NORTH CAROLINA REPORTS

Vol. 267

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1966

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1966

CITATION OF REPORTS.

Rule 46 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to the 63rd have been reprinted by the State, with the number of the Volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N.C.
1 Haywood	"	2	"
2 "	"	3	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"
1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
3 "	"	10	"
4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	21	N.C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

☛ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i.e.*, the original) paging.

The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

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

JUSTICES
OF THE
SUPREME COURT OF NORTH CAROLINA.
SPRING TERM, 1966.

CHIEF JUSTICE:

R. HUNT PARKER.

ASSOCIATE JUSTICES:

WILLIAM H. BOBBITT,
CARLISLE W. HIGGINS,
CLIFTON L. MOORE,[1]
SUSIE SHARP,
I. BEVERLY LAKE,
J. WILL PLESS, JR.

EMERGENCY JUSTICES:

J. WALLACE WINBORNE,[2]
WILLIAM B. RODMAN, JR.,[3]
EMERY B. DENNY.[4]

ATTORNEY GENERAL:

THOMAS WADE BRUTON.

DEPUTY ATTORNEYS-GENERAL:

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

ASSISTANT ATTORNEYS-GENERAL:

CHARLES D. BARHAM, JR.,
JAMES F. BULLOCK,
PARKS H. ICENHOUR
ANDREW H. McDANIEL,
WILLIAM W. MELVIN,
BERNARD A. HARRELL,
GEORGE A. GOODWYN,
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]Died 9 July 1966. Succeeded by Joseph Branch, Enfield, N. C.
[2]Died 12 July 1966.
[3]On recall 7 February 1966 to 26 March 1966.
[4]On recall 28 March 1966 to 7 July 1966.

FIRST DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth 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. W. JACKSON	Twenty-Ninth	Hendersonville.
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.	CHESTER R. MORRIS	Coinjock.

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); 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.
LARRY G. FORD, RALEIGH, N. C.

U. S. Marshal

HUGH SALTER, RALEIGH, N. C.

Clerk U. S. District Court

SAMUEL A. HOWARD, RALEIGH, N. C.

Deputy Clerks

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

MIDDLE DISTRICT

Judges

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

Senior Judge

JOHNSON J. HAYES, WILKESBORO, N. C.

U. S. Attorney

WILLIAM H. MURDOCK, GREENSBORO, N. C.

Assistant U. S. Attorneys

HENRY MARSHALL SIMPSON, GREENSBORO, N. C.
R. BRUCE WHITE, JR., GREENSBORO, N. C.
RICHARD MAURICE DAILEY, GREENSBORO, N. C.

U. S. Marshal

E. HERMAN BURROWS, GREENSBORO, N. C.

Clerk U. S. District Court

HERMAN AMASA SMITH, GREENSBORO, N. C.

Deputy Clerks

MRS. JOAN E. BELK, GREENSBORO, N. C.
MRS. SUE L. BUMGARNER, WILKESBORO, N. C.
MRS. RUTH R. MITCHELL, GREENSBORO, N. C.
MRS. BOBBIE D. FRAZIER, GREENSBORO, N. C.
WAYNE N. EVERHART, GREENSBORO, N. C.
ALBERT L. VAUGHN, GREENSBORO, N. C.
MISS JUDITH ANN MABE, GREENSBORO, N. C.

WESTERN DISTRICT

Judges

WILSON WARLICK, *Chief Judge*, NEWTON, N. C.

U. S. Attorney

WILLIAM MEDFORD, ASHEVILLE, N. C.

U. S. Marshal

PAUL D. SOSSAMON, ASHEVILLE, N. C.

Clerk U. S. District Court

THOMAS E. RHODES, ASHEVILLE, N. C.

Deputy Clerks

MISS ELVA McKNIGHT, CHARLOTTE, N. C. (Chief Deputy)
VERNE E. BARTLETT, ASHEVILLE, N. C.
MISS M. LOUISE MORISON, ASHEVILLE, N. C.
MRS. GLENIS S. GAMM, CHARLOTTE, N. C.
MRS. GLORIA S. STADLER, CHARLOTTE, N. C.
MISS MARTHA E. RIVES, STATESVILLE, N. C.

CASES REPORTED.

PAGE

A

Acme Builders, Inc., Ashe v. 384
Ætna Casualty and Surety Co., Rice v. 421
Allen v. Sharp 99
Altman v. Sanders 158
American Air Filter Co., Inc., v. Robb 583
Amos, Church v. 412
Anderson v. Webb 745
Andrews, S. v. 436
Angell v. Raleigh 387
Anson Bank & Trust Co. v. Henry 253
Apel v. Coach Co 25
Ashe v. Builders Co 384
Asheville, Mosseller v. 104
Atwood, Cline v. 182
Atwood v. Holland 722

B

Bagwell v. Brevard 604
Bank v. Fesmire 589
Bank v. Wells 276
Baptist Church, Bryan v. 111
Baptists, Eastern Conference of v. Piner 74
Barefoot v. Holmes 242
Barham, Pearce v. 707
Barnhardt, Indemnity Co. v. 302
Barnhill, Lewis v. 457
Battle, S. v. 513
Beasley v. Wilson 95
Beaufort County Board of Education, Dilday v. 438
Bell, S. v. 513
Bentwood Co., Furniture Co. v. 119
Best, S. v. 435
Blackburn, Heating Co. v. 155
Blackwelder, Johnson v. 209
Board of Adjustment, Craver v. 40
Board of Adjustment, Joyner v. 44
Board of Education, Brown v. 740
Board of Education, Dilday v. 438
Bonardi, King v. 221
Bowling v. Oxford 552
Bradford, S. v. 438
Branch v. Gurley 44
Brevard, Bagwell v. 604
Brewer v. Garner 219
Bridgers, S. v. 121
Britt, King v. 594
Broadfoot, Vaughan v. 691

PAGE

Brogden Produce Co. v. Stanley 608
Brooks, S. v. 427
Brown v. Board of Education 740
Brown, S. v. 189
Bryan v. Church 111
Bryant v. Dougherty 545
Builders Co., Ashe v. 384
Bullard, Hammond v. 570
Bullard, S. v. 599
Burton, *In re* Will of 729
Butler v. Wood 250
Bynum, Insurance Co. v. 289

C

Cain, Dove v. 645
Callicutt v. Smith 252
Carolina Cooling & Heating, Inc. v. Blackburn 155
Carolina Telephone & Telegraph Co., State v. 257
Carson v. National Co 229
Cason, S. v. 316
Cates v. Construction Co 560
Caudle Sand & Rock Co., Inc., Snell v. 613
Charlotte-Mecklenburg Board of Education, Brown v. 740
Childress, S. v. 85
Chinnis, S. v. 85
Church v. Amos 412
Church, Bryan v. 111
Church of God in Christ Jesus New Deal, Inc., v. Amos 412
City of Asheville, Mosseller v. 104
City of Durham Housing Authority v. Thorpe 431
City of Lenoir, LeFevers v. 79
City of Oxford, Bowling v. 552
City of Oxford, R. R. v. 552
City of Raleigh, Angell v. 387
City of Randleman v. Hinshaw 136
City of Winston-Salem Board of Adjustment, Craver v. 40
City of Winston-Salem Board of Adjustment, Joyner v. 44
Clayton, Comr. of Revenue v. Blackburn 155
Clayton, Comr. of Revenue, Oil Corp. v. 15
Clemmons v. Insurance Co 495
Cline v. Atwood 182
Coach Co., Apel v. 25

PAGE

Coley v. Telephone Co. 701
Colwell Electric Company v. Construction Co. 714
Commissioners of Moore, Hobbs v. 665
Commissioner of Revenue v. Blackburn 155
Commissioner of Revenue, Oil Corp. v. 15
Conference v. Piner 74
Consolidated Vending Co., Inc. v. Turner 576
Construction Co., Cates v. 560
Construction Co., Electric Co. v. 714
Conyers, S. v. 618
Cook v. Lanier 166
County of Beaufort Board of Education, Dilday v. 438
County of Duplin v. Jones 68
County of Guilford, Hicks v. 364
County of Moore, Hobbs v. 665
Covington, S. v. 292
Cox v. Gallamore 537
Cox, McGee v. 314
Craver v. Board of Adjustment 40
Cummings, S. v. 300

D

Davis Original Free Will Baptist, Conference v. 74
Davis, S. v. 126
Davis, S. v. 429
Dean, Nicholson v. 375
Devena, S. v. 85
Dilday v. Board of Education 438
Doggett, S. v. 648
Dougherty, Bryant v. 545
Dove v. Cain 645
Duplin County v. Jones 68
Durham Housing Authority v. Thorpe 431

E

Eastern Conference of Original Free Will Baptists v. Piner 74
Electric Co. v. Construction Co. 714
Emanuel, S. v. 663

F

Fasteners Co., Hollenbeck v. 401
Fesmire v. Bank 589
Filter Co. v. Robb 583
First-Citizens Bank & Trust Co., Nationwide Homes v. 528
First Free Will Baptist Church, Bryan v. 111

PAGE

First National Bank of Nevada v. Wells 276
First Union National Bank of N. C., Fesmire v. 589
Food Systems, Freeman v. 56
Freeman v. Food Systems 56
Free Will Baptist Church, Bryan v. 111
Free Will Baptists v. Piner 74
Furio, S. v. 353
Furniture Co. v. Bentwood Co. 119
Futrell, Marine Corp. v. 194

G

Gallamore, Cox v. 537
Garner, Brewer v. 219
Gilliam Furniture, Inc. v. Bentwood, Inc. 119
Globe Indemnity Co., Shearin v. 505
Godwin, S. v. 216
Greensboro Redevelopment Commission v. Hagins 622
Griffin v. Ward 296
Guilford County, Hicks v. 364
Gulf Oil Corp. v. Clayton, Comr. of Revenue 15
Gurley, Branch v. 44

H

Hagins, Redevelopment Commission v. 622
Hall v. Moore 344
Hall, S. v. 90
Hammond v. Bullard 570
Hardee's Food Systems, Inc., Freeman v. 56
Harris, Pendergraft v. 396
Heating Co. v. Blackburn 155
Hedrick v. Tigniere 62
Henry, Trust Co. v. 253
Hicks v. Guilford County 364
Highway Commission v. Phillips 369
Hinshaw, Randleman v. 136
Hobbs v. Moore County 665
Hodge, S. v. 238
Holcomb, S. v. 85
Holland, Atwood v. 722
Hollenbeck v. Fasteners Co. 401
Holmes, Barefoot v. 242
Horney v. Pool Co. 521
Housing Authority v. Thorpe 431
Howser, Potts v. 484
Hubbard v. Josey 651

	PAGE
Hunt Construction Co., Inc., Cates v.	560
Hunt, Trust Co. v.	173
I	
Imperial "400" National, Inc., Carson v.	229
Indemnity Co. v. Barnhardt	302
Indemnity Co., Shearin v.	505
In re McBride	93
In re Macon	248
In re Wallace	204
In re Will of Burton	729
In re Will of Jones	48
In re Will of Lynn	234
Insurance Co. v. Bynum	289
Insurance Co., Clemmons v.	495
Insurance Co., Pardue v.	82
Insurance Co. v. Storage Co.	679
Insurance Co., Young v.	339
J	
Jenkins v. Winecoff	639
Johnson v. Blackwelder	209
Johnson, Jones v.	656
Johnson, S. v.	85
Jones, Duplin County v.	68
Jones, *In re* Will of	48
Jones v. Johnson	656
Jones, S. v.	434
Jones, S. v.	513
Josey, Hubbard v.	651
Joyner v. Board of Adjustment	44
K	
Kale-Barnwell Realty & Construction Co., Electric Co. v.	714
King v. Bonardi	221
King v. Britt	594
King, S. v.	631
Kolman Manufacturing Co., Ward v.	131
L	
Lanier, Cook v.	166
Lawson v. Lawson	643
Lawson, Wilson v.	103
Leake, S. v.	662
LeFevers v. Lenoir	79
Lenoir, LeFevers v.	79
Lewis v. Barnhill	457
Little v. Stevens	328
Long v. Thompson	310
Lucas, Miller v.	1
Lucas, S. v.	304
Lynn, *In re* Will of	234
Mc	
McBride, *In re*	93
McClure v. State	212
McGee v. Cox	314
M	
Macon, *In re*	248
Manufacturing Co., Ward v.	131
Mariam, S. v.	513
Marine Corp. v. Futrell	194
Marks, Streater v.	32
Matthews, S. v.	244
Mayo, S. v.	415
Meredith Swimming Pool Co., Horney v.	521
Michigan Millers Mutual Insurance Co., Pardue v.	82
Miller v. Lucas	1
Miller, S. v.	409
Montague v. Womble	360
Moody v. Widner	101
Moore, Hall v.	344
Moore, Sink v.	344
Moore County, Hobbs v.	665
Moose, S. v.	97
Morris Telephone Co., Inc., Coley v.	701
Mosseller v. Asheville	104
Mullinax, S. v.	85
Mullinax, Wiles v.	392
N	
National Co., Carson v.	229
Nationwide Homes of Raleigh, N. C., Inc. v. Trust Co.	528
Nationwide Mutual Insurance Co. v. Bynum	289
Nationwide Mutual Insurance Co., Clemmons v.	495
Nello L. Teer Co., Thames v.	565
Nicholson v. Dean	375
O	
Oil Corp. v. Clayton, Comr. of Revenue	15
Outboard Marine Corp. v. Futrell	194
Oxford, Bowling v.	552
Oxford, R. R. v.	552
P	
Pardue v. Insurance Co.	82
Pearce v. Barham	707
Pendergraft v. Harris	396

PAGE

Peoples Bank & Trust Co. v. Snowden ... 749
Phillips, Highway Commission v. ... 369
Pike, S. v. ... 312
Pindell, S. v. ... 130
Piner, Conference v. ... 74
Pool Co., Horney v. ... 521
Potts v. Howser ... 484
Prevette, S. v. ... 85
Produce Co. v. Stanley ... 608

Q

Queen City Coach Co., Apel v. ... 25

R

R. R. v. Oxford ... 552
R. R., Schafer v. ... 419
R. R., Utilities Commission v. ... 317
Raleigh, Angell v. ... 387
Ramset Fasteners, Inc., Hollenbeck v. ... 401
Randleman v. Hinshaw ... 136
Redevelopment Commission v. Hagins ... 622
Revis, S. v. ... 255
Rhinehart, S. v. ... 470
Rice v. Surety Co ... 421
Richardson, Whitley v. ... 753
Robb, Filter Co. v. ... 583
Rock Co., Snell v. ... 613

S

Safeguard Insurance Co. v. Storage Co ... 679
Sanders, Altman v. ... 158
Saunders v. Warren ... 735
Sayland v. Sayland ... 378
Schafer v. R. R. ... 419
Scott, Supply Corp. v. ... 145
Security Fire & Indemnity Co. v. Barnhardt ... 302
Sellers v. Vereen ... 307
Selph v. Selph ... 635
Sharp, Allen v. ... 99
Shearin v. Indemnity Co ... 505
Sims, S. v. ... 256
Sink v. Moore ... 344
Smith, Callicutt v. ... 252
Smith, S. v. ... 659
Smith, S. v. ... 755
Snell v. Rock Co ... 613
Snowden, Trust Co. v. ... 749
Southern Railway Company v. Oxford ... 552

PAGE

Southern Railway Co., Schafer v. ... 419
Southern Railway Co., Utilities Comm. v. ... 317
Sparks, Waycaster v. ... 87
Sprinkle, Walker v. ... 626
Stafford, S. v. ... 201
Stallings, S. v. ... 405
Stanley, Produce Co. v. ... 608
Stantliff, S. v. ... 663
S. v. Andrews ... 436
S. v. Battle ... 513
S. v. Bell ... 513
S. v. Best ... 435
S. v. Bradford ... 438
S. v. Bridgers ... 121
S. v. Brooks ... 427
S. v. Brown ... 189
S. v. Bullard ... 599
S. v. Cason ... 316
S. v. Childress ... 85
S. v. Chinnis ... 85
S. v. Conyers ... 618
S. v. Covington ... 292
S. v. Cummings ... 300
S. v. Davis ... 126
S. v. Davis ... 429
S. v. Devena ... 85
S. v. Doggett ... 648
S. v. Emanuel ... 663
S. v. Furio ... 353
S. v. Godwin ... 216
S. v. Hall ... 90
S. v. Hodge ... 238
S. v. Holcomb ... 85
S. v. Johnson ... 85
S. v. Jones ... 434
S. v. Jones ... 513
S. v. King ... 631
S. v. Leake ... 662
S. v. Lucas ... 304
S., McClure v. ... 212
S. v. Mariam ... 513
S. v. Matthews ... 244
S. v. Mayo ... 415
S. v. Miller ... 409
S. v. Moose ... 97
S. v. Mullinax ... 85
S. v. Pike ... 312
S. v. Pindell ... 130
S. v. Prevette ... 85
S. v. Revis ... 255
S. v. Rhinehart ... 470
S. v. Sims ... 256

	PAGE
S. v. Smith	659
S. v. Smith	755
S. v. Stafford	201
S. v. Stallings	405
S. v. Stantliff	663
S. v. Stinson	661
S. v. Thompson	653
S. v. Upchurch	417
S. v. Wallace	513
S. v. Waller	85
S. v. White	238
S. v. Whitted	129
S. v. Williams	424
S. *ex rel.* Clayton, Comr. of Revenue v. Blackburn	155
S. *ex rel.* Utilities Commission v. R. R.	317
S. *ex rel.* Utilities Comm. v. Telegraph Co.	257
State Farm Mutual Automobile Ins. Co., Young v.	339
State Highway Comm. v. Phillips	369
Stevens, Little v.	328
Stinson, S. v.	661
Storage Co., Insurance Co. v.	679
Streater v. Marks	32
Supply Corp. v. Scott	145
Surety Co., Rice v.	421

T

Teer Co., Thames v.	565
Telegraph Co., Utilities Commission v.	257
Telephone Co., Coley v.	701
Thames v. Teer Co.	565
Thompson, Long v.	310
Thompson, S. v.	653
Thorpe, Housing Authority v.	431
Tigniere, Hedrick v.	62
Town of Brevard, Bagwell v.	604
Trust Co. v. Henry	253
Trust Co. v. Hunt	173
Trust Co., Nationwide Homes v.	528
Trust Co. v. Snowden	749
Turner, Vending Co. v.	576

U

Upchurch, S. v.	417
Utilities Commission v. R. R.	317
Utilities Commission v. Telegraph Co.	257

V

Vaughan v. Broadfoot	691
Vending Co. v. Turner	576
Vereen, Sellers v.	307
Virginia-Carolina Laundry Supply Corp. v. Scott	145

W

Wachovia Bank & Trust Co. v. Hunt	173
Walker v. Sprinkle	626
Wallace, *In re*	204
Wallace, S. v.	513
Waller, S. v.	85
Ward, Griffin v.	296
Ward v. Manufacturing Co.	131
Warren, Saunders v.	735
Waycaster v. Sparks	87
Webb, Anderson v.	745
Wells, Bank v.	276
White, S. v.	238
Whitley v. Richardson	753
Whitted, S. v.	129
Widner, Moody v.	101
Wiles v. Mullinax	392
Williams, S. v.	424
Wilmington Cold Storage Co., Insurance Co. v.	679
Wilson, Beasley v.	95
Wilson v. Lawson	103
Winecoff, Jenkins v.	639
Winston-Salem Board of Adjustment, Craver v.	40
Winston-Salem Board of Adjustment, Joyner v.	44
Womble, Montague v.	360
Wood, Butler v.	250

Y

Young v. Insurance Co.	339

Z

Zoning Board of Adjustment, Craver v.	40
Zoning Board of Adjustment, Joyner v.	44

DECISIONS OF THE SUPREME COURT OF NORTH CAROLINA UPON REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

S. v. Hamilton, 264 N.C. 277. Petition for *certiorari* denied 20 June 1966.

S. v. Mitchell, 265 N.C. 584. Petition for *certiorari* denied 20 June 1966.

S. v. Mallory, 266 N.C. 31. Petition for *certiorari* denied 2 May 1966.

S. v. Logner, 266 N.C. 238. Petition for *certiorari* denied 20 June 1966.

S. v. Klopfer, 266 N.C. 349. Petition for *certiorari* granted 20 June 1966.

S. v. Bennett, 266 N.C. 755. Petition for *certiorari* pending.

Housing Authority v. Thorpe, 267 N.C. 431. Petition for *certiorari* pending.

