civil Session 1965, CASWELL Superior Court. Docketed and argued as Case No. 766 Fall Term 1965, docketed as Case No. 765 Spring Term 1966.

In 1960 Elizabeth Rudd Rimmer, then age 42, owned a life estate in a tract of land in Caswell County containing 314.98 acres on which she had a tobacco allotment of seven acres. She also owned the fee simple subject to the second life estate of a minor daughter, Rachel Rimmer Wilson. Mrs. Rimmer owed T. E. Steed $5700.00 which was secured by a deed of trust on her interest in the above lands and owed an additional $4,000.00 in debts and liens created by her, the minor daughter having received no benefits from the proceeds of said debts.

On August 18, 1960 Mrs. Rimmer, her husband and Aaron Wilson (husband of Rachel Rimmer Wilson) instituted special proceedings against Rachel Rimmer Wilson and Rebecca Lou Rimmer, another infant daughter of Mrs. Rimmer, in which the Petitioner sought the appointment of a guardian for the minor defendants with the proposal that Mrs. Rimmer would convey her remainder interest in the above lands, subject to her own life estate, to the two minors if the guardian would join in a deed of trust securing a debt of $9800.00 with which Mrs. Rimmer expected to pay the debts and liens referred to above.

The clerk found that to be "for the best interest of the minors (although not finding that their interests would be materially promoted as required in G.S. 33-31) and upon approval by the Judge, a deed of trust was executed by the parties for the benefit of T. E. Steed who, after paying himself approximately $5700.00 provided the additional $4,000.00 necessary to satisfy the other debts and liens owed by Mrs. Rimmer.

Upon default in the payment of the debts secured by the deed of trust, foreclosure proceedings were started. This action was then instituted by the guardian to prevent foreclosure, alleging, *inter alia*, that a sale of the minors' interest in the property would be illegal and unlawful in that there had been no compliance with G.S. 33-31 and that the execution of the deed of trust by their guardian *ad litem* was not in their best interests and did not materially promote them. The defendants filed answers admitting many of the facts alleged but denied that the transaction was unlawful. The plaintiffs moved for judgment on the pleadings and prayed that the deed of trust be declared null and void and a cloud on the interest of the minors; praying further that the trustee be restrained from selling any right, title or interest of the minors in the lands described in the deed of trust.

The motion was heard by Honorable Walter E. Johnston, Jr.,

Judge Presiding on March 4, 1965 who denied the motion and "denied an injunction to prevent the foreclosure of said deed of trust," and dismissed the action and taxed the plaintiffs with the cost. Plaintiffs appeal, assigning error.

D. Emerson Scarborough, Attorney for the appellants.

John H. Vernon, Thomas C. Carter, Attorneys for the appellees, C. L. Pemberton, Trustee, and Wachovia Bank & Trust Company, Executor of the Estate of T. E. Steed.

PLESS, J. G.S. 33-31 provides that the sale or mortgage of a minor's real estate shall be allowed upon compliance with its terms. which was not done in this instance. The petition was not filed by a guardian (who is under bond and has a continuing and quasi-permanent responsibility for his ward's interest) but by a guardian *ad litem*. "A clerk of the Superior Court in this State has no jurisdiction with respect to infants or with respect to property, real or personal, of infants, except such as is conferred by statute. He has power to authorize the sale of property, real or personal, owned by an infant, only upon the application of his duly appointed and duly qualified guardian by petition duly verified by such guardian. An order made by a clerk of the Superior Court for the sale of the infant's property, real or personal, on the petition of one who is not his duly appointed and duly qualified guardian is void. All proceedings under color of such order are void, and no rights to the property of the infant can be acquired under such order. A purchaser of an infant's property at a sale made under an order which is void because the clerk who made the order had no jurisdiction of the proceeding in which the order was made, acquired no right, title, interest, or estate in said property, adverse to the infant." *Buncombe County v. Cain,* 210 N.C. 766, 188 S.E. 399. Further, the judge did not specify how the proceeds of the loan should be applied, which is a requirement of the statute. While the order of the Clerk holds the proposed conveyance to be for the best interest of the minors, the defendants in their pleadings admitted that the interest of the minor, Rachel Rudd Wilson, was made security for the debts of her mother which had been incurred without advantage to the minor and also that a major portion of the proceeds of the new debt was used to pay off an old debt to the lender. This does not "materially promote" the interest of the minor. For the above reasons we hold that the conveyance by the guardian *ad litem* of her interest to her mother and the later execution of the deed of trust upon the interest of the minors by the guardian *ad litem* was

void and that foreclosure of the deed of trust will not convey any interest of the minors in the property concerned.

In view of the fact that Elizabeth Rudd Rimmer executed the deed to the minor plaintiffs herein for the purpose of obtaining the execution of the deed of trust involved; and since the deed of trust has been adjudged null and void, in fairness to all parties concerned, particularly the creditors of Elizabeth Rudd Rimmer, we hold that the deed to the minor plaintiffs is likewise void. This puts the plaintiff and her creditors in substantially the same status they were before the execution of these instruments.

Reversed.

MOORE, J., not sitting.

PARKER, C.J., and BOBBITT, J., concur in result.

STATE OF NORTH CAROLINA v. LESTER GREEN.

(Filed 30 March, 1966.)

1. Criminal Law § 162—

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have testified if permitted to answer.

2. Automobiles § 3—

In a prosecution for driving a motor vehicle without a license, a question asked a police officer as to whether it was not true that in practically no instance would a driver have a new registration and new title for an automobile purchased only three days before, is irrelevant.

3. Indictment and Warrant § 14—

A defendant waives duplicity in the warrant by going to trial without moving to quash.

4. Criminal Law § 118—

A verdict will be interpreted with reference to the charge, the evidence, the theory of trial, and the instructions of the court.

5. Automobiles § 75—

Where the case is tried solely on the controverted question of whether defendant was operating his motor vehicle on a public street while under the influence of intoxicating liquor, the jury's verdict of guilty will be construed with reference to the evidence, the theory of trial and the charge of the court, obviating any ambiguity in the warrant in charging

operation of a vehicle while under the influence of intoxicating liquor or narcotics.

6. Criminal Law § 139—

Upon appeal from a judgment entered upon defendant's plea of guilty, the judgment must be affirmed when the sentence is within the limits prescribed by statute and no fatal defect appears upon the face of the record proper.

MOORE, J., not sitting.

DENNY, E.J., took no part in the consideration or decision in this case.

APPEAL by defendant from *McLean, J.,* 8 November 1965 Session of CATAWBA.

Criminal prosecution on five warrants, all five cases heard *de novo* on appeal in each of the five cases from a conviction and judgment imposed upon defendant in each of the five cases by the municipal court of the city of Hickory.

The defendant is an indigent, and was represented by his court-appointed attorney, A. Terry Wood.

The case on appeal filed in this Court did not contain copies of any of the five warrants, but contained a stipulation signed by the solicitor and by defendant's court-appointed counsel that the case on appeal should not contain copies of said warrants. The State, through the Attorney General, moved to dismiss the appeal upon authority of *S. v. Hunter,* 245 N.C. 607, 96 S.E. 2d 840, for that the record on appeal is fatally defective in that it does not contain copies of the warrants. The Court denied this motion. The Court allowed defendant's motion for diminution of the record in order to file as part of the record certified copies of the said five warrants.

In Case No. 35 the warrant charges that defendant on 8 November 1964 did unlawfully and wilfully operate a motor vehicle upon the public streets and highways within the State without first securing an operator's license as required by G.S. 20-7(a), and in this case defendant entered a plea of guilty. In Case No. 36 the warrant charges that defendant on 8 November 1964 did unlawfully and wilfully operate an automobile upon the public highways within the State without having liability insurance in effect as required by G.S. 20-313, and in this case defendant entered a plea of guilty. In Case No. 34 the warrant charges that defendant on 8 November 1964 did unlawfully and wilfully operate a motor vehicle upon the public streets and highways within the State while under the influence of intoxicating liquor or narcotics, a violation of G.S. 20-138. In Case No. 37 the warrant charges that defendant on 8 November 1964 did unlawfully and wilfully operate a motor vehicle

upon the public highways within the State with a registration plate which was issued for another motor vehicle, a violation of G.S. 20-111, Subsection 2. Cases Nos. 34 and 37 were consolidated for trial, and defendant entered a plea of not guilty. The jury returned a verdict of guilty as charged in Cases Nos. 34 and 37. In Case No. 38 the warrant charges defendant on 4 March 1965 with the larceny of an automobile battery, the property of Frank Deal, of a value of less than $200, and with receiving said property knowing it to have been stolen. The record states the court directed a verdict of not guilty in the larceny and receiving case.

The judgment of the court on the conviction in Case No. 34 was that defendant be imprisoned for a term of eight months; the judgment of the court on the plea of guilty in Case No. 35 was that defendant be imprisoned for a term of eight months, this sentence to begin at the expiration of the sentence pronounced in Case No. 34; the judgment of the court on the plea of guilty in Case No. 36 was that defendant be imprisoned for a term of eight months, this sentence to begin at the expiration of the sentence pronounced in Case No. 35; the judgment of the court upon the conviction in Case No. 37 was that the defendant be imprisoned for a term of 30 days, this sentence to run concurrently with the sentence pronounced in Case No. 36.

From each judgment of imprisonment, defendant appealed to the Supreme Court. By order of the court he was allowed to appeal *in forma pauperis*, and the court reporter was ordered to furnish him with a trial transcript, and A. Terry Wood was appointed by the court to represent defendant on his appeal to this Court.

Attorney General T. W. Bruton, Staff Attorney Wilson B. Partin, Jr., and Assistant Attorney General Charles D. Barham, Jr., for the State.

A. Terry Wood for defendant appellant.

PER CURIAM. The State's evidence shows the following facts: About 4:45 p.m. on 8 November 1964 Stanley S. Frye, a member of the police department of the city of Hickory, saw defendant operating an automobile upon a public street within the city of Hickory. He was looking for defendant's automobile because he had had a report earlier in the day that it had been involved in an accident and had failed to stop. He stopped the automobile and asked defendant if he had an operator's license. Defendant said he did not have an operator's license. Defendant got out of his automobile and leaned back against it. He was unsteady on his feet, and had the odor of alcohol on his breath. In the opinion of the officer, defendant

was under the influence of intoxicating liquor. He had a Virginia license plate on his vehicle, which plate belonged to J. C. Ruby of Connelly Springs. Defendant said he got the license plate off another automobile. When he saw defendant he seemed to be operating his automobile in a proper fashion. Defendant said he had had his automobile a couple of days, and that he had bought it from Walter's Motors. The officer arrested him at the scene for driving an automobile while under the influence of intoxicating liquor and for operating his automobile without having an operator's license. Defendant has never been charged with being involved in an accident and failing to stop at the scene. Defendant did not have a registration card indicating he had a Virginia license.

Defendant's testimony shows the following facts: He lives in Longview and works at Hildebran in the Hildebran Hosiery Mills. When the officers stopped him, he got out of his automobile, and walked back to their car to talk with them. What the officer smelled on his breath was TB medicine. The name of the medicine is PAS 9-H, and he testified, "it smells more than any white liquor you ever smelled in your life." He had not had anything to drink that afternoon except that medicine. The officer followed him about a mile before he stopped him. He got the Virginia license plate from his brother-in-law, put it on his automobile, and started operating it.

Defendant has two assignments of error, both relating to the jury trial in Cases Nos. 34 and 37. The first one is to the court's sustaining an objection by the solicitor to the following question asked police officer Frye by defendant's counsel: "And isn't it true that in practically no instance will you have a new registration and new title for an automobile which you have just bought two or three days before?" This assignment of error is overruled because the record fails to show what the witness would have testified to if permitted to answer. *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342. Further, the question asked was irrelevant, and defendant in his brief states he "abandons" this assignment of error.

Defendant's assignment of error to the charge that in part it is not in the spirit of G.S. 1-180, nor does it meet the requirements thereof, is without merit, and is overruled. A reading of the charge shows a substantial compliance with the provisions of G.S. 1-180, and error in the charge prejudicial to defendant is not shown.

In Case No. 34 the warrant charges defendant did unlawfully and wilfully operate a motor vehicle upon the public streets and highways within the State while under the influence of intoxicating liquor or narcotics. The verdict of the jury was guilty. Defendant, by going to trial on this warrant without making a motion to

quash, waived any duplicity in the warrant. *S. v. Best,* 265 N.C. 477, 144 S.E. 2d 416.

Every feature of the trial discloses that both the State and defendant considered the criminal prosecution in Case No. 34 related solely to whether defendant was operating an automobile on a public street in Hickory while under the influence of intoxicating liquor. It is true that the defendant testified that the only thing that he had been drinking that afternoon was TB medicine, PAS 9-H, and that "it smells more than any white liquor you ever smelled in your life." There is nothing in defendant's testimony to suggest that he was under the influence of this TB medicine. 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 Hickory while under the influence of intoxicating liquor, and whether defendant was guilty of this criminal offense was the only question submitted to the jury in Case No. 34. 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."

In the trial of consolidated Cases Nos. 34 and 37 we find no error.

In Case No. 35 the warrant charges that defendant on 8 November 1964 did unlawfully and wilfully operate a motor vehicle upon the public streets and highways within the State without first securing an operator's license as required by G.S. 20-7(a). In this case defendant entered a plea of guilty. The judgment of the court that in this case defendant be imprisoned for a term of eight months, this sentence to begin at the expiration of the sentence pronounced in Case No. 34, is within the limits prescribed by G.S. 20-7(n), and is affirmed. *S. v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695; *S. v. Downey,*

253 N.C. 348, 117 S.E. 2d 39. Defendant has no assignment of error in respect to Case No. 35.

In Case No. 36 defendant entered a plea of guilty. The judgment of the court that in this case defendant be imprisoned for a term of eight months, this sentence to begin at the expiration of the sentence pronounced in Case No. 35, is within the statutory limits prescribed by G.S. 20-313(a), and is affirmed. Defendant has no assignment of error in respect to this case.

The result is this:

In the trial of consolidated cases Nos. 34 and 37: No error.

In Case No. 35, the judgment is affirmed.

In Case No. 36, the judgment is affirmed.

MOORE, J., not sitting.

DENNY, E.J., took no part in the consideration or decision in this case.

STATE v. ROBERT C. PFEIFER.

(Filed 30 March, 1966.)

1. Criminal Law §§ 26, 122—

In a case less than capital, the setting aside of the verdict and the ordering of a mistrial for serious illness of a juror is within the sound discretion of the trial court, reviewable only in case of gross abuse, and such proceeding will not support a plea of former jeopardy upon subsequent trial.

2. Escape § 1—

Where defendant is tried for escape in a municipal recorder's court, his trial upon appeal to the Superior Court cannot exceed the offense over which the recorder's court had jurisdiction, and defendant may not be sentenced in the Superior Court for felonious escape.

MOORE, J., not sitting.

APPEAL from *Falls, J.*, December 1965 Session GASTON Superior Court.

The defendant was called for trial upon a bill of indictment in the October, 1965 Term of Gaston County Superior Court in which he was charged with the felony of a second escape from prison. A jury was sworn and impaneled but before any evidence was offered,

a juror became seriously ill and the judge declared a mistrial, continuing the case to the December 1965 Term. At that time a new bill of indictment was returned, the grand jury charging the defendant with the felony of escape, it being the second offense. When the case was called for trial, the defendant pleaded former jeopardy because of the mistrial at the previous term and, upon this plea being denied, entered a plea of not guilty. The jury rendered a verdict of guilty and from judgment pronounced, the defendant appealed.

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

J. Ralph Phillips Attorney for the defendant.

PER CURIAM. The defendant's plea of former jeopardy cannot be sustained. The defendant does not question the serious illness of the juror at the October Term of the court nor that the mistrial was ordered before any evidence had been presented.

"Our court has frequently held that in all cases less than capital the court has discretion to order a mistrial and discharge a jury before verdict in furtherance of justice and the court need not find facts constituting the necessity for such discharge, and ordinarily the action is not reviewable. Such action by the judge is reviewable only in case of gross abuse of discretion." *S. v. Guice,* 201 N.C. 761, 161 S.E. 533; *S. v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838.

The indictment charges that the first conviction of the defendant was in the Gastonia Municipal Recorder's Court. This is true and that court had jurisdiction over a first offense of escape. Upon his conviction there, he appealed to the Superior Court of Gaston County and was again convicted upon the same charge. That trial and conviction superseded the trial in the Recorder's Court and the bill would, therefore, not support a conviction of a second offense of escape. However, there was ample evidence to support a conviction of an escape, a misdemeanor, and the defendant may be sentenced therefor. It would not support a charge of felonious escape and the judgment pronounced upon it is hereby set aside. The cause is remanded to the Superior Court of Gaston County for appropriate judgment on the misdemeanor.

Remanded.

MOORE, J., not sitting.

Remarks of Honorable Sam J. Ervin, Jr., in Presenting the Portrait of Chief Justice Maurice Victor Barnhill to the Supreme Court of North Carolina, March 25, 1966.

It is fitting that our tribute to Chief Justice Maurice Victor Barnhill should be simple, and direct, as befits the man, for in his lifetime he shunned rhetoric and hyperbole as he abhorred publicity and sham. Gifted with a precise, highly developed intellect, he used it in his life as in the law, to pare away the irrelevant, the non-essential and the valueless to reveal swiftly and meaningfully the hard core of truth. I was deeply honored to be asked to present this portrait to the Court, for as a friend and colleague, Judge Barnhill will remain forever in my memory as one of the most remarkable human beings I have ever known.

Graced with sophistication in knowledge of many subjects, he yet retained that simplicity of manner and firmness of conviction that comes with self knowledge, belief in God, and an awareness of man's place in the universe. It was this self knowledge that lent to his work in the law a humanity which is the mark of a great human being. And it was his profound knowledge of the law and its meaning that tempered his work with the depth and objectivity which is the mark of a truly great judge.

From 1887 to 1963, his life spanned almost eight decades. Those years, most significant of our country's history, saw America undergo the Spanish-American War, two World Wars and the Korean conflict. They witnessed our growth as a world power, and our development into a great industrial nation. They saw us sink into the depths of depression and rise again into the greatest economic prosperity known to a people in the history of the world. They have seen the rise of great cities and the increasing urbanization of our society, ideological clashes and intergroup strife and the resolution of our differences. Our governmental structure in this period has been altered by political, social, and economic changes, and the resulting bureaucracies have spread throughout the states. Yet we have prospered as a people and as a state. North Carolina has kept pace with these changes as Judge Barnhill kept pace with them. His life, I believe, epitomizes the challenges and the rewards which North Carolina offered in those years to an individual of conviction, dedication and perseverance.

And these were indeed traits of character with which Maurice Victor Barnhill was endowed by nature, his family and his surroundings. Born on December 5, 1887, to Martin Van Buren and Mary (Dawes) Barnhill, he was raised on a farm near Enfield, in

Halifax County, North Carolina. This country life enabled him to bring to his life's work the discipline and those rich qualities of spirit early instilled by the rural life and constant exposure to the beauties and forces of nature.

After attending private and public schools in Enfield and Elm City, North Carolina, he entered the University of North Carolina, where he affiliated with the Sigma Chi fraternity. Upon the completion of his academic studies there, he accepted the post of assistant cashier of the Toisnot Banking Company in Elm City, which he retained until he could save enough from his earnings to undertake the study of law. Having accomplished this purpose, he attended the Law School of the University of North Carolina, where he graduated with distinction in 1909. Thirty seven years later his alma mater bestowed upon him its honorary degree of Doctor of Laws.

Judge Barnhill brought to the bench extensive experience as a practicing attorney, and as a judge could draw on his own experience with the intricacies of preparing for litigation. Licensed to practice by the Supreme Court in February, 1909, he entered into partnership with Walter H. Grimes of Raleigh. In March, 1910, he moved to Rocky Mount where he soon developed a large practice and dealt with much of the important litigation before the courts of that area.

His business experience as president and director of banks, his local government experience as Chairman of the Nash County Highway Commission, and Chairman of the Board of Trustees of the Rocky Mount Graded Schools, enabled him to better comprehend and judge people, issues and institutions in the fields of business, commerce, and education. His service in the State Legislature in 1921 afforded him broad and direct contact with the politics of government, the mechanics of legislating, and with the legislative personalities and attitudes which were shaping the statutory law of North Carolina. He had an opportunity to observe the influence of various groups and organizations and their style of operation. Because the cases before the Courts often reflected these same influences and involved the activities of the same groups, this was invaluable background for a judge.

So also was his involvement in law enforcement as prosecuting attorney of Nash County and his service as judge of the county court at Nashville.

In addition to his activities in these areas, Judge Barnhill participated in the affairs of the Democratic Party, served as a steward in the Rocky Mount Methodist Church, and held memberships in the Nash County Bar Association, the North Carolina Bar Associa-

tion, the Masonic Lodge, the York Rite, the Mystic Shrine, and other organizations and fraternities. As Chairman of the North Carolina Judicial Council, he made significant contributions to legal reform.

Judge Barnhill was most fortunate in his choice of a helpmate. On June 5, 1912, he married Miss Nannie Rebecca Cooper, the daughter of George B. and Alice (Arrington) Cooper, who was born at Rocky Mount on June 17, 1887, and died at Raleigh on February 21, 1962.

This happy marriage was blessed by a son, Maurice Victor Barnhill, Jr., and a daughter, Rebecca Arrington Barnhill, donors of the portrait being presented to the Court. They honor us today by their presence. Maurice Victor Barnhill, Jr., who is one of the State's ablest lawyers, is accompanied by his wife, the former Ruth Margaret Zerbach, and his sons, Maurice Victor Barnhill III, a student at Stanford University Graduate School, and James Herbert Barnhill, a student at Harvard Law School.

Guided by a strong sense of duty, Judge Barnhill always viewed the law as an instrument of service to society. "Law," he wrote in 1931, "is nothing more than a rule of human conduct. The standard of government in a community is nothing more than the composite will and opinion of its citizens. It follows as a matter of course that each citizen by his individual conduct and his participation in his government either elevates or lowers that standard."

I remember how he applied those principles of duty to me on the eve of my appointment to the Senate and my resignation from the Court in 1954. Senator Hoey had passed away, and Governor William B. Umstead had the appointment of his successor under consideration. It was the end of the Court's session. Judge Barnhill said he wanted to speak with me, and I went to his chambers. He shut all the doors in a somewhat conspiratorial manner, and then said "The Governor wants you to call him. I suspect he is going to offer you the appointment to the Senate. If he does, I think you should accept. I would hate to lose you on the court, but I think it would be your duty to accept the appointment." It was typical of the man, that while others were viewing the position as an honor, he saw it as a call to public duty. And, loving the law as he did, he knew what it would mean to me to leave the Court, even for such a high federal post.

Throughout his life he tried to instill in others the devotion to the law and the sense of satisfaction in it which he felt so deeply. Speaking to a group of young lawyers in Forsyth, after he joined the Supreme Court, he expressed his belief in the written law as a chronicle of our civilization. "You can get our civilization as it has

progressed through the years in our North Carolina reports, and the history and progress of North Carolina may be seen more clearly in these reports than in any other place," he said. He admonished them to turn to the records of the law for help in dealing with the future.

The law is a worthy profession, he reminded them saying: "To a person who doesn't love the law, it is a dry and uninteresting thing, but to the lawyer who has a love for his profession, it is live, vital and interesting."

Although his education and experience were primarily legal, he was one of the most widely read persons it has been my pleasure to know. Steeped in the humanities and knowledgeable about current events, he probably, through his reading, had traveled more widely and lived more deeply than most men. He allowed no experience to escape him, for like Tennyson's Ulysses, he was a part of all that he met.

For thirteen years from June, 1924, to July, 1937, he served as Judge on the Superior Court of North Carolina. An outstanding trial judge, he was specially assigned to try many of the most important cases in the State during his tenure. Two of these in particular stand out in the legal history of the state. One of them was the sensational trial of Fred Beal and others for the murder of Gastonia Police Chief O. F. Aderholt during the 1929 textile mill strike. (199 N.C. 278). The other was the trial of Luke Lea, Luke Lea, Jr. and Wallace Davis in 1931 for misuse of the assets and credit of the Central Bank and Trust Company, the largest bank in Western North Carolina.

I wish to discuss these cases, for they illustrate well the judicial temperament and breadth of legal experience which Judge Barnhill brought to this Court.

By the time he was 42 years of age, the Judge had practiced law in two or three counties and been on the bench for five years presiding over the courts in Eastern North Carolina. Although well known in his State as a painstaking and capable judge, he was little known outside North Carolina, and, as it was written of his at the time, "had been so quiet and free from even the suggestion of desiring publicity that he has not figured large in the public eye."

Then, suddenly, his picture was in almost every newspaper in the United States and abroad. He was faced with the greatest challenge of his judicial career as he received assignment from Governor Gardner to preside over one of the century's most controversial murder trials — a case born of all the burning religious, social, political, and economic issues of those depression years.

This trial of sixteen strikers and organizers, several of whom

were admitted Communists, grew out of a strike by the local branch of the National Textile Workers' Union at the Loray Mill in Gastonia. On June 7, 1929, during an encounter between city police officers and those in charge of union premises, Police Chief Aderholt was killed and several others were wounded.

Coming soon after the Sacco-Venzetti trial in Massachusetts, the Gastonia trial of alleged Communists seemed destined to challenge and at the same time symbolize the American system of justice. Many feared the defendants would be tried not for murder but for their religious, political and economic theories. But their fears were groundless.

With the eyes of the whole world upon him, Judge Barnhill charged the jury in a classic statement of what constitutes a fair criminal trial.

> "There is only one issue. Are the defendants guilty as charged? This must be determined in a quiet and orderly manner. It must not be clouded by any other issue."

He warned that the political, economic and religious views and beliefs of the defendants had nothing to do with the case and their injection into the trial would not be permitted.

> "When a person comes into court he comes on exact equality with every other citizen. He has no right to expect to be either exalted or condemned, to receive either more or less than is just on account of his race, color, or condition in life, or by his convictions upon social, economic, industrial, political, or religious matters."

One editorial stated the next day "those who have been most insistent that North Carolina's good name be unscarred and that the cause of justice prevail must necessarily have been strengthened after reading Judge Barnhill's charge to the grand jury and noting the fairness, directness and firmness with which he spoke."

His first test came as the attorney for the defendants requested a change of venue. Judge Barnhill realized that with passions inflamed in Gaston County, it might be difficult for a jury from that county to hear the case objectively at that time and in that atmosphere. He therefore granted a continuance and the case was assigned to Mecklenburg County Superior Court at Charlotte with Judge Barnhill appointed to preside. This decision was received as firm indication throughout the State and the land that justice was to prevail as far as he was able to assure it, and that the trial of the case would be as free as possible from prejudicial publicity.

During the progress of the original trial, one of the jurors was incapacitated as the result of an emotional breakdown, and a mistrial was ordered. Although indictments were returned against 16 defendants, only seven of them went to final trial, which resulted in convictions and sentences for second degree murder and related crimes.

There were many difficult rulings during the course of the trial, as the judge sought an impartial trial, without artificial drama. Some of these rulings made judicial history and are today studied by students in North Carolina law schools. When the State introduced a life-size plaster figure of Police Chief Aderholt as evidence against the alleged murderers, Judge Barnhill ordered the effigy removed from the courtroom.

Time and time again throughout the trial, he was cautious not to admit into testimony any evidence which might show the Communist connections of the defendants.

For purposes of impeachment Judge Barnhill overruled objections to questioning a witness about her belief in God, basing his ruling on the North Carolina Statute of Oaths of 1777, which stipulated that a witness must believe in divine punishment after death to qualify as a witness. He commented later "If I believed that life ends with death and that there is no punishment after death, I would be less apt to tell the truth."

This ruling received much strong comment throughout the country; both from those who favored it and those critical of it.