CASES CITED.

A

Aaser v. Charlotte....265 N.C. 494.... 67
Abernathy v. Railroad....150 N.C. 97.... 374
Adams v. Board of Education....248 N.C. 506.... 65
Air Conditioning Co. v. Douglass....241 N.C. 170.... 73
Aldridge v. Hasty....240 N.C. 353.... 494
Allen v. Yarborough....201 N.C. 568.... 638
Allison v. Sharp....209 N.C. 477.... 389
Amusement Co. v. Tarkington....251 N.C. 461.... 255
Anderson v. Motor Co....233 N.C. 372.... 115
Armentrout v. Hughes....247 N.C. 631.... 523
Arrington v. Engineering Corp....264 N.C. 38.... 564
Asheville v. Herbert....190 N.C. 732....607, 608
Askew v. Tire Co....264 N.C. 168.... 365
Atkins v. McAden....229 N.C. 752....448, 449, 450
Austin v. Brunnemer....266 N.C. 697.... 43
Avery v. Stewart....136 N.C. 426.... 719

B

Bailey v. Matthews....156 N.C. 78.... 698
Bailey v. Winston....157 N.C. 252....108, 109
Baker v. Construction Corp....255 N.C. 302.... 207
Bakeries Co. v. Johnson....259 N.C. 419....21, 22, 24
Bank v. Appleyard....238 N.C. 145....330, 331, 332, 333, 334
Bank v. Atkinson....245 N.C. 563.... 592
Bank v. Bryan....240 N.C. 610.... 395
Bank v. Caudle....239 N.C. 270.... 581
Bank v. Hackney....266 N.C. 17.... 523
Bank v. Hall....201 N.C. 787.... 72
Bank v. Lacy....188 N.C. 25.... 677
Bank v. Lindsey....264 N.C. 585.... 728
Bank v. McArthur....165 N.C. 374.... 697
Bank v. M'F'G Co.... 96 N.C. 298.... 336
Bank v. Slaughter....250 N.C. 355.... 582
Barbee v. Edwards....238 N.C. 215.... 157
Barber v. Barber....217 N.C. 422.... 382
Barber v. Minges....223 N.C. 213.... 548
Barlow v. Bus Lines....229 N.C. 382.... 658
Bartlett, *In re* Will of....235 N.C. 489.... 368
Basnight v. Wilson....245 N.C. 548.... 100
Bass v. Lee....255 N.C. 73.... 34
Bassinov v. Finkle....261 N.C. 109.... 120
Batten v. Aycock....224 N.C. 225.... 714
Beach v. Patton....208 N.C. 134.... 187
Beauchamp v. Clark....250 N.C. 132.... 343
Beck v. Wilkens....179 N.C. 231.... 688
Belk's Dept. Store, Inc. v.
Guilford County....222 N.C. 441.... 207
Bell v. Dewey Brothers, Inc....236 N.C. 280.... 115
Bell v. Lacey....248 N.C. 703.... 35
Bell v. Maxwell....246 N.C. 257.... 228

Bell v. Wycoff....131 N.C. 245.... 611
Belvin, *In re* Will of....261 N.C. 275.... 734
Bennett v. Cain....248 N.C. 428.... 211
Benton v. Montague....253 N.C. 695.... 681
Berger v. Cornwell....260 N.C. 198.... 66
Biggs v. Moffitt....218 N.C. 601.... 580
Bird v. Bradburn....131 N.C. 488.... 639
Blanchard v. Ward....244 N.C. 142.... 644
Blankenship v. Blankenship....256 N.C. 638.... 249
Bleacheries, Inc. v.
Johnson, Comr....266 N.C. 692.... 20
Blevins v. Cotton Mills....250 N.C. 493.... 8
Blue v. Blue.... 79 N.C. 69.... 141
Blum v. R. R....187 N.C. 640.... 542
Board of Education v. Lewis....231 N.C. 661.... 448
Board of Managers v. Wilmington..237 N.C. 179.... 652
Bondurant v. Mastin....252 N.C. 190.... 749
Boney, Insurance Comr.
v. Insurance Co....213 N.C. 563.... 395
Bost v. Metcalfe....219 N.C. 607....549, 597
Bourne v. Lay & Co....264 N.C. 33....97, 721
Bowen v. Bank....209 N.C. 140.... 59
Bowling v. Bowling....252 N.C. 527....382, 383
Branham v. Panel Company....223 N.C. 233....562, 563, 564
Brannon v. Ellis....240 N.C. 81.... 739
Bridges v. Graham....246 N.C. 371....227, 244
Briscoe v. Lighting and
Power Co....148 N.C. 396....628, 629
Brissie v. Craig....232 N.C. 701.... 734
Britt v. Wilmington....236 N.C. 446.... 557
Brittain v. Aviation, Inc....254 N.C. 697.... 639
Broach's Will, *In re*....172 N.C. 520.... 51
Brock v. Insurance Co....156 N.C. 112.... 171
Brown v. Brown....264 N.C. 485.... 468
Brown v. Griffin....263 N.C. 61.... 253
Brown v. Martin....176 N.C. 31.... 171
Brown v. Mitchell....102 N.C. 347.... 154
Bruce v. Nicholson....109 N.C. 202.... 73
Bryan v. T. A. Loving Co....222 N.C. 724.... 116
Bryant v. Bryant....193 N.C. 372.... 719
Bryant v. Construction Co....197 N.C. 639.... 520
Bryant v. Shields....220 N.C. 628.... 72
Bryant v. Woodlief....252 N.C. 488.... 188
Buchanan v. Clark....164 N.C. 56.... 534
Buffaloe v. Barnes....226 N.C. 313.... 592
Buffaloe v. Barnes....226 N.C. 778.... 592
Bullard v. Oil Co....254 N.C. 756.... 587
Bundy v. Powell....229 N.C. 707....6, 10
Bunn v. Bunn....262 N.C. 67.... 382
Bunton v. Radford....265 N.C. 336.... 464
Burgess v. Gibbs....262 N.C. 462.... 524
Burgess v. Trevathan....236 N.C. 157....304, 686
Burke v. Coach Co....198 N.C. 8.... 188
Burney v. Comrs....184 N.C. 274.... 448
Burnsville v. Boone....231 N.C. 577.... 534

Burroughs v. Womble....205 N.C. 432.... 36
Butler v. Gantt....220 N.C. 711.... 638
Butner v. Spease....217 N.C. 82....187, 188
Bynum v. Bank....221 N.C. 101.... 592

C

Calcutt v. McGeachy....213 N.C. 1.... 391
Caldwell v. R. R....218 N.C. 63.... 542
Call v. Stroud....232 N.C. 478.... 144
Candler v. Asheville....247 N.C. 398....107, 557
Capps v. Smith....263 N.C. 120....188, 523
Carney v. Edwards....256 N.C. 20.... 702
Carraway v. Moseley....152 N.C. 351.... 176
Carrigan v. Dover....251 N.C. 97.... 464
Carroll v. Montgomery....128 N.C. 278.... 574
Carson v. Doggett....231 N.C. 629....169, 171
Carstarphen v. Plymouth....180 N.C. 26.... 607
Carswell v. Greene....253 N.C. 266.... 713
Carswell v. Lackey....253 N.C. 387.... 570
Carter v. Graves.... 12 N.C. 74.... 695
Cartwright v. Coppersmith....222 N.C. 573....591, 592
Carver v. Leatherwood....230 N.C. 96.... 653
Casualty Co. v. Teer....250 N.C. 547.... 233
Chandler v. Bottling Co....257 N.C. 245.... 737
Charles, *In re* Will of....263 N.C. 411.... 734
Cherokee County v. Meroney....173 N.C. 653.... 582
Childress v. Nordman....238 N.C. 708....7, 9
Church v. Miller....260 N.C. 331.... 134
Clemmons v. King....265 N.C. 199.... 496
Cleve v. Adams....222 N.C. 211.... 732
Clinard v. Lambeth....234 N.C. 410.... 446
Cline v. Cline....258 N.C. 295.... 700
Clontz v. Krimminger....253 N.C. 252.... 298
Coach Co. v. Burrell....241 N.C. 432.... 164
Cody v. Hovey....219 N.C. 369.... 580
Coffee v. Thompson....248 N.C. 207.... 446
Coggins v. Coggins....260 N.C. 765.... 382
Cole v. Guilford County....259 N.C. 724.... 368
Coleman v. Colonial Stores, Inc....259 N.C. 241.... 90
Collins v. Highway Comm....237 N.C. 277....140, 142
Comrs. v. Boring....175 N.C. 105.... 677
Comrs. v. Prudden....180 N.C. 496.... 671
Conard v. Motor Express....265 N.C. 427.... 567
Conference v. Allen....156 N.C. 524.... 78
Conference v. Creech....256 N.C. 128....78, 79
Conference v. Miles....259 N.C. 1....77, 78, 79
Conger v. Insurance Co....260 N.C. 112.... 587
Conrad v. Foundry Co....198 N.C. 723.... 525
Constantian v. Anson County....244 N.C. 221....451, 676
Convent v. Winston-Salem....243 N.C. 316.... 43
Cooperative Exchange v. Scott....260 N.C. 81.... 582
Copeland v. Phthisic....245 N.C. 580....66, 67
Cornelison v. Hammond....225 N.C. 535.... 702
Cornwell v. Huffman....258 N.C. 363.... 288

Coston v. Hotel....231 N.C. 546.... 66
Cox v. Brown....218 N.C. 350.... 356
Cox v. Cox....246 N.C. 528.... 249
Cox, *In re* Will of....254 N.C. 90....732, 733
Cox v. Lee....230 N.C. 155.... 298
Cox v. R. R....149 N.C. 117.... 171
Cox v. Shaw....263 N.C. 361....165, 523
Cratch v. Taylor....256 N.C. 462....446, 611
Credit Co. v. Norwood....257 N.C. 87.... 510
Crisp v. Insurance Company....256 N.C. 408.... 422
Crisp v. Medlin....264 N.C. 314....752, 753
Crook v. Warren....212 N.C. 93.... 157
Crow v. Ballard....263 N.C. 475.... 567
Crump v. Eckerd's, Inc....241 N.C. 489.... 581
Culp v. Love....127 N.C. 457.... 363
Cummings v. Coach Co....220 N.C. 521.... 647
Curlee v. Scales....200 N.C. 612.... 411
Curlee v. Scales....223 N.C. 788.... 647

D

Darden v. Leemaster....238 N.C. 573.... 647
Davis v. Bass....188 N.C. 200.... 72
Davis v. Construction Co....247 N.C. 332....563, 564
Davis v. Davis....223 N.C. 36.... 574
Davis v. Jessup....257 N.C. 215.... 188
Davis v. Manufacturing Co....249 N.C. 543.... 161
Davis v. Rigsby....261 N.C. 684.... 729
Davidson v. R. R....170 N.C. 281.... 541
Deal v. Sanitary Disrtict....245 N.C. 74.... 446
DeBruhl v. Highway Commission..245 N.C. 139.... 712
Dellinger v. Bridges....259 N.C. 90.... 688
Dempster v. Fite....203 N.C. 697.... 30
Dennis v. Albemarle....243 N.C. 221.... 560
Dennis v. Albemarle....242 N.C. 263.... 560
Denny v. Coleman....245 N.C. 90.... 493
Development Co. v. Braxton....239 N.C. 427....390, 391
Dickerson v. Refining Co....201 N.C. 90....169, 170
Dilday v. Board of Education....267 N.C. 438.... 678
Distributing Co. v. Carraway....189 N.C. 420.... 73
Dix v. Pruitt....194 N.C. 64.... 78
Dixon v. Young....255 N.C. 578.... 253
Dobias v. White....240 N.C. 680....157, 721
Doss v. Sewell....257 N.C. 404.... 567
Drainage District, *In re*....254 N.C. 155.... 142
Drake v. Drake.... 15 N.C. 110.... 671
Drumwright v. Wood....266 N.C. 198....227, 753
Duckworth v. Orr....126 N.C. 674.... 591
Duke v. Shaw....247 N.C. 236.... 20
Duncan v. Charlotte....234 N.C. 86.... 115
Dunlap v. Guaranty Co....202 N.C. 651.... 698
Dunlap v. Lee....257 N.C. 447.... 617
Duplin County v. Ezzell....223 N.C. 531.... 492

E

Early v. Eley....243 N.C. 695.... 689
Eason v. Grimsley....255 N.C. 494.... 581
Edgerton v. Johnson....217 N.C. 314.... 520
Edwards v. Arnold....250 N.C. 500....72, 73
Edwards v. Hamill....266 N.C. 304.... 616
Efird, *In re* Will of....195 N.C. 76....55, 576
Elam v. Realty Co....182 N.C. 599.... 395
Electric Corp. v. Aero Co....263 N.C. 437....688, 691
Electric Co. v. Dennis....259 N.C. 354.... 712
Ellis, *In re* Will of....235 N.C. 27.... 734
Equipment Co. v. Swimmer....259 N.C. 69.... 395
Erwin v. Mills Corp....249 N.C. 575.... 630
Essick v. Lexington....232 N.C. 200.... 161
Etheridge v. Corprew.... 48 N.C. 14.... 734
Etheridge v. Etheridge....222 N.C. 616.... 468
Etheridge v. Leary....227 N.C. 636.... 390
Eubanks, *In re*....202 N.C. 357.... 390
Ex parte Schenck.... 63 N.C. 601.... 611

F

Faison v. Trucking Co....226 N.C. 383....504, 738
Fallins v. Insurance Company....247 N.C. 72.... 422
Faw v. North Wilkesboro....253 N.C. 406....107, 108, 109, 557
Feezor v. Siceloff....232 N.C. 563....448, 450
Fetner v. Granite Works....251 N.C. 296.... 504
Fields v. Board of Education....251 N.C. 699.... 743
Finance Co. v. Leonard....263 N.C. 167....24, 141, 671
Finch v. Small
Business Administration....252 N.C. 50.... 135
Fincher v. Rhyne....266 N.C. 64.... 31
Fisher v. New Bern....140 N.C. 506.... 558
Fitch v. Selwyn Village....234 N.C. 632.... 629
Fitzgerald v. Concord....140 N.C. 110....108, 109
Fleming v. Land Bank....215 N.C. 414.... 157
Fletcher v. Comrs. of Buncombe....218 N.C. 1.... 675
Foote v. Davis & Co....230 N.C. 422....587, 588
Forgy v. Schwartz....262 N.C. 185.... 352
Fowle v. Fowle....263 N.C. 724.... 170
Fox v. Commissioners of Durham..244 N.C. 497.... 391
Franks, *In re* Will of....231 N.C. 252.... 53
Freeman v. Belfer....173 N.C. 581.... 72
Freeman v. Preddy....237 N.C. 734.... 144
Frey v. Ramsour.... 66 N.C. 466.... 97

G

Gales v. Smith....249 N.C. 263.... 700
Gallimore v. Highway Commission.241 N.C. 350.... 374
Galloway v. Lawrence....266 N.C. 245.... 368
Gambell, *In re*....244 N.C. 149.... 713
Garland v. Arrowood....177 N.C. 371.... 154
Garner v. Pittman....237 N.C. 328.... 188

Gathings v. Sehorn....255 N.C. 503.... 55
Gatlin v. Parsons....257 N.C. 469.... 520
Gatling v. Highway Comm....245 N.C. 66.... 144
George v. R. R....217 N.C. 684.... 220
Gettys v. Marion....218 N.C. 266.... 108
Gibbs v. Light Co....265 N.C. 459.... 469
Gibson v. Whitton....239 N.C. 11.... 520
Gillikin v. Burbage....263 N.C. 317.... 14
Glenn v. Raleigh....246 N.C. 469....12, 557
Godfrey v. Power Co....190 N.C. 24.... 712
Godwin v. Casualty Co....256 N.C. 730.... 509
Godwin v. R. R....220 N.C. 281.... 299
Goldman v. Kossove....253 N.C. 370.... 66
Goldsboro v. R. R....246 N.C. 101.... 534
Goldsmith v. Samet....201 N.C. 574.... 523
Goldston v. Wright....257 N.C. 279.... 637
Goodwin v. Claytor....137 N.C. 224.... 135
Gore v. Columbus County....232 N.C. 636.... 450
Grabenhofer v. Garrett....260 N.C. 118.... 73
Graham v. Gas Co....231 N.C. 680.... 617
Graham v. Sturgill....123 N.C. 384.... 613
Greene v. Board of Education....237 N.C. 236.... 742
Greene v. Laboratories, Inc....254 N.C. 680....34, 35, 37, 38, 39
Greene v. Tile Co....263 N.C. 503.... 39
Greensboro v. Wall....247 N.C. 516.... 391
Greer v. Broadcasting Co....256 N.C. 382.... 169
Griffin v. Baker....192 N.C. 297.... 36
Griffin v. Blankenship....248 N.C. 81.... 101
Grimes v. Coach Co....203 N.C. 605.... 749
Grimes v. Power Co....245 N.C. 583.... 144
Griners' & Shaw, Inc.
v. Casualty Co....255 N.C. 380....494, 699, 700
Gross v. Smith....132 N.C. 604.... 592
Guest v. Iron & Metal Co....241 N.C. 448.... 563
Guilford v. Georgia Co....112 N.C. 34.... 73
Gunter v. Winders....253 N.C. 782.... 37
Gurganus v. Trust Co....246 N.C. 655.... 712
Guthrie v. Gocking....214 N.C. 513.... 37
Guy v. Gould....202 N.C. 727.... 378

H

Hall, *In re* Will of....252 N.C. 70....637, 639
Hall v. Hall....250 N.C. 275.... 382
Hamilton v. Adams.... 6 N.C. 161.... 139
Hamilton v. Henry....239 N.C. 664.... 84
Hamilton v. McCash....257 N.C. 611.... 65
Hancock v. Wooten....107 N.C. 9.... 148
Handley v. Warren....185 N.C. 95.... 592
Hanes v. Shapiro....168 N.C. 24.... 688
Hardee v. York....262 N.C. 237.... 748
Hardin v. Insurance Company....261 N.C. 67.... 424
Hardy v. Fryer....194 N.C. 420.... 720
Hardy v. Mayo....224 N.C. 558.... 580
Hargrave v. Gardner....264 N.C. 117.... 36