When it considered this ruling as a possible error, the Supreme Court held this no interference with the right of conscience. Chief Justice Stacy said:

> "The answers of the witness, taken in connection with her previous testimony, do not show that she intended to express disbelief in a Supreme Being, or to deny all religious sense of accountability, such as would have disqualified her as a witness" . . . But, even if error were committed in not sustaining objections to the questions propounded, which is not conceded, it would seem that, in the light of the answers elicited, no appreciable harm has come to the defendants, if harm at all, and that the verdicts and judgments ought not to be disturbed on account of these exceptions."

To those who knew Judge Barnhill's fairness, it was no surprise that after examining the record, Chief Justice Stacy, speaking for the Supreme Court, was able to say:

"We are convinced, from a searching scrutiny of all that tran-

spired on the hearing, to which exceptions have been taken, that substantial justice has been done, and that no reversible error has been made to appear." (199 N.C. 278).

The case of Luke Lea, Luke Lea, Jr., and Wallace Davis was even more complicated and controversial than the Gastonia case because of the many people involved and because of its effect on the politics and economics of the State. The trial was to test to the fullest Judge Barnhill's patience, knowledge of the law and good humor. In the latter part of the 1920's land speculation, then prevalent in Florida, overflowed to the mountains of Western North Carolina. The slogan was "Florida in the Winter: the North Carolina mountains in the summer." Centering around Asheville, the speculation was so extensive that many farms were subdivided into "city lots." The City of Asheville and Buncombe County extended water and sewer lines into sparsely populated areas. The debt of the city and county rose rapidly with the fever of speculation. Prices became inflated beyond real values. Sometimes the same piece of land would change ownership many times on the same day. In the fall of 1930, the Central Bank and Trust Company failed. Wallace Davis, the President, ex-Senator Luke Lea and his son, Luke Lea, Jr. of Nashville, Tennessee, were indicted on multiple charges of criminal conspiracy to use the assets and credit of the bank for unlawful purposes. Because of the involvement of city and county officials in some of the irregular, if not criminal, transactions of the bank, the fact that an ex-United States Senator was a defendant, and the multitude of transactions between the Leas and their associates in Tennessee and the bank in North Carolina, the trial attracted not only great local and state-wide interest, but also national attention.

In 1931, Judge Barnhill was assigned to hold special terms of the Superior Court of Buncombe County for the purpose of trying the resulting criminal cases.

As all trial lawyers know, the most difficult criminal case to try without committing reversible error is one involving books of account and records such as are normally maintained by banks. In the trial of the case against the Leas and Davis, literally scores of questions arose involving the admissibility of evidence and its application to the issues raised by the criminal indictments. The record on appeal to the Supreme Court consisted of 1,221 pages, and the attorneys for the defendant managed to state 300 exceptions. The Supreme Court of North Carolina was unable to find any reversible error in this voluminous record and the proceedings of a trial which continued for several weeks (203 N.C. 13). The Court subsequently denied petitions for rehearing (203 N.C. 35) and for a new trial based on newly discovered evidence (203 N.C. 316). Petitions to

the Supreme Court of the United States for writs of *certiorari* were denied (287 U.S. 649. 77 L. Ed. 561, and 287 U.S. 668, 77 L. Ed. 576).

Major Lennox Polk McLendon, now of the Greensboro Bar, was retained by the State Banking Commission with the approval of Governor Gardner to assist in the prosecution of the criminal cases growing out of the Central Bank failure. Speaking of the masterful way Judge Barnhill conducted the trial, Major McLendon said:

> "The difficulties inherent in the case against Luke Lea, Sr., Luke Lea, Jr., and Wallace Davis were numerous. Not only did the case involve the usual problems growing out of the use of bank books and records; but, in addition, it involved serious difficulties with respect to the identity of securities and their ownership by the bank, the issuance of certificates of deposit without a contemporaneous recording of them on the bank's books, the disparity between entries in books of deposit issued to depositors, and the entries upon the bank's records and the authenticity of typewritten letters without written signatures or other usual internal evidence of authorship. Through a maze of documentary evidence and the testimony of the employees of the bank and of expert accountants, Judge Barnhill directed the trail of the case with extraordinary patience, good judgment and absolute fairness . . . Through it all, he maintained the poise and dignity of a great judge. His charge to the jury was a masterpiece of clarity and fairness to both the State and the defendants. I really do not see how any judge could have done a better job under the extraordinary circumstances of this case."

When Governor Clyde R. Hoey appointed Judge Barnhill an Associate Justice of the North Carolina Supreme Court on July 1, 1937, the appointment was acclaimed throughout the State as most fitting. He was elected to the Associate Justiceship for full eight year terms in the general elections of 1938 and 1946, and served in that capacity until February 1, 1954, when Governor Umstead named him Chief Justice to fill the vacancy occasioned by the retirement of Judge William A. Devin. He was elected to the post of Chief Justice in the general election of 1954 and filled that office with great acceptability until August 21, 1956, when he retired and qualified as an Emergency Justice.

When Judge Barnhill joined the Court as an Associate Justice, Walter P. Stacy, one of America's greatest jurists of all time, was Chief Justice. Other Associate Justices were Heriot Clarkson, George Whitfield Connor, Michael Schenck, William A. Devin, and John

Wallace Winborne. Judge Barnhill also served with these later additions to the Court during subsequent years: Aaron Ashley Flowers Seawell, Emery B. Denny, the speaker, Murray G. James, Jeff D. Johnson, Jr., Itimous T. Valentine, R. Hunt Parker, William H. Bobbitt, Carlisle W. Higgins, and William B. Rodman, Jr. All who had the privilege of working with him on this Court knew Maurice Victor Barnhill to be an intellectual and legal giant as well as a warm-hearted friend.

All in all, Judge Barnhill served the law and the people of North Carolina for nineteen fruitful years as a Justice of this Court. It would require a book to appraise the enduring values his opinions added to the law. Time does not permit me to undertake this task. I must content myself with brief comments on a few of his opinions.

Judge Barnhill preferred agreement among the members of the court but left room for dissent when a member felt his convictions required dissent. All of the Justices on his seven-man court worked hard. It is not generally known, I find, that the Supreme Court of North Carolina hands down written opinions sooner after argument of cases than any other appellate court in the United States. It is seldom longer than four weeks after a case is heard that a decision is rendered. Because of the pressure of work, our discussions were usually serious. However, among the members there was a camaraderie born of a common isolation from the world outside, a common bond forged by that sense of seclusion and neutrality which society demands of its judges, and by the unity of our minds and hearts in a task often poorly comprehended by outsiders.

Although Judge Barnhill's opinions appear in 33 volumes of the Supreme Court Reports, from volume 212 through 244, his service on the Court is not reflected solely in the opinions he wrote. In conferences as we discussed cases and tried to reach decisions he lent the energies of his inquiring mind to the solution in every case, regardless of who was writing the opinion. So interested was he that frequently after a tentative decision was reached in conference, he went to the chambers of the judge who was assigned to write the opinion and made extremely valuable suggestions.

He possessed a remarkable ability to express himself clearly and understandingly in an opinion, and as a result of his distinguished career as a practicing lawyer and a trial judge, he believed firmly in the necessity for doing so. Appellate opinions, he believed, are helpful only insofar as they are clear and unambiguous and can be used as a basis for instructions to a jury or guidance to a client.

His reaction to the law, because of his training and knowledge, was often almost intuitive. He possessed an almost uncanny ability to respond immediately and accurately to a legal proposition, or to

catch instinctively the significance of the mere mention of a decision in the course of an argument or discussion.

His attitude toward the role of regulatory agencies and legislative control of them is apparent in many of his opinions. Deeply aware of the extent of bureaucratic control which government in his lifetime had imposed on the individual and on the private institutions of society, he was quick to check its excesses. In a 1952 concurring opinion, for instance, he agreed that the State Board of Nurse Examiners had exceeded its authority in dropping the Hamlet Hospital School for Nursing from the accredited lists without notice or a hearing. Revealing not only a sense of the importance of the regulatory agencies in society, but a knowledge of the special needs of educational and small professional institutions, he wrote:

"The legislature is the policy-making agency of the State government. The law-making function is assigned exclusively to it and it alone can prescribe standards of conduct which have the force and effect of law. This function, except where expressly authorized by the Constitution, cannot be delegated to any other authority or body." However, he noted, the legislature may create an administrative agency and authorize it to make rules and regulations to effect the operation and enforcement of a law within the general scope and expressed general purpose of the statute. This authority he stated "cannot lawfully include the power to make the law, for neither urgency of necessity nor gravity of a situation arising from economic or social conditions allows the Legislature to abdicate, transfer, or delegate its constitutional authority to an administrative agency. Hence, an administrative agency has no power to create a duty where the law creates none." (234 N.C. 673).

His words, I believe, bear a special significance today for both state and federal regulatory agencies. This opinion is typical of his sense of the social purpose of legislation. In seeking to accomplish the objective of assuring adequate training for nurses, admonished the Justice, the Board "should keep in mind the fact that the statute was not enacted for the benefit of nurses or to create a guild having the legal right to limit or proscribe competition, either of nurses or of hospital schools of nursing. It was enacted to promote the good health and general welfare of the people at large."

His opinions frequently revealed a dry humor and a sympathy for the parties which his strict adherence to the law could not always conceal. In *Singletary v. Nixon,* 239 N.C. 635 a civil action for compensation for personal injuries resulting from an automobile-tractor-trailer collision, the judgment of nonsuit was upheld because of the contributory negligence of the plaintiff by excessive speed or not keeping a proper lookout. At the end of his opinion,

the Chief Justice sent a public message to the plaintiff, in these words:

> "The plaintiff may, perhaps, draw consolation from the fact this record tends to show that he is the type of man who 'sweareth to his own hurt and changeth not.' Psalms 15:4. In his examination and cross-examination he was afforded opportunities to modify his testimony to his own advantage. Yet he adhered strictly to his first statements in respect to the manner in which the collision occurred, his nearness to the truck when he first saw it, the time when he applied his brakes, and other circumstances which tended to prove his own want of due care. For this at least he is to be commended."

He felt very strongly about the role of the jury in our system of justice, and about the duty of a judge to uphold the jury, even when he did not agree. His frustration with the loopholes of the law sometimes broke through in such cases. One opinion in particular illustrates his attitude in this regard. This is *Jyachosky v. Wensil,* 240 N.C. 217, in which he wrote a concurring opinion deploring the fact that the jury misinterpreted the facts but, conscious of his oath, affirming the judgment, and calling on the General Assembly to take action to help the court. He said there:

> "Yet the jury adopted the bare, artificial inference of fact permitted by the statute and found that it was sufficient to override and outweigh all the positive evidence to the contrary. While we may grant new trials for errors of law committed by the trial judge, we are without authority to correct this error in the verdict. The jury was the final arbiter of the facts. Therefore we must affirm a judgment which compels the defendant to pay plaintiff $18,000 which he should not be required to pay. This offends my every sense of justice and fair play. I can only say that it is most unfortunate that judicial officers should be placed in a position where they must deny relief against injustice in the name of the law. While we need some statute such as G.S. 20-71.1, this Act should be so amended as to afford the Court an opportunity to grant relief in a case of this kind.
>
> "Since the trial judge committed no error in the trial of the cause, I must, in compliance with my oath to administer the law as it is written, concede that the judgment entered must be affirmed. In so doing, I make my assent as negative as language will permit."

In *Kennedy v. Parrott,* 243 N.C. 355, Justice Barnhill wrote the

Court's opinion in a landmark decision holding, among other things, that the consent of a patient to a major internal operation will be construed as general in nature so that the surgeon may lawfully perform such operation as good surgery demands, even though this requires an extension of the operation further than was originally contemplated. Before this decision, an extension of such an operation, however necessary, might have resulted in an assault charge against the physician. Although it is almost a general rule today, it was among the first such decisions in the country. His attitude in dealing with an area of the law in flux is typical of his recognition of the need to modify some strict common law rules to meet modern conditions. He cited conditions during the period which shaped the common law rule, "prior to the advent of the modern hospital and before anesthesia had appeared on the horizon of the medical world." In those days, he noted, even a major operation was performed in the home of the patient, and the patient ordinarily was conscious so that he could give his consent. If he was not, members of his family were immediately available.

"However," wrote the Justice, "now that hospitals are available to most people in need of major surgery; anesthesia is in common use; operations are performed in the operating rooms of such hospitals while the patient is under the influence of an anesthetic; the surgeon is bedecked with operating gown, mask, and gloves; and the attending relatives, if any, are in some other part of the hospital, sometimes many floors away, the law is in a state of flux. More and more courts are beginning to realize that ordinarily a surgeon is employed to remedy conditions without any express limitation on his authority in respect thereto, and that in view of these conditions which make consent impractical, it is unreasonable to hold the physician to the exact operation — particularly when it is internal — that his preliminary examination indicated was necessary. We know that now complete diagnosis of an internal ailment is not effectuated until after the patient is under the influence of the anesthetic and the incision has been made.

"These courts act upon the concept that the philosophy of the law is embodied in the ancient Latin Maxim: *Ratio est legis anima; mutata legis ratione matatur et lex.* Reason is the soul of the law; the reason of the law being changed, the law is also changed."

It was ill health which finally compelled Judge Barnhill to retire from the Court he loved. Not many people realized the severe physical handicap under which he lived and worked throughout his adult years. From the time he was eighteen years old, he was subject to severe attacks of asthma and it advanced through the years to emphysema. In 1950, he had a serious operation for a malignancy

from which he never fully recovered. Toward the end of his career he had to see a doctor several times a day because of the emphysema. His daughter tells me that he often said to her that his poor health might have been a blessing in disguise and that he might have lived a different life if he had been well. As it was, he had to concentrate on his career and a quiet life of studying and reading.

"It isn't life that matters, but the courage you bring to it." Frosted Moses' advice in Walpole's *Fortitude* might well have been Judge Barnhill's daily reminder to himself throughout his life. A person of less indomitable will would have given up. Yet he never mentioned his affliction and struggled not to show it. The only personal reference to it is found in his opinion in *Lippard v. Johnson* involving plaintiff's reaction to a Novocain shot. Judge Barnhill wrote:

> "Practical application of the medical science is necessarily to a large degree experimental. Due to the varying conditions of human systems, the result of the use of any medicine cannot be predicted with certainty. What is beneficial to many sometimes proves to be highly injurious to others. A food or drink that one allergic person may use with immunity is highly injurious to another. The goldenrod is a thing of beauty to one asthmatic; to another, it is a thing to be shunned. Even the expert cannot completely fathom or understand the reactions of the human system. Therefore, to say that an unexpected, unanticipated, and unfavorable result of a treatment by a physician invokes the application of the doctrine of *res ipsa loquitur* would be to stretch that doctrine far beyond its real purpose and to destroy its recognized usefulness in proper cases."

When I learned that Judge Barnhill had journeyed to the bourne from which no traveler returns, I thought of his great service as a judge and of the physical handicap under which it was rendered, and I called to mind the King's Son in Edward Rowland Sill's inspiring poem "Opportunity."

> "This I beheld, or dreamed it in a dream:—
> There spread a cloud of dust along a plain;
> And underneath the cloud, or in it, raged
> A furious battle, and men yelled, and swords
> Shocked upon swords and shields. A prince's banner
> Wavered, then staggered backward, hemmed by foes.
>
> "A craven hung along the battle's edge,
> And thought, 'Had I a sword of keener steel —

That blue blade that the king's son bears, —
but this
Blunt thing!' he snapped and flung it from his hand,
And lowering crept away and left the field.

Then came the king's son, wounded, sore bestead,
And weaponless, and saw the broken sword,
Hilt-buried in the dry and trodden sand,
And ran and snatched it, and with battle shout
Lifted afresh he hewed his enemy down,
And saved a great cause that heroic day."

Instead of seeking "a sword of keener steel", Maurice Victor Barnhill made the most of what God had given him in body, in mind, and in spirit. When he died at Raleigh on October 12, 1963, he left to his family and his state the example of a life of service, a life well-lived.

And surely, he left the law, as a profession, as a science, and as art, not as he had found it, but enriched a thousandfold. Of his great legacy, this portrait of Judge Barnhill will remind the members of this Court and all those who attend here in future years.

Remarks of Chief Justice R. Hunt Parker in Accepting the Portrait of Chief Justice M. V. Barnhill.

This Court has heard with pleasure the eloquent, scholarly, and faithful tribute to our former Chief Justice M. V. Barnhill delivered by the senior United States Senator from North Carolina, himself an eminent lawyer and jurist, who served on this Court with Judge Barnhill for more than six years.

Those of us who knew Chief Justice Barnhill as a boy and youth realized that he had a brilliant, analytical mind, and that even then he was capable of close and logical reasoning and of terse and lucid statement. With such talents he was destined for the law, and he became a lawyer of the first rank. We agree with the speaker that he will take his place among the ablest Justices who have served on this Court. He was proud of the great record this Court has, and was ever ready to spend himself to the uttermost in promoting the work and the usefulness of this Court, of the lower courts, and of the legal profession. In conference, his familiarity with our decisions, and their significance, was most helpful, and he was ever ready to drop his work and to be of assistance to his associates. Victor Barnhill is dead, but his life's work endures in thirty-three volumes of our Reports to aid his successors in accurately writing the decisions of the Court.

The Marshal will see that the portrait is hung in its appropriate place in the courtroom, and these proceedings will be printed in the forthcoming volume of our Reports, and spread upon the minutes of the Court.

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ANALYTICAL INDEX

ACTIONS.

§ 2. Right of Nonresidents to Maintain Action Here.

Motion to dismiss on the ground that plaintiff is a foreign corporation which had transacted business in this State without being domesticated must be determined prior to trial, since the motion challenges the authority of the court to proceed. *Foundry Co. v. Benfield*, 342.

To support judgment of dismissal, the court must find facts supporting conclusion that plaintiff is a nonresident corporation that had transacted business here without being domesticated. *Ibid.*

§ 3. Moot Questions.

An action instituted by directors, apprehensive that they would lose their offices in the election at the annual meeting, to preclude the counting of alleged invalid proxies, and alleging that the secretary refused to permit them to inspect the books to ascertain the number of votes to which the various stockholders were entitled, *held* properly dismissed as moot when it appears from an amended complaint filed after the stockholders' meeting that plaintiffs were reelected directors and that the right to inspect the books had been granted under court order. *Crew v. Thompson*, 476.

§ 5. Action When Plaintiff's Own Wrong Is Basis of Action.

Where the husband survives the wife only a short time after the fatal accident proximately caused by the negligence of the husband, there can be no recovery in respect to the share to which the husband or his estate would otherwise be entitled. *Bank v. Hackney*, 17.

§ 12. Termination of Action.

Judgment sustaining a demurrer and dismissing the action is a final judgment which terminates the action. *Davis v. Anderson Industries*, 610.

ADVERSE POSSESSION.

§ 2. Hostile and Permissive Use in General.

The use of a right of way across another's land must be under claim of right and be open and hostile and under definite boundaries in order to establish a right by prescription, but hostile use is simply use under such circumstances as to manifest and give notice that the use is being made under claim of right. *Dulin v. Faires*, 257.

§ 12.1. Adverse Possession by State or Political Subdivision.

The State of North Carolina and its political subdivisions may acquire title by adverse possession to the same extent as an individual. G.S. 1-38 and G.S. 1-40 apply to any legal entity and not only to an individual. *Williams v. Board of Education*, 761.

§ 20. Presumption of Possession by Holder of Legal Title and Necessity for Possession Within Twenty Years Preceding Action.

Since proof of legal title to lands raises the presumption that the owner has been in legal possession thereof within twenty years before commencement of the action, it is not necessary that the complaint in a real action allege such possession within the twenty-year period, but allegations in the

ADVERSE POSSESSION—*Continued.*

answer that plaintiffs had not been in possession within the twenty-year period should not be stricken on motion when defendants claim title by adverse possession. *Williams v. Board of Education*, 761.

§ 21. Pleadings and Burden of Proof.

In an action against the State to quiet title, allegations in the answer asserting acquisition of title under color of title by seven years' adverse possession and by adverse possession for more than twenty years under known and visible boundaries, and allegations that plaintiffs were estopped from asserting title by permitting the State to remain in open, notorious, and adverse possession of the *locus* for more than twenty years, set up a valid defense and motion to strike same is properly denied. *Williams v. Board of Education*, 761.

§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.

The evidence in this case *held* sufficient to permit the jury to find that defendants had used the road in question substantially in the same location for any and all purposes incident to the use and enjoyment of their contiguous properties as the only means of access from their properties to a public road, and had done so for more than 20 years preceding the institution of the action, and that such use was adverse and under claim of right, and therefore a directed verdict based on the assumption that the evidence was insufficient to establish their right must be reversed. *Dulin v. Faires*, 257.

APPEAL AND ERROR.

§ 3. Right to Appeal and Judgments Appealable.

The allowance of a motion to strike portions of the complaint is not immediately appealable but may be reviewed only by *certiorari*. Rule of Practice in the Supreme Court No. 4(a)(2). Such motion does not admit the truth of the allegation sought to be stricken for the purpose of the hearing on the motion to strike or otherwise. The allowance of a motion to strike is appealable only when it is to strike a cause of action, a plea in bar, or a defense in its entirety, amounting to a demurrer or the granting of a plea in bar. *Cecil v. R. R.*, 728.

The setting aside of the verdict for error of law committed during the trial is appealable. *Wells v. Bissette*, 774.

§ 11. Appeal and Appeal Entries.

Notice of appeal must be served upon appellee within 10 days as a jurisdictional requirement. *Teague v. Teague*, 320.

Where the unexcepted to findings of the trial court disclose that plaintiff did not note an appeal at the trial and that plaintiff did not file notice of appeal until 12 days after the rendition of the judgment, G.S. 1-279, G.S. 1-280, the Supreme Court obtains no jurisdiction of the purported appeal, and will dismiss it upon motion in writing entered at or before the argument of the appeal on its merits. *Oliver v. Williams*, 601.

§ 12. Jurisdiction of Lower Court After Appeal.

Where notice of appeal is not served within the time required, the case remains in the Superior Court which may dismiss the attempted appeal. *Teague v. Teague*, 320.

APPEAL AND ERROR—*Continued.*

§ 16. Certiorari as Method of Review.

Upon the granting of *certiorari*, the case is before the Supreme Court in all respects as on appeal. *Williams v. Board of Education*, 761.

§ 19. Necessity for and Form of Objections, Exceptions and Assignments of Error in General.

An assignment of error not based on an exception appearing in the case on appeal will not be considered. *S. v. Mallory*, 31; *Beanblossom v. Thomas*, 181.

Exceptions which first appear in the tendered statement of case on appeal are ineffectual. *S. v. Ferebee*, 606.

An assignment of error to the exclusion or admission of evidence must disclose the questions sought to be presented without the necessity of going beyond the assignment. *Plumbing Co. v. Harris*, 675.

§ 20. Parties Entitled to Object and Take Exception.

Where one driver contends that the other driver was negligent in respect to speed but there is no evidence as to such speed, the act of the court in reading the provisions of G.S. 20-141(c) is favorable to the first driver and he may not complain thereof. *Wilkins v. Turlington*, 328.

§ 21. Exception and Assignment of Error to Judgment or to Signing of Judgment.

An exception to the judgment presents the face of the record for review for the purpose of determining whether error of law appears on the face of the record and whether the judgment is regular in form. *S. v. Mallory*, 31.

A sole exception to the judgment presents the single question whether the facts found are sufficient to support the judgment, and does not present the question of the sufficiency of the evidence to support the findings. *Hatchell v. Cooper*, 345.

§ 22. Exceptions and Assignments of Error to Findings of Fact.

Exceptions to the refusal of the trial court to find certain facts will not be sustained when some of the findings requested are immaterial and the evidence in regard to the others is conflicting. *Ins. Co. v. Ins. Co.*, 430.

§ 24. Exceptions and Assignments of Error to Charge.

An exception to an excerpt from the charge does not ordinarily challenge the omission of the court to charge further on the same or any other aspect of the case. *Wilkins v. Transportation Co.*, 328.

§ 34. Form and Requisites of Transcript.

The record must show the filing date of every pleading, motion, affidavit, or other document in the transcript. *Oliver v. Williams*, 601.

§ 38. The Brief.

Assignments of error not brought forward in the brief are deemed abandoned. *Morgan v. Tea Co.*, 221; *Moore v. Ins. Co.*, 440.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Ordinarily, the admission of testimony to the effect that defendant in a negligence action is protected by liability insurance is prejudicial error and cannot be corrected by the withdrawal of such testimony, and in this case the

APPEAL AND ERROR—*Continued.*

admission of such testimony together with emphasis of the topic by extensive discussion by the court in withdrawing the evidence, including reiteration of the fact of common knowledge that a motorist is required in this State to prove financial responsibility, *held* prejudicial. *Fincher v. Rhyne*, 64.

The admission of incompetent evidence does not entitle appellant to a new trial when, under the peculiar circumstances of the case, there is no reasonable probability that the evidence affected the result of the trial. *Beanblossom v. Thomas*, 181.

§ 42. Harmless and Prejudicial Error in Instructions.

Defendant testified to the effect that he did not have his son enter for him a plea of guilty in the recorder's court to a charge of failing to yield the right of way, but that he did not object to it. In recapitulating the evidence the court charged that defendant testified that his son pleaded him guilty before a justice of the peace for failing to yield the right of way. *Held:* If defendant deemed the court's statement to be inaccurate he should have called the matter to the court's attention in time for correction, and upon defendant's failure to do so he waives error, if any, therein. *O'Berry v. Perry*, 78.

While an instruction will be construed contextually, the failure of the court to refer to sudden emergency in connection with defendant's evidence that he put on his brakes and skidded to the left on a wet and slippery highway upon being suddenly confronted with an unlighted vehicle in his lane of travel, cannot be held cured by a later general instruction upon the doctrine of sudden emergency not related to the particular issue. *Hunt v. Truck Supplies*, 314.

§ 46. Review of Discretionary Matters.

The denial of a motion to set aside the verdict on the ground that it was contrary to the greater weight of the evidence will not be disturbed in the absence of a showing of abuse. *Bryant v. Russell*, 629.

§ 49. Review of Findings or Judgments on Findings.

Failure of the court to make findings requested cannot be prejudicial when such requested findings are not material. *Anderson v. Ins. Co.*, 309.

In a trial by the court, it will be presumed that it ignored any incompetent evidence. *Ibid.*

Findings of fact which are supported by competent evidence are conclusive on appeal. *Ins. Co. v. Ins. Co.*, 430.

§ 51. Review of Judgments on Motions to Nonsuit.

In passing upon the correctness of judgment of nonsuit, the Supreme Court must consider all the evidence favorable to plaintiff, both properly and improperly admitted. *Keith v. Gas Co.*, 119; *Veach v. American Corp.*, 542.

§ 54. New Trial and Partial New Trial.

Where there is no prejudicial error relating to the negligence of the driver of the vehicle and the sole prejudicial error relates to the issue of agency of the owner, the Supreme Court may grant a partial new trial on the issue of agency without disturbing the verdict against the driver. *Passmore v. Smith*, 717.

§ 55. Remand.

Where, upon defendant's motion, the court dismisses the action under G.S. 55-154(a), upon the court's conclusion that plaintiff is a nonresident cor-

APPEAL AND ERROR—*Continued.*

poration that has transacted business here without being domesticated, the cause must be remanded, since the court must find the specific facts supporting its conclusion, notwithstanding the court denominates the conclusion a finding of fact. *Foundry Co. v. Benfield*, 342.

§ 60. Law of the Case and Subsequent Proceedings.

The decision on appeal overruling demurrer to the complaint and striking a defense set up in the answer as being inapposite, becomes the law of the case and is binding upon the second trial with regard to the sufficiency of the complaint and the impertinency of the defense. *Ins. Co. v. Blythe Brothers Co.*, 229.

Decisions on former appeals become the law of the case in subsequent proceedings. *Howard v. Boyce*, 572; *Horton v. Redevelopment Comm.*, 725.

ARREST AND BAIL.

§ 10. Liabilities on Bail Bonds and Recognizances.

A bail or appearance bond ordinarily binds the principal to appear and answer to a specific charge, to stand and abide the judgment of the court, and not to depart without leave of the court, and each of these obligations are separate and distinct. *S. v. Mallory*, 31.

An appearance bond conditioned upon defendant appearing at a specified term of Superior Court and each succeeding term "pending the final disposition" of the cause, and not to depart without leave of the court, and a cash bond upon like conditions, are not discharged by decision on appeal quashing the indictments, stipulating that defendants are not entitled to their discharge, and stating that the State might proceed upon new indictments. *Ibid.*

Service of notice of judgment *nisi* upon the attorney in fact of the surety is service upon the surety. *Ibid.*

Upon breach of condition of a cash appearance bond neither issuance of a *scire facias* nor other notice is necessary, and judgment absolute may be entered after 30 days or at the next term of court, whichever is later. *Ibid.*

Defendants breach their appearance bonds when they are called and fail to answer upon the return of new indictments after quashal of the original indictments, and judgment *nisi* is thereupon properly entered, and after service of notice upon the surety, judgment of forfeiture is properly entered at the term designated in the notice, but the judgment of forfeiture should further provide that the State should have and recover from the principals and the sureties the amount stipulated in the respective bonds. *Ibid.*

ASSAULT AND BATTERY.

§ 4. Elements of Criminal Assault.

Whether the victim is "put in fear" is inapposite when there is an actual battery. *S. v. Hill*, 103.

§ 8. Self-Defense.

Evidence tending to show that appealing defendant struck the prosecuting witness with a brick after the co-defendants had assaulted the prosecuting witness and he had turned to leave the scene in a disabled condition, fails to raise the question of self-defense. *S. v. Hill*, 103.

Evidence tending to show that the victim, standing in the road some 200 feet away, threatened to kill the resident of a house, who was standing on his porch, if he came down there, that the resident did not go but that defendant

ASSAULT AND BATTERY—*Continued.*

and a companion walked to where the victim was standing, grabbed him, and cut him with a knife, *held* not to present the question of self-defense or defense of another. *S. v. Cooper*, 644.

In a prosecution for assault, it is error for the court to place the burden upon defendant to prove self-defense. *S. v. Cloer*, 672.

§ 14. Sufficiency of Evidence and Nonsuit.

Where the evidence discloses an actual physical assault made upon prosecutrix by defendant, nonsuit is properly denied, principles relating to a constructive assault being inapposite. *S. v. Higgins*, 589.

The State's evidence tending to show that defendant, without provocation, struck his wife with his fist and then took an alcohol bottle and beat her with it, *held* sufficient to be submitted to the jury on the charge of assault, notwithstanding defendant's evidence that his only act was to disarm his wife who had attacked him with a knife. *S. v. Goodman*, 659.

§ 17. Verdict and Punishment.

Where defendant is charged with assault on a female, he being a male over the age of 18 years, but the verdict of guilty rendered by the jury is in response to the question whether the jury found defendant guilty or not guilty to the charge of assault on a female, the verdict is a verdict of guilty of a simple assault on a female for which the punishment may not exceed a fine of $50 or imprisonment for 30 days. *S. v. Higgins*, 589.

Where a male defendant testifies that he is over 18 years old and the verdict of the jury is that he is guilty of an assault on a female, he being a male over 18 years of age, supports punishment for a general misdemeanor, notwithstanding the failure of the warrant to charge that defendant is a male person over 18 years of age. *S. v. Goodman*, 659.

AUTOMOBILES.

§ 3. Driving Without License.

In a prosecution for driving a motor vehicle without a license, a question asked by a police officer as to whether it was not true that in practically no instance would a driver have a new registration and new title for an automobile purchased only three days before, is irrelevant. *S. v. Green*, 785.

§ 9. Stopping, Parking, Signals and Lights.

"Parking" and "leaving standing" as used in G.S. 20-161(a) are synonymous, and neither term includes a mere temporary or momentary stoppage on a highway for a necessary purpose when there is no intent to break the continuity of travel. *Faison v. Trucking Co.*, 383.

§ 10. Following too Closely and Hitting Slowing or Stopped Vehicle.

A motorist is required to maintain that distance behind the preceding motorist which is reasonable and prudent under the circumstances so as to enable him to avoid injury, taking into consideration conditions of the road and weather, other traffic on the highway, characteristics of the vehicle he is driving as well as the one ahead, the relative speed of the automobiles, and his ability to control and stop his vehicle should an emergency require it, G.S. 20-152(a), and while he is not required to anticipate negligence on the part of others, he is required to anticipate the usual exigencies of traffic under like circumstances. *Beanblossom v. Thomas*, 181.

AUTOMOBILES—*Continued.*

§ 11. Lights.

The function of a headlight is to enable a motorist, under normal atmospheric conditions, to see an object 200 feet ahead; the function of a parking light is to render a vehicle visible under similar conditions for a distance of 500 feet. *O'Berry v. Perry*, 77.

The violation of G.S. 20-129 and G.S. 20-134, setting forth statutory requirements as to lights, is negligence *per se*. *Faison v. Trucking Co.*, 383.

§ 12. Backing.

A driver backing a motor vehicle must use that degree of care which a reasonably prudent man would use under similar circumstances to avoid injuring another, and while the degree of care varies with the exigencies of the occasion, the requirement that before backing he must exercise due care to ascertain whether he can do so with safety to others obtains even on private property when he has reason to believe that a pedestrian or another vehicle may be in his intended path. *Bennett v. Young*, 164.

§ 17. Intersections.

When two drivers approach at approximately the same time an intersection uncontrolled by traffic signs, it is the duty of the motorist on the left to yield the right of way, G.S. 20-155, and the motorist on the right has the right to assume he will be given the right of way and act on this assumption until he is given notice to the contrary. *Wilder v. Harris*, 82; *Neal v. Stevens*, 96.

The driver along a dominant highway is not under duty to anticipate that the operator of a vehicle approaching along a servient highway will fail to stop as required by statute before entering the intersection with the dominant highway, and the driver along the dominant highway, in the absence of anything which gives or should give him notice to the contrary, is entitled to assume and act upon the assumption, even to the last moment, that the operator of the vehicle on the servient highway will stop. *Moore v. Hales*, 482.

§ 19. Sudden Emergencies.

Evidence that defendant's driver was confronted with an unlighted vehicle in his lane of travel on a wet and slippery highway, that he applied his brakes and exercised his best efforts, but that his trailer jackknifed, causing his vehicle to skid to the left and stop with the engine in the ditch and the trailer blocking most of the highway, *held* not to disclose as a matter of law that the driver contributed to the emergency in traveling at excessive speed or in failing to keep a proper lookout so as to preclude the doctrine of sudden emergency. *Hunt v. Truck Supplies*, 314.

The doctrine of sudden emergency holds a person confronted with a sudden emergency to the course of conduct which a reasonably prudent person so confronted would pursue, rather than holding him to the wisest choice of conduct in such situation, and the doctrine applies to conduct subsequent to the emergency and does not excuse negligence creating or contributing to it. *Rodgers v. Carter*, 564.

Motorist confronted with vehicle approaching from opposite direction and zig-zagging across the road is confronted with sudden emergency. *Dixon v. Cox*, 637.

§ 32. Bicycles.

The operation of a bicycle upon a public highway is governed by the rules governing motor vehicles insofar as the nature of the vehicle permits. *Webb v. Felton*, 707.

AUTOMOBILES—*Continued.*

Ordinarily, a bicyclist, before turning from a direct line of travel, is under duty to ascertain that the movement can be made in safety, and to signal his intention to do so when other vehicles may be affected. *Ibid.*

§ 34. Children and School Buses.

The care which a motorist must exercise when he sees or should see children on or near the highway is the constant standard care of the reasonably prudent man, but the degree of care varies with the fatcual situation confronting the motorist, including variations in the age of the child, whether it is attended, whether the child darts out from a place of concealment, etc. *Rodgers v. Carter*, 564.

The presence of a very young child on the shoulder of a highway is, in itself, a danger signal to the oncoming motorist, who must thereupon take such precautions as are reasonable under all the circumstances. *Ibid.*

§ 37. Relevancy and Competency of Evidence in General.

Testimony of an officer investigating the accident that he did not charge one of the drivers involved therein with any traffic violation, is incompetent. *Beanblossom v. Thomas*, 181.

Testimony of a witness that he did not see any headlights burning on defendant's stationary vehicle is without probative force when the witness further testifies that he never was in a position from which he could have seen the lights on the front of the vehicle had they been burning. *Vann v. Hayes*, 713.

§ 38. Opinion Evidence as to Speed.

While it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of the accident, his testimony as to his conclusions from these facts, such as that one of the vehicles had either stopped or was barely moving at the time of impact, is incompetent and is properly excluded. *Farrow v. Baugham*, 739.

§ 39. Physical Facts at Scene of Accident.

Evidence of the distance traveled and the damage wrought by a vehicle after a collision does not raise an inference that the vehicle was traveling at excessive speed prior to the collision when the operator of the vehicle testifies that he lost control of his vehicle upon impact and put his foot on the gas instead of the brake, and was rendered unconscious when the vehicle thereafter struck a telephone pole, since the driver's testimony is consistent with and tends to explain the physical facts. *Moore v. Hales*, 482.

§ 40. Relevancy and Competency of Declarations and Admissions.

Testimony of statements made by a party some time after the accident as to what occurred on the occasion of the collision, the party being dead at the time of the trial, is hearsay and incompetent. *Faison v. Trucking Co.*, 383.

§ 41a. Sufficiency of Evidence of Negligence and Nonsuit in General.

The doctrine of *res ipsa loquitur* does not apply to an automobile accident, and negligence will not be presumed from the mere fact of an accident and injury, and while negligence may be established by circumstantial evidence, an inference cannot rest upon mere conjecture. *Drumwright v. Wood*, 198.

AUTOMOBILES—*Continued.*

The court may withdraw the issue of negligence from the jury only if the evidence is free from material conflict and the only reasonable inference to be drawn therefrom is either that there was no negligence on the part of defendant or that the negligence of defendant was not a proximate cause of the injury. *Ibid.*

The accident in suit occurred when the car in question drove off the highway to its left at the end of a 400 foot curve to the right. The physical facts at the scene, including the fact of extensive damage to the car when it stopped in the ditch, the fact that it tore up several small pine trees, that it traveled 175 feet after leaving the road and dug up the bank of the road, that the tires were still inflated after the accident, etc., *held* sufficient to permit the inference that the accident was the result of excessive speed or reckless driving. *Ibid.*

Plaintiff's evidence must be viewed in relation to the factual situation alleged in the complaint in determining the sufficiency of the evidence to be submitted to the jury. *Faison v. Trucking Co.*, 383.

Evidence that defendant motorist was confronted with a vehicle approaching from the opposite direction, zig-zagging across the road, first on one side then on the other, that defendant slowed down and had his front wheel off the hard-surface to the right when the other vehicle crashed into his automobile, *held* insufficient to be submitted to the jury on the issue of defendant's negligence. *Dixon v. Cox*, 637.

Negligence is not presumed from the mere fact that plaintiff's intestate was killed in a collision, and when the testimony and the physical facts at the scene leave in speculation the determinative facts as to the order the vehicles entered the intersection and as to their directions and turnings, nonsuit is properly entered, since the burden is on plaintiff to offer evidence permitting a legitimate inference of negligence from established facts. *Farrow v. Baugham*, 739.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Road in Passing Vehicles Traveling in Opposite Direction.

Evidence that the driver of a tractor-trailer applied his brakes on a wet and slippery highway, that the trailer jackknifed, causing the vehicle to skid and to cross over and block the left lane, resulting in the injuries in suit when a vehicle approaching from the opposite direction collided therewith, *held* sufficient to be submitted to the jury on the issue of the truck driver's negligence. *Hunt v. Truck Supplies*, 314; but the court should charge on the doctrine of sudden emergency as excusing this maneuver. *Ibid.*

§ 41d. Sufficiency of Evidence of Negligence in Passing Vehicle Traveling in Same Direction.

The failure of a bus driver to blow his horn in apt time before attempting to pass a boy on a bicycle, who was obviously unaware of the overtaking vehicle, is evidence of negligence. *Webb v. Felton*, 707.

§ 41e. Sufficiency of Evidence of Negligence in Stopping Without Signal or Parking Without Lights.

Evidence that the individual defendant stopped the corporate defendant's tractor-trailer on the highway at night, without lights, and that plaintiff, a guest in a following car, was injured when the car crashed into the rear of the trailer, *held* to take the issue of negligence to the jury, notwithstanding conflict in the evidence as to whether lights were burning on the trailer. *Faison v. Trucking Co.*, 383.

AUTOMOBILES—*Continued.*

§ 41f. Following too Closely and Hitting Vehicle Stopped or Parked on Highway.

Evidence favorable to plaintiff tending to show that a vehicle without lights was stopped on a straight highway some 300 to 400 feet beyond a curve, and that the driver of the car in which plaintiff was a passenger collided with the rear of the standing vehicle, *held* sufficient to take the issue of the driver's negligence to the jury. *Faison v. Trucking Co.*, 383.

§ 41g. Sufficiency of Evidence of Negligence at Intersection.

In this action by a passenger in a car, the physical facts indicated that both vehicles entered an intersection at about the same time, plaintiffs' driver being on the right. The only eye-witness was one of plaintiffs who testified that plaintiffs' driver was driving at some 35 MPH in a normal manner with nothing to complain of about in her driving, and that immediately before the accident the witness saw the headlights of a car approaching the intersection from the witness' left. *Held:* There is no sufficient evidence that plaintiffs' driver was guilty of negligence constituting a proximate cause of the accident. *Wilder v. Harris*, 82.

In this action to recover for a collision at an intersection, plaintiff's car being on the right, defendant's own testimony to the effect that the first time he saw plaintiff's car it was partly in the intersection and that defendant's car was then perhaps a half a car length from the intersection, requires nonsuit of defendant's counterclaim. *Neal v. Stevens*, 92.

Evidence held not to show that driver should have seen in time to avoid injury that other driver was not going to obey traffic signal. *Motors v. Bottling Co.*, 251.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

The drivers of the first and fourth vehicles proceeding in the same direction were involved in the collision in suit. The evidence tended to show that the driver of the fourth vehicle while having a clear view of the left lane for approximately half a mile undertook to pass the others, blowing her horn successively before passing the third and second vehicles, that when she was immediately to the rear of the first vehicle the driver thereof, without signal, made a left turn across her lane of travel to enter a private drive. *Held:* The evidence is sufficient to be submitted to the jury on the issue of negligence of the driver of the first vehicle. *Wilkins v. Transportation Co.*, 328.

§ 41k. Sufficiency of Evidence of Negligence in Backing.

Evidence tending to show that a dump truck on a construction site was standing waiting to back into place to be loaded, that its rear view mirrors did not disclose any object within twenty feet of its rear, and that the driver without warning or sounding his horn backed the truck into a workman who had been driving a stake with his back to the truck, *held* sufficient to be submitted to the jury on the question of the truck driver's negligence. *Bennett v. Young*, 164.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrian.

While a motorist is under duty to keep a proper lookout and to anticipate the use of the highway by other traffic and travelers, he is not required to anticipate that a pedestrian will be lying or sitting upon the highway in his path of travel. *Battle v. Chavis*, 778.

The evidence tended to show that defendant was traveling some 35 miles an hour upon an asphalt highway, that in traversing the crest of a hill he

AUTOMOBILES—*Continued.*

dimmed his lights for oncoming traffic, and that after traversing the next 200 feet, and while his lights were still deflected, he struck intestate who, dressed in dark clothes, was sitting on the highway. *Held:* The evidence discloses that defendant did not have time and means after he discovered, or should have discovered, intestate's perilous position to have avoided striking intestate. *Ibid.*

Negligence is not presumed from the mere fact that a pedestrian was struck by defendant's vehicle, and plaintiff has the burden of showing negligence and that such negligence caused injuries resulting in death, and not leave in speculation whether intestate died from such injuries or from alcoholism or epileptic seizure. *Ibid.*

§ 41m. Sufficiency of Evidence of Negligence in Striking Child on or Near Highway.

Where the driver's own evidence discloses that two six-year old girls were standing for some three minutes eight feet from the hard-surface, that the road was straight and unobstructed for seven-tenths of a mile, that the driver did not see the children until he was approximately 250 feet from them, at which time he observed intestate standing with her back to him, that he did not sound his horn or reduce speed, and that when intestate suddenly turned and ran across the highway he immediately applied his brakes and did everything possible to avoid the accident, *held*, the evidence does not present the doctrine of sudden emergency since the fact that defendant acted with due care after being confronted with the emergency would not absolve him from his prior negligence if it constituted a proximate cause of the accident. *Rodgers v. Carter*, 564.

§ 41p. Sufficiency of Evidence of Identity of Driver.

The identity of the driver of an automobile at the time of a collision may be established by circumstantial evidence. *Drumwright v. Wood*, 198.

Evidence that husband and wife were riding in an automobile, that she did not know how to drive, had never been seen driving, that shortly before the accident the husband was seen driving, together with physical evidence at the scene of the accident tending to establish that he was on the left and she was on the right at the time the accident occurred, *held* sufficient to be submitted to the jury on the question of the identity of the husband as the driver of the car. *Ibid.*

§ 42h. Nonsuit for Contributory Negligence in Turning.

Evidence permitting the inference that defendant's bus was traveling downhill with its motor idling, that a boy on a bicycle, traveling in the same direction, was on his right side of the road, apparently oblivious of the bus behind him, that the bus driver veered to his left, and as the bus came nearly abreast, pressed hard on the accelerator in attempting to pass the bicycle, and that the bicyclist, upon hearing the sudden noise close behind him, reflexively turned left, *held*, in the aggregate to disclose a situation constituting an emergency, and the act of the bicyclist in so turning without signal into the path of the bus does not constitute contributory negligence as a matter of law. *Webb v. Felton*, 707.

§ 42g. Nonsuit for Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence held not to show contributory negligence as a matter of law on the part of plaintiff in entering an intersection while faced with the green

AUTOMOBILES—*Continued.*

traffic control signal after having observed the traffic in all directions and ascertained that no vehicles were in the intersection in his lane of travel, but who was hit by defendant's vehicle which entered the intersection while faced with a red traffic signal and collided with the left side of plaintiff's vehicle, since plaintiff had the right to act upon the assumption that defendant would stop in obedience to the red light. *Hams Co. v. Scott*, 353.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

Allegations that plaintiff, the driver of a vehicle along the dominant highway, entered the intersection with a servient highway at a high and unlawful rate of speed do not require the submission of the issue of contributory negligence in the respect alleged when there is no evidence that plaintiff was traveling in excess of the speed limit, and the physical facts as to the distance traveled by plaintiff's car after the collision are explained so that there is no substantial evidence that plaintiff was exceeding the 35 mile speed restriction. *Moore v. Hales*, 482.

Where the physical facts are that the front of defendant's car, traveling along the servient highway, struck the right side of plaintiff's car, which approached the intersection along the dominant highway from defendant's left, *held* there is no evidence to support defendant's allegation to the effect that defendant's car first entered the intersection at a time when plaintiff's car was approaching it. *Ibid.*

Defendant's allegations that she came to a complete stop at the stop sign, and that, seeing no traffic approaching, she proceeded slowly into the intersection with the dominant highway, *held* to preclude defendant from asserting that plaintiff, who entered the intersection from defendant's left along the dominant highway, was negligent in entering the intersection when he should have seen defendant's car approaching at a high rate of speed and should have apprehended, in time to have avoided collision, that defendant was not going to stop, since evidence of negligence in respects not supported by allegations is ineffectual. *Ibid.*

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

The doctrine of last clear chance does not apply if, under the circumstances, defendant does not have the time and means to avoid injury after he has seen or should have seen plaintiff or intestate in a perilous situation and apparently inadvertent to the danger or unable to extricate himself therefrom. *Battle v. Chavis*, 778.

§ 46. Instructions in Automobile Accident Cases.

An instruction which, in effect, requires plaintiff to show by the greater weight of the evidence that defendant failed to yield the right of way to plaintiff as required by statute and failed to keep a proper lookout, must be held for error as requiring plaintiff to prove conjunctively both bases of negligence in order to recover, since an affirmative finding of negligence in either one of the aspects would be sufficient to support an affirmative answer to the issue. *Neal v. Stevens*, 96.

In this action, one driver admitted negligence and the trial turned upon whether the other driver was guilty of concurring negligence. The court explained joint and concurring negligence and instructed the jury that if the negligence of both drivers concurred in proximately causing the accident to answer the issue in the affirmative, because in such event the contesting driver

and his superior would be liable. *Held:* The correct instruction is not subject to objection that it required the jury to find the negligence of the contesting driver was solely responsible for the collision in order to render an affirmative verdict. *Beanblossom v. Thomas*, 181.

The charge of the court in this case as to the following motorist's duty to maintain such distance behind the preceding vehicle as is reasonable and prudent under the circumstances *held* without prejudicial error when construed contextually. *Ibid.*

Where defendant's evidence is to the effect that his driver when confronted with the sudden emergency of an unlighted vehicle in his lane of travel, applied his brakes, causing the trailer to jackknife and the vehicle to skid across his left lane, blocking traffic, an instruction that if the driver failed to drive on his righthand side of the highway, without any reference upon this issue to defendant's evidence of sudden emergency excusing the maneuver, must be held for prejudicial error. *Hunt v. Truck Lines*, 314.

Failure to charge that stopping under situation presented by evidence would not constitute parking held error. *Faison v. Trucking Co.*, 383.

An instruction on the duty of a motorist to maintain a reasonably careful lookout and control and not to drive at a speed greater than reasonable and prudent under the circumstances, but which fails to relate these principles of law to a factual situation presented by plaintiff's allegations and evidence to the effect that defendant driver crashed into the rear of an unlighted tractor-trailer standing in her lane of travel on a straight highway some 300 to 400 feet beyond a curve, must be held for prejudicial error. *Ibid.*

Doctrine of sudden emergency held not raised by the evidence, and instruction thereon was error. *Rodgers v. Carter*, 564.

The evidence tended to show that one defendant's vehicle struck the other defendant's vehicle, which was standing on the hard surface on its left of the highway. There was no evidence as to how long the stationary vehicle had been stopped when the accident occurred. *Held:* An instruction in regard to the duty of a motorist in stopping upon the highway first to ascertain that the maneuver can be made in safety and an instruction in regard to requirements as to lights in operating a car on the highway at nighttime, are erroneous as charging on principles of law not supported by any view of the evidence. *Vann v. Hayes*, 713.

§ 46.1. Issues in Auto Accident Cases.

Where the court in regard to plaintiff's action submits issues of negligence, contributory negligence and damages, but as to defendants' counterclaims submits only issues of negligence of plaintiff and damages, and there is no objection to the issues submitted, the answer of the jury to the first issue determines the question of defendants' negligence, and the failure of the court to submit issues of contributory negligence in respect to the counterclaims will not be held for error. *Wilkins v. Turlington*, 328.

§ 49. Contributory Negligence of Guest or Passenger.

Evidence that plaintiff, a co-driver, was sitting beside the driver and leaning over to put on his boots, that when he raised up he saw defendant's locomotive blocking their lane of travel and cried out a warning, without evidence that he could have seen the danger sooner had he not been engaged in putting on his boots, *held* insufficient to disclose contributory negligence as a matter of law. *Young v. R. R.*, 458.

AUTOMOBILES—*Continued.*

§ 50. Negligence of Driver Imputed to Passenger.

Under Ohio law, the negligence of the driver of a vehicle is not imputed to the co-driver riding therein. *Young v. R. R.*, 458.

§ 52. Liability of Owner for Driver's Negligence in General.

The owner may be held to derivative liability only in the event that the negligence of the driver is properly established. *Vann v. Hayes*, 713.

§ 54g. Instructions on Issue of Agency.

One defendant's admission of the ownership of the vehicle driven by the other requires the submission of the issue of agency to the jury, G.S. 20-71.1, but when the only positive evidence relating to agency is that offered by defendants tending to show that the driver was on a purely personal mission at the time of the collision, the owner is entitled to an instruction that the jury should answer the issue of agency in the negative if they should find the facts to be as the positive evidence tends to show, and this without special request therefor. *Passmore v. Smith*, 717.

§ 70. Indictment and Warrant for Driving While under Influence of Intoxicating Liquor or Drugs.

A defendant who goes to trial on a warrant charging him with operating a motor vehicle upon a public highway "while under the influence of intoxicating liquor — narcotic drugs" may not for the first time on appeal raise the question of duplicity. *S. v. Strouth*, 340.

§ 71. Competency and Relevancy of Evidence in Prosecutions for Driving Under Influence of Intoxicants or drugs.

An officer who is present at the scene of an arrest for the purpose of assisting in it if necessary is an "arresting officer" within the meaning of G.S. 20-139.1(a), and testimony by such officer as to the result of a Breathalyzer test which he conducted is incompetent. *S. v. Stauffer*, 358.

§ 75. Verdict in Prosecutions for Drunken Driving.

Where the case is tried solely on the controverted question of whether defendant was operating his motor vehicle on a public street while under the influence of intoxicating liquor, the jury's verdict of guilty will be construed with reference to the evidence, the theory of trial and the charge of the court, obviating any ambiguity in the warrant in charging operation of a vehicle while under the influence of intoxicating liquor or narcotics. *S. v. Green*, 785.

BANKS AND BANKING.

§ 10. Paying Checks of Depositor.

The payee of a check as well as the drawer, has the right to expect the bank to pay the check in accordance with its tenor, and when the bank pays the check to an agent of the payee it is necessary to the bank's protection that it ascertain that the agent is authorized to receive payment for the payee, and the drawer has no right, as against the payee, to direct its payment to anyone else. *Construction Co. v. Trust Co.*, 648.

BASTARDS.

§ 7. Instructions in Prosecutions for Wilful Refusal to Support.

In this prosecution of defendant for wilful failure to support his illegiti-

BASTARDS—*Continued.*

mate child, the court's definition of the term "wilful" *is held* without error. *S. v. Peek*, 639.

BILL OF DISCOVERY.

§ 2. Examination of Adverse Party to Obtain Information to Draw Pleadings.

Motion for order to inspect writings under G.S. 8-89 is addressed to the discretion of the trial court and the court's ruling thereon will not be disturbed in the absence of a showing of abuse of discretion. *Ins. Co. v. Sprinkler Co.*, 134.

BILLS AND NOTES.

§ 10. Presentment and Acceptance.

Ordinarily, a draft must be accepted by the drawee in order to bind him, but where the drawee is also the drawer, or the draft is issued by the drawee's duly authorized agent, the draft becomes in effect a promissory note, and acceptance is not required. *Trust Co. v. Ins. Co.*, 279.

In this case it was stipulated that the general agent of defendant insurer was authorized to draw the draft in question and that he issued its draft payable to the insured and insured's mortgagee, and that plaintiff bank cashed the draft upon their endorsement. *Held:* Acceptance was not required, and insurer is liable to the bank on the draft. *Ibid.*

The acceptance of an instrument operates as a promise of the drawee to pay it, G.S. 25-139, while payment is the performance of that promise, which ends the negotiable life of the instrument, and the two are fundamentally different so that the payment of a check by the drawee bank cannot operate as an acceptance and cannot be the basis of liability of the bank to the payee. *Construction Co. v. Trust Co.*, 648.

§ 14. Payment and Discharge.

The payment of a check by a bank to the agent of the payee at the request of the drawer may result in liability on the part of the bank to the payee if the agent was not authorized to receive payment by the payee. *Construction Co. v. Trust Co.*, 648.