Hargrave v. King..... 40 N.C. 430..... 233
Harris v. Fisher.....115 N.C. 318..... 350
Harris v. Watson.....201 N.C. 661..... 676
Harrison v. Williams.....260 N.C. 392..... 309
Hathaway v. Freeman..... 29 N.C. 109..... 611
Hawkins v. McCain.....239 N.C. 160..... 15
Hawkins v. Simpson.....237 N.C. 155..... 12
Hawley v. Insurance Company.....257 N.C. 381.....422, 512
Hayes v. Elon College.....224 N.C. 11.....365, 366, 367
Hayes v. Ricard.....244 N.C. 313..... 714
Hayes v. Wilmington.....243 N.C. 525..... 291
Heath v. Kirkman.....240 N.C. 303..... 597
Heffner v. Insurance Co.....214 N.C. 359..... 492
Helms v. Green.....105 N.C. 251..... 186
Helton v. Stevens Co.....254 N.C. 321..... 495
Henderson v. Insurance Co.....254 N.C. 329..... 499
Henderson v. Powell.....221 N.C. 239..... 543
Henry v. Leather Co.....231 N.C. 477..... 563
Herman v. R. R.....197 N.C. 718..... 188
Hester v. Motor Lines.....219 N.C. 743..... 30
Hicks v. Beam.....112 N.C. 642..... 574
Hicks v. Guilford County.....267 N.C. 364..... 548
Highway Commission v. R. R.....260 N.C. 274..... 541
Highway Comm. v. Young.....200 N.C. 603..... 140
Hildebrand v. Furniture Co.....212 N.C. 100..... 115
Hill v. Development Co.....251 N.C. 52..... 343
Hill v. Edwards.....255 N.C. 615..... 38
Hill v. Moseley.....220 N.C. 485.....349, 351
Hill v. R. R.....195 N.C. 605..... 542
Hine v. Blumenthal.....239 N.C. 537..... 653
Hines v. Frink.....257 N.C. 723..... 536
Hinkle v. R. R.....109 N.C. 472..... 542
Hinnant v. R. R.....202 N.C. 489..... 188
Hinton v. Cline.....238 N.C. 136..... 46
Hobbs v. Cashwell.....152 N.C. 183..... 154
Hobbs v. Coach Co.....225 N.C. 323..... 749
Hobbs v. Mann.....199 N.C. 532..... 658
Hodges v. Stewart.....218 N.C. 290..... 363
Hodges v. Wilson.....165 N.C. 323..... 520
Hoke v. Glenn.....167 N.C. 594..... 36
Holden v. Holden.....245 N.C. 1..... 446
Holmes v. Fayetteville.....197 N.C. 740..... 356
Holt v. Hogan..... 58 N.C. 82..... 180
Hood v. Cobb.....207 N.C. 128.....153, 154
Hood, Comr. of Banks,
v. Realty, Inc.....211 N.C. 582..... 391
Hooks, Solicitor v. Flowers.....247 N.C. 558..... 698
Hoover v. Gregory..... 253 N.C. 452..... 31
Hoover v. Indemnity Co.....202 N.C. 655..... 549
Hopkins v. Barnhardt.....223 N.C. 617..... 641
Horn v. Insurance Company.....265 N.C. 157..... 422
Hospital v. Stancil.....263 N.C. 630..... 504
Howell v. Department of Conservation and Development.....206 N.C. 206.....367, 368
Howell v. Indemnity Co.....237 N.C. 227.....498, 499

Huff v. Board of Education.....259 N.C. 75..... 743
Hunt v. Bradshaw.....242 N.C. 517..... 547
Hunt v. Davis.....248 N.C. 69..... 536
Huskins v. Feldspar Corp.....241 N.C. 128..... 15
Hutchens v. Southard.....254 N.C. 428..... 65

I

Ice Cream Inc. v. Hord.....263 N.C. 43..... 24
Ingram v. McCuiston.....261 N.C. 392..... 30
In re Broach's Will.....172 N.C. 520..... 51
In re Drainage District.....254 N.C. 155..... 142
In re Estate of Ives.....248 N.C. 176..... 523
In re Eubanks.....202 N.C. 357..... 390
In re Gambell.....244 N.C. 149..... 713
In re Pine Hill Cemeteries, Inc.....219 N.C. 735..... 43
In re Will of Bartlett.....235 N.C. 489..... 368
In re Will of Belvin.....261 N.C. 275..... 734
In re Will of Charles.....263 N.C. 411..... 734
In re Will of Cox.....254 N.C. 90.....732, 733
In re Will of Efird.....195 N.C. 76.....55, 576
In re Will of Ellis.....235 N.C. 27..... 734
In re Will of Franks.....231 N.C. 252..... 53
In re Will of Hall.....252 N.C. 70.....637, 639
In re Will of Isley.....263 N.C. 239..... 51
In re Will of Kemp.....234 N.C. 495..... 55
In re Will of Marks.....259 N.C. 326..... 734
In re Will of Puett.....229 N.C. 8.....733, 734
In re Will of Redding.....216 N.C. 497..... 652
In re Will of Tatum.....233 N.C. 723..... 53
In re Will of York.....231 N.C. 70..... 53
Insurance Co. v. Chevrolet Co.....253 N.C. 243..... 403
Insurance Co. v. Faulkner.....259 N.C. 317..... 685
Insurance Co. v. Gold.....254 N.C. 168..... 20
Ins. Co. v. Ins. Co.....264 N.C. 749..... 291
Insurance Co. v. Insurance Co.....266 N.C. 430..... 509
Ins. Co. v. Lumber Co.....186 N.C. 269.....304, 691
Ins. Co. v. Motor Lines.....225 N.C. 588..... 304
Insurance Co. v. Motors, Inc.....240 N.C. 183..... 688
Insurance Co. v. R. R.....179 N.C. 255..... 685
Ins. Co. v. R. R.....193 N.C. 404..... 304
Insurance Co. v. Roberts.....261 N.C. 285..... 652
Insurance Co. v. Trucking Co.....256 N.C. 721.....685, 686
Irby v. R. R.....246 N.C. 384..... 542
Isley, *In re* Will of.....263 N.C. 239..... 51
Ives, *In re* Estate of.....248 N.C. 176..... 523
Ivey v. Prison Department.....252 N.C. 615.....526, 527

J

Jackson v. Gin Co.....255 N.C. 194..... 386
Jackson v. Joyner.....236 N.C. 259..... 465
Jackson v. Stancil.....253 N.C. 291..... 30
Jarrell v. Board of Adjustment.....258 N.C. 476..... 42

Jenkins v. Fields....240 N.C. 776.... 343
Jenkins v. Trantham....244 N.C. 422.... 702
Jenette v. Hovey....182 N.C. 30.... 134
Johns v. Day....257 N.C. 751.... 227
Johnson v. Allen....100 N.C. 131.... 520
Johnson v. Heath....240 N.C. 255.... 144
Johnson v. Leavitt....188 N.C. 682.... 72
Johnson v. Morrow....228 N.C. 58.... 448
Johnson v. R. R....163 N.C. 431....542, 543
Johnson v. R. R....255 N.C. 386....542, 543
Johnston v. Knight....117 N.C. 122.... 180
Jones v. Greensboro....124 N.C. 310.... 109
Jones v. Insurance Co....210 N.C. 559.... 639
Jones v. Life and Casualty Co....199 N.C. 772.... 422
Jones v. Pinehurst, Inc....261 N.C. 575.... 66
Jones v. Waldroup....217 N.C. 178.... 593
Jones v. Warehouse....137 N.C. 337.... 30
Jordan v. Glickman....219 N.C. 388.... 14

K

Kemp, *In re* Will of....234 N.C. 495.... 55
King v. Insurance Company....197 N.C. 566.... 422
King v. Powell....252 N.C. 506.... 47
King v. Rudd....226 N.C. 156.... 492
Kirby v. Fulbright....262 N.C. 144.... 567
Kirkman v. Highway Commission..257 N.C. 428.... 372
Kizer v. Bowman....256 N.C. 565.... 311
Kornegay v. Goldsboro....180 N.C. 441....671, 677

L

Lake v. Express Co....249 N.C. 410.... 47
Lamb v. Perry....169 N.C. 436.... 574
Lane v. Bryan....246 N.C. 108.... 227
Lane v. Dorney....252 N.C. 90....244, 752, 753
Langley v. Insurance Co....261 N.C. 459.... 689
Lanier v. Pullman Co....180 N.C. 406.... 560
Lawson v. Highway Commission....248 N.C. 276.... 367
Lawson v. Key....199 N.C. 664.... 721
Ledford v. Lumber Co....183 N.C. 614....252, 253
Lee v. American Enka Corp....212 N.C. 455.... 366
Leggette v. McCotter....265 N.C. 617....163, 466
Leonard v. Transfer Co....218 N.C. 667.... 465
Lewis v. Beaufort County....249 N.C. 628.... 454
Lewis v. Insurance Co....243 N.C. 55.... 523
Lewis v. Lee....246 N.C. 68.... 37
Lewis v. Tobacco Co....260 N.C. 410.... 115
Lewis v. Watson....229 N.C. 20....12, 739
Lide v. Mears....231 N.C. 111....389, 392
Light Co. v. Isley....203 N.C. 811.... 390
Lincoln v. R. R....207 N.C. 787.... 228
Lister v. Lister....222 N.C. 555.... 593
Livingston v. Livingston....213 N.C. 797.... 638
Lockey v. Cohen, Goldman & Co....213 N.C. 356.... 116

Lockwood v. McCaskill....262 N.C. 663.... 30
Lofquist v. Insurance Co....263 N.C. 615.... 498
Loving v. Whitton....241 N.C. 273....36, 39, 188
Lowery v. School Trustees....140 N.C. 33.... 677
Lucas v. White....248 N.C. 38.... 581
Lumber Co. v. Power Co....206 N.C. 515.... 558
Luther v. Insurance Co....262 N.C. 716.... 509
Lutz Industries, Inc. v.
Dixie Home Stores....242 N.C. 332.... 172
Lynn v. Clark....252 N.C. 289.... 162
Lyon v. Lyon....205 N.C. 326.... 162

Mc

McArver v. Gerukos....265 N.C. 413.... 461
McCanless v. Ballard....222 N.C. 701.... 702
McCanless v. Flinchum.... 89 N.C. 373.... 154
McCaskill v. Walker....147 N.C. 195.... 152
McCurdy v. Ashley....259 N.C. 619.... 714
McGinnis v. Robinson....258 N.C. 264.... 749
McGuinn v. McLain....225 N.C. 750.... 434
McKay v. Bullard....219 N.C. 589....706, 707
McLean v. McDonald....175 N.C. 418.... 400
McLean v. McLean....233 N.C. 139.... 140
McMillan v. Robeson County....262 N.C. 413.... 139
McNair v. Ward....240 N.C. 330.... 524
McNamara v. Outlaw....262 N.C. 612.... 461

M

Manufacturing Co. v. McCormick....175 N.C. 277.... 582
Manufacturing Co. v. R. R....222 N.C. 330.... 698
Marks, *In re* Will of....259 N.C. 326.... 734
Marshburn v. Patterson....241 N.C. 441.... 598
Martin v. Martin....263 N.C. 86.... 382
Martin v. Underhill....265 N.C. 669.... 27
Massengill v. Lee....228 N.C. 35.... 613
Matheny v. Mills Corp....249 N.C. 575.... 630
Mauldin v. McAden....234 N.C. 501.... 450
Maurer v. Salem Co....266 N.C. 381.... 161
Maxwell, Comr. v. Mfg. Co....204 N.C. 365.... 23
Meiselman v. Wicker....224 N.C. 417.... 395
Mercer v. Mercer....253 N.C. 164.... 382
Messick v. Turnage....240 N.C. 625.... 386
Mica Co. v. Express Co....182 N.C. 669.... 698
Mica Industries v. Penland....249 N.C. 602.... 120
Millar v. Wilson....222 N.C. 340.... 557
Miller v. State....237 N.C. 29.... 416
Millinery Co. v. Little-Long Co....197 N.C. 168.... 233
Mills v. Hansel....168 N.C. 651.... 134
Mintz v. R. R....233 N.C. 607.... 598
Mitchell v. R. R....183 N.C. 162.... 671
Mitchem v. Weaving Co....210 N.C. 732.... 171
Monroe v. Niven....221 N.C. 362.... 732
Montford v. Gilbhaar....265 N.C. 389.... 738

Moore v. Boone....231 N.C. 494.... 299
Moore v. Hales....266 N.C. 482.... 39
Moore v. Humphrey....247 N.C. 423....343, 534
Moore v. Young....260 N.C. 654.... 342
Moore v. Young....263 N.C. 483....342, 343
Moorefield v. Roseman....198 N.C. 805.... 149
Morgan v. Bank....190 N.C. 209.... 690
Morgan v. Bell Bakeries, Inc....246 N.C. 429.... 468
Morgan v. Stewart....144 N.C. 424.... 170
Morrow v. Allison.... 33 N.C. 217.... 611
Morrow v. R. R....213 N.C. 127.... 164
Morton v. Insurance Co....255 N.C. 360.... 492
Moseley v. R. R....197 N.C. 628.... 542
Moss v. Tate....264 N.C. 544.... 461
Mosseller v. Asheville....267 N.C. 104.... 557
Muncie v. Insurance Co....253 N.C. 74.... 499
Murphy v. Murphy....261 N.C. 95.... 249
Murray v. Wyatt....245 N.C. 123.... 500
Murrill v. Palmer....164 N.C. 50.... 433
Muse v. Motor Co....175 N.C. 466.... 597

N

Nationwide Homes v. Trust Co....262 N.C. 79....531, 533
Nebel v. Nebel....223 N.C. 676.... 288
Nesbitt v. Gill....227 N.C. 174....141, 671
Newman v. Bost....122 N.C. 524.... 592
Newton v. McGowan....256 N.C. 421.... 55
Nichols v. Fibre Co....190 N.C. 1.... 164
Norris v. Department Store....259 N.C. 350.... 66

O

Oliver v. Raleigh....212 N.C. 465.... 109
Osborne v. Canton....219 N.C. 139.... 580

P

Pafford v. Construction Co....217 N.C. 730.... 66
Pardue v. Tire Co....260 N.C. 413.... 118
Parker v. Anson County....237 N.C. 78....449, 450
Parks v. Oil Company....255 N.C. 498.... 233
Parrish v. R. R....146 N.C. 125.... 30
Parsons v. Gunter....266 N.C. 731.... 336
Patterson v. R. R....219 N.C. 23.... 698
Patterson v. Trust Co....157 N.C. 13.... 592
Peacock v. Scotland County....262 N.C. 199.... 675
Pearson v. Watts....184 N.C. 499.... 391
Peed v. Burleson's, Inc....244 N.C. 437.... 642
Pemberton v. Greensboro....208 N.C. 466.... 373
Pender v. Trucking Co....206 N.C. 266.... 738
Penland v. Coal Co....246 N.C. 26.... 30
Perkins v. Langdon....233 N.C. 240.... 120
Perry v. Bakeries....262 N.C. 272.... 115
Perry v. Bassenger....219 N.C. 838.... 490

Perry v. Owens....257 N.C. 98.... 398
Petty v. Print Works....243 N.C. 292.... 309
Phillips v. Mining Co....244 N.C. 17.... 121
Pierce v. Murnick....265 N.C. 707.... 67
Pine Hill Cemeteries, Inc., *In re*....219 N.C. 735.... 43
Pinnix v. Casualty Company....214 N.C. 760.... 157
Pinnix v. Griffin....221 N.C. 348.... 164
Pittman v. Snedeker....264 N.C. 55.... 291
Plemmons v. Cutshall....234 N.C. 506.... 702
Plumidies v. Smith....222 N.C. 326.... 349
Poore v. Poore....201 N.C. 791.... 389
Potter v. Frosty Morn Meats, Inc....242 N.C. 67.... 291
Poultry Co. v. Equipment Co....247 N.C. 570....386, 581
Powell v. Cross....263 N.C. 764....47, 186
Powell v. Mills....237 N.C. 582.... 81
Powell v. Water Co....171 N.C. 290.... 304
Power Co. v. Clay County....213 N.C. 698.... 677
Power Company v. Currie....254 N.C. 17.... 21
Powers v. Sternberg....213 N.C. 41....187, 188
Presnell v. Beshears....227 N.C. 279.... 59
Priddy & Co. v. Sanderford....221 N.C. 422.... 645
Propst v. R. R....139 N.C. 397.... 335
Pruden v. Keemer....262 N.C. 212.... 702
Pruett v. Inman....252 N.C. 520....220, 461, 618, 688
Pruitt v. Ray....230 N.C. 322.... 637
Puett, *In re* Will of....229 N.C. 8....733, 734

Q

Queen v. DeHart....209 N.C. 414.... 482

R

R. R. v. Reid....187 N.C. 320.... 677
R. R. v. Woltz....264 N.C. 58.... 568
Ramey v. R. R....262 N.C. 230.... 541
Randall v. Rogers....262 N.C. 544....227, 244, 752
Randleman v. Hinshaw....267 N.C. 136.... 671
Raper v. Byrum....265 N.C. 269.... 727
Raper v. McCrory-McLellan Corp....259 N.C. 199.... 351
Rawls v. Lupton....193 N.C. 428.... 378
Recreation Commission
v. Barringer....242 N.C. 311.... 653
Redding, *In re* Will of....216 N.C. 497.... 652
Reeves v. Staley....220 N.C. 573.... 188
Reid v. Holden....242 N.C. 408....164, 337
Reid v. Johnston....241 N.C. 201.... 78
Revis v. Orr....234 N.C. 158....66, 67
Revis v. Raleigh....150 N.C. 348.... 109
Rhodes v. Raxter....242 N.C. 206.... 97
Rice v. Rigsby....261 N.C. 687.... 729
Richards v. Nationwide Homes....263 N.C. 295....365, 366
Richardson v. Wicker.... 80 N.C. 172.... 611
Roberts v. Cameron....245 N.C. 373.... 157
Roberts v. Hill....240 N.C. 373.... 637

Robinson v. McAlhaney....216 N.C. 674....60, 61, 62
Rock v. Rock....260 N.C. 223....382
Roth v. News Company....217 N.C. 13....172
Rouse v. Jones....254 N.C. 575....47
Rouse v. Kinston....188 N.C. 1....144
Rouse v. Peterson....261 N.C. 600....220
Rowe v. Fuquay....252 N.C. 769....739
Russ v. Woodard....232 N.C. 36....494
Ryals v. Contracting Co....219 N.C. 479....739
Ryder v. Oates....173 N.C. 569....178, 180

S

St. George v. Hanson....239 N.C. 259....534
St. George v. Hardie....147 N.C. 88....391
Sanders v. George....258 N.C. 776....712
Sandy v. Stackhouse, Inc....258 N.C. 194....116
Saunders v. Warren....264 N.C. 200....737
Sayer v. Henderson....225 N.C. 642....330
Scarlette v. Grindstaff....258 N.C. 159....10
Schaeffer v. Haseltine....228 N.C. 484....181
Schloss v. Hallman....255 N.C. 686....558
Schloss v. Jamison....262 N.C. 108....43
Schwabenton v. Bank....251 N.C. 655....533, 535
Scott v. Bryan....96 N.C. 289....121
Scott v. Insurance Co....205 N.C. 38....36
Scott v. Lumber Co....232 N.C. 162....367
Searcy v. Logan....226 N.C. 562....363
Service Co. v. Sales Co....259 N.C. 400....30, 582
Service Co. v. Sales Co....264 N.C. 79....581
Shapiro v. Winston-Salem....212 N.C. 751....465
Shaw v. Barnard....229 N.C. 713....78
Shingleton v. State....260 N.C. 451....652
Short v. Chapman....261 N.C. 674....618
Shuford v. Cook....169 N.C. 52....153
Skipper v. Yow....238 N.C. 659....81
Sledge v. Wagoner....248 N.C. 631....66
Sloan v. Light Co....248 N.C. 125....468
Smith v. Fite....92 N.C. 319....81
Smith v. Gordon....204 N.C. 695....330
Smith v. Hickory....252 N.C. 316....107, 109
Smith v. Hosiery Mill....212 N.C. 661....647
Smith v. Kappas....219 N.C. 850....12, 739
Smith v. Lumber Co....142 N.C. 26....60, 61, 62
Smith v. Sink....211 N.C. 725....187
Smith v. Smith....255 N.C. 152....592
Smith v. Thompson....210 N.C. 672....549
Smith v. Winston-Salem....247 N.C. 349....356
Snell v. Rock Co., Inc....267 N.C. 613....682
Snow v. Highway Commission....262 N.C. 169....371, 372
Snyder v. Oil Co....235 N.C. 119....343
Solon Lodge v. Ionic Lodge....247 N.C. 310....336
Sparks v. Sparks....232 N.C. 492....207
Speas v. Bank....188 N.C. 524....171
Speas v. Ford....253 N.C. 770....336

Speight v. Trust Co.....209 N.C. 563..... 719
Spiers v. Davenport.....263 N.C. 56..... 24
Spivey v. Newman.....232 N.C. 281.....30, 48
Springs v. Doll.....197 N.C. 240..... 748
Squires v. Sorahan.....252 N.C. 589..... 291
Staley v. Winston-Salem.....258 N.C. 244..... 357
Stancil v. Stancil.....255 N.C. 507..... 382
Stancill v. Underwood.....188 N.C. 475..... 170
Stanford v. Grocery Co.....143 N.C. 419..... 171
Stanley v. Hyman-Michaels Co.....222 N.C. 257..... 745
Stansel v. McIntyre.....237 N.C. 148..... 38
S. v. Albarty .....238 N.C. 130..... 215
S. v. Alston .....228 N.C. 555..... 647
S. v. Anderson .....208 N.C. 771..... 519
S. v. Ardrey .....232 N.C. 721..... 192
S. v. Arrington ..... 7 N.C. 571..... 482
S. v. Arthur .....244 N.C. 582..... 633
S. v. Bailey .....254 N.C. 380..... 660
S. v. Baker .....222 N.C. 428..... 410
S. v. Barefoot .....241 N.C. 650..... 214
S. v. Barnes .....264 N.C. 517.....431, 620, 621, 622
S. v. Bazemore .....193 N.C. 336.....481, 482
S. v. Beal .....199 N.C. 278..... 517
S. v. Best .....232 N.C. 575..... 248
S. v. Biller .....252 N.C. 783..... 296
S. v. Birckhead .....256 N.C. 494..... 518
S. v. Blackmon .....260 N.C. 352..... 215
S. v. Blades .....209 N.C. 56..... 479
S. v. Bonner .....222 N.C. 344..... 519
S. v. Boykin .....255 N.C. 432..... 518
S. v. Brady .....237 N.C. 675.....247, 248
S. v. Bridgers .....267 N.C. 121..... 519
S. v. Browder .....252 N.C. 35..... 92
S. v. Brown .....266 N.C. 55.....192, 193
S. v. Bruton .....264 N.C. 488..... 125
S. v. Bryson .....200 N.C. 50..... 411
S. v. Burnette .....242 N.C. 164..... 215
S. v. Byrd .....259 N.C. 141..... 356
S. v. Calcutt .....219 N.C. 545..... 479
S. v. Carter .....265 N.C. 626.....215, 307
S. v. Cash .....219 N.C. 818..... 87
S. v. Caudle .....208 N.C. 249..... 218
S. v. Coal Company.....210 N.C. 742..... 358
S. v. Cofield .....247 N.C. 185..... 517
S. v. Cooke .....248 N.C. 485..... 295
S. v. Cooper .....238 N.C. 241..... 655
S. v. Cooper .....256 N.C. 372.....128, 191, 192, 193, 248
S. v. Cox ..... 28 N.C. 440..... 241
S. v. Crocker .....239 N.C. 446..... 517
S. v. Crook .....133 N.C. 672..... 411
S. v. Dancy ..... 83 N.C. 608..... 306
S. v. Dannenberg .....150 N.C. 799..... 356
S. v. Darnell .....266 N.C. 640.....240, 479
S. v. Davis .....175 N.C. 723..... 92
S. v. Davis .....267 N.C. 126..... 193

S. v. Donnell ..... 202 N.C. 782 519
S. v. Eason ..... 114 N.C. 787 356
S. v. Exum ..... 138 N.C. 599 92
S. v. Faulkner ..... 241 N.C. 609 416
S. v. Flynn ..... 230 N.C. 293 125
S. v. Ford ..... 266 N.C. 743 193
S. v. Fowler ..... 266 N.C. 667 193
S v. Furley ..... 245 N.C. 219 429
S. v. Garrigues ..... 2 N.C. 241 517
S. v. Gatlin ..... 241 N.C. 175 481
S. v. Graham ..... 225 N.C. 217 655
S. v. Gray ..... 162 N.C. 608 411
S. v. Grice ..... 265 N.C. 587 215
S. v. Griffin ..... 246 N.C. 680 655
S. v. Gross ..... 230 N.C. 734 419
S. v. Grundler ..... 251 N.C. 177 479
S. v. Haddock ..... 254 N.C. 162 479
S. v. Hales ..... 256 N.C. 27 358
S. v. Harris ..... 223 N.C. 697 517
S. v. Hawkins ..... 115 N.C. 712 633
S. v. Hill ..... 223 N.C. 711 633
S. v. Hill ..... 223 N.C. 753 92
S. v. Hines ..... 266 N.C. 1 ..... 519, 621
S. v. Hobbs ..... 216 N.C. 14 86
S. v. Hodge ..... 267 N.C. 238 479
S. v. Holland ..... 216 N.C. 610 218
S. v. Holland ..... 234 N.C. 354 86
S. v. Hollingsworth ..... 263 N.C. 158 637
S. v. Holloway ..... 265 N.C. 581 192
S. v. Hoskins ..... 236 N.C. 412 665
S. v. Humbles ..... 241 N.C. 47 518
S. v. Johnson ..... 109 N.C. 852 142
S. v. Johnson ..... 261 N.C. 727 411
S. v. Johnston ..... 76 N.C. 209 306
S. v. Jones ..... 227 N.C. 47 481
S. v. Jones ..... 264 N.C. 134 435
S. v. Jordan ..... 226 N.C. 155 215
S. v. Jordan ..... 247 N.C. 253 406
S. v. Keith ..... 266 N.C. 263 621
S. v. King ..... 219 N.C. 667 87
S. v. King ..... 264 N.C. 578 ..... 633, 634
S. v. Lamb ..... 198 N.C. 423 535
S. v. Langston ..... 88 N.C. 692 357
S. v. Leonard ..... 236 N.C. 126 633
S. v. Lowry ..... 263 N.C. 536 359
S. v. Lowther ..... 265 N.C. 315 301
S. v. Lucas ..... 247 N.C. 208 633
S. v. McClain ..... 240 N.C. 171 218
S. v. McCoy ..... 236 N.C. 121 647
S. v. McKay ..... 150 N.C. 813 482
S. v. M'Leod ..... 8 N.C. 344 638
S. v. McMilliam ..... 243 N.C. 771 ..... 408, 419
S. v. Mallory ..... 263 N.C. 536 358
S. v. Mathis ..... 109 N.C. 815 480
S. v. Matthews ..... 231 N.C. 617 482

S. v. Moore ....262 N.C. 431.... 519
S v. Morgan ....226 N.C. 414.... 215
S. v. Morrison ....210 N.C. 117....358, 671
S. v. Newman ....232 N.C. 281.... 48
S. v. Noland ....204 N.C. 329.... 482
S. v. Overcash ....226 N.C. 632.... 99
S. v. Partlow .... 91 N.C. 550.... 671
S. v. Patton ....221 N.C. 117.... 479
S. v. Perry ....225 N.C. 174....481, 482
S. v. Perry ....226 N.C. 530.... 92
S. v. Perry ....265 N.C. 517.... 242
S. v. Reynolds ....212 N.C. 37.... 410
S. v. Rhinehart ....209 N.C. 150.... 633
S. v. Roberson ....215 N.C. 784.... 713
S. v. Roddey ....219 N.C. 532.... 411
S. v. Rogers ....233 N.C. 390.... 620
S. v. Roux ....266 N.C. 555.... 519
S. v. Sailor ....240 N.C. 113....633, 634
S. v. Scales ....172 N.C. 915.... 671
S. v. Scott ....142 N.C. 582.... 411
S. v. Shaft ....166 N.C. 407.... 429
S. v. Sloan ....238 N.C. 547.... 416
S. v. Smith ....156 N.C. 628....349, 350
S. v. Smith ....240 N.C. 631.... 84
S. v. Smith ....266 N.C. 747.... 193
S. v. Speller ....229 N.C. 67.... 368
S. v. Spruill ....225 N.C. 356.... 411
S. v. Stansbury ....230 N.C. 589.... 128
S. v. Stephens ....244 N.C. 380.... 519
S. v. Stevens ....244 N.C. 40.... 125
S. v. Strickland ....243 N.C. 100.... 215
S. v. Strickland ....254 N.C. 658.... 294
S. v. Stubbs ....266 N.C. 274.... 192
S. v. Stubbs ....266 N.C. 295.... 128
S. v. Summers ....263 N.C. 517....191, 193
S. v. Sutton ....230 N.C. 244.... 739
S v. Swindell ....189 N.C. 151.... 215
S. v. Taylor .... 82 N.C. 554.... 411
S. v. Tessnear ....254 N.C. 211.... 192
S. v. Thompson ....256 N.C. 593....125, 519
S. v. Thornton ....251 N.C. 658.... 416
S. v. Tilley ....239 N.C. 245.... 186
S. v. Wagstaff ....219 N.C. 15.... 124
S. v. Walker ....251 N.C. 465.... 218
S. v. Walker ....266 N.C. 269....621, 622
S. v. Weaver ....264 N.C. 681.... 241
S. v. Webb ....228 N.C. 304.... 633
S. v. Welch ....232 N.C. 77.... 128
S. v. Whaley ....263 N.C. 824.... 128
S. v. White ....244 N.C. 73.... 419
S. v. White ....246 N.C. 587.... 295
S. v. Williams ....225 N.C. 182.... 86
S. v. Williams ....253 N.C. 337.... 296
S. v. Wilson ....176 N.C. 751.... 92
Stegall v. Sledge....247 N.C. 718.... 617

Stevens v. R. R.....237 N.C. 412..... 541
Stone v. Coach Co.....238 N.C. 662..... 164
Story v. Slade.....199 N.C. 596..... 721
Strickland v. Jackson.....259 N.C. 81..... 645
Strigas v. Insurance Company.....236 N.C. 734..... 422
Stubbs v. Motz.....113 N.C. 458..... 337
Studios v. Goldston.....249 N.C. 117..... 157
Sugg v. Greenville.....169 N.C. 606..... 560
Suits v. Insurance Co.....241 N.C. 483..... 655
Sumner v. Candler..... 92 N.C. 634..... 714
Swain v. Insurance Co.....253 N.C. 120..... 499
Swain v. Motor Co.....207 N.C. 755..... 690
Swain v. Phelps.....125 N.C. 43..... 612
Swann v. Bigelow.....243 N.C. 285..... 638
Swindell v. Swindell.....153 N.C. 22..... 592
Sykes v. Boone.....132 N.C. 199..... 719

T

Talley v. Granite Quarries Co.....174 N.C. 445..... 338
Tarkington v. Printing Co.....230 N.C. 354..... 291
Tatum, *In re* Will of.....233 N.C. 723..... 53
Taylor v. Eatman..... 92 N.C. 601..... 181
Taylor v. Hodge.....229 N.C. 558..... 171
Taylor v. Twin City Club.....260 N.C. 435..... 366
Teague v. Oil Co.....232 N.C. 65..... 77
Teague v. Oil Co.....232 N.C. 469..... 77
Tew v. Runnels.....249 N.C. 1..... 729
Therrell v. Freeman.....256 N.C. 552..... 739
Thomas v. College.....248 N.C. 609..... 62
Thomas v. Morgan.....262 N.C. 292.....89, 227, 244
Thompson v. Berry..... 65 N.C. 484..... 611
Thompson v. Onley..... 96 N.C. 9..... 593
Thormer v. Mail Order Co.....241 N.C. 249..... 700
Thrush v. Thrush.....245 N.C. 63..... 135
Tolson v. Young.....260 N.C. 506..... 211
Tomlins v. Cranford.....227 N.C. 323..... 721
Tomlinson v. Norwood.....208 N.C. 716..... 367
Transportation Co. v. Currie.....248 N.C. 560..... 21
Troxler v. Motor Lines.....240 N.C. 420.....37, 39
Trust Co. v. Casualty Co.....231 N.C. 510..... 535
Tryon v. Power Co.....222 N.C. 200.....389, 390
Turner v. Page.....111 N.C. 291.....611, 613

U

Underwood v. Car Co.....166 N.C. 458..... 403
Utilities Comm. v.
Champion Papers, Inc.....259 N.C. 449.....269, 270
Utilities Comm. v. Coach Co.....224 N.C. 390..... 271
Utilities Comm. v. Coach Co.....233 N.C. 119..... 271
Utilities Comm. v. Coach Co.....260 N.C. 43.....269, 270, 271
Utilities Comm. v. Coach Co.....261 N.C. 384..... 273
Utilities Comm. v. R. R.....254 N.C. 73..... 270
Utilities Comm. v. State.....239 N.C. 333..... 323
Utilities Comm. v. Telegraph Co.....239 N.C. 333..... 323

V

Vause v. Equipment Co.....233 N.C. 88.....366, 525, 563
Vincent v. Woody.....238 N.C. 118.....688

W

Waldrop v. Hodges.....230 N.C. 370.....448, 450, 454
Walker v. Wilkins, Inc.....212 N.C. 627.....116
Walker v. Wilson.....222 N.C. 66.....107
Wall v. Bain.....222 N.C. 375.....298, 617
Walsh v. Friedman.....219 N.C. 151.....181
Walston v. Coppersmith.....197 N.C. 407.....714
Walston v. Greene.....246 N.C. 617.....637
Warner v. Leder.....234 N.C. 727.....161
Warren v. Makely.....85 N.C. 12.....154
Watkins v. Mfg. Co.....131 N.C. 536.....560
Watkins v. Raleigh.....214 N.C. 644.....109
Watson v. Mitchell.....108 N.C. 364.....610
Watson v. Smith.....110 N.C. 6.....644
Waugh v. Brittain.....49 N.C. 470.....611
Weaver v. Bennett.....259 N.C. 16.....161, 465, 469
Weavil v. Myers.....243 N.C. 386.....464
Wells v. Clayton.....236 N.C. 102.....207, 615, 616
Wells v. Odum.....205 N.C. 110.....734
Wells v. Trust Co.....265 N.C. 98.....281
Wetherington v. Motor Co.....240 N.C. 90.....78
White v. Hines.....182 N.C. 275.....171, 559
White v. McCarter.....261 N.C. 362.....581
White v. Roach.....261 N.C. 371.....89
Whitehurst v. Elks.....212 N.C. 97.....164
Widenhouse v. Yow.....258 N.C. 599.....378
Wilkins v. Finance Co.....237 N.C. 393.....581
Wilkins v. Finance Co.....238 N.C. 745.....581
Willetts v. Willetts.....254 N.C. 136.....336
Williams v. Insurance Company.....212 N.C. 516.....422
Williams v. McSwain.....248 N.C. 13.....66
Williamson v. Bennett.....251 N.C. 498.....598
Wilson v. Anderson.....232 N.C. 521.....211
Wilson v. Bright.....255 N.C. 329.....65, 464
Wilson v. Camp.....249 N.C. 754.....228
Wilson v. Chandler.....238 N.C. 401.....494
Wilson v. Finance Co.....239 N.C. 349.....512
Wilson v. Motor Lines.....207 N.C. 263.....36
Wingate v. Causey.....196 N.C. 71.....170
Winslow v. Carolina Conference Assoc.....211 N.C. 571.....525
Withers v. Black.....230 N.C. 428.....115
Wofford v. Highway Commission.....263 N.C. 677.....372
Wolfe v. Land Bank.....219 N.C. 313.....97
Woodie v. North Wilkesboro.....159 N.C. 353.....107, 557
Woodruff v. Insurance Co.....260 N.C. 723.....498, 499
Woody v. Barnett.....235 N.C. 73.....371
Woolard v. Smith.....244 N.C. 489.....72
Wright v. McGee.....206 N.C. 52.....390

Wright v. Pegram.....244 N.C. 45..... 47
Wright v. Wright.....229 N.C. 503..... 165

Y

Yarn Co. v. Mauney.....228 N.C. 99..... 599
Yates v. Chappell.....263 N.C. 461.....227, 752
Yeargin v. Wood..... 84 N.C. 326..... 611
York, *In re* Will of.....231 N.C. 70..... 53
York v. Murphy.....264 N.C. 453..... 66
Young v. Whitehall Co.....229 N.C. 360..... 671

Z

Zollicoffer v. Zollicoffer.....168 N.C. 326..... 592

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1966

ANNIE L. MILLER v. PHILIP E. LUCAS, ADMINISTRATOR OF THE ESTATE OF V. W. DOSS AND U-HAUL COMPANY.

(Filed 13 April, 1966.)

1. Evidence § 16—

Whether evidence of the existence of a condition or state of facts at one time is competent to prove the existence of such condition or state of facts at a prior time depends upon the length of time intervening and whether, in view of the nature of the subject matter and circumstances, the condition would not ordinarily exist at the time referred to by the evidence unless it had also existed at the prior time in question.

2. Same; Automobiles § 41r—

Evidence that only a few hours after a trailer had been attached to an automobile by a "ball and socket" hitch the trailer became detached while the automobile was traveling some 25 miles per hour on a city street, causing the accident in suit, and that immediately after the accident part of the socket having a screw for fastening the socket to the ball was broken off, and the safety chains were in the hooks on the trailer, *held* competent evidence that the defect in the coupling mechanism existed at the time the trailer was attached and that the safety chains had not then been attached to the rear of the automobile.

3. Appeal and Error § 41—

Testimony that one tort-feasor stated that the other tort-feasor attached the trailer causing the accident to his automobile and that as it was attached "he did not get out of the automobile" is not prejudicial to the other tort-feasor when such other tort-feasor introduces evidence that its dealer hitched the trailer to the car.

4. Automobiles §§ 6, 21—

G.S. 20-123(b), specifying the safety requirements of trailers and their couplings is intended and designed to prevent injury to persons and property on the highways, and the violation of the statutory requirements is negligence *per se*.

5. Automobiles § 7—

Every motorist is required to exercise reasonable care to avoid injury to persons or property of another, and the failure to exercise such care which proximately causes injury is actionable. G.S. 20-140.

6. Automobiles § 41r—

Allegation and evidence to the effect that the agents of a trailer rental service attached a trailer to the automobile of defendant's intestate and that intestate stated that he did not even get out of his automobile when the trailer was attached, together with evidence that the safety chains were not attached to the rear of the automobile and of defects in the coupling mechanism which caused the trailer to become detached in traffic, is sufficient to be submitted to the jury upon the issue of intestate's negligence in failing to exercise reasonable care to see that the trailer was properly attached to the rear of his car. G.S. 20-140, G.S. 20-123(b).

7. Trial § 21—

So much of defendant's evidence which is favorable to plaintiff and tends to clarify and explain plaintiff's evidence and is not inconsistent therewith is properly considered on motion to nonsuit.

8. Automobiles § 41r—

Evidence that agents of a trailer rental service attached a leased trailer to intestate's automobile, together with evidence permitting the inference that at that time there was a defect in the coupling mechanism and that the safety chains were not attached to the rear of the car, and that shortly thereafter the trailer became detached in traffic, causing the accident in suit, *held* sufficient to be submitted to the jury on the issue of negligence of the trailer rental service. G. S. 20-123(b).

9. Automobiles § 46—

An instruction to answer the issue of negligence in the affirmative if the jury were satisfied by the greater weight of the evidence that defendant was negligent as the court had defined that term or had violated the safety statutes read to the jury, without instructing the jury in any part of the charge as to what facts were necessary to be found by the jury to constitute negligence on defendant's part, must be held for prejudicial error in failing to apply the law to the factual situations presented by the evidence.

10. Trial § 33—

It is the duty of the trial court to explain the law arising on the evidence as to all substantial features of the case adduced by the evidence, and the mere declaration of the law in general terms and the statement of the contentions of the parties is not sufficient. G.S. 1-180.

11. Damages § 14—

Evidence tending to show that plaintiff was jarred and her body swayed to the right in the accident in suit, that immediately after the accident

plaintiff suffered pain in her lower back, but that plaintiff thereafter returned to work although she continued to have pain in her back, improving and worsening during treatment by physicians, that later the condition became worse, and that almost eight months after the accident she was operated on for a ruptured disc, without medical expert testimony that the ruptured disc could or might have been caused by the injury received in the collision, *is held* insufficient predicate for the award of damages for the ruptured disc or the operation.

MOORE, J., not sitting.

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

APPEAL by defendants from *Crissman, J.*, 18 January 1965 Civil Session of FORSYTH. Docketed and argued as Case No. 449 Fall Term 1965, and docketed as Case No. 443 Spring Term 1966.

Civil action to recover damages for personal injuries and demolition of an automobile.