§ 20. Issuing Bad Checks.

A warrant charging that defendant did "issue" and "pass" a worthless check cannot be held defective in failing to aver that defendant delivered the check to another, since the words "issue" and "pass", in context, import delivery. *S. v. Beaver*, 115.

Evidence tending to show that defendant issued checks to a named payee, that the checks were not post dated, that there was no understanding that the payee would hold them at the time of delivery, but that a request was made the day thereafter that the payee hold them, which the payee did for a time and then presented them to the drawee bank, which refused payment, *is held* sufficient to overrule nonsuit in a prosecution under G.S. 14-107. *Ibid.*

BOUNDARIES.

§ 9. Sufficiency of Description and Admissibility of Parol.

A contract obligating the vendor to convey a 20-acre tract in a named township, the contract being executed in a county embracing such township,

BOUNDARIES—*Continued.*

together with a stipulation that the lands referred to were identical with those described in a certain deed duly registered at a specified page and book, *held* a sufficient description to permit location by parol. *Quinn v. Thigpen*, 720.

BURGLARY AND UNLAWFUL BREAKINGS AND ENTERINGS.

§ 4. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendant's identity of the perpetrator of the offense of feloniously breaking and entering held sufficient to be submitted to the jury. *S. v. Roux*, 555.

Evidence tending to show that defendant was a passenger in a vehicle driven by the owner and that articles which had been stolen from a building sequent to a breaking were found on the back floor board, *held* insufficient to be submitted to the jury on the question of defendant's guilt of felonious breaking and larceny. *S. v. Hopson*, 643.

§ 5. Instructions.

In charging the law applicable to breaking and entering or entering with intent to commit a felony, it is not required that the court charge that the breaking and entering must be unlawful, since a breaking and entering with intent to commit a felony is perforce unlawful. *S. v. Stubbs*, 274.

§ 7. Punishment.

If any person feloniously breaks and enters or enters any storehouse, shop or other building where personal property is situate, with intent to commit the felony of larceny G.S. 14-72 does not apply, and such person is guilty of a felony notwithstanding the specified chattel taken from the building has a value of less than $200. *S. v. Brown*, 55.

A person who breaks or enters a building with intent to commit the crime of larceny is guilty of a felony regardless of whether he succeeds in stealing property or whether he actually steals property of a value not exceeding $200; it is only when the indictment and evidence disclose that the breaking or entering was with the intent to steal specific identifiable property of the value of $200 or less that the offense is a misdemeanor. *S. v. Smith*, 747.

CARRIERS.

§ 5. Rates and Tarriffs.

Evidence held to support conclusion that differential in rates over approximate equal distances was not unreasonable because of "single line" and not "joint line" operations. *Utilities Comm. v. Teer Co.*, 366.

COMPROMISE AND SETTLEMENT.

The admission in evidence of a letter containing an offer of compromise cannot be prejudicial when the court resolves the question of the amount of damages in favor of plaintiff. *Anderson v. Ins. Co.*, 309.

CONSTITUTIONAL LAW.

§ 1. Supremacy of Federal Constitution.

Decisions of state courts in regard to the requisites and sufficiency of a search warrant are subject to the overriding authority of the U. S. Supreme

CONSTITUTIONAL LAW—*Continued.*

Court in determining the citizen's rights under the Fourth and Fourteenth Amendments to the Federal Constitution. *S. v. Myers*, 581.

§ 10. Judicial Powers.

The courts must construe a statute in accordance with the expressed legislative intent. *Barnhardt v. Cab Co.*, 419.

§ 24. Due Process in Civil Actions.

There can be no adjudication of the rights of a party unless such party is a party to the proceeding in which such liability is determined and is given an opportunity to be heard. *Ingram v. Ins. Co.*, 404; *Russell v. Mfg. Co.*, 531.

While ordinarily no judgment *in personam* can be rendered against a defendant not personally served with summons within the jurisdiction, this rule is not absolute, and there may be a valid substitute service upon a defendant having such contacts within the jurisdiction that such service does not offend "the traditional notions of fair play and substantial justice." *Thomas v. Frosty Morn Meats*, 523.

§ 26. Full Faith and Credit to Foreign Judgments.

Our courts are not required to give a foreign decree any greater effect than it has in the state in which rendered, and therefore an interlocutory order awarding custody of the children in a divorce action pending the hearing on the merits does not preclude our courts from determining custody in *habeas corpus*, all parties being before the court. *In re Craigo*, 92.

In an action on a foreign judgment, such judgment must be given the same efficacy as it has in the jurisdiction rendering it, Constitution of the United States, Art. IV, § 1, and a duly authenticated transcript imports verity and validity with the presumption in favor of jurisdiction, and the burden is upon defendant to avoid the judgment by showing that the court rendering it had no jurisdiction as to the subject matter or of the person, or other vitiating matter. *Thomas v. Frosty Morn Meats*, 523.

§ 30. Due Process in Criminal Actions in General.

The fundamental law secures to every defendant the right to a speedy trial. *S. v. Hollars*, 45.

The constitutional right to a speedy trial extends to convicts and prisoners. *Ibid.*

Neither the constitution nor the statutes attempts to fix the exact time in which a trial must be had in order to comply with the constitutional requirement of a "speedy" trial, and in the practical application of this relative term four factors are to be considered: the length of the delay, the reason for the delay, prejudice to defendant, and waiver by defendant, the burden being upon defendant to show that the delay was due to the neglect or wilfulness of the State. *Ibid.*

Record held not to support conclusion that defendant was denied constitutional right to speedy trial. *Ibid.*

Whether admission in evidence of confession constitutes violation of constitutional rights see Criminal Law § 71.

Nolle prosequi with leave does not deprive defendant right to speedy trial. *S. v. Klopfer*, 349.

The Federal decisions determining a citizen's rights under the Fourth and Fourteenth Amendments to the Federal Constitution are controlling upon the states. *S. v. Myers*, 581.

CONSTITUTIONAL LAW—*Continued.*

§ 31. Right of Confrontation.

A defendant may not waive his right to be present at any stage of the trial in a capital prosecution, but for a felony less than capital defendant himself may waive the right, and in a misdemeanor the right may be waived by defendant through his counsel with the consent of the court, and in such event the court may enter appropriate sentence, provided no corporal punishment, active or suspended, is imposed. *S. v. Forebee*, 606.

Where, during the testimony of a witness, the prosecution asks for and receives permission to withdraw the witness to be recalled later, but closes its case without recalling the witness, defendant, if he wishes to assert his right to cross-examine the witness, must request the court to have the witness return to the stand, and when he fails to do so, he may not assert that he was deprived of his constitutional right of confrontation. *S. v. Gattison*, 669.

§ 32. Right to Counsel.

The appointment of counsel for a defendant charged with a misdemeanor is within the sound discretion of the presiding judge, and no abuse of discretion is shown in this case in the refusal to appoint counsel for a certified public accountant fined $25.00 upon conviction of a misdemeanor. *S. v. Bennett*, 755.

§ 36. Cruel and Unusual Punishment.

Punishment which does not exceed the limits fixed by statute cannot be cruel or unusual in the constitutional sense. *S. v. Stubbs*, 295.

CONTEMPT OF COURT.

§ 5. Orders to Show Cause.

One judge may not refer hearing on order to show cause to another judge without notice to contemnor. *Teague v. Teague*, 320.

CONTRACTS.

§ 3. Definiteness and Certainty of Agreement.

An agreement relating to future undertakings must specify all of the essential and material terms and leave nothing to be agreed upon as the result of future negotiations. *Young v. Sweet*, 623.

§ 7. Contracts in Restraint of Trade.

Evidence permitting the inferences that the parties executed a new contract of employment giving the employee an advancement and providing that as a part of this contract the employee should not engage in business in competition with the employer within a specified area within a specified time after termination of the employment, is sufficient to support the jury's findings that the covenant was supported by a valuable consideration. *Greene Co. v. Arnold*, 85.

A covenant by an employee not to engage in business in competition with the employer after termination of the employment is in partial restraint of trade and to be enforceable must be in writing, be supported by valuable consideration, and be reasonable as to time and territory. *Ibid.*

A covenant by an insurance adjuster not to engage in business in competition with the employer within 75 miles of the office of the employer at which the employee was manager, for a period of four years after termination of

CONTRACTS—*Continued.*

the employment, *held* not void as being unreasonable as to time or territory. *Ibid.*

§ 10. Contracts Limiting Liability for Negligence.

The rule that a common carrier or a public utility may not contract against its liability for negligence is applicable to warehousemen, G.S. 27-7, and such rule precludes also a stipulation limiting liability for loss or damage to an amount which the warehouseman knows, or in the exercise of ordinary judgment should know, is greatly less than the value of the articles received by it. *Jordan v. Storage Co.*, 156.

§ 12. General Rules of Construction.

In the construction of contracts, words which are in common use will be given their ordinarily accepted meaning in the absence of evidence disclosing an intent that they be given their technical or legal meaning. *Ins. Co. v. Ins. Co.*, 430.

CORPORATIONS.

§ 2. Domestication of Foreign Corporations.

Where a foreign corporation has complied with the statutory requirements for domestication it is not required to file with the Secretary of State the certificate prescribed by G.S. 55-138, nor is it required to notify the Secretary of State of its principal office in this State. *Surety Co. v. Transit Co.*, 756.

§ 17. Transfer of Stock.

Under the Uniform Stock Transfer Act an unlimited endorsement and delivery of a certificate of stock to another, or the delivery of it to him together with a separate document containing a written assignment or a power of attorney to him for the transfer of the stock, clothes such other with indicia of ownership, and a bona fide purchaser for value will take the shares free from any lack of actual authority. *Patterson v. Lynch, Inc.*, 489.

COUNTIES.

§ 2.1. Zoning Regulations.

Certiorari to review the proceedings and order of a county Board of Adjustment gives the Superior Court jurisdiction to review the proceedings for error of law and to give relief against arbitrary, oppressive action or abuse of authority. *Austin v. Brunnemer*, 697.

Where a zoning ordinance prohibits construction or use of any building in the zoned area except those specifically permitted or authorized, a business not so specified is prohibited in the zone, notwithstanding that other portions of the ordinance make no provisions in regard to such use. *Ibid.*

The Superior Court, on *certiorari* from the denial of a building permit for a prohibited use, may order the issuance of the permit only if the applicant has changed his plans from a prohibited use to one that is permitted, and the proposed structure otherwise conforms to the zoning requirements. *Ibid.*

Where a zoning ordinance specifically authorizes the Board of Adjustment to permit a variance from the terms of the ordinance in its discretion, subject to specific limitations, upon a showing of special conditions upon which a literal enforcement of the ordinance would result in undue hardship, the Board of Adjustment has authority to allow a proper variance in its discre-

COUNTIES—*Continued.*

tion without change in or modification of the ordinance, and denial of such application on the ground that the intended use violates the ordinance and that no sufficient reason had been shown why the Board should modify the ordinance, requires remand for consideration of the application by the Board in the exercise of its discretion rather than as a strict legal right. *Ibid.*

COURTS.

§ 2. Jurisdiction of Courts in General.

The court should dismiss an action immediately it appears the real party in interest is not before it. *Howard v. Boyce,* 572.

§ 6. Appeals to Superior Court from Clerk.

On appeal to the Superior Court from order of the clerk removing the guardian of an incompetent for cause, the jurisdiction of the Superior Court is derivative and it may review the record only for errors of law. *In re Simmons,* 702.

§ 9. Jurisdiction After Judgment or Orders of Another Superior Court Judge.

One Superior Court judge cannot modify prior order of another awarding custody of children when there is no showing of change of condition. *Stanback v. Stanback,* 72.

§ 20. Conflict of Laws — Laws of This and Other States.

In an action to recover for negligent injury inflicted in another state, the law of the state in which the accident occurred governs the rights and duties cast upon the parties by law, and the law of this State governs the procedure. *Young v. R. R.,* 458.

In a prosecution for breaking and entering committed in this State, the sufficiency of a search warrant issued in another state sequent to which some of the stolen goods were recovered there, is to be determined by the law of this State. *S. v. Myers,* 581.

CRIME AGAINST NATURE.

§ 1. Elements and Essentials of Offense.

Contention of defendant that homosexuality is a disease is not a defense. *S. v. Stubbs,* 295.

Specific intent to commit an unnatural sexual act is an essential element of the offense defined by G.S. 14-202.1. *S. v. Richmond,* 357.

§ 2. Prosecutions.

The indictment in this case *held* sufficient to charge defendant with committing the crime against nature with another male. *S. v. Stubbs,* 295.

When there is evidence tending to show that defendant took immoral, improper and indecent liberties with a minor, but not evidence of the essential specific intent, nonsuit must be entered. *S. v. Richmond,* 357.

CRIMINAL LAW.

§ 1. Nature and Elements of Crime in General.

Contention that homosexuality is a disease is not defense to charge of crime against nature. *S. v. Stubbs,* 295.

CRIMINAL LAW—*Continued.*

§ 9. Aiders and Abettors.

Evidence held to show defendant's constructive presence, ready to render aid if necessary, when robbery was committed, rendering him guilty as aider and abettor. *S. v. Sellers*, 734.

§ 14. Jurisdiction — Commission of Offense in This State.

In a prosecution for an offense committed in this State, our laws control in determining the validity of a search warrant issued and served in another state sequent to which the stolen goods were discovered in such other state. *S. v. Myers*, 581.

§ 21. Preliminary Proceedings.

The evidence in this case shows that the warrant was read to and served upon defendant, and defendant's contention to the contrary *held* precluded by waiver in failing to make objection until after verdict. *S. v. Keith*, 263.

§ 23. Plea of Guilty.

Where the evidence supports the court's findings that defendant, on trial for murder in the first degree, freely and understandingly entered a plea of guilty of murder in the second degree, the acceptance of the plea by the court will not be disturbed. *S. v. Coleman*, 355.

§ 25. Plea of Nolo Contendere.

Unawareness at the time of entering a plea of *nolo contendere* of asserted error in connection with conviction under a prior indictment in a companion case is insufficient ground for nullifying the plea of *nolo contendere*. *S. v. Sellers*, 734.

§ 26. Plea of Former Jeopardy.

Plea of former jeopardy is not apposite upon a retrial obtained by defendant pursuant to G.S. 15-217. *S. v. Hollars*, 45.

Statement of the solicitor that the State would not ask for conviction of the capital offense charged, but only for a less degree of the crime, is tantamount to a verdict of not guilty of the capital offense and, upon the granting of a new trial, the State may prosecute only for less degrees of the crime. *S. v. Pearce*, 234.

Mistrial for serious illness of juror will not support plea of former jeopardy in subsequent prosecution. *S. v. Pfeifer*, 790.

§ 30. Nolle Prosequi.

After a *nolle prosequi*, the cause can be replaced on the docket by the solicitor only with the consent of the court, while a *nolle prosequi* with leave implies the consent of the court, and the solicitor may have the case restored for trial without further order. *S. v. Klopfer*, 349.

In this prosecution of defendant for trespass, the jury was unable to agree and a mistrial was ordered. Thereafter the solicitor took a *nolle prosequi* with leave. *Held:* Defendant may not object thereto on the ground that the proceeding denied him his constitutional right to a speedy trial, since the defendant does not have the right to compel the State to prosecute him if it elects not to do so. *Ibid.*

§ 55. Tests for Intoxication.

An officer who is present at the scene of an arrest for the purpose of assisting in it if necessary is an "arresting officer" within the meaning of G.S.

CRIMINAL LAW—*Continued.*

20-139.1(a), and testimony by such officer as to the result of a Breathalyzer test which he conducted is incompetent. *S. v. Stauffer*, 358.

§ 71. Confessions.

The competency of an extra-judicial confession is a preliminary question to be determined by the trial court upon the *voir dire*. *S. v. Logner*, 238; *S. v. Keith*, 263; *S. v. Pressley*, 578.

A voluntary confession is admissible in evidence, and the fact that the confession was made in the presence of an officer does not render it incompetent if the confession was, in fact, voluntary. *S. v. Hines*, 1.

Where the trial court finds upon the *voir dire* from conflicting evidence that the confession in question was freely and voluntarily made after defendant had been advised of his right not to speak and his right to have counsel, and that defendant was at that time not so intoxicated as to amount to mania, the findings, being supported by evidence, are conclusive on appeal. *S. v. Logner*, 238.

The trial court's findings of fact upon the *voir dire* with respect to the voluntariness of a confession are conclusive when supported by competent evidence, and therefore when the evidence supports the court's findings that defendants, respectively, were warned of their right not to make any statement, their right to counsel, and that any statement made by them might be used against them, and that their confessions were freely and voluntarily made without inducement or threat, the admission of the confessions, respectively, will not be held for error, even though there be evidence to the contrary. *S. v. Hines*, 1.

A confession is voluntary only if, in fact, it is voluntarily made. *S. v. Keith*, 263.

The fact that a defendant was illegally held at the time he made a confession, standing alone, is not sufficient to render his confession, otherwise voluntary, incompetent as a matter of law. *S. v. Hines*, 1.

The voluntariness of a confession is to be determined by the trial court upon the *voir dire* in the absence of the jury, and the evidence and findings in regard to voluntariness are not for the consideration of the jury and should not be referred to in the jury's presence. *S. v. Walker*, 269.

A statement by an officer to defendant that others, jointly indicted, had talked and said that they had gone to the store in question and robbed the proprietor, and that the officer wanted to know what defendant had to say about it, does not render defendant's ensuing confession involuntary as a matter of law, the statement by the officer being true. *S. v. Hines*, 1.

The fact that counsel is not present when defendant makes a voluntary confession does not render the confession incompetent when it appears that the defendant had been advised of his right to have counsel and requested none. *Ibid.*

The fact that one of the officers present at the time of the making of a confession was not examined upon the *voir dire* does not render the confession incompetent when the defendant does not ask for permission to examine the officer. *Ibid.*

Where more than two months transpires between defendant's incarceration on a capital charge and the appointment of counsel, admissions or confessions obtained from defendant during this interval after repeated questioning must be held incompetent. *S. v. Pearce*, 234.

Intoxication does not render a confession inadmissible unless at the time defendant is so drunk as to be unconscious of the meaning of his words, and

intoxication to a degree less than mania relates to the credibility of the statement, and the trial court correctly so instructs the jury. *S. v. Logner*, 238.

Upon the *voir dire* the court heard evidence that defendant voluntarily made the confession, later admitted in evidence, without force, fear or favor. Defendant elected not to introduce any evidence upon the *voir dire*, but contended that he had never made any confession. *Held:* The admission of the confession in evidence was proper. *S. v. Keith*, 263.

Objection that the court did not find the facts upon which it concluded that the confession offered in evidence was voluntary *held* inapposite when defendant contends that he had made no confession and does not contest the State's evidence supporting the conclusion of voluntariness. *Ibid.*

Notwithstanding there is no evidence tending to vitiate a confession at the time it is admitted in evidence, if its involuntariness becomes apparent thereafter from testimony of a State's witness, it should be stricken on motion. *S. v. Pressley*, 663.

Where it appears that prior voluntary statements made by defendant have thoroughly implicated him in the commission of crime and caused the filing of charges, the fact that a later statement, not necessary to complete the prior confession, may have been induced by the promise of leniency if the goods stolen were recovered, does not vitiate the prior confession, the stolen goods not having been recovered or introduced in evidence. *Ibid.*

A confession is presumed voluntary and competent, and if defendant does not object to the admission in evidence of testimony of incriminating statements made by him, there is no occasion for findings upon a *voir dire* to determine voluntariness. *S. v. Stubbs*, 274.

It is not error for the court, upon the *voir dire*, to admit in evidence defendant's FBI fingerprint record in order to show defendant's familiarity with criminal proceedings as bearing upon the voluntariness of his confession, provided the matter is heard only in the absence of the jury. *S. v. Pressley*, 578.

Where the court finds upon supporting evidence that defendant was advised of his right to counsel, his right to refuse to make any admission, that any statements he made could be used against him at the trial, his right to use the telephone, and his right to testify on preliminary inquiry, the court's action in admitting his confession in evidence will not be disturbed. *Ibid.*

The evidence, though conflicting, *held* sufficient to support the court's findings that defendant's confession was voluntarily made. *S. v. Lynch*, 584.

Where the record affirmatively shows that defendant sent for officers after he had killed a man and told them about it on the way to the scene, there is nothing to indicate that his statements were not voluntary and competent. *S. v. Camp*, 626.

§ 74. Acts and Declarations of Companions, Codefendants and Coconspirators.

A declaration made by one defendant in the presence of the others in perpetrating the common offense is competent as against the other defendants. *S. v. Hines*, 1.

§ 80. Evidence of Character of Defendant.

Where a defendant takes the stand as a witness he may be cross-examined with respect to prior criminal convictions and prior indictments returned against him for similar or like offenses for the purpose of impeaching his credibility as a witness. *S. v. Brown*, 55.

CRIMINAL LAW—*Continued.*

§ 83. Cross-Examination.

The asserted refusal of the court to permit one defendant to cross-examine the State's witness will not be held for prejudicial error when the record discloses that counsel for another defendant was allowed full cross-examination of the witness which enured to the benefit of each of defendants, and it appears that all witnesses were fully examined and cross-examined and all features of the case fully developed. *S. v. Hill*, 103.

§ 86. Time of Trial and Continuance.

A motion for continuance rests in the sound discretion of the trial court, and when it appears that a medical expert has testified from his examination of defendant that defendant was able to stand trial and defendant's counsel has presented a written instrument waiving appearance and authorizing counsel to enter a plea of guilty, no abuse of discretion is shown in refusing motion for continuance. *S. v. Ferebee*, 606.

§ 87. Consolidation and Severance of Counts for Trial.

Where several defendants are jointly charged with a crime committed by them in concert, their respective motions for a separate trial are addressed to the sound discretion of the trial court, and the court's denial of the motions will not be held for error in the absence of a showing of abuse of discretion. *S. v. Hines*, 1.

§ 90. Admission of Evidence Competent for Restricted Purpose.

One defendant is not entitled to object to the admission in evidence of the confession of another defendant when the court restricts its admission to the question of the guilt of the defendant making it and instructs the jury not to consider it as against the others. *S. v. Hines*, 1.

Where two defendants are jointly tried without objection, the admission in evidence of the confession of one of them which is competent against the defendant making it, cannot entitle the other defendant to a new trial, even though the confession implicates him, when the court instructs the jury that the confession should be considered only against that defendant who made it. *S. v. Lynch*, 584.

Where the written confession of one defendant charging that the other was the actual perpetrator of the offense is admitted in evidence against the defendant making it, but an officer is thereafter permitted to testify that the second defendant knew that the officer had the statement and that the officer had read that part of the statement which identified the second defendant as being a participant in the robbery, the admission of the testimony must be held for prejudicial error on the second defendant's appeal, notwithstanding the court instructs the jury that the confession was to be considered only against the defendant making it. *Ibid.*

§ 91. Withdrawal of Evidence.

Where a witness competently testifies that defendant offered to sell him a specified chattel, the fact that the witness incompetently adds that the chattel had been taken from a specified place, is not ground for a new trial when the court immediately withdraws the incompetent part of the testimony and instructs the jury not to consider it, the fact that the chattel had been stolen from the place specified being supported by ample, competent evidence. *S. v. Brown*, 55.

CRIMINAL LAW—*Continued.*

§ 94. Expression of Opinion on Evidence by Trial Court During Progress of Trial.

G.S. 1-180 governs not only the charge but prohibits the trial court from expressing an opinion on the evidence in the hearing of the jury at any time during the trial. *S. v. Walker*, 269.

The court, in the presence of the jury, interrogated an officer in regard to the voluntariness of a defendant's confession which incriminated defendant, and then ruled in the presence of the jury that the defendant's confession was voluntary and competent. *Held:* The occurrence entitles defendant to a new trial for prejudicial error of the court in expressing an opinion on the evidence. *Ibid.*

The court's admonition to defendant's counsel while counsel was interrogating defendant as a witness, while infelicitous in the choice of words, *held* not to have prevented defendant from presenting all of his evidence or to have prejudiced defendant in the eyes of the jury. *S. v. Davis*, 633.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On motion for nonsuit, the evidence must be taken in the light most favorable to the State and it it entitled to the benefit of every reasonable inference to be drawn therefrom. *S. v. Beaver*, 115; *S. v. Roux*, 555.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

If there is evidence, circumstantial, direct, or a combination of both, amounting to substantial evidence of each material aspect of the charge, motion to nonsuit should be denied, it being the province of the jury to determine whether the circumstantial evidence excludes every reasonable hypothesis of innocence. *S. v. Bogan*, 99.

The sufficiency of circumstantial evidence to be submitted to the jury is a question of law for the court to be determined upon the basis of whether there is substantial evidence of all material elements of the offense charged, it being the province of the jury to determine if the circumstantial evidence is such as to exclude every reasonable hypothesis except that of defendant's guilt. *S. v. Roux*, 555.

§ 103. Withdrawal of a Count or Degree of Crime from Jury.

The court's election to submit only the question of defendant's guilt of the lesser charge is equivalent to a verdict of not guilty of all other charges included in the bill of indictment. *S. v. Adams*, 406.

§ 106. Instructions on Burden of Proof.

The court is not required to define "reasonable doubt" in its charge to the jury. *S. v. Potts*, 117.

A charge on the defense of alibi that in order to sustain a conviction the State is required to prove beyond a reasonable doubt that defendant was present at the time and place the offense was committed and that defendant participated in its commission is sufficient. *S. v. Malpass*, 753.

§ 111. Charge on Character Evidence and Credibility of Witnesses.

It is not prejudicial error for the trial court to fail to charge the jury that it should scrutinize the testimony of accomplices when defendant's counsel makes no request for special instructions upon this subordinate feature. *S. v. Roux*, 555.

CRIMINAL LAW—*Continued.*

§ 112. Charge on Contentions of Parties.

Ordinarily, objection to statement of the contentions and to the court's review of the evidence must be made before the jury retires. *S. v. Ford*, 743.

When the court states defendant's contention that if he were guilty the State would have also prosecuted his minor accessory, it will not be held for prejudicial error that the Court states the opposing contention supported by evidence, that the accessory would be dealt with in the juvenile court and that the minor had only done what the older defendant had told him to do. *Ibid.*

§ 118. Sufficiency and Effect of Verdict.

A verdict will be interpreted with reference to the charge, the evidence, the theory of trial, and the instructions of the court. *S. v. Green*, 785.

§ 120. Acceptance of Verdict.

The fact that the clerk receives the verdict of guilty as to one defendant and then the verdict of guilty as to the other before inquiring as to whether the verdict was the verdict of all, does not entitle the appealing defendant to a new trial. *S. v. Higgins*, 589.

§ 121. Arrest of Judgment.

The arrest of judgment vacates the verdict and sentence and permits the State, if so advised, to proceed against the defendant upon a sufficient bill of indictment. *S. v. Fowler*, 528.

A motion in arrest of judgment may be allowed only for fatal defect appearing on the face of the record. *S. v. Higgins*, 589; *S. v. Sellers*, 734.

§ 122. Setting Aside Verdict and Ordering Mistrial in General.

The allowance or refusal of a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court. *S. v. Hines*, 1; *S. v. Brown*, 55.

In a case less than capital, the setting aside of the verdict and the ordering of a mistrial for serious illness of a juror is within the sound discretion of the trial court, reviewable only in case of gross abuse, and such proceeding will not support a plea of former jeopardy upon subsequent trial. *S. v. Pfeifer*, 790.

Where it appears that defendant in question did not object to the introduction of the extrajudicial confessions of his codefendants, and it further appears that each confession was restricted to the defendant making it, and that the court's charge to the jury does not appear of record, the refusal of a motion for mistrial on the ground that the admission in evidence of the confessions of his codefendants was prejudicial will not be disturbed, it being presumed that the court correctly limited the admission of the confessions, and therefore, that there was no abuse of discretion in denying the motion. *S. v. Hines*, 1.

§ 131. Severity of Sentence.

The 1933 Amendment to G.S. 14-18, providing that punishment for involuntary manslaughter should be in the discretion of the court and that the defendant may be fined or imprisoned, or both, does not provide specific punishment and therefore the punishment is governed by the limits prescribed in G.S. 14-2 and G.S. 14-3, and a sentence of 18 to 20 years is in excess of that permitted by statute. *S. v. Adams*, 406.

CRIMINAL LAW—*Continued.*

Where the judgment of the court is excessive and the cause remanded for proper judgment, defendant should be given credit for service of any part of the sentence so vacated. *S. v. Higgins*, 589.

Where cases are consolidated for judgment, such judgment cannot exceed the maximum for any one offense. *S. v. Hart*, 671.

§ 136. Revocation of Suspension of Judgment or Sentence.

Where the solicitor's bill of particulars in proceedings to activate a suspended sentence specifies the conviction of defendant in a criminal prosecution tried at that term in the Superior Court, the Court has judicial knowledge of its own proceedings and evidence of such conviction is not required to support order putting into execution the suspended sentence, and the fact that the court in activating the sentence admitted evidence and made findings with reference to other prior convictions of defendant in a municipal court is immaterial. *S. v. Hill*, 107.

The burden is upon the State to show by evidence reasonably satisfactory to the court that defendant has violated one of the conditions of his probation in order for the court to order the probation revoked and the sentence previously suspended to be activated. *S. v. Seagraves*, 112.

Actions of a defendant which violate the instructions of his probation officer but which do not constitute a violation of the conditions of suspension, do not warrant order revoking probation and activating the prior suspended sentence, and breach of condition of good behavior is conduct which constitutes a violation of some criminal law. *Ibid.*

§ 139. Nature and Grounds of Appellate Jurisdiction in Criminal Cases in General.

The Supreme Court will grant defendant a new trial when it appears upon the face of the record that defendant has been deprived of a constitutional right in the admission of an involuntary confession, notwithstanding no objection to the evidence appears in the record. *S. v. Pearce*, 234.

The Supreme Court will review the record proper for fatal defect appearing upon its face, and therefore will arrest judgment *ex mero motu* when it appears that the conviction was upon a fatally defective indictment. *S. v. Fowler*, 528.

On appeal from sentence imposed upon defendant's voluntary plea of guilty to the crime charged, the Supreme Court may determine only whether error appears on the face of the record proper and whether the sentence is in excess of the statutory limit. *S. v. Darnell*, 640; *S. v. Green*, 785.

§ 143. Right of Defendant to Appeal.

The unlimited right of a defendant to appeal is easily abused by an indigent defendant who may appeal without cost to himself. *S. v. Darnell*, 640.

§ 148. Docketing of Transcript of Record in Supreme Court.

A defendant who has obtained a *certiorari* must perfect his appeal and file a proper case on appeal within the time required or the proceedings will be dismissed. *S. v. Potts*, 117.

§ 151. Conclusiveness of Record and Presumption in Regard to Matters Omitted.

Where the charge of the court is not set out in the record it will be presumed that the court correctly instructed the jury on every phase of the case, both with respect to the law and the evidence. *S. v. Hines*, 1.

The Supreme Court will take judicial notice that the party appealing from the execution of a suspended judgment is the same as the appellant in a companion criminal prosecution. *S. v. Hill*, 107.

§ 154. Necessity for and Form of Exceptions and Assignments of Error in General.

An exception should indicate the subject and ground of defendant's objection. *S. v. Hill*, 107.

An assignment of error to the judgment presents only the face of the record for review. *Ibid.*

Exceptions which first appear in the tendered statement of the case on appeal are ineffectual. *S. v. Ferebee*, 606.

No objection or exception need be taken in any trial or hearing with reference to questions propounded to a witness by the court. *S. v. Walker*, 269.

An appeal is itself an exception to the judgment, presenting the face of the record for review. *S. v. Darnell*, 640.

§ 155. Necessity for and Form of Exceptions and Assignments of Error to Evidence.

Mere notation of an exception after the completion of the examination of the State's witness and again after completion of the cross-examination by counsel of another defendant is insufficient to support an assignment of error upon the asserted ground that the court refused to allow appealing defendant to cross-examine the witness. *S. v. Hill*, 103.

An objection to the admission of evidence is necessary to present defendant's contention that the evidence was incompetent. *S. v. Camp*, 626.

§ 156. Exceptions and Assignments of Error to Charge.

An assignment of error to the failure of the court to charge upon a specified aspect of the case should be supported by a statement of the instructions which appellant considers appropriate in relation to the facts in evidence. *S. v. Hill*, 103.

An assignment of error to the failure of the court to charge the jury more fully as to an aspect of the case, and apply the law to the evidence adduced thereon, should set out defendant's contentions as to what the court should have charged. *S. v. Malpass*, 753.

§ 159. The Brief.

Assignments of error not brought forward and discussed in the brief are deemed abandoned. *S. v. Stubbs*, 295; *S. v. Sellers*, 734.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

In this prosecution for forgery, in which the State introduced evidence of defendant's guilt of forging and uttering four checks, the introduction in evidence of two other checks which had been forged, but which were not referred to in the indictment and which were not connected with them by evidence, and which the court thereafter instructed the jury not to consider, *held* not prejudicial. *S. v. Welch*, 291.

The exclusion of evidence cannot be held prejudicial when the record fails to show what the witness would have testified if permitted to answer. *S. v. Green*, 785.

CRIMINAL LAW—*Continued.*

§ 168. Review of Judgments on Motions to Nonsuit.

In reviewing the trial court's denial of motion to nonsuit, all the evidence, including any incompetent evidence admitted, must be considered in the light most favorable to the State. *S. v. Walker*, 269.

§ 173. Post Conviction Hearing.

Once a trial has been declared a nullity in a post-conviction proceeding, defendant may not be allowed to withdraw his petition and reinstate the vacated sentence. *S. v. Hollars*, 45.

DAMAGES.

§ 2. Compensatory Damages in General.

The injured party may recover for all medical expenses actually incurred by or for him, notwithstanding his employer may have paid or provided for the payment of such expenses. *Young v. R. R.*, 458.

§ 6. Liquidated Damages.

Where the person making an increased bid for municipal property deposits the required sum under a written contract that if he failed to comply with his bid the deposit should be forfeited as liquidated damages, and that the bidder should have no further rights in the property, and the city would be free to sell the property, *held*, the provision for the forfeit of the deposit as liquidated damages precludes the city from recovering in addition thereto any further loss sustained in the resale of the property. This result would not be affected if the forfeiture be deemed a penalty, since in this event the measure of damages is the actual loss not exceeding the penalty fixed. *Kinston v. Suddreth*, 618.

§ 14. Burden of Proof and Sufficiency of Evidence of Damages.

Compensatory damages may not be based on mere speculation devoid of factual basis. *Gay v. Thompson*, 394.

Negligence is not presumed from the mere fact that a pedestrian was struck by defendant's vehicle, and plaintiff has the burden of showing negligence and that such negligence caused injuries resulting in death, and not leave in speculation whether intestate died from such injuries or from alcoholism or epileptic seizure. *Battle v. Chavis*, 778.

§ 15. Instructions on Measure of Damages.

Where there is evidence that plaintiff's hospital expenses were paid out of hospital insurance carried for the benefit of employees, an instruction that plaintiff's right to medical expenses was limited to the actual monetary losses he had suffered, must be held for error. *Young v. R. R.*, 458.

Where there is evidence of concurring negligence on the part of defendant and a third person, an instruction that plaintiff was entitled to recover compensation for injuries which were the proximate result of negligence on the part of defendant must be held for prejudicial error as permitting allocation of damages in accordance with the negligence of the respective parties. *Ibid.*

DEATH.

§ 1. Proof of Cause of Death.

Certified copy of death certificate is competent as to cause of death but

DEATH—*Continued.*

not as to cause of accident. *Branch v. Dempsey*, 733; Evidence held sufficient to support inference that death was result of collision. *Ibid.*

Plaintiff has the burden of showing that the injuries sustained by his intestate as the result of defendant's negligence were the cause of intestate's death. *Battle v. Chavis*, 778.

§ 3. Nature and Grounds of Action for Wrongful Death.

Where the husband survives the wife only a short time after the accident causing the death of both, and children of the marriage survive, *held* the administrator of the wife may maintain an action against the executor of the husband's estate to recover damages for the wrongful death of the wife for distribution to the children. This result is not against public policy as allowing the children to benefit from a wrong committed by their father. Such action is not demurrable for want of adversary parties, nor does it violate the rule that unemancipated minor children may not sue their parent in tort. *Bank v. Hackney*, 17.

In this jurisdiction a right of action to recover damages for wrongful death is purely statutory, and the statute confines recovery to a fair and just compensation for the pecuniary injuries resulting from the death. *Gay v. Thompson*, 394.

No action lies to recover for the wrongful prenatal death of a viable child *en ventre sa mere*, since there can be no evidence from which a jury may infer upon any factual basis any pecuniary injury resulting from such death. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 1. Nature of Titles by Descent in General.

Persons entitled to distribution under the Intestate Succession Act are to be determined at the time of the decedent's death, and where the husband survives the wife only a short time after the accident causing the death of both, and children of the marriage survive, the husband and children are the wife's beneficiaries under the Intestate Succession Act. *Bank v. Hackney*, 17.

§ 6. Wrongful Act Causing Death as Precluding Inheritance.

Where the husband survives the wife only a short time after the fatal accident proximately caused by the negligence of the husband, there can be no recovery in respect to the share to which the husband or his estate would otherwise be entitled. *Bank v. Hackney*, 17.

DIVORCE AND ALIMONY.

§ 13. Divorce on Ground of Separation.

A separation agreement legalizes the separation, and in the husband's suit for divorce on the ground of more than two years' separation after the execution of the agreement the wife may not maintain that the separation was the result of his wrongful abandonment of her. *O'Brien v. O'Brien*, 502.

Husband's failure to make payments for support of children is not defense to his action for divorce on ground of separation. *Ibid.*

§ 16. Alimony Without Divorce.

The complaint in this case *held* to state a cause of action for alimony without divorce under G.S. 50-16. *Teague v. Teague*, 320.

DIVORCE AND ALIMONY—*Continued.*

§ 18. Alimony and Subsistance Pendente Lite.

Where the affidavits and verified pleadings support order for subsistence *pendente lite* and the award of custody of the children of the marriage, and there is no charge that the wife was unfaithful and no request for findings of fact, detailed findings are not required. *Teague v. Teague*, 320.

An interlocutory order for support of the wife and children of the marriage *pendente lite* will be affirmed when supported by findings of fact made by the court upon competent supporting evidence. *Romano v. Romano*, 551.

§ 20. Decree of Divorce as Affecting Right to Alimony.

Ordinarily, a decree of divorce on the ground of separation does not destroy the wife's right to receive alimony or other benefits provided for her under prior judgment or decree. *O'Brien v. O'Brien*, 502.

§ 21. Enforcing Payment of Alimony.

Where the provisions of a separation agreement are embodied in a consent judgment, the wife has the remedy of a motion in the cause for contempt if the husband wilfully refuses to comply with its terms. *McLeod v. McLeod*, 144.

Where an order to show cause is issued by one judge and, without notice to the contemner, such judge transfers the proceeding and orders it to be heard by another Superior Court judge, the order of contempt issued by such other judge must be set aside, since contemner is entitled to notice and an opportunity to be heard. *Teague v. Teague*, 320.

§ 22. Jurisdiction to Award Custody of Children.

In all actions for divorce, the children of the marriage become wards of the court and the court has jurisdiction over their custody, which continues even after divorce. *Stanback v. Stanback*, 72.

Order awarding custody of the children of the marriage is not final but is subject to modification upon change of condition, the controlling factor always being the welfare of the children. *Ibid.*

One Superior Court judge may not review an order of another, but while an order in a divorce action awarding the custody of the children of the marriage is subject to modification, it may be altered only upon a showing of change in the needs of the children or change in the fitness and capacity of the respective parties to care for them which warrants such modification in the interest of the children. *Ibid.*

Wife held estopped by record from asserting that custody of children could be determined only on motion in prior action. *Hinkle v. Hinkle*, 189.

The rule that a custodial order affecting the person of an infant cannot be entered unless the infant is before the court applies in those instances in which the absence of the infant precludes the court from enforcing its decree, and is subject to exception when both parties contending for custody are before the court and subject to its jurisdiction, and the decree of the court is enforceable through coercive action against the parties. *Romano v. Romano*, 551.

In such instance the court has jurisdiction to order monthly payments for the support of the children. *Ibid.*

§ 23. Awarding Custody.

Where the court finds upon supporting evidence that both the mother and father are fit and suitable persons to have the custody of the children of their marriage and that the best interests of the children require that their

DIVORCE AND ALIMONY—*Continued.*

father have their custody, and awards custody to the father with visitation rights in the mother, such order will be upheld, the question of custody being addressed to the discretion of the trial court and its finding being conclusive when supported by evidence. *Hinkle v. Hinkle*, 189.

Where the children of the marriage are of the age of discretion, the court may consult their wishes in regard to their custody, but their wishes are only entitled to consideration and are not controlling, the controlling factor remaining the best interests of the children, and therefore the failure of the lower court to include a finding as to the preferences of the minor children is insufficient to upset its order of award. *Ibid.*

§ 24. Effect and Modification of Custody Orders.

An order entered in a divorce action awarding custody of the children of the marriage to the father to preserve the *status quo* pending the determination of the matter upon the final hearing is an interlocutory order. *In re Craigo*, 92.

A foreign interlocutory decree awarding custody in a divorce action pending the hearing on the merits does not preclude our courts from later adjudicating custody in a *habeas corpus* proceeding. *Ibid.*

A valid order awarding custody of the child of the marriage is conclusive upon the parties and may not be modified collaterally by a petition praying that the child's custody be awarded to petitioner during a certain period. *Robbins v. Robbins*, 635.

EASEMENTS.

§ 2. Creation of Easements by Deed or Agreement.

An easement may be created by agreement as well as by grant, and may be conditioned upon the happening of a stipulated event, and may be terminable upon the failure of the event. *Dees v. Pipeline Co.*, 323.

An instrument denominated a "Right of Way Easement Option" granting a described right of way easement upon the payment of an initial consideration stipulated, with further provision that upon payment of an additional stipulated amount within four months the easement should become indefeasible, is not an ordinary option, and, upon the payment of the additional stipulated sum within the time specified, the easement becomes absolute and indefeasible. *Ibid.*

ELECTION OF REMEDIES.

§ 4. Acts Constituting Election and Effect Thereof.

If a party, with knowledge of his rights and of the facts and without imposition or fraud on the part of his adversary, prosecutes one remedial right to final judgment, he is thereafter barred from prosecuting an inconsistent remedial right, even though he fails to secure final satisfaction in the prior action. *Plumbing Co. v. Harris*, 675.

Subcontractor recovering from owner on contract is barred thereafter from asserting his contract was with main contractor. *Ibid.*

ELECTRICITY.

§ 4. Care Required of Electric Companies in General.

Electricity is an inherently dangerous agency, and power companies are held to the utmost diligence consistent with the operation of their business to prevent injury therefrom. *Keith v. Electric Co.*, 119.

ELECTRICITY—*Continued.*

§ 7. Connections, Disconnections and Fires on Premises of Customer.

A customer, in order to hold an electric company liable for a fire on his premises, must show that the fire was proximately caused by electricity supplied by the company and that the company in supplying the electricity was negligent. *Keith v. Gas Co.*, 119.

Evidence that a power company employee at the request of a customer took out the meter at a building after a fire therein had burned off the insulation on wires in the building, and that the employee subsequently reinstalled the meter, the wire being still without insulation, *is held* sufficient to permit the inference that the reinstallation of the meter caused electricity to pass through the wiring inside the building, causing the subsequent fire, and is sufficient to be submitted to the jury on the issue of the power company's negligence. *Ibid.*

ENGINEERING.

§ 2. Duties and Liabilities.

One who engages in a business, occupation or profession represents to those who deal with him in that capacity that he possesses the knowledge, skill and ability, with reference to matters relating to such calling, which others engaged therein ordinarily possess, and represents that he will exercise reasonable care in the use of his skill and in the application of his knowledge and will exercise his best judgment in the performance of the work for which his services are engaged. *Ins. Co. v. Sprinkler Co.*, 134.

The evidence tended to show that defendant, after inspection, contracted to change a sprinkler system in a building from a wet to a dry system, that one of the pipes of the system had a declination which prevented it from draining by gravity, and that defendant did not change its grade or insert an additional drain, so that during freezing weather ice formed in the pipe, bursting it and activating the system, which resulted in damage to goods stored in the building. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence in the performance of the contract. *Ibid.*

ESCAPE.

§ 1. Elements and Prosecutions for Escape.

Where defendant is tried for escape in a municipal recorder's court, his trial upon appeal to the Superior Court cannot exceed the offense over which the recorder's court had jurisdiction, and defendant may not be sentenced in the Superior Court for felonious escape. *S. v. Pfeifer*, 790.

ESTOPPEL.

§ 3. Estoppel by Record.

While an action for divorce from bed and board was pending, the parties executed a separation agreement and contemplated that nonsuit be taken in the divorce action, but through inadvertence this was not done. Thereafter the husband instituted suit for divorce on the ground of separation and alleged that the custody of the children was not involved. The wife controverted the averment that custody was not involved and prayed that the court award the custody of the children to her, and did not assert that the court was without jurisdiction to award custody because of the pendency of the prior

ESTOPPEL—*Continued.*

divorce action until after the court had awarded custody to the husband. *Held:* On the record the wife is estopped to assert the pendency of the prior action. *Hinkle v. Hinkle*, 189.

Wife suing on policy as executrix and recovering judgment would be estopped from thereafter attacking change of beneficiary and suing on policy in her individual capacity. *Moore v. Ins. Co.*, 440.

EVIDENCE.

§ 3. Judicial Notice — Facts Within Common Knowledge.

It is a matter of common knowledge that car owners customarily purchase automobile liability insurance and that in this State a motorist is required by statute to show proof of financial responsibility as prerequisite to issuance of license. *Bank v. Hackney*, 17.

It is a matter of common knowledge that if the motor of an automobile equipped with automatic transmission is running and its transmission is in "drive", a jolt, vibrations of the motor, or slight pressure on the accelerator may start the car forward, and that absent warning devices an automobile can be driven for a considerable distance with the parking brakes set before the driver notices. *Nance v. Parks*, 206.

§ 15. Negative Evidence.

A showing that a witness was in a position to hear or see or would have heard or would have seen is a prerequisite to the admissibility of negative evidence that the witness did not hear or see. *Vann v. Hayes*, 713.

§ 19. Evidence Relating to Prior Trial or Proceedings.

It is not competent for an investigating officer to testify that he did not charge one of the drivers with any traffic violation. *Beanblossom v. Thomas*, 181.

§ 30. Admissions and Declarations.

Statements of a driver made some time after the accident as to what occurred on the occasion of the collision, the driver having died prior to trial, are hearsay and incompetent. *Faison v. Trucking Co.*, 384.

§ 35. Opinion Evidence in General.

Opinions of a nonexpert witness on the issue are inadmissible when the material facts can be placed before the jury. *Beanblossom v. Thomas*, 181.

The testimony of a nonexpert witness must be based on facts of which he has personal knowledge, and therefore he may not testify upon the assumption of the use of machinery during a given number of hours each working day after its purchase by plaintiff, as to the condition of its buffer wheels, offered in evidence, at the time of purchase, or as to why its pins, holding its parts together, broke. An expert would not be competent to give such testimony without the additional hypothesis that the exhibit had remained in the same condition from the time of the accident to the time of the trial. *Veach v. American Corp.*, 542.

§ 37. Nonexpert Expert Testimony as to Mental Capacity.

A non-expert witness may testify from his observation of a person within a reasonable time before or after the date in question that in the witness' opinion such person did not have mental capacity on that date to know and understand the nature and effect of the act in question. *Moore v. Ins. Co.*, 440.

EVIDENCE—*Continued.*

§ 42. Expert Testimony in General.

An expert may testify only to those conclusions which are based upon facts within his own knowledge or upon facts theretofore shown in evidence and narrated in a proper hypothetical question. *Keith v. Gas Co.*, 119; *Shafer v. R. R.*, 285.

§ 43. Competency and Qualification of Experts.

The evidence disclosed that the witness casually observed the cracks in the walls of plaintiff's building while standing outside. *Held:* The evidence does not disclose such an inspection of the building as would qualify him to give an expert opinion as to the cause of the cracks in the wall of the building. *Shafer v. R. R.*, 285.

The trial court's findings, supported by evidence, as to the qualifications and field of an expert witness are binding on appeal when supported by competent evidence. *Edwards v. Hamill*, 304.

§ 46. Expert Testimony as to Mental Capacity.

A medical expert who has examined a person and diagnosed a disease with which such person was suffering may testify that in his opinion such disease existed a number of days prior to his examination and that such person did not then know and understand the nature of the act in question. *Moore v. Ins. Co.*, 440.

Permitting an expert witness to testify that insured's mental status on the date in question was such that he could not understand "legal matters" *held* not prejudicial, athough the use of such general terms is not commended. *Ibid.*

§ 51. Examination of Experts.

A hypothetical question must include only facts which are already in evidence or those which a jury might logically infer therefrom. *Keith v. Gas Co.*, 119.

An expert should testify as to whether upon a given state of facts a particular result might ensue and not that such result did in fact ensue. *Ibid.*

Where plaintiff's evidence supports only the conclusion that the fire in suit had been in progress for a substantial period of time before there was an explosion in the building, a hypothetical question based upon the assumption that the explosion preceded the fire is improper. *Ibid.*

Defendant's expert witness was permitted to testify as to his opinion of the cause of the cracks in the walls of plaintiff's building upon a question which, in narrating hypothetical facts in evidence, stated that some of the evidence indicated the cracks did not appear until after the trespass and other evidence tended to show that the cracks existed before the trespass. *Held:* Objection to the question and answer should have been sustained, since it cannot be ascertained whether the opinion was based upon the premise that the cracks appeared before or after the trespass. *Shafer v. R. R.*, 285.

An expert witness, after testifying to having an opinion based upon hypothetical facts stated, should be asked whether the facts assumed could have caused the condition in question rather than what actually did cause it. *Ibid.*

The court properly refuses to permit an expert to answer hypothetical questions when at the time some of the material facts stated as the basis of the hypothesis are not in evidence. *Bryant v. Russell*, 629.

Where an expert has left the courtroom and is not available for cross-examination, it is not error for the court to refuse to permit his answer to a hypothetical question, put in the record in the absence of the jury, to be read to the jury, regardless of whether at that time all of the facts stated in the hypothesis were properly in evidence. *Ibid.*

EVIDENCE—*Continued.*

An expert may not, on the basis of his examination of a party, give his opinion as to injuries the party had sustained in a collision some three months prior to the examination, which collision the witness did not observe. *Ibid.*

§ 55. Evidence Competent for Purpose of Corroborating Witness.

Where a defendant testifies as a witness in his own behalf in refuting plaintiff's allegations and evidence in regard to negligent acts committed by him, it is competent for defendant to show his good character by general reputation as affecting his credibility as a witness, and while the court has the discretionary power to limit the number of character witnesses in order to keep the scope and volume of the testimony within reasonable bounds, it is error of law for the trial court to refuse to permit defendant to offer the testimony of any character witness. *Wells v. Bissette*, 774.

§ 56. Evidence Competent to Impeach or Discredit Witness.

Where the statement of a witness is not in contradiction of prior testimony given by him, such statement cannot be held competent as impeaching evidence. *Beanblossom v. Thomas*, 181.

FALSE PRETENSE.

§ 1. Nature and Elements of Crime.

The crime of false pretense is statutory in this State, and the statute specifically denominates the crime a felony. *S. v. Fowler*, 528.

FORGERY.

§ 2. Prosecutions.

Evidence tending to show that the name of the maker of a check was forged, that defendant forged an endorsement, and obtained value therefor, is sufficient to overrule defendant's motion for nonsuit, and the fact that there was no evidence that the name of the payee was forged is immaterial. *S. v. Welch*, 291.

FRAUDS, STATUTE OF.

§ 6b. Contracts to Convey or Devise.

A verbal acceptance of an option is binding on the vendor, although it would not repel the statute of frauds as to the purchaser. *Burkhead v. Farlow*, 595.

GAS.

§ 1. Degree of Care Required in General.

Gas is an intrinsically dangerous substance and a supplier thereof is held to a high degree of care to prevent escape thereof into a building. *Keith v. Gas Co.*, 119.

§ 2. Installation, Service and Delivery.

Proof of an explosion in a building serviced by natural gas does not establish that gas had leaked from the pipes or fixtures, the doctrine of *res ipsa loquitur* not being applicable. *Keith v. Gas Co.*, 120.

If a customer detects the odor of gas in his building after a fire therein had been extinguished, and the customer makes no effort to inform the gas

GAS—*Continued.*

company, does not attempt to turn off the gas at the valves of the individual units of the equipment or examine the main cut-off valve, such customer is guilty of contributory negligence as a matter of law barring recovery for a subsequent fire and explosion. *Ibid.*

Even though gas is an inherently dangerous commodity, the liability of the supplier for damages resulting from escaping gas must be based upon its negligence. *Ibid.*

Evidence held insufficient to show that fire was caused by negligence of gas company. *Ibid.*

Where plaintiff's evidence shows without contradiction that the fire in suit had been burning in the interior of her one-room building for some ten minutes before an explosion therein occurred, testimony to the effect that the fire and explosion were caused by a spark getting into the nautral gas will not be taken as true, since it is contrary to scientific fact that gas would remain in any quantity for a period of ten minutes in the presence of fire without exploding. *Ibid.*

GUARDIAN AND WARD.

§ 4. Sale or Mortgaging Ward's Estate.

Sale or mortgaging of an infant's property may be ordered only on application of his duly appointed guardian, and a guardian *ad litem* may not be authorized to do so. *Wilson v. Pemberton*, 782.

In a proceeding to sell a minor's property the court should direct the disbursement of the funds and should find that sale or mortgage of the minor's real estate will materially promote the interest of the minor. *Ibid.*

The mother of minor children owned a life estate and, subject to an intermediate life estate of a minor child, owned the remainder in the tract of land in question. Pursuant to a special proceeding instituted by the mother, a guardian *ad litem* for the minor children was appointed, and the mother conveyed her remainder to her minor children, and a deed of trust was executed by the guardian in behalf of the minors to pay off a lien and debts created for the benefit of the mother. *Held:* All proceedings pursuant to the order in the special proceeding are void and the deed of trust executed by the guardian *ad litem* on the minors' interest is a nullity. *Ibid.*

Where a remainder is conveyed to minors, one of whom owns a life estate, for the purpose of obtaining their execution of a deed of trust to pay off a lien and debts created by the grantee, and the mortgage is void for failure to comply with G.S. 33-31, the deed to the minors will also be set aside and the parties put in *statu quo ante*. *Ibid.*

HABEAS CORPUS.

§ 3. To Determine Right to Custody of Minor Children.

Our court has jurisdiction of a *habeas corpus* proceeding instituted here by grandparents in which the children, then residing in the county, are brought before the court, and in which the parents appear, even though the children were forcibly taken by their mother from their father's residence in another state. *In re Craigo*, 92.

In *habeas corpus* proceedings, the court's findings, supported by the evidence, that neither parent is a suitable person to have the custody of the children and that the petitioners, grandparents, are suitable persons, and that the best interest of the children require that their custody be awarded petitioners, support the court's order to this effect. *Ibid.*

HOMICIDE.

§ 27. Instructions on Defenses.