According to plaintiff's allegations in her amended complaint and her evidence, about 5:30 p.m. on 30 May 1963 she was operating her automobile in a southerly direction on South Broad Street in the city of Winston-Salem and was meeting an approaching automobile driven by V. W. Doss in a northerly direction on the same street, which automobile had attached to its rear a two-wheel trailer owned by U-Haul Company; that as the two automobiles approached each other the trailer became detached from the Doss automobile, veered to the left of the street in the direction it was going, and collided with the left side of her automobile, injuring her and demolishing her automobile.

The amended complaint alleges that defendant Doss was negligent in the operation of his automobile as follows: He operated it in a careless and reckless manner, in violation of G.S. 20-140; he operated it with a trailer attached to its rear and failed and neglected to firmly attach the trailer to the rear of his automobile drawing it, and without having it so equipped that it would not shake and break loose, in violation of G.S. 20-123(b). We omit other allegations of negligence, because plaintiff has offered no evidence to support them.

The amended complaint alleges that defendant U-Haul Company was negligent as follows: It allowed defendant Doss to use the trailer without first ascertaining that the same was properly and securely attached to the rear of the Doss automobile, in violation of G.S. 20-123(a); that the trailer was not properly equipped in such manner as to prevent its shaking behind the said vehicle operated by Doss, in violation of G.S. 20-123; that it furnished the said trailer to defendant Doss and failed to fasten the safety chains upon the

trailer. We omit an allegation of negligence that it furnished the trailer to Doss without making any provision for brakes upon the trailer and without equipping the same with brakes, in violation of G.S. 20-124(e), because plaintiff has no evidence to support such an allegation.

The amended complaint alleges that the negligence of the two defendants concurred and cooperated to cause the collision and injury to plaintiff's person and demolition of her automobile.

The amended complaint further alleges that Doss was acting as the servant, agent, and employee of U-Haul Company; that the trailer was the property of U-Haul Company and was being used with its knowledge and consent.

The answer of defendant U-Haul Company denies every allegation in the amended complaint, except it admits the residence of the parties. As a further answer and defense it alleges: It leased a trailer to defendant Doss for his own use under a written lease agreement, and that defendant Doss was at no time its agent, servant, or employee.

The answer of defendant Doss admits the allegations of the amended complaint as to the residence of the parties; that on 30 May 1963 plaintiff was driving her automobile in a southerly direction along South Broad Street in the city of Winston-Salem, and that he was driving his automobile in a northerly direction along said street pulling a trailer belonging to U-Haul Company; that the trailer came loose from his automobile and struck plaintiff's automobile; that he was acting as an agent, servant, and employee of defendant U-Haul Company, and that the trailer was the property of defendant U-Haul Company and was being used with the consent and knowledge of the U-Haul Company; that defendant U-Haul Company, by its servants and employees, was negligent, in that it hooked the trailer to his automobile and failed to fasten the safety chains upon the trailer. It denies that he was negligent and all other allegations in the amended complaint.

In the statement of the case on appeal it is said that defendant Doss died shortly after he filed his answer. In the brief of defendant Lucas, administrator of the estate of V. W. Doss, it is stated that Doss was killed in an accident, and defendant Philip E. Lucas, administrator of the estate of V. W. Doss, was substituted as a defendant in his place. Plaintiff and defendant U-Haul Company offered evidence; Lucas, administrator, offered no evidence.

The following issues were submitted to the jury and answered as shown:

"(1) Was the Plaintiff injured and her automobile damaged by the negligence of the Defendant's intestate, V. W.

Doss, as alleged in the complaint?

"ANSWER: Yes.

"(2) Was the Defendant's intestate the agent of the Defendant U-Haul Company, as alleged in the complaint?

"ANSWER: No.

"(3) Was the Plaintiff injured and her automobile damaged by the negligence of the Defendant U-Haul Company, as alleged in the complaint?

"ANSWER: Yes.

"(4) What amount, if any, is the Plaintiff entitled to recover:

(a) For personal injuries?

"ANSWER: $20,000.00.

(b) For damage to her automobile?

"ANSWER: $325.00."

From a judgment based on the verdict that plaintiff have and recover from both defendants, and each of them, the sum of $20,000 for personal injuries and $325 for demolition of her automobile, and that the costs be taxed against the defendants, each defendant appealed to the Supreme Court.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by W. F. Maready and J. Robert Elster for Philip E. Lucas, Administrator of the Estate of V. W. Doss, defendant appellant.

Womble, Carlyle, Sandridge & Rice by Grady Barnhill, Jr., for U-Haul Company, defendant appellant.

White, Crumpler, Powell, Pfefferkorn and Green by Harrell Powell, Jr., for plaintiff appellee.

PARKER, C.J. Each defendant assigns as error the denial of its and his motion for judgment of compulsory nonsuit made at the close of all the evidence.

Plaintiff's evidence, considered in the light most favorable to her, tends to show the following facts: Plaintiff, a 40-year-old woman, about 5 p.m. on 30 May 1963 was driving her automobile at a speed of 25 to 30 miles an hour south on South Broad Street in the city of Winston-Salem. Approaching her was an automobile with a two-wheel trailer attached to its rear driven by defendant Doss at a speed of 25 to 28 miles an hour north on the same street. The Doss automobile traveling down grade "hit the dip" in the street, and the trailer came loose from the Doss automobile, "swung around to the left," and hit the side of her automobile. The tongue

of the trailer came inside her automobile and broke out the back side glass and all the rear glass, and practically demolished her automobile. No part of the trailer hit her, but the collision jarred her and swayed her body to the right. She stopped her automobile at the scene, got out and saw the trailer which had been pulled against the curb out of the way of traffic. The safety chains on the trailer were in the hooks on the trailer. When she started walking around, she had pain in her lower back.

T. B. Leach, a police officer of the city of Winston-Salem, arrived at the scene about 5:55 p.m. At the scene the street is about 32 feet wide. The two automobiles, the trailer, and Doss were there when he arrived. The trailer was equipped with a ball-type hitch designed to be clamped to the rear bumper of Doss's automobile. Leach testified that he examined the trailer, and then testified as follows: "[T]he trailer was loaded with tree limbs and branches. The hitch, which was a ball-and-socket hitch, the cap fits down over the ball which is, of course, fastened to the car, and this cap then has a kind of a screw on top of it with which to tighten the coupling there — this top was broken off; the part that you screw down to tighten the coupling, it was broken off. . . . The only connection I found attached to the automobile was the knob or the ball, I call it, to which the trailer is fastened." He also testified that Doss told him at the scene: "Mr. Doss stated that he had some work to do in some trees and he needed a trailer, so he went to the service station at Waughtown and Peachtree and rented the trailer from there, and that they hitched the trailer up for him, he did not even get out of the car." Lucas, administrator, did not object to this evidence.

Evidence offered by U-Haul Company as is favorable to plaintiff or tends to clarify or explain testimony offered by plaintiff not inconsistent therewith *(Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307) tends to show these facts: On the afternoon of 30 May 1963 defendant Doss leased the trailer here from a U-Haul Company dealer, Irvin H. Thomas, Jr., and signed a written lease agreement with U-Haul Company. Thomas attached the trailer to the rear of Doss's automobile. About 7 p.m. on the same day and after it had collided with plaintiff's automobile, Doss brought the trailer back to this dealer. Upon objection by Lucas, administrator, this evidence was not admitted against him, and U-Haul Company excepted. The ball-type hitch when properly clamped to the rear bumper of an automobile prevents "the trailer from shaking or snaking" behind the automobile to which it is attached. If the ball-type hitch is broken, or the handle on top is broken, it would have a tendency to

cause the trailer to break loose. The trailer here had safety chains fastened to each corner of the trailer body to be hooked to the rear of the chassis of the towing automobile. The purpose of these chains when properly fastened is to keep the trailer attached to the towing vehicle in case something occurs to cause the trailer hitch to come loose or in case it does come loose. If these chains are properly installed, even if the trailer hitch breaks, the trailer would not break loose. The safety chains serve as a precautionary measure should the trailer become disconnected. The U-Haul Company rents trailers. Its employees are taught how to hook trailers to its customers' automobiles. It instructs its employees to take charge of hooking its trailers to its customers' automobiles. When a trailer is rented from U-Haul Company, its procedure is to write up a lease contract for the customer to sign.

Defendant U-Haul Company contends "the testimony of the broken condition of the hitch after the impact was not competent to prove the condition of the latch before the impact," and cites the following language from *Childress v. Nordman,* 238 N.C. 708, 78 S.E. 2d 757, in support of its contention:

> "This being true, the case falls within the purview of the general rule that mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion. [Citing numerous cases.] This general rule is based on the sound concept that inferences or presumptions of fact do not ordinarily run backward. [Citing cases.]"

However, the general rule stated in the *Childress* case above quoted is not of universal application. "Whether the past existence of a condition or state of facts may be inferred or presumed from proof of the existence of a present condition or state of facts, or proof of the existence of a condition or state of facts at a given time, depends largely on the facts and circumstances of the individual case, and on the likelihood of intervening circumstances as the true origin of the present existence or the existence at a given time. Accordingly, in some circumstances, an inference as to the past existence of a condition or state of facts may be proper, as, for example, where the present condition or state of facts is one that would not ordinarily exist unless it had also existed at the time as to which the presumption is invoked." 31A, C.J.S., Evidence, § 140, pp. 306-07.

This is said in Stansbury, N. C. Evidence, 2d Ed., § 90:

> "Whether the existence of a particular state of affiairs at

> one time is admissible as evidence of the same state of affairs at another time, depends altogether upon the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime. The question is one of the materiality or remoteness of the evidence in the particular case, and the matter rests largely in the discretion of the trial court. . . . There has been some reference in recent cases to a 'general rule' that inferences 'do not ordinarily run backward'; but so much depends upon circumstances that it seems a mistake to think in terms of a 'rule' with respect to this or any other of the many factors that must be considered."

In *Blevins v. Cotton Mills,* 150 N.C. 493, 64 S.E. 428, the Court said:

> "On the admission of testimony as to the condition of the machine not long before the trial of the cause and twenty-two months after the occurrence, the authorities are very generally to the effect that when the condition of an object at a given time is the fact in issue its condition at a subsequent period may be received in evidence, when the circumstances are such as to render it probable that no change has occurred."

According to the further answer and defense in the answer of U-Haul Company, it leased the trailer here to V. W. Doss. According to the testimony of its dealer, Irvin H. Thomas, Jr., he attached the trailer to the back of Doss's automobile on the afternoon of 30 May 1963. About 5 p.m. on the same afternoon Doss was driving his automobile with the trailer attached at a speed of 25 to 30 miles an hour on South Broad Street in the city of Winston-Salem traveling down grade and "hit the dip," and the trailer came loose from his automobile, "swung to the left," and hit the side of plaintiff's automobile which was meeting the Doss automobile. The trailer was pulled against the curb out of the way of traffic. Plaintiff got out of her automobile, went back to the trailer, and at that time the safety chains on the trailer were in the hooks on the trailer. About 5:55 p.m. on the same afternoon T. B. Leach, a police officer of the city of Winston-Salem, arrived at the scene and saw the trailer. He testified as follows as to the condition of the trailer at that time: "The hitch, which was a ball-and-socket hitch, the cap fits down over the ball which is, of course, fastened to the car, and this cap then has a kind of a screw on top of it with which to tighten the coupling there — this top was broken off; the part that you screw down to tighten the coupling, it was broken off. . . .

The only connection I found attached to the automobile was the knob or the ball, I call it, to which the trailer is fastened." Considering the fact that the trailer became detached from the Doss automobile when it was traveling 25 to 28 miles per hour on a city street of Winston-Salem only a few hours after it had been attached to his automobile by a representative of U-Haul Company; the lack of evidence of any likelihood of any intervening circumstances which could have caused the trailer to come loose from the Doss automobile; the fact that the trailer would not ordinarily have come loose from the Doss automobile if the ball-and-socket hitch had not been defective when it was attached to the Doss automobile and if the safety chains had been hooked to the rear of the Doss automobile; and considering all the other facts and circumstances of this particular case, it is our opinion, and we so hold, the evidence was competent, and permits the inference that the condition of the trailer immediately after the collision, in respect to the defective ball-and-socket hitch and in respect to the safety chains on the trailer being in the hooks on the trailer, was the same condition in these respects that the trailer was in when Doss drove away from the U-Haul Company with the trailer attached to the rear of his automobile a few hours before the collision.

Both defendants assign as errors the admission of testimony by plaintiff, over their objections, as to the condition of the trailer when she saw it immediately after the collision. Lucas, administrator, cites no authority to support his contention. Defendant U-Haul Company cites in support of its contention the quotation from *Childress v. Nordman* quoted above. The evidence was competent, and defendants' assignments of error in respect thereto are overruled.

U-Haul Company assigns as error that the Court, over its objection, permitted officer Leach to testify to the effect that Doss told him at the scene that he rented the trailer and they hitched the trailer up for him, and he did not get out of the automobile. U-Haul Company alleges in its further answer and defense that it leased the trailer to Doss. Its evidence is that its dealer hitched the trailer to Doss's automobile. It would seem Doss's statement that he did not get out of the automobile in no way affects the liability of U-Haul Company, but was an admission against interest by Doss. This assignment of error is overruled.

G.S. 20-123(b) provides: "No trailer or semi-trailer shall be operated over the highways of the State unless such trailer or semi-trailer be firmly attached to the rear of the motor vehicle drawing same, and unless so equipped that it will not snake, but will

travel in the path of the wheels of the vehicle drawing such trailer or semi-trailer, which equipment shall at all times be kept in good condition." A violation of this statute intended and designed to prevent injury to persons or property on the highways is negligence *per se.* 1 Strong, N. C. Index, Automobiles, § 6.

> "One using a vehicle trailer on the public highways is required to exercise reasonable care, both as to the equipment of the trailer and as to the operation of the vehicle to which it is attached. . . .
>
> "The owner of a motor vehicle to which a trailer is attached is generally held liable for loss or injury proximately by reason of a defect in the trailer fastening or hitch, resulting in the trailer breaking loose and becoming detached from the motor vehicle. Some statutes require certain safety devices in connection with the use of trailers, and liability for resulting damages may be predicated upon the failure to comply with such requirements. However, the owner of a motor vehicle with a trailer attached is generally held not liable for loss or injury inflicted by reason of a defect in the trailer fastening or hitch resulting in the trailer breaking loose, where he did not have knowledge of such defect, and would not have discovered it by reasonable inspection." 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 714.

"In the case of a trailer not controlled in its movements by any person thereon, the operator of the vehicle to which the trailer is attached must exercise reasonable care to see that it is properly attached and that the progress of the two vehicles does not cause danger or injury. . . ." 60 C.J.S., Motor Vehicles, § 339, b, p. 799.

We have held many times that G.S. 20-140 requires every operator of a motor vehicle to exercise reasonable care to avoid injury to persons or property of another. A failure to so operate proximately causing injury to another gives rise to a cause of action. *Scarlette v. Grindstaff,* 258 N.C. 159, 128 S.E. 2d 221, and cases cited.

Considering plaintiff's evidence in the light most favorable to her, and considering so much of U-Haul Company's evidence as is favorable to her or tends to clarify or explain evidence offered by her not inconsistent therewith *(Bundy v. Powell, supra),* and the allegations in Doss's answer that U-Haul Company "failed to fasten the safety chain upon the said trailer," and Doss's statement to officer Leach at the scene to the effect that he did not get out of his automobile when they attached the trailer to it, it is

clear that a jury could find that Doss failed to exercise reasonable care to see that the trailer was properly attached to the rear of his automobile, that he was operating his automobile in violation of the provisions of G.S. 20-140 and in violation of the provisions of G.S. 20-123(b), that this constituted negligence on his part which proximately resulted in injury to plaintiff and demolition of her automobile. The court properly overruled the motion of Lucas, administrator, for judgment of compulsory nonsuit made at the close of all the evidence. Our opinion finds support in the following cases having to a considerable degree similar factual situations: *Steele v. Commercial Milling Co.*, 50 F. 2d 1037, 84 A.L.R. 278; *Barango v. E. L. Hedstrom Coal Co.*, 12 Ill. App. 2d 118, 138 N.E. 2d 829; *Bidleman v. Wright*, 175 Ohio St. 405, 195 N.E. 2d 904; *Staples v. Spelman*, 53 R.I. 244, 165 A. 783.

U-Haul Company's evidence favorable to plaintiff is that it owned and leased the trailer to Doss, and that it attached it to the back of Doss's automobile; that its trailer had chains fastened to each corner of the trailer body to be hooked to the rear of the chassis of the towing vehicle; that the purpose of the chains when properly fastened is to keep the trailer attached to the towing vehicle in case something occurs to cause the trailer hitch to come loose or in case it does come loose. Considering plaintiff's evidence in the light most favorable to her, and considering so much of U-Haul Company's evidence as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, it would permit, as above stated, a jury to find that U-Haul Company's trailer when U-Haul Company attached it to Doss's automobile had a defective ball-and-socket type hitch which U-Haul Company knew of or could have discovered by reasonable inspection, and that U-Haul Company did not hook the safety chains on the trailer to the rear of the chassis of Doss's automobile; that consequently when the defective ball-and-socket type hitch came loose, the trailer came loose from Doss's automobile and swerved to the left and collided with plaintiff's automobile; that U-Haul Company under the circumstances failed to exercise care commensurate with the danger to be apprehended in order to prevent injury to others; that this constituted negligence; that the negligence of U-Haul Company and Doss was joint and several, constituting a violation by both defendants of the provisions of G.S. 20-123(b), and concurred and cooperated to bring about the collision of the trailer with plaintiff's automobile, which proximately resulted in injury to plaintiff. The court properly overruled U-Haul

Company's motion for judgment of compulsory nonsuit made at the close of all the evidence.

Lucas, administrator, assigns as error the judge's instruction to the jury on the first issue, to wit, was plaintiff injured and her automobile damaged by the negligence of defendant's intestate V. W. Doss, as alleged in the complaint. On this issue the judge charged to this effect: If the jury is satisfied by the greater weight of the evidence that Doss in the operation of his automobile with the trailer attached was negligent, as the court has defined negligence for you, that is if he was operating his automobile in a manner other than the manner in which a reasonable and prudent man would have driven it under similar conditions, or if you are satisfied that his driving was a violation of the reckless driving statute, which the court will now read to you, that will be negligence, and if you are satisfied by the evidence that the negligence of this defendant or his violation of either section of the reckless driving statute proximately caused or was a proximate cause of the collision, it would be your duty to answer the first issue, Yes; if you are not so satisfied you would answer it, No. Nowhere in the charge did the judge instruct the jury what facts it was necessary for them to find to constitute negligence on Doss's part. This charge left the jury unaided to apply the law to the facts relating to the first issue as shown by plaintiff's evidence and by Doss's administrator's evidence.

The provisions of G.S. 1-180 require that the trial judge in his charge to the jury "shall declare and explain the law arising on the evidence in the case," and unless this mandatory provision of the statute is observed, "there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented." *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375. This Court has consistently ruled that G.S. 1-180 imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to meet the statutory requirements. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331, where 14 of our cases are cited; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913. In *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484; this Court said, quoting from Am. Jur.: "The statute requires the judge 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues

involved.' 53 Am. Jur., Trial, section 509." This assignment of error is good.

Each defendant assigns as error the charge as to the measure of damages to be recovered by plaintiff, if any, for personal injuries, on the ground, *inter alia,* that this charge would permit the jury to award damages for plaintiff's expenses incurred by her to Dr. E. O. Jeffreys and a hospital for an operation performed by him on her for a ruptured disc in her back on or about 14 February 1964, on the ground that there is no evidence offered by her to show a causal connection between the injuries sustained by her in the collision and her ruptured disc. After instructing the jury on the measure of damages, the court instructed the jury that plaintiff contends, *inter alia,* that her hospital and medical expenses amounted to a sum in excess of $1,100 (according to her testimony her hospital bill when she was operated on for a ruptured disc in her back was $415.50, and Dr. Jeffrey's bill was $400), and that she had to have this operation for a ruptured disc. In stating defendants' contention the judge charged, *inter alia,* they contended there is no evidence the ruptured disc was caused by the collision; that no doctor testified the ruptured disc was caused by the collision.

It seems plain that the award by the jury to plaintiff for personal injuries of $20,000 was based in large measure upon the fact that the jury found that the ruptured disc in plaintiff's back was caused by the collision of the trailer with her automobile.

Plaintiff's evidence as to her injuries is to this effect: The collision occurred about 5 p.m. on 30 May 1963. When the collision occurred she was jarred and swayed. As she tried to hold on to the steering wheel, her body swayed to the right. She did not feel anything during the collision. After the collision she got out of her automobile. She felt faint. A man took her arm and she sat down on the curb for a while. When she started walking around she had pain in her lower back, just below the belt line, two or three inches below the belt line. The pain in her back was just an ache. She went to work the following day and worked all day, running a single needle machine. The first day after the collision her back hurt all day. From May 30 to June 24 her back continued to hurt in the same place, in the lower part of her back, and up between her shoulders. She took Anacins to relieve the pain. On June 24 she worked, but got off and for the first time went to see a doctor, Dr. Isabel Bittinger. Dr. Bittinger had her x-rayed. After the x-ray she went back to Dr. Bittinger's office and Dr. Bittinger started electrical treatments on her back. She continued to work at her same job, and continued to go to Dr. Bittinger until October 1963.

In October the pain grew worse and was going down into her leg. Dr. Bittinger again started treatments, and advised her to stay out of work for two weeks. Dr. Bittinger continued her treatments, and she got better. By the end of November she was improved. On the first of January 1964 it began hurting again, getting worse, and she went back to Dr. Bittinger on the last of January, and she started giving her treatments again. It did not improve. She worked every day until she went to the hospital on 7 February 1964. In the hospital she came under the care of Dr. E. O. Jeffreys, who formed the opinion that she had a ruptured disc, and Dr. Jeffreys operated on her for this on or about 14 February 1964. Dr. Bittinger, a witness for plaintiff, testified, "There are many things that can cause a slipped disc."

Neither Dr. Bittinger nor Dr. Jeffreys testified that the ruptured disc in plaintiff's back could or might have been caused by the injury she received in the collision. In the record there is not a scintilla of medical evidence that plaintiff's ruptured disc might, with reasonable probability, have resulted from the collision on 30 May 1963.

Whether either Dr. Bittinger or Dr. Jeffreys could have expressed an expert, medical opinion on the matter of causation of plaintiff's ruptured disc, in answer to a properly framed hypothetical question, we cannot say. No such question was asked either of them. The jurors under the judge's charge, and the statement by the judge of plaintiff's contentions in respect to her ruptured disc, were left to speculate about a matter which frequently troubles even orthopedic specialists. Sharp, J., with her usual clarity, said for the Court in *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753:

> " 'One of the most difficult problems in legal medicine is the determination of the relationship between an injury or a specific episode and rupture of the intervertebral disc.' 1 Lawyers' Medical Cyclopedia § 7.16 (1958 Ed.).
>
> "There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. *Jordan v. Glickman,* 219 N.C. 388, 14 S.E. 2d 40; Annot., Admissibility of opinion evidence as to cause of death, disease, or injury, 66 A.L.R. 2d 1086, 1126, supplementing 136 A.L.R. 965, 1004. For instance, no medical evidence was required to link plaintiff's soreness the next day and the six-inch bruise on her right hip with the incident on June 12th. Where, however, the subject matter — for example, a ruptured disc — is 'so far removed from the usual and ordinary experience of the average man

that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease, or a physical condition.' *Ibid.*

"Where 'a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony.' *Huskins v. Feldspar Corp.*, 241 N.C. 128, 84 S.E. 2d 645; *accord, Burton v. Holding & M. Lumber Co.*, 112 Vt. 17, 20 A. 2d 99, 135 A.L.R. 512; See *Hawkins v. McCain*, 239 N.C. 160, 79 S.E. 2d 493. The physical processes which produce a ruptured disc belong to the mysteries of medicine."

The assignments of error by each defendant in respect to the charge on the measure of damages is sustained.

Each defendant is entitled for errors in the charge to a New trial.

MOORE, J., not sitting.

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

GULF OIL CORPORATION v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 13 April, 1966.)

1. Taxation § 36—

A taxpayer asserting that an additional assessment of income tax is illegal because assessed upon income from its subsidiaries in no way derived from its operations within the State, may pay the additional assessment under protest and sue for its recovery under G.S. 105-267, and the contention that the sole remedy is under G.S. 105-134(6)(g) by appeal to the Tax Review Board before it may have the Superior Court determine the legality of the assessment, is untenable.

2. Taxation § 28b—

The Commerce Clause of the Federal Constitution permits a state to tax only that part of the net income of a multistate corporation which is attributable to earnings within the state.

3. Same—

Where a corporation doing business in this State and other states has controlling interest in subsidiaries carrying on like business wholly outside this State, each subsidiary operating as a separate entity with separate records, *held* dividends received by the parent corporation from such foreign subsidiaries are not subject to apportionment for income tax by this State.

4. Same—

Dividend income from foreign subsidiaries received by a multistate corporation domesticated here may not be prorated for income taxation here even though the foreign subsidiaries are engaged in business similar to that of the domesticated parent unless such income from the subsidiaries is attributable to business activities within this jurisdiction or the activities of the corporations are so interrelated as to make it impossible to identify with reasonable certainty the various sources of the parent company's total earnings so that the parent corporation and its subsidiaries are engaged in a "unitary business." G.S. 105-134(2)(a).

5. Taxation § 23—

A taxpayer is entitled to minimize its taxes by any means which the law permits, and such tax avoidance is not tax evasion.

MOORE, J., not sitting.

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

APPEAL by defendant from *Peel, J.*, September 1965 Regular Non-jury Session of WAKE, docketed in the Supreme Court as Case No. 543 and argued at the Fall Term 1965.

Plaintiff instituted this action under G.S. 105-267 to recover the sum of $178,337.00 (with interest), which the original defendant W. A. Johnson, Commissioner of Revenue of North Carolina, demanded from it as additional income taxes for the years 1959 and 1960, and which plaintiff paid under protest. W. A. Johnson thereafter resigned, and I. L. Clayton, present Commissioner of Revenue, was substituted as defendant.

When the case was called for trial, defendant demurred *ore tenus* to the complaint on the ground that the Superior Court had no original jurisdiction of the action and that plaintiff should have commenced the proceedings by a petition to the Tax Review Board, augmented by the presence of the Commissioner of Revenue. The court overruled this demurrer, and defendant excepted. The parties then stipulated the facts determinative of the controversy. The stipulations relate to the years 1959 and 1960 and are summarized as follows:

Plaintiff is a Pennsylvania corporation authorized to do business in North Carolina, other states, and foreign countries. It is en-

gaged in producing oil and natural gas and in the refining, transporting, and marketing of petroleum products. It carries on each of these activities under the direction of a vice-president in charge of a separate department, which operates independently of any other within plaintiff's organization. Each department has its own budget, employees, and equipment, and is required to show an accounting of its expenses and income. All transactions of plaintiff's marketing department with other departments or subsidiaries of plaintiff are and have been conducted at "fair" market value. In North Carolina, plaintiff was engaged only in the business of marketing refined petroleum products and such accessory items as are customarily sold at gasoline filling stations. All petroleum products which plaintiff sold in North Carolina were manufactured at its refinery in Port Arthur, Texas. This refinery processed no oil from any foreign source.

Plaintiff, *inter alia,* owns all or at least 50% of the voting stock in the following subsidiary corporations:

(1) *Gulf Exploration Company,* a Delaware corporation, is engaged in the purchase and sale of crude oil in Europe, Africa, and the Far East. All the crude oil which Gulf Exploration Company sold was purchased from its wholly owned subsidiary, Gulf Kuwait Company, a corporation owning a one-half interest in an oil concession and refinery producing low-grade petroleum products in the Persian Gulf country of Kuwait. Gulf Kuwait Company sold ⅔ of its crude oil to purchasers which had no connection with plaintiff and ⅓ to Gulf Exploration, which ultimately sold less than 1% of it to plaintiff. None of this oil, which was processed in plaintiff's Philadelphia refinery, was sold or delivered in North Carolina.

(2) *Gulf Iran Company,* a Delaware corporation, owns all the capital stock of Gulf International Company, which has an interest in an oil concession in Iran, where it produces and refines crude oil. Gulf Iran Company engages chiefly in the purchase and sale of crude oil and carries on its business operations in the same manner as does Gulf Exploration Company. In 1959, Gulf Iran Company sold no crude oil to plaintiff but did sell to it, at market price, some fuel oil for use in plaintiff's ships calling at Iranian ports. All other crude oil and petroleum products which Gulf Iran purchased from Gulf International were sold and delivered outside of the United States to companies not connected with plaintiff.

(3) *Gulf Italia Company,* a Delaware corporation, was engaged in the production and sale of crude oil in Sicily, where its business was conducted. None of this oil was sold to plaintiff.

(4) *British American Oil Company, Limited* is a Canadian corporation which duplicates the activities of plaintiff. Its business is conducted from its offices in Canada. In 1959, the corporation made no sales to plaintiff. In 1960, at market price, it sold plaintiff some crude oil which plaintiff processed in Ohio and sold outside of North Carolina.

None of the subsidiary corporations listed above were domesticated in North Carolina, or owned property here, and none conducted any business activities within the State. Business transactions between them and plaintiff were limited to those already enumerated, and all were conducted at fair market value, *i.e.*, no benefit innured to plaintiff by reason of the corporate kinship. No products from any of the subsidiaries ever had any connection whatever with North Carolina. The earnings which produced the dividends which the subsidiaries paid plaintiff were all subject to taxation elsewhere, *i.e.*, in Kuwait, Iran, Italy and Canada, respectively. The net income of each subsidiary is shown on separate books and records of accounts maintained by each entirely outside of North Carolina. There is no interchange or sharing of patents or trademarks between them and plaintiff. Each subsidiary paid its prorata share of the cost of every service which plaintiff or any other subsidiary performed for it.

The following schedule indicates the dividends paid plaintiff by its subsidiaries, together with the income tax and interest which was assessed thereon by defendant, and paid under protest by plaintiff:

	DIVIDENDS PAID		COMMISSIONER'S ASSESSMENT	
	1959	1960	1959	1960
Gulf Exploration Co.	$104,000,000	$100,000,000	$66,051	$101,337
Gulf Iran Co.	2,500,000	NONE	1,588	NONE
Gulf Italia Co.	NONE	3,000,000	NONE	3,040
British American Co. Ltd.	3,635,632	3,958,718	2,309	4,012
Totals	$110,135,632	$106,958,718	$69,948	$108,389
GRAND TOTALS:	Dividends paid.		$217,094,350	
	Assessment:		178,337	

Upon the foregoing stipulations, the trial judge "found and concluded": Gulf Exploration Co., Gulf Iran Co., and Gulf Italia Co. were not engaged in a business of a type similar to that which plaintiff conducted in North Carolina. They were operated as independent businesses, unrelated to plaintiff's activities in the State. Plaintiff's business here in no way contributed to the dividends which the four

subsidiaries paid it, and they derived no income from any activity or property in North Carolina. The dividends here involved, therefore, did not constitute income which was reasonably attributable to any business activities conducted by plaintiff in this State, and defendant was without authority to subject these dividends to income taxation. From judgment decreeing that the assessment was unlawful and that plaintiff is entitled to recover of the defendant the sum of $178,337.00, with interest at 6% from March 26, 1963, defendant appeals.

Smith, Leach, Anderson & Dorsett for plaintiff appellee.

Attorney General Bruton, Deputy Attorney General Abbott for defendant appellant.

SHARP, J. Defendant Commissioner's first contention is that the Superior Court had no original jurisdiction under G.S. 105-267 to review the allocation and apportionment, made under G.S. 105-134, of the income of a corporation transacting business partly within and partly without North Carolina. He asserts that G.S. 105-134(6)(g) limits original jurisdiction to review such an allocation or apportionment to the Tax Review Board, augmented by the presence of the Commissioner of Revenue himself. This section provides that if any corporation believes that the statutory method of allocation or apportionment, as administered by the Commissioner, has operated, or will operate, so as to subject to taxation "a greater portion of its income than is reasonably attributable to earnings within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application" of the allocation formula. It authorizes the "augumented Board" to vary the statutory formula if another will more clearly reflect the income attributable to business within the State, and it prohibits any corporation from using an alternative formula except with the Board's permission.

In our opinion, it was not the intention of the Legislature, when, by Pub. L. 1953, ch. 1302, § 4, it amended G.S. 105-134, to require a corporation to secure a ruling from the augmented Tax Review Board before it might have the Superior Court determine the legality of a tax assessment against specific items of its income earned outside of North Carolina, no part of which, it contends, is allocable to North Carolina. The purpose of G. S. 105-134(6)(g) was not to provide either a substitute for, or an alternative to, G.S. 105-267, but to afford relief from the apportionment formula of G.S. 105-134(6) when it operates to tax a greater portion of a corporation's

income than is reasonably attributable to business in this State. Plaintiff here has not sought to vary the statutory formula for apportioning its income. It seeks to recover taxes which, it alleges, have been illegally assessed upon income not attributable to North Carolina and which, therefore, the State may not constitutionally tax. The statute under which it proceeds, G.S. 105-267, requires the taxpayer to pay the amount of the disputed tax and sue the State for its recovery. Such a method, has, in effect, been available to taxpayers since 1887 (Pub. L. 1887, ch. 137 § 84). It is appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute or its application to him. The law does not contemplate that administrative boards shall pass upon constitutional questions. See *Insurance Co. v. Gold, Commissioner of Insurance,* 254 N.C. 168, 118 S.E. 2d 792. Had the General Assembly meant to deprive a corporation of the right to proceed under G.S. 105-267 when it contends that it has been illegally taxed upon income not attributable to business within the State, it would undoubtedly have said so. Plaintiff has strictly complied with the provisions of G.S. 105-267. We hold that it is entitled to proceed thereunder. *Bleacheries, Inc. v. Johnson, Comr.,* 266 N.C. 692, 147 S.E. 2d 177. See *Duke v. Shaw, Commissioner of Revenue,* 247 N.C. 236, 100 S.E. 2d 506.

The second question presented by this appeal is whether dividends from income earned outside North Carolina and paid to plaintiff by four of its subsidiary corporations, which were operated independently of plaintiff, are subject to taxation in North Carolina.

Every corporation doing business in North Carolina is required to pay an annual income tax equivalent to 6% of its net taxable income as defined by G.S. 105-140. "If the corporation is transacting or conducting its business partly within and partly without North Carolina, the tax shall be imposed upon a base which reasonably represents the proportion of the trade or business carried on within the State." G.S. 105-134. Such apportionment is designed to meet the due process requirement that a state show a sufficient nexus between such a tax and the transaction within a state for which the tax is an exaction, and the proscriptions of the Commerce Clause of the Federal Constitution which permit a state to tax only that part of a corporation's net income from multistate operations which is attributable to earnings within the taxing state. *Portland Cement Co. v. Minnesota,* 358 U.S. 450, 3 L. Ed. 2d 421; *Memphis Natural Gas Co. v. Beeler,* 315 U.S. 649, 86 L. Ed. 1090; *Butler Bros. v. McColgan,* 315 U.S. 501, 86 L. Ed. 991; *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L. Ed. 823, 115 A.L.R. 944;

Norfolk & W. R. Co. v. North Carolina, 297 U.S. 682, 80 L. Ed. 977;*Hans Rees' Sons v. North Carolina,* 283 U.S. 123, 75 L. Ed. 879. Upon these and other authorities, this Court has held that North Carolina has the right to collect nondiscriminatory income taxes from a corporation doing business both within and without the State, so long as such taxes are imposed solely on that part of its net income "earned within the State of North Carolina in its interstate business, and reasonably attributable to its interstate business done or performed within the borders of this State." *Transportation Co. v. Currie, Comr. of Revenue,* 248 N.C. 560, 577, 104 S.E. 2d 403, 415, *aff'd. mem.,* 359 U.S. 28, 3 L. Ed. 2d 625. *Accord, Bakeries Co. v. Johnson, Commissioner of Revenue,* 259 N.C. 419, 131 S.E. 2d 1; *Power Company v. Currie, Comr. of Revenue,* 254 N.C. 17, 118 S.E. 2d 155, *appeal dismissed,* 367 U.S. 910, 6 L. Ed. 2d 1250.

Defendant contends that, in G.S. 105-134, the Legislature expressed its intent to adopt as its basis for allocation or apportionment the *entire net income* of a corporation carrying on multistate operations, except for certain segments specifically allocated to other states; that by subsection (2) it excluded from apportionable income all corporate dividends, *"other than* (those from) stocks of a subsidiary corporation having business transactions with or being engaged in the same or similar type of business as the taxpayer"; that it thus *included* dividends from any subsidiary with which taxpayer transacted business or which was engaged in the same or similar type of business as that carried on by the taxpayer anywhere, irrespective of where the subsidiary did its business; that all of the subsidiaries with whose dividends we are here concerned were engaged, albeit not in North Carolina, in the same or similar business in which plaintiff itself was engaged; and that there were business transactions between these subsidiaries and plaintiff, either directly or through other subsidiaries. Defendant argues, therefore, that these dividends were properly allocable and apportionable to North Carolina, even though the subsidiaries which paid them are not domesticated, carried on no business here, owned no property and sold none of their products in the State.

That contention, however, was rejected by this Court in *Bakeries Co. v. Johnson, Commissioner of Revenue, supra.* In that case, plaintiff, a Delaware corporation doing business in North Carolina, was engaged in the wholesale bakery business, manufacturing and selling its products to customers such as chain stores and restaurants. It had several subsidiaries; only one, Cushman Sons, Inc., paid dividends during 1953 and 1954. Cushman was also engaged in

the retail bakery business, manufacturing and selling its products to the general public entirely outside North Carolina. It was not domesticated here, did no business and owned no property in the State. It was not a retail outlet for American Bakeries, and sold none of its products to or through the parent corporation. Cushman maintained separate records and books, and paid for all services rendered it by the plaintiff. In reporting its income for the years 1953 and 1954, the plaintiff did not include the dividends it received from Cushman. The Commissioner adjusted these returns by including Cushman's dividends in the plaintiff's allocable income for the two years. The plaintiff paid the assessed taxes under protest and sued for refund (the same procedure adopted here). The Superior Court held that the dividends were properly included in plaintiff's income apportionable to North Carolina, but this Court reversed. The Court said:

> "As we interpret our tax laws, the mere fact that a foreign corporation engaged in business in North Carolina and other states, owns a subsidiary corporation in another state, which subsidiary does no business in North Carolina and owns no property in this State but is engaged in a similar business to that of the parent corporation, such factual situation does not of itself require the parent corporation to prorate the dividends received from such subsidiary to all the states in which the parent corporation does business." 259 N.C. at 426, 131 S.E. 2d at 6.

The Court concluded that where the separate entities of the domesticated parent and its foreign, dividend-paying subsidiary (engaged in a similar business outside of North Carolina) are maintained — each transacting its own business as a distinct corporation and dealing with the other as if no parent-subsidiary relation existed — North Carolina cannot tax the subsidiaries' dividends even though they are included in the parent's ultimate gains.

In reaching this decision the Court relied, *inter alia,* upon the case of *Hans Rees' Sons v. North Carolina, supra,* in which the Supreme Court of the United States declared that North Carolina's corporate income tax statute then in effect (Pub. L. 1923, ch. 4 § 201; Pub. L. 1925, ch. 101 § 201; Pub. L. 1927, ch. 80, § 311), was, as applied to plaintiff, unreasonable and repugnant to both the Commerce Clause and to § 1 of the 14th Amendment to the Federal Constitution. The plaintiff, a New York corporation, owned and operated a leather manufacturing plant in North Carolina, 40% of the output of which was shipped to plaintiff's warehouse in New

York. The other 60% was shipped on direct orders from New York where its sales office was located. Sales were made throughout this country, in Canada, and in Europe. It derived 17% of its average income from the North Carolina manufacturing operations. Contending that the plaintiff's buying, manufacturing, and selling of hides constituted a unitary business, the defendant, using the statutory formula, allocated to North Carolina approximately 75% of plaintiff's income for the four years in question. With reference to this allocation, Hughes, C.J., said:

> "When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction.
>
> * * *
>
> "(T)he statutory method, as applied to the appellant's business for the years in question, operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that state." 283 U.S. at 134, 135, 75 L. Ed. at 906, 908.