The charge in this case on the right of self-defense *held* not subject to the construction that the jury had to find both that the killing was necessary and that defendant reasonably believed it to be so in order to sustain the defense, but, construed contextually, correctly instructed the jury on this aspect that an apparent necessity, reasonable in the light of the circumstances as they appeared to defendant, would be sufficient. *S. v. Camp*, 626.

§ 30. Verdict and Sentence.

G.S. 14-18 does not provide specific punishment for involuntary manslaughter, and therefore sentence is subject to limitation of G.S. 14-2, and sentence of 18 to 20 years is in excess of that permitted by statute. *S. v. Adams*, 406.

HUSBAND AND WIFE.

§ 2. Marital Rights, Privileges and Disabilities in General.

The right of a married woman to support and maintenance is a property right which she may release by agreement executed in conformity with G.S. 52-6. *Hinkle v. Hinkle*, 189.

§ 9. Right to Maintain Action in Tort Against Spouse.

The wife has the right in this jurisdiction to sue her husband for negligent injury, and, in the event such injury causes her death, her personal representative is authorized to sue. *Bank v. Hackney*, 17.

§ 11. Construction and Operation of Deeds of Separation.

The parties to a valid separation agreement which makes complete and meticulous provisions for the support and maintenance of the wife and children of the marriage and for the custody of the children are remitted to the terms of the agreement with respect to the rights and liabilities to support and maintenance, although such agreement is not binding as to the custody of the minor children, and therefore when the agreement makes no provision therefor the court is without authority in a subsequent action for divorce to direct that the husband pay the cost of transporting the wife's goods to and from a municipality in another state to which she had intended to move prior to the order in the divorce action that she not take the children outside the jurisdiction of the court, notwithstanding G.S. 6-21. *Hinkle v. Hinkle*, 189.

A separation agreement making a division of personal and real property between the parties and providing that the tract of land allotted to the husband should be his for the term of his natural life and at his death the said land should be conveyed or devised or should vest in fee simple in the children of the marriage, *is held* to impose a contractual obligation on the husband to vest a fee simple title in the children at or prior to his death, which contract the children may enforce as the third party beneficiaries. *Quinn v. Thigpen*, 720.

§ 12. Revocation and Rescission of Separation Agreements.

Where, in the wife's action attacking a consent judgment of separation, she does not allege failure of the husband to deposit the initial amount specified in the separation agreement or his failure to pay the monthly payments provided therein, it will be assumed that the husband had paid these amounts in accordance with the agreement and that the wife had accepted those benefits. *McLeod v. McLeod*, 144.

HUSBAND AND WIFE—*Continued.*

The wife's allegation that the husband fraudulently represented that she would have to move from the municipality in which they had resided in order that he might continue to live there and practice his profession in order to earn the money to pay her the support stipulated in the separation agreement executed by the parties, *held* insufficient ground to attack the consent judgment for fraud, since an essential element of fraud is that the person deceived must have reasonably relied upon the misrepresentation and have acted upon it. *Ibid.*

Where a separation agreement embodied in the consent judgment executed by the parties makes meticulous provision for the support and maintenance of the wife and children of the marriage, presumably complied with, the fact that the husband had not, in the short period of several months, complied with a further provision of the judgment that he deliver to the wife a paid-up policy of insurance on his life, is not ground for attacking the judgment for fraud. *Ibid.*

A separation agreement under which the wife receives most of the household furnishings, monthly payments of alimony for two years, and release of the husband's interest in two tracts of land, upon her agreement that if he complied with the agreement for a period of two years she would quitclaim her interest in land deeded to them by the entireties by his parents, is not subject to attack on ground of want of consideration. *Tripp v. Tripp*, 378.

The certification of a separation agreement executed in accordance with G.S. 52-6 is conclusive except for fraud. *Ibid.*

Where the wife's own evidence discloses that she signed the separation agreement against the advice of her counsel in order to "be rid of" her husband, that she had received practically all of the benefits provided for her under the agreement but that her obligations thereunder had not matured, that the agreement was supported by consideration and was executed in conformity with G.S. 52-6, and that she went alone to the clerk's office and signed the agreement, the evidence is insufficient to raise the issue of whether the agreement was vitiated by fraud. *Ibid.*

§ 24. Nature and Essentials of Action for Alienation.

Evidence tending to show that plaintiff and his wife were happily married, that after she became involved with defendant she became indifferent toward plaintiff, and that defendant supplied her with liquor and wrote her love letters, *held* sufficient to establish the three elements of an action for alienation of affections, and nonsuit was improperly allowed, and the fact that defendant and his wife continue to live in the same house affects only the credibility of his testimony. *Litchfield v. Cox*, 622.

INDICTMENT AND WARRANT.

§ 7. Nature and Requisites of Indictment and Warrant in General.

When the affidavit is referred to in the warrant, they constitute one instrument in contemplation of law. *S. v. Higgins*, 589.

Where the warrant discloses that the affiant was duly sworn before a competent official and is signed by such official, and the name of the affiant is set forth, the fact that the affiant does not subscribe the affidavit is not a fatal defect. *Ibid.*

§ 9. Charge of Crime.

It is not necessary that a warrant use the exact words of a statute, it being sufficient if words of equivalent import are used. *S. v. Beaver*, 115.

INDICTMENT AND WARRANT—*Continued.*

An indictment for a felony which does not use the word "feloniously" is fatally defective unless the General Assembly otherwise expressly provides. *S. v. Fowler*, 528.

The fact that a warrant for a misdemeanor uses the word "feloniously" is not a fatal defect. *S. v. Higgins*, 589.

An affidavit charging defendant upon information and belief with an assault upon affiant will not be held defective, since the affiant must have had personal knowledge thereof. *Ibid.*

§ 14. Waiver of Defects by Failing to Move to Quash.

Duplicity is waived by failure to move to quash in apt time. *S. v. Strouth*, 340; *S. v. Green*, 785.

INJUNCTIONS.

§ 13. Continuance and Dissolution of Temporary Orders.

The purpose of an interlocutory injunction is to preserve the *status quo* until there can be a judicial determination on the merits, and an order will ordinarily be continued upon a *prima facie* showing of plaintiff's right to the final relief sought. *In re Varner*, 409.

§ 15. Modification of Permanent Injunctions.

Where defendant has eliminated features of plan upon which restraining order was issued, the court should adjudge that the prayer for injunctive relief be denied. *Horton v. Redevelopment Comm.*, 725.

INSANE PERSONS.

§ 2. Appointment and Removal of Guardian.

The clerk of the Superior Court, in the exercise of his probate jurisdiction, has power to remove the guardian of an incompetent for causes enumerated in the statute, G.S. 33-9, and the clerk's order of revocation upon findings supported by evidence that the guardian had neglected the ward, failed to maintain the ward in a suitable manner, that animosity existed between the guardian and his ward, and that the guardian was one of the ward's next of kin and could thereby benefit from the ward's estate after the ward's death, etc., *held* sufficient to support the clerk's order of revocation. *In re Simmons*, 702.

In the absence of other matters of which the court has jurisdiction, the Superior Court has no power to appoint a general guardian for an incompetent. *Ibid.*

On appeal to the Superior Court from order of the clerk removing the guardian of an incompetent for cause, the jurisdiction of the Superior Court is derivative and it may review the record only for errors of law committed by the clerk, since the provisions of G.S. 1-276, requiring a *de novo* hearing, apply only to civil actions and special proceedings and not to an order for removal of a guardian by the clerk in the exercise of duties formerly pertaining to judges of probate. *Ibid.*

§ 8. Validity of Contracts and Conveyances of Incompetent.

Contracts of a mentally incompetent are voidable and not void, and he, or after his death his personal representative or heirs, depending upon the nature of the contract, may elect to disaffirm one contract and not to disaffirm another contract even though the contracts be with the same party. *Moore v. Ins. Co.*, 440.

INSANE PERSONS—*Continued.*

Upon the attack of insured's surrender of his life policy for its cash value, there being evidence that insured had lost his job and was sick and despondent, it is not error to admit testimony to the effect that insured owned property and was not destitute, the testimony being relevant to the question of the rational quality of insured's act in surrendering the policy. *Ibid.*

INSURANCE.

§ 3. Construction of Policy Contracts in General.

While an ambiguity in an insurance contract will be construed favorably to insured, when there is no ambiguity the court must interpret the terms of the contract according to their usual and commonly accepted meaning, and may not under the guise of construction insert provisions not contained therein. *Anderson v. Ins. Co.*, 309; *Ins. Co. v. Ins. Co.*, 430.

§ 8. Agreements to Procure or Maintain Insurance.

Failure of employer to tender premium to insurer does not render employer liable when tender would not have kept certificate in force. *Conger v. Ins. Co.*, 496.

An action against insurance agents for breach of their agreement with an employer to procure compensation coverage for an employee may be maintained only by those who would have been entitled to payments had the policy been issued, and when it appears that the employee died as the result of injury received during the employment, and that the employee left a widow him surviving, such action may be maintained only by the widow, and an action instituted by the employee's administrator and the employer, who advanced the insurance premium, must be dismissed. *Crawford v. Realty Co.*, 615.

§ 16. Avoidance or Termination of Certificate Under Group Policy.

"Employment" with reference to termination of a group certificate upon termination of employment refers to the status of employer and employee, and when an employee is discharged there is a severance of this relationship, even though the employee may be entitled under his contract to accumulated pay for vacation time, and such employee cannot be held an employee on vacation following his discharge. *Conger v. Ins. Co.*, 496.

Where a certificate under a group policy specifies that the certificate should terminate upon termination of the employment, with provision for conversion upon application of the employee within 31 days, and provision that the insurance under the group policy should continue for such period, *held* the certificate does not cover the death of an employee more than 31 days from his discharge, there having been no application for conversion or facts constituting estoppel. *Ibid.*

§ 23. Cash Surrender and Paid-Up Insurance.

Upon the death of insured, the right to attack his surrender of a life policy for its cash value devolves upon his personal representative, and the personal representative may elect to attack insured's surrender of the policy on the ground of mental incapacity without questioning his act in changing the beneficiary, even though both were done at or near the same date. *Moore v. Ins. Co.*, 440.

When the personal representative elects to attack insured's act in surrendering the policy for its cash value and not his act in changing the beneficiary to his personal representative, her evidence tending to show his mental

INSURANCE—*Continued.*

incapacity at the time of both changes in the contract does not perforce destroy her right to maintain the action, and nonsuit on the ground that her evidence discloses her incapacity to sue is properly denied. *Ibid.*

§ 24a. Change of Beneficiary.

Insured changed the beneficiary in the policy on his life from his wife to his estate. The wife as executrix sued on the policy, verified the complaint, and testified as an individual in support of her action. *Held:* The wife recovering judgment in her representative capacity would be estopped from thereafter attacking the change of beneficiary and suing on the policy in her individual capacity. *Moore v. Ins. Co.*, 440.

§ 56. Limitations on Use of Vehicle in Liability Policies.

The policy in suit excluded coverage of the insured's vehicle while used in the automobile business by insured or any other business or occupation of insured. The accident in suit occurred while an insured under the policy was driving the car as a prospective purchaser from an automobile dealer. *Held:* The vehicle was not being used in the automobile business by insured, and therefore the exclusion does not apply. *Ins. Co. v. Ins. Co.*, 430.

§ 57. Drivers Insured Under Liability Policies.

Evidence held to support conclusion that son was a "resident" of his father's home within coverage of liability insurance. *Ins. Co. v. Ins. Co.*, 430.

§ 63. Defense of Action Brought by Third Party Against Insured.

Defense of the action brought by the injured third party against insured does not waive insurer's defense of noncoverage when insurer gives full notice of its reservations of all its rights and defenses. *Ins. Co. v. Ins. Co.*, 430.

§ 66.1. Payment and Subrogation Under Liability Policies and Adjustment of Liabilities Between Insurers.

Allegations that an insurer had paid plaintiff the entire loss sued for constitute a complete defense to plaintiff's right to maintain the action, and plaintiff's assertion that payments made by insurer covered only a portion of the loss raises an issue of fact but cannot entitle plaintiff to have defendant's defense stricken from the answer. *Motors v. Bottling Co.*, 251.

Policy in suit held to cover only excess over other insurance collectible at time of accident. *Anderson v. Ins. Co.*, 309.

After payment of judgment by one tort-feasor and the assignment of the judgment to a trustee, the trustee brought suit against the insurer of the other tort-feasor, alleging that such tort-feasor's liability was primary. *Held:* Demurrer was properly sustained, since the question of primary and secondary liability could not be adjudicated in an action to which the asserted primarily liable tort-feasor was not a party. *Ingram v. Ins. Co.*, 404.

§ 96.1. Property Damage Insurance — Payment and Subrogation.

Insurer in a property damage policy, upon paying a claim thereunder, is subrogated, both under standard statutory policy and under the common law, to the rights of insured against the third person tort-feasor causing the loss. *Ins. Co. v. Sprinkler Co.*, 134.

JUDGMENTS.

§ 1. Nature and Requisites of Judgments in General.

A valid judgment against a defendant can be rendered only after the

JUDGMENTS—*Continued.*

court has obtained jurisdiction of the defendant in some way sanctioned by law. *Russell v. Mfg. Co.*, 531.

§ 8. Judgments by Consent and Retraxit.

The common interest of heirs at law does not empower one of them to institute or settle an action relating to title on behalf of the others, and a judgment in retraxit entered in such action does not bind the other heirs in the absence of specific authority, ratification or estoppel. *Howard v. Boyce*, 572.

§ 14. Jurisdiction to Enter Default Judgments.

There must be valid service of process upon defendant in order to support the entry of a default judgment. *Russell v. Mfg. Co.*, 531.

§ 16. Parties Who May Attack Judgment.

A motion in the cause is the prosecution of an action within the meaning of G.S. 1-57, so that an agent or an attorney in fact has no standing to move to set aside a judgment, and the court is without jurisdiction to hear such motion. *Howard v. Boyce*, 572.

§ 19. Void Judgments.

A judgment based upon an invalid service of process is a nullity. *Russell v. Mfg. Co.*, 531.

§ 24. Attack of Judgments for Fraud.

Allegations held insufficient to attack for fraud consent judgment embodying separation agreement. *McLeod v. McLeod*, 144.

§ 34. Conclusiveness of Consent Judgments.

A consent judgment embodying a separation agreement is *res judicata* as to all matters embraced therein and cannot be modified or set aside without the consent of the parties except for fraud or mutual mistake. *McLeod v. McLeod*, 144.

§ 35. Conclusiveness of Judgments of Retraxit and Dismissal.

A judgment sustaining a demurrer for failure of the complaint to state a cause of action is *res judicata* and bars a subsequent action upon substantially identical allegation, the 1965 amendment not being applicable. *Davis v. Anderson Industries*, 610.

§ 38. Plea of Bar, Hearings and Determination.

The trial court has discretionary power to determine defendants' plea of *res judicata* prior to trial on the merits. *Davis v. Anderson Industries*, 610.

§ 44. Actions on Foreign Judgments.

In an action on a foreign judgment, such judgment must be given the same efficacy as it has in the jurisdiction rendering it, Constitution of the United States, Art. IV, § 1, and a duly authenticated transcript imports verity and validity with the presumption in favor of jurisdiction, and the burden is upon defendant to avoid the judgment by showing that the court rendering it had no jurisdiction as to the subject matter or of the person, or other vitiating matter. *Thomas v. Frosty Morn Meats*, 523.

This action was instituted by a nonresident on a judgment obtained by him in the state of his residence against a domestic corporation. The record disclosed that defendant corporation was personally served with process be-

JUDGMENTS—*Continued.*

yond the territorial jurisdiction of the courts of plaintiffs' residence. *Held:* The record does not conclusively show that the *in personam* judgment was void for want of jurisdiction, but our courts must consider the judgment roll in the proceedings in that jurisdiction in the light of its laws and court decisions to determine whether that court acquired jurisdiction of defendant corporation by substitute service. *Ibid.*

LABORERS' AND MATERIALMEN'S LIENS.

§ 3. Lien of Material Furnisher.

A contract to perform the brick work in connection with the construction of a house at a stipulated price per thousand brick and cinder block is a contract for part of the construction work and not one for a complete job for a fixed price, and claim of lien which does not set forth or have attached thereto detailed specifications of material furnished, labor performed, and the time thereof, G.S. 44-38, does not comply with the statutory requirements and is ineffectual. *Neal v. Whisnant*, 89.

§ 5. Filing of Claim.

An incomplete and ineffectual claim of lien for labor and materials furnished may not be made valid by an amendment which is not filed until after the expiration of six months from the completion of the work. *Neal v. Whisnant*, 89.

LANDLORD AND TENANT.

§ 5. Construction and Operation of Leases in General.

Where a lease is prepared by lessee, ambiguous language must be construed in favor of lessor. *Coulter v. Finance Co.*, 214.

§ 8. Assignment and Subletting.

The assignment of a lease does not release lessee of its contractual obligation to pay rent, even though the lessor consents to the assignment and accepts rental payment from the assignee. *Coulter v. Finance Co.*, 214.

§ 10. Expiration, Notice and Extensions.

Lessor waives notice of exercise of option for extended term by accepting rent at increased rate stipulated for extended term. *Coulter v. Finance Co.*, 214.

The law of contracts that an agreement relating to future undertakings must specify all of the essential and material terms and leave nothing to be agreed upon as the result of future negotiations, applies to a provision in a lease for an extension or renewal. *Young v. Sweet*, 623.

Provisions for a renewal of a lease with rental for the extended term to be subject to adjustment at the beginning of the extension period is void for uncertainty in regard to the material element of the amount of the rent. *Ibid.*

§ 11. Holding Over and Tenancies from Year to Year and Month to Month.

When a tenant holds over after the expiration of a term of years, nothing else appearing, the lessor may treat him as a trespasser and eject him, or he may continue to recognize him as a tenant under the terms of the expired lease, except that the tenancy is one from year to year and terminable by either party upon 30 days' notice prior to the end of the yearly term. *Coulter v. Finance Co.*, 214.

LARCENY.

§ 3. Degrees of the Crime and Punishment.

Where defendant is tried for breaking and entering and larceny, it is not required that the court charge that the value of the goods must exceed $200 in order to convict defendant of the felony, since larceny by breaking and entering a building is a felony without regard to the value of the property stolen. *S. v. Stubbs*, 274.

Where the indictment charges the larceny of $200 or less and does not charge that the larceny was from a building by breaking and entering, or by any other means of such nature as to make the larceny a felony, the indictment charges only a misdemeanor, and a sentence on the count in excess of two years must be vacated and the cause remanded for proper judgment. *S. v. Fowler*, 667.

Where the indictment charges simple larceny of property of a value less than $200, G.S. 14-27 does not apply and sentence of five to seven years must be vacated, notwithstanding defendant's conviction on a prior count of breaking and entering and notwithstanding the sentences on the counts are made to run concurrently. *S. v. Ford*, 743.

Where defendant is convicted of breaking and entering and of larceny of property of the value of $200 or less, and the counts are consolidated for judgment, the fact that the sentence exceeds the maximum for a misdemeanor does not entitle defendant to a vacation of the judgment, the sentence being supported by the conviction of breaking and entering. *S. v. Smith*, 747.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence that defendant registered at a motel shortly after noon under an assumed name, that the next morning it was discovered that the air conditioner was missing from the room, together with testimony that a brownish stain, similar to the stain on the window of the motel room, was seen around an imprint on the floor of the trunk of defendant's car, and that around the imprint were splinters of wood and flakes of paint, with expert testimony that the splinters of wood and flakes of paint were similar to, and could have come from, the plywood from which the air conditioner had been taken, *held* sufficient to overrule nonsuit. *S. v. Bogan*, 99.

Circumstantial evidence of defendant's identity as perpetrator of larceny held sufficient to be submitted to the jury. *S. v. Roux*, 555.

The finding of stolen articles on the back floor board of an automobile in which defendant was riding as a passenger is insufficient to be submitted to the jury on the question of defendant's guilt of larceny. *S. v. Hopson*, 643.

The fact that the indictment charges defendant with larceny of property from a specified person and the evidence discloses that such person was not the owner but was in lawful possession at the time of the offense, there is no fatal variance, since the unlawful taking from the person in lawful custody and control of the property is sufficient to support the charge of larceny. *S. v. Smith*, 747.

LIMITATION OF ACTIONS.

§ 2. Applicability to Sovereign.

Where the State and its agencies are asserting no rights deriving from their governmental status, they may assert defenses based on statutes of limitation. *Williams v. Board of Education*, 761.

§ 8. Fiduciary Relations and Trusts.

Plaintiff declared on an agreement under which he and the individual

LIMITATION OF ACTIONS—*Continued.*

defendant would divide profits from the sales of a certain mechanism and, if a patent could be obtained, would jointly own the patent, and prayed for an accounting of the profits derived from sales and an adjudication that defendants hold in trust a one-half interest in the patent issued to the individual defendant and assigned by him to the corporate defendant. *Held:* The action is for breach of contract and not one to establish a constructive or resulting trust, and therefore the action is barred after three years from defendant's categorical denial of plaintiff's rights. *Parsons v. Gunter*, 731.

§ 16. Pleading the Statute.

The pleading of statutes of limitation having no relevancy to the facts controverted in the pleadings is properly stricken. *Williams v. Board of Education*, 761.

In an action to remove cloud on title in which defendants claim title by adverse possession, allegations in the answer pleading G.S. 1-56 upon the assertion that plaintiffs' action accrued more than ten years prior to the commencement of the action, and that their cause of action for trespass accrued more than three years prior to the commencement of the action, G.S. 1-52, are properly stricken as irrelevant, there being no claim of damages for trespass. *Ibid.*

§ 17. Burden of Proof.

Upon defendant's assertion of a pleaded statute of limitations, plaintiff has the burden of overcoming the plea. *Parsons v. Gunter*, 731.

LIS PENDENS.

An action seeking to set aside for fraud a consent judgment embodying the provisions of the separation agreement is not an action affecting title to real property within the meaning of G.S. 1-116, notwithstanding the fact that if the consent judgment is set aside the wife would have rights in the husband's real estate in the event she should survive him. *McLeod v. McLeod*, 144.

MASTER AND SERVANT.

§ 20. Liability of Contractee for Injuries to Third Persons.

Where the subcontractor of the grading contractor merely operates dump trucks to carry away excavated dirt, such work is not intrinsically dangerous and the grading contractor is not liable for an injury inflicted on another as a result of the negligence of an employee of the subcontractor. *Bennett v. Young*, 164.

Evidence tending to show that the trucks of the grading contractor were the only vehicles entering upon the construction site, that there were two loading machines which could load a truck within from four to ten minutes, and that the employees of other contractors were pedestrians on the site, *held* not to show a sufficient volume of vehicular or pedestrian traffic as to constitute the failure of the grading contractor to provide a director of traffic negligence. *Ibid.*

§ 29. Contributory Negligence of Servant.

In this action to recover for injuries received when the body of a dump truck on which they were working fell upon plaintiff and one of defendants, a cousin, while the boys were working on the dump truck on the farm of the other defendant, the father of the injured defendant, *held*, nonsuit was

MASTER AND SERVANT—*Continued.*

properly entered, if not upon the principle question of liability then upon the ground of contributory negligence. *Gosnell v. Ramsey*, 537.

§ 45. Nature and Construction of Compensation Act in General.

While the North Carolina Workmen's Compensation Act must be liberally construed to accomplish its humane purpose of providing swift and certain compensation to injured workmen, the purpose of the Act is also to insure a limited and determinate liability for employers, and the Supreme Court may not, under the guise of construction, enlarge its scope beyond the limits prescribed by the statute. *Barnhardt v. Cab Co.*, 419.

§ 47. Employees Covered.

Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Act, G.S. 97-13(b), and such policy covers its executive officers, G.S. 97-2(2), notwithstanding an attempted agreement that only a single nonexecutive employee should be covered unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. G.S. 97-4. *Laughridge v. Pulpwood Co.*, 769.

§ 60. Injuries While on Way To or From Work.

Evidence tending to show that a fellow employee agreed to give claimant a ride home, that claimant and the fellow employee went straight from work to the car, which was parked in an adjacent parking lot which the employer furnished for the use of the employees free of charge, and that after some 20 minutes used exclusively in trying to get the engine started, claimant was injured while pushing the car, *held* to support an award, the case falling within the exception to the general rule that injuries in travel to and from work are not compensable. *Maurer v. Salem Co.*, 381.

§ 68. Compensation for Injury to Part-Time Worker.

Where the evidence conclusively shows that the employer hired an extra driver only during his peak seasons and that some weeks of the year the job was nonexistent, the employment cannot be treated as though it were a continuous one with regular wages, and fairness to the employer requires that both the peak and slack periods be taken into consideration. *Joyner v. Oil Co.*, 519.

The evidence disclosed that an employer employed an extra driver only during his peak seasons, and the evidence further disclosed the amount that claimant and his predecessor in the job had been paid for the 52 weeks prior to the injury, and there was no evidence that this period was exceptional. *Held:* The proper method of computing compensation is to divide the amounts earned by claimant and his predecessor during the 12 months' period by 52. *Ibid.*

§ 69. Computation of Average Weekly Wage in Exceptional Cases.

"Exceptional reasons" for which another method of computing the average weekly wage may be resorted to under the provisions of G.S. 97-2(5), refer to exceptional circumstances relating to the employment and not to the severity of the injury, and computation of the average weekly wage under this method must relate to the employment in which the employee was injured. *Barnhardt v. Cab Co.*, 419.

Where an employee holds two separate jobs and is injured in one of them, the award may not be based on his aggregate compensation from both em-

MASTER AND SERVANT—*Continued.*

ployments, but must relate only to the wages earned in the job producing the injury. *Ibid.*

Compensation for an employee who holds separate jobs must be based exclusively upon his average weekly wage in the employment in which the injury occurs. *Joyner v. Oil Co.*, 519.

The intent of G.S. 79-2(5) is that results fair and just to both the employer and employee be obtained in computing the amount of an award, and the statute requires that the basis of computation be that amount which will most nearly proximate the amount which the injured employee, except for the injury, would be earning in the employment in which he was working at the time. *Ibid.*

§ 76. Persons Entitled to Payment.

Upon the death of the employee from other causes his personal representative is entitled to recover for the benefits accrued but not paid at the time of his death, G.S. 97-29, and his sole dependent is entitled to recover for the unpaid balance of the benefits for permanent disability. *McCulloh v. Catawba College*, 513.

§ 77. Rates, Regulation and Issuance of Compensation Insurance.

An action against insurance agents for breach of their agreement with an employer to procure compensation coverage for an employee may be maintained only by those who would have been entitled to payments had the policy been issued, and when it appears that the employee died as the result of injury received during the employment, and that the employee left a widow him surviving, such action may be maintained only by the widow, and an action instituted by the employee's administrator and the employer, who advanced the insurance premium, must be dismissed. *Crawford v. Realty Co.*, 615.

§ 93. Review of Award in Superior Court.

The refusal of the Superior Court to remand the cause to the Industrial Commission for additional evidence will not be disturbed when the motion is not based on newly discovered evidence. *Hatchell v. Cooper*, 345.

Findings of Commission supported by evidence are conclusive. *McCulloh v. Catawba College*, 513.

A letter from a medical expert containing an opinion as to the degree of disability suffered by claimant at a much lower percentage than testified to by another expert at the hearing, and which the employer could have brought out at the hearing, does not constitute a proper predicate for an order of the Superior Court remanding the case to the Industrial Commission for a rehearing for newly discovered evidence. *Ibid.*

§ 94. Appeals to Supreme Court.

Where on appeal from the Industrial Commission the Superior Court expressly overrules each of defendant's exceptions by number and affirms the award, a sole exception to the judgment on further appeal to the Supreme Court does not present the correctness of the rulings of the Industrial Commission on which the exceptions were taken, but only whether the findings support the judgment of the Superior Court. *Hatchell v. Cooper*, 345.