The test then is not solely whether the business of a foreign subsidiary is *similar* to that in which the domesticated parent is engaging in North Carolina or elsewhere, or whether it has had business transactions with the parent elsewhere in the world. Conceding both similarity of businesses and intercorporate transactions outside the State, yet the dividend income which the subsidiary pays the parent cannot be constitutionally allocated to North Carolina and prorated for income taxation unless (1) it is attributable to business activities within this jurisdiction, or (2) the activities of the corporations are so interrelated as to make it impossible to identify the various sources of the taxpayer's total earnings with reasonable certainty. *Maxwell, Comr. v. Mfg. Co.*, 204 N.C. 365, 168 S.E. 397, 90 A.L.R. 476. Thus, it is only when the parent and subsidiary are engaged in a "unitary business" that G.S. 105-134 (2)(a) may be constitutionally applied without reference to whether dividend income is attributable to transactions within the taxing state. In purporting to tax dividends from subsidiaries "having business transactions with or engaged in the same or similar type

of business as the taxpayer," the Legislature was undoubtedly attempting to describe a unitary business in terms of its two most common indicia. In its application to such a business, the statute is clearly constitutional. We do not assume that the Legislature intended it to refer to any situation to which its application would be unconstitutional. See *Finance Co. v. Leonard,* 263 N.C. 167, 139 S.E. 2d 356; *Spiers v. Davenport,* 263 N.C. 56, 138 S.E. 2d 762; *Ice Cream Co., Inc. v. Hord,* 263 N.C. 43, 138 S.E. 2d 816.

The stipulations here exclude any serious contention that plaintiff and these four subsidiaries constitute a unitary business. Plaintiff is an industrial giant engaged in world-wide operations. As a result, it pays taxes to many states and foreign governments — sometimes as much as 50% of the posted price of crude oil after deducting the costs of production. Indeed, exploring ways to minimize taxes is as much a part of its business as exploring for new sources of oil. The several subsidiaries, which, in turn, own subsidiaries; the careful segregation of the activities, receipts, expenditures, and records of each; and the studied separateness of plaintiff's departments and subsidiaries — all working toward the same goal of greater profits for plaintiff — evidence a master plan of corporate organization designed to disprove a unitary operation and to minimize taxes. Defendant's argument that plaintiff's plan has been successful is beside the point. Tax avoidance by any means which the law permits is not tax exasion. 84 C.J.S., Taxation § 62 (1954).

Plaintiff's business is unitary only in the sense that its ultimate gain is derived from the entire business. This, however, "does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. . . ." *Hans Rees' Sons v. North Carolina, supra,* quoted with approval in *Bakeries Co. v. Johnson, Commissioner of Revenue, supra* at 426, 131 S.E. 2d at 6.

It is not necessary for us to decide whether Judge Peel's findings and conclusions — that Gulf Exploration Company, Gulf Iran Company, and Gulf Italia Company were not engaged in business of a type similar to the business which plaintiff conducted in North Carolina — are correct. These conclusions are not determinative of this appeal, since it is quite clear that no part of the dividend income of any of the subsidiaries is attributable to North Carolina, and since plaintiff and its subsidiaries cannot be "regarded

as component parts of a single unit." The plaintiff is entitled to the refund for which it sues.

Affirmed.

MOORE, J., not sitting.

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

RICHARD F. APEL v. QUEEN CITY COACH COMPANY, A CORPORATION, D/B/A QUEEN CITY TRAILWAYS, AND FRANK VERNON WHITE.

(Filed 13 April, 1966.)

1. Automobiles § 41f—

Evidence tending to show that defendant's bus was traveling some 50 miles per hour on a highway covered with ice and snow, that plaintiff observed the bus for a distance of some 449 feet in his rear view mirror, that plaintiff pulled as far to the right as the snow bank, thrown up by a highway scraper, would permit, and that the bus struck the rear of plaintiff's vehicle, resulting in damage to the vehicle and personal injury to plaintiff, *held* sufficient to be submitted to the jury on the issue of negligence, and defendant's motions to nonsuit and to set aside the verdict as being contrary to the greater weight of the evidence on that issue were properly denied.

2. Evidence § 51—

The admission in evidence of a categorical affirmative by plaintiff's expert that the injuries which the evidence tended to show plaintiff suffered in the accident caused the fecal incontinence from traumatic neurosis experienced by plaintiff after the accident, *held* not error, it appearing that defendant brought out the testimony on cross-examination of the witness and that defendant's expert was permitted to testify that in his opinion the accident could not have caused the condition.

3. Evidence § 44—

It is competent for a medical expert to express his opinion as to the cause of a physical condition based upon proper hypothetical question assuming facts supported by evidence.

4. Trial § 16—

Where the court immediately sustains a motion to strike an answer of a witness and cautions the jury not to consider it, it will be assumed that the jury heeded the caution and that any prejudicial effect was thus removed.

MOORE, J., not sitting.

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

APPEAL by defendants from *Pless, J.*, October 25, 1965, Schedule A Civil Session, MECKLENBURG Superior Court.

The plaintiff instituted this civil action in Watauga County to recover for the personal injuries and the property damages he sustained when the GMC passenger bus, owned by the corporate defendant and operated by the individual defendant, crashed into the rear of his 1960 Oldsmobile as both vehicles were proceeding south on U. S. Highway No. 221 near Blowing Rock. According to the plaintiff's allegations and evidence, the collision occurred about 1:30 p.m. on March 6, 1962. The highway was covered with snow and ice. The bus was not equipped either with chains or snow tires so that the driver could maintain adequate control. The driver operated the heavy vehicle at a dangerous and reckless rate of speed under existing road conditions, failed to maintain a proper lookout, followed too closely behind plaintiff's Oldsmobile, and negligently rammed it from the rear, damaging the vehicle to the extent of $1,300.00 and inflicting serious and permanent injuries on the plaintiff. Among the physical injuries resulting from the collision, the plaintiff suffered a fracture of the 7th cervical vertebrae, a fracture of the collarbone, much damage to the muscles and nerves of the neck, shoulders, and back. Additional consequential injuries and damages are set out in paragraph 16 of the complaint:

> "16. As a direct and proximate result of the negligence of the defendants as herein alleged, the plaintiff sustained an injury to his low back that aggravated a condition that had resulted from surgery to his low back in 1944 and from which condition the plaintiff had been a symptomatic for more than 19 years; that this aggravation of said condition necessitated a surgical operation to his low back and further resulted in fecal incontinence to this plaintiff and as a result of this incontinence the plaintiff has no sensation of impending bowel movement and has no control over his elimination process. It is therefore necessary for him to wear a "diaper-like" pad at all times and often he will have a bowel movement without realizing it until he has removed the diaper-type pad. This condition has caused the plaintiff pain, discomfort, embarrassment and complete humiliation on occasions and as the plaintiff is informed and believes and, upon such information and belief alleges, this condition is now permanent in nature and will continue to cause the plaintiff said discomfort, embarrassment and humiliation in the future. He further alleges that this condition has inter-

fered with his earning capacity and will continue to interfere with his earning capacity for the remainder of his life."

The defendants, by answer, denied negligence, alleged that the weather and the road conditions, snow and ice, etc., and blowing snow in the air made travel hazardous; that notwithstanding these conditions the regulatory agencies of both the State and Federal governments required the defendants to meet the bus schedule; that plaintiff was in a place of safety and voluntarily entered the highway and assumed the dangers incident to travel thereon during the blizzard; that his negligence in leaving a place of safety for a place of hazard was one of the proximate causes of the accident and injury; that the plaintiff was guilty of contributory negligence in entering the main highway from a side road without ascertaining the movement could be made in safety, did not keep a proper lookout and did not keep his vehicle under proper control; and that these negligent acts contributed to his injury.

Upon defendants' motion, the cause was removed to, and tried in, Mecklenburg County. Both parties introduced evidence, including testimony of medical experts. The court overruled motions for nonsuit, refused to give the special instructions requested by the defendants, and submitted issues of defendants' negligence in causing the injury and the plaintiff's damages. The jury found the plaintiff was injured and his property damaged by the negligence of the defendants and fixed his award at a very substantial amount. From the judgment in accordance with the verdict, the defendants appealed, assigning errors.

Haynes, Graham, Bernstein & Baucom by William E. Graham, Jr., for plaintiff appellee.

Charles T. Myers, John F. Ray for defendant appellants.

HIGGINS, J. The defendants made timely motions to nonsuit and to set aside the verdict as being contrary to the greater weight of the evidence. These motions involved the same legal questions. *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872. They were properly denied. In fact, neither in their brief nor on the oral argument do the defendants seriously challenge the sufficiency of the evidence to go to the jury on issues of negligence and some injury. However, they do seriously contend the plaintiff's evidence with respect to the consequential damages charged in paragraph 16 of the complaint was insufficient to show such condition was proximately caused by the accident of March 6, 1962; or that the evidence offered was properly admissible on that issue. The court

admitted the evidence over objection, and refused the defendants' written request to charge the jury not to consider it.

According to the plaintiff's evidence, he was driving south on Highway 221 at 1:30 in the daytime. Snow had been falling all day. Just before the accident, he met and passed the snow scraper going north on the highway. In his rearview mirror he saw the defendant's bus following him at a speed he estimated to be 50 miles per hour. He pulled as far to the right as the snow bank left by the scraper would permit. The bus struck the rear of his automobile. He testified as to the violence of the impact, his serious physical injuries and his suffering resulting directly from them. He introduced medical testimony of current injuries. Over defendants' objection, the court permitted the plaintiff's medical expert witnesses to testify in response to a hypothetical question that the loss of control over his elimination process "could" or "might" have resulted from the injury sustained in the March 6, 1962, accident.

The plaintiff admitted that he had undergone surgery for the removal of a malignant growth from his lower spinal cord in the year 1944. However, prior to the accident on March 6, 1962, he had not suffered any fecal incontinence, but in June thereafter the condition developed which he thought at the time was diarrhea but which got worse as time went on until he consulted Dr. Scheinberg who diagnosed his ailment and sent him to Dr. Ehlert who performed an exploratory operation on the lower spine in April, 1963. Both Dr. Scheinberg and Dr. Ehlert diagnosed the plaintiff's incontinency as resulting from the atrophy of the nerves and muscles of the lower body. They suspected that the growth (removed in 1944) had redeveloped, had become active, and was causing the atrophy. However, the exploratory operation proved negative.

On cross-examination, Dr. Scheinberg testified:

> "The accident occurred and he began to have incontinency and difficulty with his right leg. And it's for that reason that I believe there is a relationship. As to whether just any kind of accident could have brought this on, I don't know about any kind of accident. I am asked to give my answer, assuming these facts to be true, do I have an opinion as to whether there was a relationship, and my answer was yes. . . . As to whether it's my opinion that the injury to the neck and injury to the shoulder could have brought on the fecal incontinence, I don't see how one could come to any other conclusion. I say it brought it on. That is to say, it precipitated it on the basis of the previous disease which was present. If this were not present before he had gotten well, the accident occurred and this was

> of such an intensity as to throw him about in the automobile and cause these two fractures, then I would say they are related. . . . I am relating my answer to the basis of the chronological coincidence which seems, according to these assumptions, irrefutable. If that's a relationship — I assume they are related, but how they are related, I don't know."

The defendants may not complain that Dr. Scheinberg's quoted testimony goes beyond the "could" or "might have" limits permitted in relating the later developed disability to the accident of March 6, 1962. When challenged on cross-examination, Dr. Scheinberg stated: "I don't see how one could come to any other conclusion. I say it brought it on." The defendant brought out this testimony by a prodding cross-examination.

Dr. Allen, witness for the defendants, admitted to be a medical expert specializing in the field of neurosurgery, testified in response to the defendants' hypothetical question: "Based on those facts, it is my opinion that the accident could not have caused Mr. Apel's fecal incontinence."

The plaintiff's evidence, in the light most favorable to him, was ample to go to the jury and to support the finding the plaintiff was injured by the negligence of the defendants. The evidence of immediate physical injuries resulting from the accident was sufficient to justify a rather substantial award of damages, although the evidence does not disclose any great loss of earnings. However, it is apparent from the evidence that the major part of the jury's award was based on the evidence of fecal incontinence which developed three or more months subsequent to the 1962 accident. The questions arise whether the plaintiff's medical evidence was properly admissible and, when supplemented by the other testimony, furnishes a sufficient basis to support the entire award. The plaintiff's medical testimony indicates that probably some physical injury or trauma started the atrophy process (traumatic neurosis) which culminated in the loss of control of which the plaintiff now complains. It is evident the plaintiff's experts attach major importance to the chronological sequence of events. The only injuries disclosed in the evidence which could have had influence in producing the harmful result were: (1) the growth on the spinal cord and the operation for its removal in 1944; (2) the accident in 1962; and (3) the exploratory operation in 1963. The plaintiff argues, not without force, that the passage of 18 years after the first operation without symptoms rules out the 1944 operation as an efficient cause of his trouble. The 1963 operation proved negative except for excessive scar tissue resulting from the healing process. That operation was

performed after the trouble had developed, in an effort to locate its cause. The medical testimony suggests that during the time interval between the accident and the loss of control, the process of traumatic neurosis was at work.

For the foregoing reasons we think the court was required to admit the medical testimony and to refuse the special instructions to the jury to disregard it. The plaintiff's expert witnesses were asked for their opinion (based on the recitals in the hypothetical question) whether the accident in 1962 could, or might have resulted in the type of disability alleged in plaintiff's paragraph 16. The answers were favorable to the plaintiff. The form of hypothetical questions and the scope of the answers which are permitted are discussed in many decisions of this Court. This Court has held: "It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of a physical condition of a person if his opinion is based either upon facts within his personal knowledge or upon an assumed state of facts supported by evidence there recited in a hypothetical question." *Spivey v. Newman,* 232 N.C. 281, 59 S.E. 2d 844, citing many cases. Other similar cases not cited in *Spivey* are: *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541; *Ingram v. McCuiston,* 261 N.C. 392, 134 S.E. 2d 705; *Service Co. v. Sales Co.,* 259 N.C. 400, 131 S.E. 2d 9; *Jackson v. Stancil,* 253 N.C. 291, 116 S.E. 2d 817; *Penland v. Coal Co.,* 246 N.C. 26, 97 S.E. 2d 432; *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794; *Dempster v. Fite,* 203 N.C. 697, 167 S.E. 33; *Parrish v. R. R.,* 146 N.C. 125, 59 S.E. 348; *Jones v. Warehouse,* 137 N.C. 337, 49 S.E. 355. See also, Stansbury, North Carolina Evidence, § 137, p. 270, *et seq.;* 20 Am. Jur., Evidence § 867, p. 731; 66 A.L.R. 2d 1082.

The Court has had, and still has, difficulty in applying the rules to the facts of particular cases. Ordinarily, the hypothetical questions should not be so framed as to permit the witness to answer the ultimate issue to be determined by the jury and thus invade its province. This case is a good illustration of the difficulty. The plaintiff's experts were permitted to answer the lengthy hypothetical question as to whether the plaintiff's particular difficulty *could* or *might* have resulted from the 1962 accident. The witnesses, with some qualifications and explanations, answered, "yes," that the accident could or might have triggered the harmful results. On the other hand, the defendants' medical expert, in answer to the same question, stated, "no," the harmful result *might not* and *could not* have come from the accident. The rule overbalances the advantage in favor of the defendants.

We have discussed the defendants' major objections to the trial.

The other assignments of error have not been overlooked. Exception No. 6, Assignments of Error No. 2, involved the court's refusal to order a mistrial because the plaintiff stated that a photograph showing the damage to his automobile was made by the insurance adjuster for the bus company. Defense counsel moved the court to strike the answer and to order a new trial. The court denied the double barreled motion, but hastened to add that it was taking the motion for mistrial under advisement; then immediately sustained the motion to strike, delivering this caution to the jury: "Ladies and gentlemen, do not consider that statement." We may assume the jury heeded the caution and did not penalize the bus company because its adjuster had taken a photograph of the plaintiff's automobile. *Hoover v. Gregory*, 253 N.C. 452, 117 S.E. 2d 395; *Fincher v. Rhyne*, 266 N.C. 64, 145 S.E. 2d 316; Stansbury, North Carolina Evidence, 2d Ed. 588.

Some of the witnesses were permitted to illustrate their testimony by the use of a chart showing the surroundings of the place where the accident occurred. The plaintiff, after observing the bus for a distance of at least 449 feet, estimated its speed at 50 miles per hour. The judge made jocular side reference about inflation in connection with his charge that in awarding damages for any future suffering or loss, the present worth rule should be observed. Harmful effect in connection with these objections is not disclosed.

This is an important case. Examination of the long record and the exhaustive briefs fails to disclose error of law committed by the trial court.

No error.

PLESS, J., took no part in the consideration and decision of this case.

MOORE, J., not sitting.

MARIE STREATER v. ADELL MARKS AND CORNELIUS EUGENE McCARTHA.

(Filed 13 April, 1966.)

1. Automobiles § 35; Negligence § 20; Pleadings § 8; Torts § 3—

Where a passenger in an automobile states a cause of action against each driver involved in the collision in suit, neither defendant is entitled to file a cross-action against the other for contribution.

2. Automobiles § 35— Complaint held to state cause of action for concurring negligence of defendants.

In an action by a passenger in an automobile against the driver thereof and the driver of the other car involved in the collision, allegations to the effect that the collision occurred on a curve as the result of the negligence of the driver of the car in which plaintiff was riding in failing to maintain a reasonable and proper lookout and in operating his vehicle at a speed in excess of that which was reasonable and prudent under the prevailing circumstances, and that the driver of the other car was negligent in failing to maintain a proper lookout and control of his vehicle and in operating at a speed in excess of that which was reasonable and prudent under prevailing conditions, and that his vehicle crossed the yellow-marked center line and crashed into the vehicle in which plaintiff was riding, and that the negligence of defendants concurred in causing the accident and damage, *held* to state a cause of action against each driver as a joint tort-feasor, there being no allegation leading to the conclusion that the driver of the car in which plaintiff was riding could not have seen the other vehicle in his path in time to have avoided the collision.

3. Pleadings § 12—

Upon demurrer for failure of the complaint to state a cause of action, the complaint is to be liberally construed and every reasonable intendment and presumption must be made in plaintiff's favor.

4. Judgments § 29—

Parties to an action who are not adversaries and who do not have an opportunity to litigate their differences *inter se* are not precluded by the judgment from thereafter litigating their rights *inter se*.

5. Same; Torts § 3—

In an action by one driver against the other, judgment was rendered that plaintiff recover nothing because of the adjudication of contributory negligence. Thereafter a passenger in one of the cars sued both drivers alleging a cause of action against each as a joint tort-feasor. *Held:* If the passenger recovers judgment against only one of the drivers, such driver would not be precluded from thereafter maintaining an action against the other for contribution.

MOORE, J., not sitting.

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

SHARP, J., dissenting.

BOBBITT, J., joins in the dissenting opinion.

APPEAL by defendant Marks from *McConnell, J.,* May 1965 Civil Session of RICHMOND. Docketed and argued as Case No. 529 Fall Term 1965, and docketed as Case No. 522 Spring Term 1966.

The plaintiff sued both Marks and McCartha to recover for personal injuries sustained by her in an automobile collision. She alleges that she was a passenger in the automobile driven by Marks which collided on a curve in the highway with the automobile driven by McCartha in the opposite direction.

As to McCartha, the complaint alleges that the McCartha automobile "came across the yellow-mark center line and crashed head-on with great force and violence into the vehicle of defendant Adell Marks." It also alleges that McCartha was negligent: In failing to maintain a proper lookout; in failing to maintain proper control over his vehicle upon the highway; in operating his vehicle at a speed in excess of that which was reasonable and prudent under the prevailing conditions; in failing to decrease speed when approaching and going around the curve; in failing to keep his vehicle on the right side of the highway; and in operating it in wanton and wilful disregard of the rights and safety of others, including the plaintiff, without due caution and circumspection and in a manner so as to endanger the person and property of others, including the plaintiff.