If the evidence before the Industrial Commission, viewed in the light most favorable to plaintiff, is sufficient to support the Commission's findings of fact the courts are bound thereby. *Maurer v. Salem Co.*, 381.

MASTER AND SERVANT—*Continued.*

An exception to the award of the Industrial Commission on the ground that it is contrary to law is a broadside exception and presents only whether the facts found by the Commission support the award. *McCulloh v. Catawba College*, 513.

§ 96. Costs and Attorneys' Fees.

Where error is found in respect to the sole controversy on appeal of the employer and the insurance carrier, motion of claimant that defendants be required to pay a reasonable fee to plaintiff's attorney as part of the costs must be denied. *Barnhardt v. Cab Co.*, 419.

MUNICIPAL CORPORATIONS.

§ 4. Urban Redevelopment.

Where a prior appeal holds that the taxpayers of the municipality were entitled to enjoin the prosecution of the urban redevelopment plan set forth unless and until the plan was modified so as to eliminate a specified feature thereof, *held*, upon the elimination of the specified feature the court should adjudge that the prayer for injunctive relief be denied. *Horton v. Redevelopment Comm.*, 725.

§ 10. Liability for Torts.

Since city may not plead governmental immunity to damage from dynamiting, company constructing sewer line may not plead such immunity, *Ins. Co. v. Blythe Bros. Co.*, 229; and since company offered no evidence in support of its defense that it acted under and in accordance with contract with city, nonsuit for such defense was properly denied. *Ibid.*

§ 16. Appropriation of Private Water and Sewer Systems.

Whether a city commits acts amounting to an appropriation of a private sewerage system connected to its sewerage disposal system must be determined in accordance with the facts of each particular case. *Covington v. Rockingham*, 507.

Defendant municipality exacted a charge for sewerage service upon a private company whose sewer was connected with a sewer line constructed by and running through the lands of plaintiffs and thence into the city's outfall line. *Held:* The imposition of the charge does not amount to an appropriation of plaintiffs' private sewerage system. *Ibid.*

§ 35. Municipal Charges and Expenses.

A municipality may establish a charge for sewerage service and require all users to pay for such service whether they live within or without the corporate limits, G.S. 160-249, and such charge is not a tax, but a charge for the use of the sewer facilities of the municipality in the disposal of polluted water and sewage which drains into the disposal system of the municipality. *Covington v. Rockingham*, 507.

NAMES.

Suffix "Jr." is no part of a person's name but is merely *descriptio personae*. *Sink v. Schafer*, 347.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

If a person undertakes an active course of conduct under circumstances from which an ordinary person may reasonably foresee injury to others if he

does not use ordinary care and skill, the law imposes the duty upon him to use ordinary care and skill to avoid such danger, and he may be held liable for loss by any person to whom he owes the duty of such care. *Ins. Co. v. Sprinkler Co.*, 134.

Even though an action for negligence is distinct from one for breach of contract, where a party contracts to perform a certain act and injury is reasonably foreseeable by a person of ordinary intelligence if the contract is not performed with ordinary care and skill, the contractor may be held liable for damages proximately caused by the failure to exercise such care and skill in the performance of the contract. *Ibid.*

A person must increase his watchfulness as the possibility of danger increases. *Nance v. Parks*, 206.

§ 4. Dangerous Substances, Machinery and Instrumentalities.

One who puts a thing in charge of another which he knows to be dangerous or to have characteristics which, in the ordinary course of events, are likely to produce injury to others, owes a duty to give such person reasonable notice of the hazard. *Nance v. Parks*, 206.

Where plaintiff alleges and offers evidence tending to show damage to his property as a result of the use of explosives in constructing a sewer line by defendants, it having been established on former appeal that defendants could not rely upon the defense of governmental immunity, plaintiff makes out a *prima facie* case and nonsuit is correctly denied, notwithstanding the amended answer sets up the valid defense that defendants acted under a contract with the city and under the supervision and direction of the city engineer and were not charged with negligence in the manner in which they performed the work, the defendants having offered no evidence in support of this defense. *Ins. Co. v. Blythe Brothers Co.*, 229.

§ 7. Proximate Cause and Foreseeability.

Proximate cause is one which produces the event in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that injury was probable under the circumstances. *Nance v. Parks*, 206.

§ 8. Concurring and Intervening Negligence.

An intervening act which is reasonably foreseeable by the author of the primary negligence cannot insulate such negligence. *Nance v. Parks*, 206.

§ 9. Primary and Secondary Liability and Indemnity.

Where the injured party has obtained a joint and several judgment against the joint tort-feasors, the one defendant may not, upon payment of the judgment, recover from the other on grounds of primary and secondary liability until there is an adjudication of the issue of primary and secondary liability in an action in which the other defendant is a party and has an opportunity to defend. *Ingram v. Ins. Co.*, 404.

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance does not apply if, under the circumstances, defendant does not have the time and means to avoid injury after he has seen or should have seen plaintiff or intestate in a perilous situation and apparently inadvertent to the danger or unable to extricate himself therefrom. *Battle v. Chavis*, 778.

NEGLIGENCE—*Continued.*

§ 21. Presumptions and Burden of Proof.

Contributory negligence is an affirmative defense which must be pleaded and proven in accordance with the allegations. *Moore v. Hales*, 482.

§ 22. Competency and Relevancy of Evidence.

In an action for damages for negligent injury the existence of insurance covering defendant's liability is irrelevant to the question of negligence and to the question of the *quantum* of damages, and any reference in the evidence to liability insurance is ordinarily prejudicial and entitles movant to a new trial. The reasons for exclusion of such evidence are as valid under compulsory coverage as under voluntary insurance. *Fincher v. Rhyne*, 64.

An offer by defendant to pay the hospital bills incurred by plaintiff as a result of injury because the accident occurred on defendant's property, *held* not an admission of liability and properly excluded. *Gosnell v. Ramsey*, 537.

§ 24a. Sufficiency of Evidence of Negligence to Overrule Nonsuit in General.

If there is sufficient evidence of actionable negligence for which a defendant is responsible, and the evidence, considered in the light most favorable to plaintiff, does not disclose contributory negligence of plaintiff as the sole reasonable inference, nonsuit should be denied. *Bennett v. Young*, 164.

Evidence held for jury on issue of negligence in leaving car for mechanics in garage with motor running and automatic transmission in drive without warning mechanics of danger. *Nance v. Parks*, 206.

Evidence that the floors of a house had just been lacquered, that fumes were strong and pervading, that the employee of the heating and cooling contractor was told that he could not walk on the floors for several hours and also not to strike a match "around here," together with evidence competent as against the employee alone that he went under the house and used an acetylene torch on coils connected with the duct work leading to the rooms, *held* sufficient to be submitted to the jury on the question of whether the employee failed to exercise the care of a reasonably prudent man under the circumstances in the face of a danger which he should have apprehended, but as to the heating and cooling contractor, there being no evidence competent against it that the employee did light the acetylene torch, nonsuit was proper. *Edwards v. Hamill*, 304.

§ 25. Sufficiency of Evidence to Require Submission of Issues of Contributory Negligence to Jury.

While defendant has the burden of proof on the issue of contributory negligence, he is entitled to have the evidence bearing on that issue considered in the light most favorable to him in determining the evidence to raise the issue; nevertheless defendant must offer some substantial evidence of contributory negligence in respect to matters alleged in the answer. *Moore v. Hales*, 482.

§ 26. Nonsuit for Contributory Negligence.

Evidence tending to show that a construction worker was driving grading stakes on the construction site under the supervision of his superior and that on the occasion in question was doing so with his back to a dump truck, and had reason to believe that his superior was standing watching him do so, *held* not to disclose contributory negligence as a matter of law on his part so as to bar an action for his wrongful death resulting when the waiting

NEGLIGENCE—*Continued.*

dump truck was backed without warning and struck him. *Bennett v. Young*, 164.

Nonsuit may be granted for contributory negligence only when plaintiff's own evidence establishes it as the sole reasonable conclusion. *Young v. R. R.*, 458.

Nonsuit on the ground of contributory negligence may be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes defendant's affirmative defense that no other reasonable inference or conclusion can be drawn from it. *Webb v. Felton*, 707.

§ 27. Nonsuit for Insulating Negligence.

Nonsuit on the ground of insulating negligence may be granted only when the evidence of plaintiff permits no reasonable conclusion except that the negligence of the third person could not have been reasonably foreseen by defendant. *Young v. R. R.*, 458.

§ 37a. Definition of Invitee.

A customer entering a supermarket during business hours to make purchases is an invitee. *Morgan v. Tea Co.*, 221.

§ 37b. Duties of Proprietor to Invitee.

The proprietor is not an insurer of the safety of its customers and may be held liable for injury to a customer in a fall only upon a showing of negligence, there being no inference of negligence from the mere fact of a fall and the doctrine of *res ipsa loquitur* not being applicable. *Morgan v. Tea Co.*, 221.

The proprietor of a supermarket is under legal duty to exercise ordinary care to keep its aisles and passageways where customers are expected to go in a reasonably safe condition and to give warning of hidden dangers or unsafe conditions of which it has knowledge or of which, by the exercise of reasonable supervision and inspection, it should be cognizant. *Ibid.*

A proprietor is not an insurer of the safety of his invitees but is only under duty to use reasonable care to keep his premises within the compass of the invitation safe for use by customers, and what constitutes due care in a given situation depends upon the nature of the business and the normal use in such establishments in like areas. *Holland v. Malpass*, 750.

§ 37c. Contributory Negligence of Invitee.

An invitee is required to use reasonable care for his own safety commensurate with the normal activities of the establishment he visits. *Holland v. Malpass*, 750.

§ 37f. Sufficiency of Evidence and Nonsuit in Action by Invitee.

Evidence tending to show that the propreitor of a supermarket maintained a weighing scale some 20 to 30 feet from the bins for fresh vegetables, that customers habitually carried the vegetables from the bins to the weighing scale for weighing and, as they walked, part of the leafy vegetables fell onto the floor in the aisle, that plaintiff fell in the aisle when her foot slipped on a piece of leafy vegetable, and that debris of vegetables, onion husks, lint and dirt covered an area of some three feet square in the aisle, that the market served numerous customers, and that the floor had not been swept for 45 minutes prior to the injury, *held* sufficient to be submitted to the jury on the issue of negligence. *Morgan v. Tea Co.*, 221.

NEGLIGENCE—*Continued.*

Evidence that an experienced mechanic and garageman brought an automobile part to another garage for work and adjustment, that prior to injury he had traversed the aisle in question several times, that the aisle was well lighted, and that on the occasion causing the injury he fell over a "stiff-knee" jack which had in the interim been placed or slid into the aisle, *held* insufficient to be submitted to the jury on the issue of negligence. *Holland v. Malpass*, 750.

§ 37g. Nonsuit for Contributory Negligence of Invitee.

Evidence that plaintiff was looking at the floor in the direction she was walking, that she could not see the floor "real good," that the tiles of the floor were gray and green, and that the vegetable leafs thereon were green, *held* not to disclose contributory negligence as a matter of law on her part in her action to recover for a fall resulting when she stepped upon a piece of leafy vegetable on the floor. *Morgan v. Tea Co.*, 221.

Evidence held to disclose contributory negligence as matter of law on part of garage customer falling over jack in aisle. *Holland v. Malpass*, 750.

NUISANCE.

§ 10. Abatement of Public Nuisance.

Where verdict of operating a public nuisance is returned solely against the lessees of the premises, order for the sale of personalty may be entered, but the court properly refrains from ordering the realty padlocked, since the proceeding is *in personam* and the lessors may not be deprived of possession unless they are parties and it is established that they knew or by due diligence should have known that the nuisance was being maintained. *Bowman v. Fipps*, 535.

§ 12. Disbursement of Proceeds of Sale, and Costs.

Whether an attorney's fee should be allowed from the proceeds of sale of personalty ordered by the court in a proceeding to abate a nuisance is addressed to the discretion of the court, and its refusal to allow attorney's fees will not be disturbed in the absence of a showing of abuse. *Bowman v. Fipps*, 535.

PARENT AND CHILD.

§ 2. Liability of Parent for Injury to Child.

Where the husband survives the wife only a short time after the accident causing the death of both, and children of the marriage survive, *held* the administrator of the wife may maintain an action against the executor of the husband's estate to recover damages for the wrongful death of the wife for distribution to the children. This result is not against public policy as allowing the children to benefit from a wrong committed by their father. Such action is not demurrable for want of adversary parties, nor does it violate the rule that unemancipated minor children may not sue their parent in tort. *Bank v. Hackney*, 17.

§ 8. Abandonment and Nonsupport.

A warrant charging defendant with wilful refusal and neglect to provide adequate support for his minor children, naming them, is sufficient to charge one of the offenses proscribed by G.S. 14-322 under the 1957 amendment to the statute. *S. v. Goodman*, 659.

PARENT AND CHILD—*Continued.*

The State's evidence tending to show that defendant had not worked and was drunk every day since his release from prison, and had not provided any support for his minor children, is sufficient to be submitted to the jury on the charge of wilful failure to support, notwithstanding defendant's evidence that he had worked and had given his wife the major portion of his earnings for the support of the children. *Ibid.*

PARTIES.

§ 2. Parties Plaintiff.

The personal representative may bring an action for wrongful death, and the statutory distributees are not the real parties in interest within the meaning of G.S. 1-57. *Bank v. Hackney*, 17.

Allegation that liability insurer had paid plaintiff total loss, even though denied, raises issue of plaintiff's capacity to maintain the action. *Motors v. Bottling Co.*, 251.

An action may be prosecuted only by the real party in interest, and an agent or an attorney in fact may not maintain an action in his own name for the benefit of his principal. *Howard v. Boyce*, 572.

§ 4. Proper Parties.

In an action against one partner to recover damages for such partner's breach of agreement to sell plaintiff his one-half interest in the partnership, the other partner, who arranged the meeting but did not participate in the negotiations culminating in the contract, *held* not a necessary party, and the Superior Court properly vacated the order of the clerk making him a party to the action. *Vernon v. Reheis*, 351.

PAYMENT.

§ 1. Transactions Constituting Payment.

Payment is an affirmative defense, and the burden is upon the party alleging payment to prove payment in money or by some other thing given and received in payment. *Lett v. Markham*, 318.

§ 4. Evidence and Proof of Payment.

This action was instituted by an administrator to recover the balance due on the purchase price of land sold by intestate under contract for the payment of the balance of the purchase price in cash upon delivery of deed or in cash according to a fixed time schedule. Defendant claimed payment of the balance by giving plaintiff's intestate credit on obligations which intestate owed defendant. *Held:* The evidence raised an issue of fact as to payment and it was error for the court to enter judgment of involuntary nonsuit. *Lett v. Markham*, 318.

PHYSICIANS AND SURGEONS.

§ 11. Nature and Extent of Liability of Physician or Surgeon.

The fact that a physician or surgeon possesses the requisite professional knowledge and skill is not alone sufficient to preclude liability to his patient, since he may be held liable for injuries resulting from his failure to exercise reasonable diligence in the application of his knowledge and skill to the patient's case, or for his failure to give the patient such attention as the case requires. *Galloway v. Lawrence*, 245.

PHYSICIANS AND SURGEONS—*Continued.*

No action lies to recover for the wrongful prenatal death of a viable child *en ventre sa mere*, since there can be no evidence from which a jury may infer upon any factual basis any pecuniary injury resulting from such death. *Gay v. Thompson*, 394.

PLEADINGS.

§ 2. The Complaint.

The complaint and the amended or supplemental complaint will be construed together, and allegations in the amended or supplemental complaint supercede those in the original complaint to the extent of any conflict. *Crew v. Thompson*, 476.

§ 4. Prayer for Relief.

The relief to which a party is entitled is determined by the facts alleged in his pleading and established by evidence, and his assertion of an untenable legal theory as the basis for his relief is immaterial. *Construction Co. v. Trust Co.*, 648.

§ 12. Office and Effect of Demurrer.

A demurrer admits proper allegations of fact but not conclusions of law, and averment in regard to who are the real parties in interest in the action relates to a legal conclusion not admitted by demurrer. *Bank v. Hackney*, 17.

A demurrer admits for its purposes the truth of the factual averments of the complaint well stated and relevant inferences of fact reasonably deducible therefrom, but not inferences or conclusions of law. *McLeod v. McLeod*, 144; *Gay v. Thompson*, 394.

Upon demurrer, a complaint will be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. *McLeod v. McLeod*, 144; *Homes, Inc. v. Holt*, 467; *Patterson v. Lynch, Inc.*, 489.

§ 21.1. Judgments on Demurrer and Effect Thereof.

Judgment sustaining demurrer and dismissing the action is a final judgment which terminates the action, and therefore when such judgment is entered prior to the effective date of the 1965 amendment to G.S. 1-131, permitting one action to be instituted after judgment sustaining demurrer, the action is not then pending, and the amendment, although applying to pending litigation as well as subsequent litigation, can have no application. *Davis v. Anderson Industries*, 610.

§ 24. Scope of Amendment to Pleadings.

A motion to amend the answer after trial has begun is addressed to the discretion of the trail court, and denial of the motion will not be reviewed in the absence of a showing of abuse of discretion. *Moore v. Ins. Co.*, 440.

§ 28. Variance Between Allegation and Proof.

Plaintiff may recover only on the theory of her complaint. *Jordan v. Storage Co.*, 156; *Bingham v. Lee*, 173; *Faison v. Trucking Co.*, 383; *Conger v. Ins. Co.*, 496.

A defendant must prove his defenses in accordance with the allegations of his answer. *Moore v. Hales*, 482.

§ 29. Issues Raised by Pleadings, Admissions and Necessity for Proof.

Nonsuit on the ground that plaintiff had failed to establish that defend-

PLEADINGS—*Continued.*

ants were engaged in a joint venture is properly denied when defendants' answer alleges facts compelling the conclusion of joint venture. *Ins. Co. v. Blythe Brothers Co.*, 229.

On defendant's motion for nonsuit, inferences of fact may not be drawn from evidential recitals in the pleadings unless such recitals have been introduced in evidence. *Edwards v. Hamill*, 304.

§ 33. Motions to Strike.

A motion to strike an entire defense is in substance, if not in form, a demurrer thereto, and therefore in passing upon such motion allegations of the answer must be deemed admitted and the truth of the allegations cannot be attacked upon such motion. *Motors v. Bottling Co.*, 251.

Allegation that liability insurer had paid plaintiff total loss, notwithstanding plaintiff's denial thereof, raises issue of fact, and allegation should not be stricken. *Motors v. Bottling Co.*, 251.

PRINCIPAL AND AGENT.

§ 1. Nature and Essentials of Relationship.

An attorney in fact is one appointed by a written instrument to transact business for the principal out of court. *Howard v. Boyce*, 572.

§ 6. Ratification and Estoppel.

Where a person without authority or with limited authority purports to act as agent in doing an unauthorized act, the supposed principal, upon discovery of the facts, may ratify the act of the agent and thus give it the same effect as though it had been authorized. *Patterson v. Lynch, Inc.*, 489.

An act must be ratified in whole and not in part; however, the ratification of one unauthorized act does not require the ratification of another and entirely different act, and the principal may ratify the sale of personal property by an agent without authorizing the agent to collect the purchase price therefor. *Ibid.*

Complaint, although alleging facts constituting ratification of agent's transfer of stock, held not to allege facts estopping plaintiff from denying agent's authority to receive payment. *Ibid.*

PROCESS.

§ 1. Function, Form and Requisites of Process in General.

The suffix "Jr." is no part of a person's name but is *descriptio personae*, and therefore when the caption of the summons does not designate defendant as a junior but the body does so designate him, and the summons is served in compliance with the applicable statute upon the defendant, the fact that the caption fails to properly describe him as junior is immaterial. *Sink v. Schafer*, 347.

§ 11. Service of Process on Domestic Corporations.

Service of process commanding the sheriff to summon a named individual, local agent for a named corporation, defendants, does not bring the corporation into court, but is service upon the named individual alone, the words "local agent" being merely *descriptio personae*. *Russell v. Mfg. Co.*, 531.

§ 13. Service of Process on Foreign Corporation.

While ordinarily no judgment *in personam* can be rendered against a de-

PROCESS—*Continued.*

fendant not personally served with summons within the jurisdiction, this rule is not absolute, and there may be a valid substitute service upon a defendant having such contacts within the jurisdiction that such service does not offend "the traditional notions of fair play and substantial justice." *Thomas v. Frosty Morn Meats*, 523.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

Allegation of title and that defendant claims interest adverse to plaintiff is sufficient to state cause of action to quiet title. *Williams v. Board of Education*, 761.

RAILROADS.

§ 6. Injuries to Auto Passengers in Crossing Accidents.

Under the law of Ohio, recovery is not allowed for injury resulting from a collision when a vehicle is driven into the side of a train at a grade crossing in the absence of special circumstances rendering the crossing peculiarly hazardous. *Young v. R. R.*, 458.

Evidence of negligence in leaving engine unlighted and unattended, partly blocking crossing, held to take issue of negligence to jury. *Ibid.*

REFERENCE.

§ 1. Nature and Grounds of Remedy.

It is not contemplated that a referee may be appointed to attend an annual meeting of members of a building and loan association and there make determinations relating to the respective rights of the contesting parties during the progress of such meeting. *Crew v. Thompson*, 476.

No order of reference should be entered until the pleadings have been filed and issues raised. *Ibid.*

REGISTRATION.

§ 3. Registration as Notice.

The registration of a contract to convey accords the purchaser the same protection as a grantee. *Quinn v. Thigpen*, 720.

ROBBERY.

§ 1. Nature and Elements of the Offense.

The distinction between robbery and highway robbery no longer obtains in this State. *S. v. Lynch*, 584.

The gist of the offense of robbery is the taking of another's property by force or by putting in fear the person in lawful possession. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit.

Nonsuit for variance does not lie for discrepancy in the indictment and proof in charging ownership of the property in the cashier of a store rather than in the store corporation. *S. v. Lynch*, 584.

Where the indictment charges robbery at, in, and near a public highway, and the proof establishes robbery from a commercial establishment, nonsuit for variance is properly denied, since the distinction between robbery and

ROBBERY—*Continued.*

highway robbery no longer obtains in this State, and the surplus words merely indicate, vaguely, the location of the alleged robbery, and do not result in any variance between the crime charged and the proof. *Ibid.*

Evidence *held* amply sufficient to overrule nonsuit in this prosecution for robbery. *S. v. Gilleabeaux*, 642.

Evidence tending to show that defendant collaborated with another in planning and setting the stage for a robbery and in escaping with the stolen money, and waited and watched, armed with a pistol, near enough to the scene to render aid if necessary, establishes defendant's constructive presence when the robbery actually occurred and renders him guilty as a principal in the second degree. *S. v. Sellers*, 734.

SALES.

§ 5. Express Warranties.

Statement by a salesman that equipment had been completely rebuilt and reconditioned cannot constitute a warranty by the seller when the subsequently written agreement specifies that the seller guaranteed, for a specified period, that the equipment was free from defect in workmanship and material when used in normal service, and obligated itself only to make good defective part or parts returned, and that such guarantee was in lieu of all other guarantees, expressed or implied. *Veach v. American Corp.*, 542.

§ 14a. Right of Action or Counterclaim for Breach of Warranty.

Liability for breach of warranty arises out of contract, irrespective of negligence. *Veach v. American Corp.*, 542.

§ 16. Actions by Purchaser or User for Personal Injuries from Defects.

The seller of equipment manufactured by a third party may be held liable for injuries resulting to the purchaser in the use of the machinery only if the defect causing the injury was latent, and thus not reasonably discoverable by the purchaser, and the seller had knowledge or should have discovered the latent defect and, in the exercise of reasonable care, should have reasonably foreseen that it was likely to cause injury in ordinary use, and failed to warn the buyer of such defect. *Veach v. American Corp.*, 542.

In this action by plaintiff, the purchaser of reconditioned recapping equipment, to recover for injuries received when a buffing wheel disintegrated and parts of same struck plaintiff, causing the injury in suit, the evidence *is held* sufficient to permit the jury to find that the injury resulted from a latent defect of which the seller should have had knowledge, and that plaintiff, who was without prior experience with such equipment, was not guilty of contributory negligence as a matter of law. *Ibid.*

The purchaser of equipment, suing for personal injuries resulting from a defect therein, may not contend that the seller was negligent in failing to provide a guard for the equipment, since the absence of a guard is a patent defect. Further, in this case, plaintiff's complaint failed to specify the absence of the guard as an element of negligence. *Ibid.*

SCHOOLS.

§ 10. Assignment of Pupils.

Our Pupil Assignment Law places the duty upon the board of education of the respective administrative units to assign and reassign pupils in accordance with the procedures and standards set forth in the Act, with em-

SCHOOLS—*Continued.*

phasis on the welfare of the individual pupil and the effect of assignment and reassignment upon the respective units, and this duty the board must exercise in accordance with the standards set forth in the statute, and it may not by contract or agreement limit its power in this regard, notwithstanding any coercion or threat to withhold school aid funds by an employee of the Federal Government, or otherwise. *In re Varner*, 409.

The Civil Rights Act of 1964 has no application to proceedings to determine to which of two administrative units a pupil should be assigned when such proceeding is based solely on the welfare of the individual pupil and the proper administration of the schools, without any indication that race had anything to do with the application for reassignment. *Ibid.*

Upon appeal from an order of a board of education upon an application for the reassignment of a child, the court hears the matter *de novo* as though no action had theretofore been taken, G.S. 115-179, and the court has the power to assign or reassign the pupil subject only to the standards and limitations prescribed by the Pupil Assignment Law. *Ibid.*

Under the Pupil Assignment Law as amended, an administrative unit may not permit to be enrolled in one of its schools a child who resides in the territory of another unit solely upon its own willingness to do so and the desire of the child or its parents to attend that school, but it is also necessary that the assent of the board of the unit in which the child resides be obtained. On appeal, however, the court may reassign the pupil without such assent. *Ibid.*

Court may properly continue order restraining reassignment of pupil upon a *prima facie* showing. *Ibid.*

Where the unit to which the parents wish to have their child reassigned has expressed in writing its willingness to accept such child, such unit is not a necessary party to an action for reassignment. *Ibid.*

SEARCHES AND SEIZURES.

§ 2. Requisites and Validity of Search Warrant.

In a prosecution for breaking and entering committed in this State, the sufficiency of a search warrant issued in another state sequent to which some of the stolen goods were recovered there, is to be determined by the law of this State. *S. v. Myers*, 581.

Decisions of state courts in regard to the requisites and sufficiency of a search warrant are subject to the overriding authority of the U. S. Supreme Court in determining the citizen's rights under the Fourth and Fourteenth Amendments to the Federal Constitution. *Ibid.*

Upon motion to suppress evidence obtained by a search warrant on the ground of the insufficiency of the warrant, the court may conduct a preliminary inquiry relating to the legality of the search. *Ibid.*

Where the affidavit of a search warrant states that the affiant swears under oath that he verily believes that defendant's domicile contains stolen merchandise, without any reference to any articles taken from the building defendant is charged with breaking and entering, the warrant is insufficient and the admission of evidence of merchandise found upon such search, which had been removed from the building in question, is prejudicial error. *Ibid.*

STATE.

§ 4. Actions Against the State.

Action may be maintained against State to quiet title. *Williams v. Board of Education*, 761.

STATUTES.

§ 5. General Rules of Construction.

Where a statute excludes from its general operation a single specific circumstance, it is evidence of the legislative intent not to exempt other circumstances not expressly provided for by the statute. *Barnhardt v. Cab Co.*, 419.

The objective of statutory construction is to ascertain the legislative intent, and to this end the words of a statute will be construed in accordance with their meaning at the time of enactment. *Tel. Co. v. Clayton*, 687.

Words of a statute will be given their generally accepted meaning unless manifestly contrary to the legislative intent. *Bleacheries Co. v. Johnson*, 692.

TAXATION.

§ 23. Construction of Taxing Statutes in General.

Tax statutes are to be strictly construed against the State and in favor of the taxpayer. *Tel. Co. v. Clayton*, 687.

§ 26. Franchise Taxes.

A franchise tax is imposed for the privilege of engaging in business in this State, the amount of tax varying with the nature and magnitude of the privilege taxed, its expected financial return, and the burden on the State in regulating, protecting and fostering the enterprise. *Tel. Co. v. Clayton*, 687.

The word "rentals" as used in G.S. 105-120(b), imposing a tax upon the gross receipts of telephone companies, *is held* to refer to the "rentals" of telephones pursuant to the company's public utility services for which the franchise tax is imposed, and does not include rentals charged electric power companies and others for the use of its poles, this being consonant with the history of the statute and its purport. *Ibid.*

Textile finishing plant is engaged in manufacturing for purpose of computing franchise tax liability, even though it processes goods of others for a fee on contractual basis. *Bleacheries Co. v. Johnson*, 692.

§ 36. Remedies of Taxpayer.

A taxpayer contending that an additional assessment of income tax is invalid is not required to proceed under G.S. 105-134(6)g, but may pay the tax under protest, make proper demand for refund and, upon refusal, bring suit under G.S. 105-267. *Bleacheries Co. v. Johnson*, 692.

§ 28c. Computation of Income Tax of Corporations.

Textile finishing plant is engaged in manufacturing for purpose of computing income tax, even though it processes goods of others for fee on contractual basis. *Bleacheries Co. v. Johnson*, 692.

TORTS.

§ 2. Joint Tort-Feasors.

Each tort-feasor is jointly and severally liable for all injuries which result from an accident of which his negligence is a proximate cause. *Young v. R. R.*, 458.

TRESPASS.

§ 7. Sufficiency of Evidence and Nonsuit.

Undisputed evidence that defendant trespassed upon plaintiff's land entitles plaintiff to a peremptory instruction upon the issue of trespass and to nominal damages at least. *Schafer v. R. R.*, 285.

TRIAL.

§ 3. Time of Trial and Continuance.

Motion for continuance is addressed to discretion of trial court. *O'Brien v. O'Brien*, 502.

§ 6. Stipulations.

Pretrial stipulations duly entered into by the parties are binding upon them. *Quinn v. Thigpen*, 720.

§ 10. Expression of Opinion on Evidence by Court During Progress of Trial.

Statement of court upon interrogation of witness that evidence was that defendant took appropriate action in regard to matter under investigation and that there was no evidence that he did not, *held* prejudicial expression of opinion on evidence. *Galloway v. Lawrence*, 245.

Defendant surgeon, in a malpractice suit, was offered as an expert witness. The court, in the presence of the jury, stated that the court found defendant to be an expert physician in surgery, qualifying the witness to testify. *Held:* The remark of the court in the presence of the jury constituted prejudicial error. *Ibid.*

The statutory proscription against the trial judge expressing an opinion upon the evidence, G.S. 1-180, applies not only to the charge alone, but prohibits the trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion to what has or has not been shown by the testimony of a witness. *Ibid.*

Remarks of the court in the presence of the jury and questions asked by the court of certain witnesses for the purpose of clarification, *held* not to amount to an expression of opinion by the court upon the evidence under the facts of this case. *Wilkins v. Turlington*, 328.

§ 16. Withdrawal of Evidence.

In criminal prosecutions see Criminal Law § 91.

Ordinarily, the admission of testimony to the effect that defendant in a negligence action is protected by liability insurance cannot be corrected by the withdrawal of such testimony. *Fincher v. Rhyne*, 64.

Where, immediately upon motion to strike an irresponsive question the court, in the presence of the jury, allows the motion, the fact that the court fails to instruct the jury to disregard the answer of the witness will not be held for prejudicial error when the record discloses that the jury must have understood that the answer of the witness was not to be regarded as evidence in the case. *Moore v. Ins. Co.*, 440.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit a counterclaim, the evidence must be taken in the light most favorable to defendant, and plaintiff's evidence in conflict therewith must be disregarded. *Wilder v. Harris*, 82; *Keith v. Gas Co.*, 119; *Ins. Co. v. Sprinkler Co.*, 134; *Bennett v. Young*, 164; *Nance v. Parks*, 206; *Morgan v. Tea Co.*, 221; *Motors v. Bottling Co.*, 251; *Edwards v. Hamill*, 304; *Young v. R. R.*, 458; *Plumbing Co. v. Harris*, 675.

The rule that upon motion to nonsuit plaintiff's evidence must be taken as true does not extend to statements of witnesses which are contrary to established scientific truth of which the court may take judicial notice. *Keith v. Gas Co.*, 119.

TRIAL—*Continued.*

§ 22. Sufficiency of Evidence to be Submitted to Jury.

Conflicting inferences make a case for the jury. *Construction Co. v. Trust Co.*, 648.

§ 26. Nonsuit for Variance.

Where plaintiff's evidence is insufficient to establish the cause of action alleged in the complaint, nonsuit is proper. *Bingham v. Lee*, 173.

§ 27. Nonsuit on Affirmative Defense.

Nonsuit may not ordinarily be allowed upon an affirmative defense, and certainly not where defendant fails to introduce any evidence in support of such defense. *Ins. Co. v. Blythe Brothers Co.*, 229.

§ 31. Directed Verdict and Peremptory Instructions.

If the evidence is insufficient to be submitted to the jury on an issue, the court may direct a verdict against the party upon whom rests the burden of proof. *Dulin v. Faires*, 257.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

Excerpts from a charge will not be held for error when the charge, construed in context, correctly states the applicable principles of law. *Beanblossom v. Thomas*, 181.

The trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. *Faison v. Trucking Co.*, 384.

Evidence of a defendant which is favorable to plaintiff must be considered in passing on motion to nonsuit and be included in the charge as one of the variant factual situations presented by the evidence. *Ibid.*

A charge which does not state any of the evidence except in the form of the contentions of the parties is not sufficient. *Ibid.*

It is error for the court to submit in its instructions to the jury a principle of law which is not supported by allegation and evidence. *Veach v. American Corp.*, 542; *Vann v. Hayes*, 713.

§ 37. Statement of Contentions.

A party may not complain of the failure of the court to submit a contention not supported by allegation. *Wilkins v. Turlington*, 328.

An exception to the statement of the contentions will not be sustained when the matter is not called to the attention of the trial court in apt time. *Bryant v. Russell*, 629.

§ 38. Requests for Instructions.

The court correctly refuses to give an instruction not supported by any view of the evidence in the case. *Jordan v. Storage Co.*, 156.

Where the pleadings do not put in issue an aspect of the case asserted by a party, such party may not object to the refusal of the trial court to charge the jury with reference thereto. *Moore v. Ins. Co.*, 440.

§ 40. Form and Sufficiency of Issues.

The issues arise upon the pleadings. *Moore v. Ins. Co.*, 440.

§ 41. Tender of Issues.

The court properly refuses to submit an issue which is without predicate in the pleadings. *Moore v. Ins. Co.*, 440.

TRIAL—*Continued.*

§ 42. Form and Sufficiency of Verdict.

It is the function of the jury to find the facts in the form of answers submitted to it by the court and not to determine or make recommendations concerning the judgment to be rendered thereon. *Homes, Inc. v. Holt*, 467.

§ 45. Acceptance or Rejection of Verdict by Court.

The court properly refuses to accept a verdict containing recommendations concerning the judgment to be rendered. *Homes, Inc. v. Holt*, 467.

§ 50. New Trial for Misconduct of or Affecting Jury.

Parties, counsel, witnesses, relatives and friends should refrain from any conduct which casts the slightest suspicion upon the integrity of the trial, and should scrupulously avoid any communication and social contact with jurors during the trial. *O'Berry v. Perry*, 77.

Defendant moved for a new trial on the ground that during the noon recess while the trial was in process a juror had walked with plaintiff and one of his witnesses from the courthouse to lunch. The evidence adduced at the court's inquiry tended to show that the encounter was accidental, that the parties thereto did not discuss the case, and that the incident in no way affected the outcome of the trial. *Held:* The court's denial of the motion to set aside the verdict will not be disturbed. *Ibid.*

The granting or denial of a motion for a mistrial for alleged misconduct of a juror rests in the sound discretion of the trial judge, and his ruling thereon will be upheld on appeal unless it is clearly erroneous. *Ibid.*

§ 51. Setting Aside Verdict as Contrary to Weight of Evidence.

Motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court and its ruling thereon will not be reviewed in the absence of a showing of abuse. *Wilkins v. Turlington*, 328.

§ 53. New Trial for Error of Law Committed During Trial.

Action of the trial court in setting aside the verdict for error of law is appealable, but when defendant has testified in his own behalf in refuting the allegations and evidence of negligence on his part, the trial court properly sets aside the verdict for error of law when it has excluded all testimony of character witnesses offered to prove defendant's good character as affecting his credibility. *Wells v. Bissette*, 774.

TRUSTS.

§ 13. Creation of Resulting Trust.

A resulting trust arises in favor of a person furnishing a part of the purchase price for land for which title is placed in another under a prior express agreement that such other should hold the property for the benefit of those furnishing the purchase price, but in order to establish such trust plaintiff must prove that the consideration paid by him was actually used in the purchase of the property. *Bingham v. Lee*, 173.

§ 19. Actions to Establish Resulting or Constructive Trusts.

Evidence that plaintiff and one defendant made an agreement to purchase property as a partnership, that plaintiff gave this defendant money to be used as a down payment, but the evidence is to the effect that the second defendant took title to the property and furnished the down payment, without any evi-

TRUSTS—*Continued.*

dence that the first defendant turned over to the second defendant the money furnished by plaintiff, *held* insufficient to establish a resulting trust in plaintiff's favor. *Bingham v. Lee*, 173.

UNJUST ENRICHMENT.

§ 1. Nature and Grounds of Remedy.

When one party builds a house upon the land of another in good faith and under a reasonable mistake as to the true owner of the land, the landowner, if he elects to retain the house upon his property, must pay therefor the amount by which the value of his land has been increased. This right of action is distinct from the right of a person in possession under a *bona fide* claim of right to recover for improvements, and the right of action for unjust enrichment obtains notwithstanding the true owner was not chargeable with knowledge the house was being constructed, and lies irrespective of ratification. *Homes, Inc. v. Holt*, 467.

§ 2. Actions.

Allegations to the effect that plaintiff, pursuant to a contract with defendant's mother upon the mother's representation that she was the owner of the land, constructed a house thereon under the *bona fide* belief that the mother owned the land, that the construction of the house improved the value of the land, and that defendant, the true owner, claimed the house and would not allow plaintiff to remove it, *held* to state a cause of action for unjust enrichment. *Homes, Inc. v. Holt*, 467.

UTILITIES COMMISSION.

§ 6. Fixing of Rates.

The statutory requirement that the Utilities Commission prevent discrimination in rates and services does not require an equality of rates where shipments are from different points of origin to the same destinations, even though the distances be equal or approximately so, since the Commission must take into consideration in addition to distance other factors which furnish a distinction between customers, such as quantity, time, manner of service, cost of service, and competition from other forms of transportation. *Utilities Comm. v. Teer Co.*, 366.

Differential based on "joint-line" and "single line" carriage held justified. *Ibid.*

A shipper complaining of unjust discrimination in rates has the burden of proving the facts essential to its right to relief. *Ibid.*

Expert opinion testimony as to the fair value of a utility's property on the date in question in a sum slightly in excess of replacement costs, exclusive of costs of construction in progress, materials and supplies, *held* properly considered by the Commission in determining the fair market value of the property of the utility in use and useful in rendering service to its customers. *Utilities Comm. v. Tel. Co.*, 450.

In arriving at the fair value of a public utility's property used and useful in providing service to its customers, the Utility Commission is charged with the duty of taking into consideration the requirements set forth in the statute as well as other relevant facts, G.S. 62-133, and when its determination of the fair value of the utility's property is ascertained with due consideration of such factors and is supported by substantial, competent and material evidence, the value as ascertained by it will be sustained. *Ibid.*

The low interest rate charged a telephone company on a loan by the REA is properly taken into consideration in figuring the operating costs of such utility, since such low interest rate is granted for the purpose of making it possible to extend telephone services to areas which, in all probability, would not be served otherwise, and the Commission owes the duty to be fair to the public as well as to the utility. *Ibid.*

The Utilities Commission and not the courts has the duty and power to establish rates for public utilities. *Ibid.*

The fixing by the Utilities Commission, in the exercise of its discretion, of a rate return of 3.8 per cent upon the predetermined value of a utility's property on the date in question will be upheld, there being no evidence of capricious, unreasonable or arbitrary action or disregard of law on the part of the Commission in arriving at such rate. *Ibid.*

§ 9. Appeal and Review.

Rates of the Utilities Commission are *prima facie* just and reasonable and will be upheld on appeal when a review of the whole record fails to disclose prejudicial error and the order of the Commission is supported by findings supported by competent evidence. *Utilities Comm. v. Teer Co.*, 366.

VENDOR AND PURCHASER.

§ 1. Requisites, Validity and Construction of Options and Contracts to Convey in General.

Where an option to purchase is not under seal and is not supported by a valuable consideration, it may be withdrawn at any time before, but not subsequent to, unconditional acceptance. *Burkhead v. Farlow*, 595.

A verbal acceptance of an option is binding on the vendor, although it would not repel the statute of frauds as to the purchaser. *Ibid.*

In the absence of agreement to the contrary the law implies an obligation on the part of the vendor to furnish a marketable title, and therefore acceptance of an option upon tender of a marketable title, as distinguished from a title satisfactory to the purchaser or his attorney, is an unconditional acceptance, and an acceptance of an option depending upon "title examination" implies acceptance if the title is ascertained to be marketable, and therefore is an unconditional acceptance. *Ibid.*

One who has a contractual right to compel another to convey is, upon the recordation of the contract, accorded the same protection as a grantee in a recorded deed. *Quinn v. Thigpen*, 720.

Agreement in deed of separation that husband would will or convey land allotted to him for life to children of the marriage entitles children to enforce agreement as third party beneficiaries. *Ibid.*

§ 2. Duration of Option and Time of Performance or Tender.

A written option to purchase, good to a specified time, was not under seal or supported by consideration. Plaintiff accepted the option, depending upon "title examination." Before examination of title was completed, but within the period limited, defendants advised plaintiff they would not sell. *Held:* Plaintiff's acceptance of the offer within the time limited was unconditional and defendants had no right thereafter to withdraw the option. *Burkhead v. Farlow*, 595.

Where vendors state that they withdraw their option and refuse to execute deed, tender of purchase price by the purchaser is not required. *Ibid.*

VENUE.

§ 1. Nature of Venue.

Failure to object to improper venue constitutes a waiver thereof. *Wright v. Vaden*, 299.

§ 2. Principal Place of Business.

Where the evidence is sufficient to support the court's findings that plaintiff, a nonresident corporation, had domesticated in this State and had brought the action in the county in which it maintained its principal place of business here, denial of defendant's motion for change of venue will not be disturbed. *Surety Co. v. Transit Co.*, 756.

§ 3. Actions by or Against Executors or Administrators.

An action for the construction of a will should be instituted in the county where the will was admitted to probate. *Wright v. Vaden*, 299.

WAREHOUSEMEN.

§ 1. Liabilities of Warehousemen.

Plaintiff's allegations and evidence were to the effect that defendant packed, transported and stored plaintiff's goods and that while the goods were in the exclusive possession of defendant some of them were lost and others damaged. Plaintiff alleged that the loss and damage occurred while the goods were in storage. *Held:* The burden was not upon plaintiff to show that the loss and damage occurred after the goods had been stored, but upon defendant, if it sought to escape liability on the ground that the loss and damage occurred prior to storage, to prove such circumstances as a defense to plaintiff's claim, the facts being peculiarly within the knowledge of defendant. *Jordan v. Storage Co.*, 156.

Plaintiff's evidence to the effect that she delivered to defendant warehouseman articles of personalty in good condition and that defendant failed to redeliver some of the articles and delivered others in damaged condition is sufficient to support a finding by the jury that defendant through its negligence lost the missing articles and damaged those which were redelivered to plaintiff in damaged condition. *Ibid.*

The provisions of a bill of lading issued by a carrier-warehouseman that it should not be liable for loss or damage to articles packed by other than its employees or breakage of articles not described as fragile, and that it should not be liable for the contents of any specific cartons unless the articles packed therein were specifically itemized in the receipt, *held* not applicable when the carrier-warehouseman itself packed the articles. *Ibid.*

Where the warehouseman itself packs the household furnishings, china and silver delivered to it, it is charged with the knowledge that the value of a barrel or carton of such articles would exceed $50.00, and its stipulation of limitation of liability for loss or damage to $50.00 to any one carton or barrel is void. *Ibid.*

WILLS.

§ 32. Rule in Shelley's Case.

The rule in *Shelley's* Case applies where there is a remainder over after a life estate to the heirs general of the life tenant, and if the words used, regardless of phraseology, disclose an intent to carry the remainder to such heirs the rule applies as a rule of property, notwithstanding testator may have intended to convey only a life estate to the first taker. *Wright v. Vaden*, 299.

WILLS—*Continued.*

The word "purchaser" when used with reference to the rule in *Shelley's* Case designates one who takes an estate in his own right under the instrument, while words of limitation define the extent or quality of the estate. *Ibid.*

A devise to a life tenant and at her death "to the children or other lineal descendants of the said" life tenant * * * "to them and their heirs, executors and administrators absolutely," *held* not to attract the rule in *Shelley's* Case, since it is apparent that testator was not describing heirs general to take in indefinite succession but wished the remainder to go to the children of the life tenant who survived the life tenant and to the issue of children who predeceased her. *Ibid.*

§ 50. Bequests and Devises to Charities.

By virtue of the provisions of G.S. 36-23.1, direction that after a life estate to testator's widow, testator's home should be given to some charity to be selected by the executor, testator's son, is not void for indefiniteness. *Banner v. Bank*, 337.

§ 63. Whether Beneficiary is Put to his Election.

The doctrine of election is in derogation of the record title, and therefore it must clearly appear from the terms of the will that testator intended to put a beneficiary to an election in order for the doctrine to apply. *Burch v. Sutton*, 333.

Testator, when disposing of four tracts of land, referred successively to each as "my" land. One tract devised to a person other than his wife belonged to her as surviving tenant by the entireties. *Held:* The doctrine of election does not apply, since it clearly appears from the will that testator erroneously thought the tract held by the entireties to be his own, and therefore that he did not intend to put his wife to her election. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-38, 1-40. Applies to State and political subdivisions. *Williams v. Board of Education*, 761.

1-39, 1-42. Complaint in real action need not allege that plaintiff has been in possession within 20 years preceding action. *Williams v. Board of Education*, 761.

1-52, 1-56. Plea of statutes properly stricken when they are irrelevant to plaintiff's cause of action. *Williams v. Board of Education*, 761.

1-56. Action on agreement for division of profits from patent is barred within three years of breach of agreement. *Parsons v. Gunter*, 731.

1-57. Attorney in fact may not move to set aside judgment against principal. *Howard v. Boyce*, 572.

1-116. Action to set aside consent judgment embodying provisions of deed of separation is not an action affecting title to realty. *McLeod v. McLeod*, 144.

1-131. After dismissal of action upon demurrer, it is no longer pending. *Davis v. Anderson Industries*, 610.

1-151. Pleading liberally construed upon demurrer. *Patterson v. Lynch, Inc.*, 489.

1-180. Trial judge is prohibited from expressing opinion on evidence at any time during trial. *Galloway v. Lawrence*, 245; *S. v. Walker*, 269.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued*

Remark of court having tendency to prejudice jury is ground for new trial. *Homes, Inc. v. Holt*, 467.
Failure to state evidence except in stating contentions is insufficient. *Faison v. Trucking Co.*, 383.

1-206(4). Objection and exception not required with reference to questions propounded by court. *S. v. Walker*, 269.

1-267. Jurisdiction on appeal to Superior Court from order of clerk removing guardian is derivative. *In re Simmons*, 702.

1-279, 1-280. Appellant must serve notice of appeal within ten days. *Teague v. Teague*, 320; *Oliver v. Williams*, 601.

6-21. Court may not order allowances in excess of those set forth in valid separation agreement. *Hinkle v. Hinkle*, 189.

8-89. Application for inspection of writings is addressed to discretion of trial court. *Ins. Co. v. Sprinkler Co.*, 134.

14-27. Indictment charging larceny of value less than $200 cannot support judgment for felony. *S. v. Ford*, 743.

14-72, 14-54. Breaking and entering with intent to commit larceny is felony regardless of value of property stolen. *S. v. Brown*, 55; *S. v. Smith*, 747.

14-100. False pretense is a felony. *S. v. Fowler*, 528.

14-107. Evidence held sufficient for jury in prosecution for issuing worthless check. *S. v. Beaver*, 115.

14-177. Indictment for crime against nature held sufficient; contention that homosexuality is a disease is no defense. *S. v. Stubbs*, 295.

14-322. Abandonment not necessary to prosecution for wilful refusal to support minor child. *S. v. Goodman*, 659.

15-4.1. Confession obtained after repeated questioning over period of months prior to appointment of counsel is incompetent. *S. v. Pearce*, 234.
Indigent defendant's right to unlimited appeal is easily abused. *S. v. Darnell*, 640.

15-19. Affiant is not required to subscribe affidavit. *S. v. Higgins*, 589.

15-27.1. General averment that defendant's domicile contains stolen merchandise is insufficient basis for search warrant. *S. v. Myers*, 581.

15-47. Fact that defendant is illegally held does not in itself render confession invalid. *S. v. Hines*, 1.

15-113. Judgment absolute may be entered on cash appearance bond without issuance of *scire facias*. *S. v. Mallory*, 31.

15-217. Plea of former jeopardy not apposite upon new trial obtained by defendant. *S. v. Hollars*, 45.

19-8. Whether court should allow attorney's fees in action to abate nuisance is addressed to discretion of court. *Bowman v. Fipps*, 535.

20-38(ff). Bicycles are governed by motor vehicle rules insofar as nature of bicycle permits. *Webb v. Felton*, 707.

20-71.1. Owner is entitled to peremptory instruction when all evidence shows that driver was not agent. *Passmore v. Smith*, 717.

20-129, 20-134. Violation of statutes is negligence *per se*. *Faison v. Trucking Co.*, 383.

20-139.1(a). Officer present at scene of accident is arresting officer within meaning of statute. *S. v. Stauffer*, 358.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued*

20-141(c). Where there is no evidence of excessive speed, charge thereon is error. *Wilkins v. Turlington*, 328.

20-141(c), 20-141(b), 20-140(b). Evidence held to permit inference that accident was result of excessive speed or reckless driving. *Drumwright v. Wood*, 198.

20-149(b). Failure of motorist to blow horn in attempting to pass bicycle is negligence. *Webb v. Felton*, 707.

20-152(a). Distance required to be maintained between vehicles traveling in same direction. *Beanblossom v. Thomas*, 181.

20-155. Motorist on right has right of way. *Wilder v. Harris*, 82.

20-161(a). Temporary stop for necessary purpose is not parking. *Faison v. Trucking Co.*, 383.

25-134, 25-139, 25-144. Payment of check by drawee bank cannot operate as an acceptance; but payment of check by bank to payee's agent not authorized to receive payment renders bank liable for conversion. *Construction Co. v. Trust Co.*, 648.

27-7. Rule against contracting against negligence applies to warehousemen. *Jordan v. Storage Co.*, 156.

28-173, 1-57. Action by personal representative for wrongful death is instituted by real party in interest. *Bank v. Hackney*, 17.

28-174. No action for wrongful death for prenatal injury. *Gay v. Thompson*, 394.

33-9. Evidence held to support clerk's order removing guardian of incompetent. *In re Simmons*, 702.

33-31. Mortgaging land of minor to pay off debt of parent void. *Wilson v. Pemberton*, 782.

36-23.1. Devise of home to charity to be selected by executor is not void for indefiniteness. *Banner v. Bank*, 337.

41-10.1. Action may be maintained against State to quiet title. *Williams v. Board of Education*, 761.

44-38. Contract for brickwork at stipulated price per thousand is not for complete job and claim of lien must be detailed. *Neal v. Whisnant*, 89.

50-11. Decree of divorce on ground of separation does not affect prior judgment for alimony. *O'Brien v. O'Brien*, 502.

50-16. Complaint held to state cause of action for alimony without divorce. *Teague v. Teague*, 320.

52-6. Married woman may release husband from duty to provide support and maintenance. *Hinkle v. Hinkle*, 189.
Certification of separation agreement is conclusive in absence of fraud. *Tripp v. Tripp*, 378.

52-10.1, 28-173. Wife may sue husband for negligent injury, and in case of her death her personal representative may sue, *Bank v. Hackney*, 17.

55-75, 55-98. Under Uniform Stock Transfer Act an unlimited endorsement and delivery of stock protects bona fide purchaser for value. *Patterson v. Lynch, Inc.*, 489.

55-138. Foreign corporation which has domesticated is not required to file certificate. *Surety Co. v. Transit Co.*, 756.

55-154(a). Court must find facts sustaining its conclusion that plaintiff had transacted business here without being domesticated. *Foundry Co. v. Benfield*, 342.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued*

58-176. Insurer paying claim subrogated to rights of insured. *Ins. Co. v. Sprinkler Co.*, 134.

62-94(c)(e), 62-132. Order of Utilities Commission will be upheld in absence of showing of error. *Utilities Comm. v. Teer Co.*, 366.

62-133. Commission's findings of fair value in accordance with statute conclusive when supported by evidence. *Utilities Comm. v. Telephone Co.*, 450.

72-75. Shipper complaining of unjust discrimination has burden of proving case. *Utilities Comm. v. Teer Co.*, 366.

79-2(5). Compensation of part-time employee may not be computed on basis of projected annual wage. *Joyner v. Oil Co.*, 519.

97-2(5). Only wages received in employment out of which injury arose may be considered, notwithstanding employee has two jobs. *Barnhardt v. Cab Co.*, 419.

97-13(b), 97-2(2), 97-4. Attempted agreement to limit coverage of compensation policy is ineffectual. *Laughridge v. Pulpwood Co.*, 769.

97-29, 97-37. Where employee who is permanently partially disabled dies from other causes, benefits accrued at time of death may be recovered by personal representative and sole defendant may recover unpaid balance. *McCulloh v. Catawba College*, 513.

105-120(b). Rents from use of telephone poles by other utilities should not be included in computing tax upon gross receipts, *Telephone Co. v. Clayton*, 687.

105-134(6)(g), 105-267. Taxpayer may sue to recover illegal assessment of income tax. *Bleacheries Co. v. Johnson*, 692.

105-134(6), 105-122. Textile finishing plant is engaged in manufacturing for purpose of computing franchise and income taxes. *Bleacheries Co. v. Johnson*, 692.

115-176. Board of Education must assign pupils in accordance with statutory directives, regardless of any coercion or threat by Federal Government to withhold school aid fund. *In re Varner*, 409.

160-249. Imposition of sewerage charge does not amount to appropriation of private system. *Covington v. Rockingham*, 507.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

Art. I, § 2. Where State's witness is withdrawn to be recalled later and is not recalled, defendant must request that witness be returned to stand if he wishes to exercise right of cross-examination. *S. v. Gattison*, 669.

Art. I, § 15. General averment that affiant's domicile contains stolen merchandise is insufficient basis for search warrant. *S. v. Myers*, 581.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

Art. IV, § 1. Foreign judgment must be given same efficacy it has in state rendering it. *Thomas v. Frosty Morn Meats*, 523.

Fourth Amendment. Federal Constitution controls sufficiency of search warrant. *S. v. Myers*, 581.

Fourteenth Amendment. Federal Constitution controls sufficiency of search warrant. *S. v. Myers*, 581.