As to Marks, the complaint alleges that in the operation of his vehicle:

> "(a) He negligently and carelessly failed to maintain a reasonable and proper lookout * * *;
>
> "(b) * * * negligently and carelessly failed to maintain a proper control over his vehicle * * *;
>
> "(c) * * * operated his vehicle * * * at a speed which greatly exceeded that speed which was reasonable and prudent under the conditions then and there existing * * *;
>
> "(d) * * * failed to decrease the speed of his vehicle when approaching and going around the aforementioned curve * * *;
>
> "(e) * * * operated his vehicle in a careless manner, in wanton and willful disregard of the rights and safety of others, and particularly this plaintiff, without due caution and circumspection and in a manner so as to endanger the person and property of others, especially this plaintiff * * *;
>
> "(f) * * * failed to use due care in regard to the attendant facts and circumstances then and there existing."

The complaint then alleges that the negligence of the two defendants was joint and concurrent, that the plaintiff's injuries,

which are alleged in detail, were proximately caused by the individual negligence of each defendant and by their joint and concurring negligence, and prays the recovery of damages from the defendants and each of them.

Marks filed an answer denying negligence by him, admitting the allegations of the complaint as to the negligence of McCartha, and alleging that the sole proximate cause of the collision and of the plaintiff's injuries was such negligence by McCartha.

McCartha filed an answer denying negligence by him and alleging as his first and second further answers: (1) That the sole proximate cause of the collision and of the plaintiff's injuries was certain specified negligent acts and omissions of Marks, and (2) contributory negligence of the plaintiff.

As a third further answer and cross-action for contribution against Marks, McCartha alleges that the complaint "failed to allege any facts to show negligence on the part of the defendant Marks as a proximate cause of the collision referred to," that McCartha sued Marks in a prior action in the Superior Court of Mecklenburg County to recover for personal injuries and damages sustained in the same collision, that Marks there filed an answer and counterclaim against McCartha on account of personal injuries and damages sustained by Marks in this collision, that the Mecklenburg action was tried and the jury therein returned a verdict finding negligence by Marks and contributory negligence by McCartha, and that judgment was entered therein adjudging that neither McCartha nor Marks recover anything of the other. McCartha attached the complaint, answer and judgment in the Mecklenburg action to his answer in this action as Exhibits A, B and C, respectively.

Marks filed a demurrer to and motion to strike the third further answer of McCartha on the ground that, both he and McCartha being original defendants in this action, the third further answer and cross-action for contribution is not proper pleading but is a misjoinder of causes of action in the present suit and is prejudicial to the defense by Marks in this action.

From an order overruling this demurrer and denying the motion to strike, Marks appeals.

Pittman, Pittman & Pittman for defendant appellant Marks.

Bynum, Blount, Leath & Hinson; Carpenter, Webb & Golding for defendant appellee McCartha.

LAKE, J. In *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82, followed in *Bass v. Lee*, 255 N.C. 73, 120 S.E. 2d 570, this Court said:

"In an action against two defendants, as joint tort-feasors, may one defendant set up a plea for contribution against the co-defendant and thereby preclude dismissal of the co-defendant during the trial and before judgment (paragraph 10 of Seventh Further Answer and Defense)?

"The answer is 'No.'"

In the *Greene* case, as here, one of the defendants, originally sued by the plaintiff, filed a further answer in which he alleged a cross-action against his original co-defendant for contribution in the event that the jury should find both of them negligent and liable to the plaintiff. Upon motion of the defendant against whom such cross-action was pleaded, the trial court struck from the answer the allegations asserting the cross-action for contribution. This Court affirmed, three justices dissenting, the majority opinion stating the question and the answer as above quoted. The majority opinion, quoting from *Bell v. Lacey,* 248 N.C. 703, 104 S.E. 2d 833, said:

"'This Court has uniformly held that where all the joint tort-feasors are brought in by a plaintiff *and a cause of action is stated against all of them,* such defendants under our statutes, G.S. 1-137 and G.S. 1-138, are permitted to set up in their respective answers as many defenses and counterclaims as they may have arising out of the causes of action set out in the complaint. However, they are not allowed to set up and maintain cross-actions as between themselves which involve affirmative relief not germane to the plaintiff's action. * * * This is so, notwithstanding the fact that the defendants' claim for damages may have arisen out of the same set of circumstances upon which the plaintiff's action is bottomed.'" [Emphasis added.]

Here, McCartha contends that his cross-action for contribution against Marks does not fall within the rule announced in *Greene v. Laboratories, Inc., supra,* because the plaintiff's complaint does not state a cause of action against his co-defendant Marks. McCartha, therefore, contends that the court below correctly denied Marks' motion to strike McCartha's further answer asserting the cross-action for contribution.

The premise upon which McCartha would reach this conclusion is unsound. The complaint does state a cause of action against Marks. Counsel for Marks so conceded in his oral argument in this Court, but we reach this conclusion independent of such concession.

In considering the sufficiency of a complaint, as against a demurrer on the ground that it does not state a cause of action, the complaint is to be liberally construed and every reasonable intendment and presumption in favor of the plaintiff is to be made. *Hargrave v. Gardner,* 264 N.C. 117, 141 S.E. 2d 36; *Wilson v. Motor Lines,* 207 N.C. 263, 176 S.E. 750; *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; *Hoke v. Glenn,* 167 N.C. 594, 83 S.E. 807.

The complaint alleges that Marks was negligent in that he failed to maintain a reasonable and proper lookout, and in that he operated his vehicle at a speed in excess of that which was reasonable and prudent under the prevailing conditions. There are also other alleged specifications of negligence by him which may possibly fall into the category of conclusions rather than allegations of ultimate facts. The complaint further alleges that these negligent acts of Marks and the alleged negligent acts and omissions of McCartha were concurrent proximate causes of the injuries sustained by the plaintiff in the collision.

It is true that the complaint also alleges that, as the automobiles of the two defendants "approached each other on the aforementioned curve," the McCartha vehicle "came across the yellow mark center line and crashed head-on with great force and violence into the vehicle of defendant Adell Marks." There is, however, no allegation in the complaint that this alleged crossing of the center line by McCartha was so sudden as to constitute an intervening cause, insulating the alleged negligence of Marks. It does not appear from the complaint that the curve was so sharp as to obstruct Marks' view of the McCartha automobile as it approached. Construing the complaint liberally, as we are required to do in determining its sufficiency to resist a demurrer for failure to state a cause of action, we find nothing in it to lead to the conclusion that Marks, had he been maintaining a proper lookout and traveling at the proper speed, could not have discovered the obstruction in his path in time to avoid the collision from which the plaintiff's injuries resulted.

The decisions cited to us by McCartha to support his contention that the plaintiff's complaint does not state a cause of action against Marks are distinguishable. In each of those cases it appears affirmatively from the complaint, itself, that the negligence of one of the defendants was the sole proximate cause of the collision and, therefore, no cause of action was alleged against the other defendant. In *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919, the plaintiff alleged that one defendant, proceeding on a servient street, in

violation of the stop sign, drove into the intersection "directly in front of and into the path of" the vehicle of the other defendant. It thus appeared from the complaint, itself, that the negligence of the driver on the servient street was the sole proximate cause of the collision. In *Troxler v. Motor Lines,* 240 N.C. 420, 82 S.E. 2d 342, the complaint alleged that one defendant, having the green light, drove through the intersection at an excessive speed and the other defendant, facing the red light, entered the intersection, made a right turn and struck the first defendant's vehicle in the rear. From these circumstances this Court concluded that the speed of the first defendant's car was not a proximate cause of the collision. In *Lewis v. Lee,* 246 N.C. 68, 97 S.E. 2d 469, the complaint alleged that the vehicle of one defendant suddenly appeared on the highway on the wrong side of the road in front of the other defendant. Again, the Court held that the complaint showed the negligence of the first driver was the sole proximate cause. In *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707, the complaint alleged that the automobile of the plaintiff was following the automobile of one defendant when the vehicle of the other defendant, driving rapidly from the opposite direction and on the wrong side of the road, collided with the automobile of the first defendant and, as a result of that collision, struck the plaintiff's vehicle. The Court said that it appeared from the complaint that the negligence, if any, of the defendant who was driving in the same direction as the plaintiff was not the proximate cause of the plaintiff's injuries, observing that if he had gotten out of the path of the oncoming vehicle it would have collided with the plaintiff with even greater force than it did.

Thus, in all of the cases cited by the defendant McCartha in support of his contention that no cause of action is here stated against Marks, it appeared from the complaint that the negligence of only one defendant was the sole proximate cause of the collision. That does not appear from the complaint in this case. Consequently, the allegations of the plaintiff's complaint do not remove this case from the rule of *Greene v. Laboratories, Inc., supra.*

The striking of McCartha's third further answer asserting his cross-action for counterclaim does not deprive him of his right to contribution from Marks if, upon the trial of the present action, a verdict is rendered in favor of the plaintiff against McCartha alone, nor does it deprive him of the full benefit of the judgment which has been entered in the Mecklenburg action between McCartha and Marks.

In *Gunter v. Winders,* 253 N.C. 782, 786, 117 S.E. 2d 787, this Court said:

"A judgment does not conclude parties to the action who are not adversaries and who do not have an opportunity to litigate their differences *inter se.* * * * Issues and admissibility of evidence are determined by the pleadings. Unless defendants have opportunity to cross-plead, evidence relating exclusively to their differences is inadmissible — result, an insufficient opportunity to be heard."

Thus, it is only where the claim for contribution is injected into the plaintiff's action through a cross-action by an original defendant against an additional defendant that a judgment in such action against only one defendant can be *res judicata* as between the alleged joint tort-feasors. See: *Hill v. Edwards,* 255 N.C. 615, 122 S.E. 2d 383. McCartha and Marks were parties to the Mecklenburg action. It was there determined that the negligence of each was a proximate cause of the collision in which the present plaintiff was injured. Therefore, as to their rights against each other, the judgment in the Mecklenburg action is a final determination and that issue may not again be litigated. *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345. Thus, if, in the present action, the plaintiff recovers from either Marks or McCartha, and fails to recover from the other, the defendant against whom she recovers judgment may, upon paying the judgment, maintain an action against the other defendant herein for contribution. In that action the Mecklenburg judgment would be conclusive upon the question of their being joint tort-feasors with the right of and liability to contribution as between themselves.

The denial of the motion by Marks to strike the third further answer of McCartha was in conflict with the decision in *Greene v. Laboratories, Inc., supra.*

Reversed.

MOORE, J., not sitting.

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

SHARP, J., dissenting: The majority opinion is based upon the premise that the plaintiff has alleged a cause of action against both defendant Marks and defendant McCartha. With this conclusion I cannot agree. Defendants were operating motor vehicles approaching each other on a curve from opposite directions. Plaintiff alleges that in the operation of his motor vehicle, Marks was negli-

gent in four respects: (1) he failed to keep a proper lookout; (2) he failed to keep his vehicle under proper control; (3) his speed was greater than was reasonable and prudent under the circumstances; and (4) he failed to decrease his speed when approaching a curve. His 5th allegation, that Marks was guilty of reckless driving, and his 6th allegation, that he failed to use due care, are mere conclusions. *Troxler v. Motor Lines,* 240 N.C. 420, 82 S.E. 2d 342. Plaintiff makes identical allegations against defendant McCartha, plus the additional one that McCartha failed to keep his vehicle on the right side of the highway and that he "came across the yellow marked center line and crashed head-on with great force and violence into the vehicle of defendant Adell Marks, and in which plaintiff was riding as a passenger in the right front seat."

After making these specifications of negligence, plaintiff alleges that her injuries were "the direct result of both the individual negligent acts of each defendant herein complained of, and the joint and concurrent negligence of the two defendants herein complained of." This allegation with reference to proximate cause is the pleader's mere conclusion. "It is not sufficient for a complaint to charge a defendant with negligence. The complaint must go further and allege facts showing the negligent act was a proximate cause of the injuries of which plaintiff complains." *Green v. Tile Co.,* 263 N.C. 503, 505, 139 S.E. 2d 538, 540. Plaintiff here has alleged no *facts* which show that the negligence of Marks was a proximate cause of the collision. As long as McCartha stayed on his side of the road, Marks' alleged speed, lack of control, and failure to keep a proper lookout *on her side of the road* could have played no part in the collision. There is no allegation that McCartha crossed the center line when Marks was at such a distance that, if driving at a reasonable speed, keeping a proper lookout, and having her car under control, she could have avoided the collision. Without such an allegation the complaint is demurrable as to Marks, and it will not support an issue of negligence as to her. *Moore v. Hales,* 266 N.C. 482, 146 S.E. 2d 385; *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919.

When the complaint fails to state a cause of action against one of two defendants, the rule enunciated in *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82, does not preclude the defendant, against whom a cause of action is stated, from joining the other.

Ordinarily, when a defendant alleges a cross action for contribution against an additional defendant, he merely raises an issue, for the fact of their joint and concurring negligence will not usually have been established, as here, by a judgment rendered in a prev-

ious action between them. That this issue has already been determined should not preclude defendant from setting up his right to contribution in plaintiff's action, but it would seem that this pleading should be for the judge and not the jury.

For the reasons stated I vote to affirm the judgment from which defendant Marks appeals.

BOBBITT, J., concurs in dissenting opinion.

JOHN P. CRAVER AND WIFE, DORETHA K. CRAVER, PETITIONERS, v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF WINSTON-SALEM; AMOS SPEAS; J. A. HANCOCK; ROY SETZER; WILLIAM F. THOMAS; A. T. HARRINGTON; AND C. C. SMITHDEAL, JR., RESPONDENTS.

(Filed 13 April, 1966.)

1. Municipal Corporations § 25—

An application for a special permit invokes the discretion of the Zoning Board, while an application for a permit as a matter of right under the zoning regulations usually involves controverted questions of fact ordinarily to be found by the Board from sworn testimony.

2. Same—

Where the applicant for a special permit files an unverified petition and, without being sworn, explains in detail the circumstances upon which he bases his application and makes no request that those opposing his application be sworn, he may not thereafter complain that those objecting to the special permit were heard by unverified petition containing statements not under oath and were not present for cross-examination.

3. Municipal Corporations § 26—

Where the record discloses that full discussions took place before the Zoning Board upon petitioner's application for a special permit, that applicant was not denied opportunity to present any and all facts pertinent to the inquiry, and that the Board in its discretion denied the application and considered all new information in applicant's request for a rehearing before denying same, applicant's contention that the record before the Board was not sufficiently comprehensive to permit the Superior Court on appeal to determine whether the Board had acted arbitrarily or had committed errors of law in denying the permit, is untenable.

4. Municipal Corporations § 25—

An applicant for a special permit may not contend that the provision of the zoning ordinance for the granting or denying of special permits is too vague and indefinite to be followed, since if such provision is void for indefiniteness the municipal board is without authority to issue the permit and petitioners are subject to the terms of the ordinance prohibiting the use requested.

5. Same—

A special permit is not a legal right but is a concession in exceptional cases which a zoning board, in the exercise of its discretion, may grant or refuse, subject to court review. G.S. 160-178.

MOORE, J., not sitting.

APPEAL by petitioners John P. Craver and wife, from *Lupton, J.*, November 15, 1965 Civil Session, FORSYTH Superior Court.

The petitioners originated this proceeding by application to the Zoning Board of Adjustment for a variance or special use permit "(T)o park a mobile home on a separate lot located on the south side of Friedland Church Road between High Point Road and Ridgewood Road. Property is zoned Rural." The petitioners filed a "plot plan" drawn to scale (showing the layout) and designating the owners of adjoining property.

At the hearing on the petition, the building inspector stated the petitioners had parked "a mobile home on a lot with existing dwelling . . . in a Rural district" in violation of the zoning ordinance.

The inspector gave the petitioners notice of the violation. Immediately they filed with the Board the application for the special use permit. Mr. Craver stated to the Zoning Board that his lot contained approximately two acres; that his wife's grandparents lived in the trailer on a temporary basis, spending most of their time in Florida. The trailer was hooked up to the petitioners' water pump and septic tank. The adjoining property owners and members of the nearby church filed a written objection to the permit. At the hearing, Mr. Craver explained at length his reason for the application and why it should be granted. Mr. Hines appeared and made a statement in opposition. Others filed written objection. The minutes of the meeting are rather full, including inquiries by members of the Board and the answers given by Mr. Craver and Mr. Hines. The Board by unanimous vote denied the permit, and thereafter denied a petition to rehear.

The petitioners applied to the Superior Court for and obtained a writ of *certiorari* to review the proceedings. Pursuant to the writ, the respondents certified to the Superior Court "the complete record of the proceedings before the Zoning Board of Adjustment with respect to the application of the petitioners."

On review, Judge Lupton found the Zoning Board of Adjustment had "afforded a full and fair hearing," had acted within its discretion in denying the permit; that the Board's action was not arbitrary or oppressive, or attended with manifest abuse of authority, and entered an order affirming the Board's denial of the permit and dismissing the proceeding. The petitioners appealed.

Harold R. Wilson, Edward R. Green for petitioner appellants.
Womble, Carlyle, Sandridge & Rice by W. F. Womble for respondent appellees.

HIGGINS, J. The petitioners assign three grounds upon the basis of which they contend the judgment of the Superior Court should be reversed: (1) The hearing before the Board was based upon statements not under oath and those objecting to the special permit were heard by unverified petition and were not present for cross-examination; (2) the record of the hearing before the Board was not sufficiently comprehensive to permit the court to determine whether the Board had acted arbitrarily or had committed errors of law in denying the permit; (3) the standards set up by the Zoning ordinance are too vague and indefinite for the Board of Adjustment to follow in granting or denying a special use permit.

The appellants contend the Board of Adjustment in passing on a request for a special use permit must base its decision on testimony taken in an open hearing under oath "affording the parties the right to cross-examine." For support they rely on this Court's decision in *Jarrell v. Board of Adjustment,* 258 N.C. 476, 128 S.E. 2d 879. In *Jarrell* the zoning board was required to find as a fact whether on the day the zoning ordinance became effective the petitioner's property was in use as a one family or as a two family unit — if a two family unit, the owner had the right to continue its use as such — if a one family unit the owner was in violation of the ordinance by using it for two families. The dispute presented a question of fact. The finding involved a property right. The courts are bound by the findings if supported by competent, material and substantial evidence. Obviously, when material findings of fact must be made on conflicting testimony, witnesses should be sworn. To that end G.S. 160-178 authorizes the chairman or acting chairman of the board "to administer oaths to the witnesses in any matter coming before the board." However, by voluntary participation in a hearing, a party may waive the right to insist that the witnesses should be under oath.

The petition now involved is addressed to the discretion of the Board. The petitioners are charged with the duty of presenting facts sufficient to warrant the Board in issuing the special use permit. The petition was not verified. The petitioner, Mr. Craver, according to the minutes, presented a "plot plan," explained in detail that his wife's grandparents wanted to live near her in the summer, and return to Florida in winter. Mr. Craver was not sworn as a witness. He made no request that any of those objecting to the permit be

sworn or that they be called for cross-examination. Mr. Craver, therefore, is not in a favorable position to complain that the objectors were not sworn and not available for his cross-examination.

The record discloses full discussions took place before the Board, participated in by Mr. Craver on behalf of the petitioners, and by Mr. Hines on behalf of those opposed. The proceedings were informal, made so by Mr. Craver's lead, and continued in the same vein without his objection. The burden is on the petitioners to show merit in the application. If only sworn testimony may be considered, they offered nothing to support the application. The first assignment of error is not sustained.

The record shows that after the original proceeding Mr. Craver filed a request for reconsideration upon the basis of additional information set forth in the petition. That petition was not verified. The Board, after considering the new information in the request, denied a rehearing. The petitioner appellants even now do not allege they were denied opportunity to present any and all facts pertinent to the inquiry. The Board's minutes show the Board considered all matters presented and, in its discretion, denied the application. The petitioners, having invoked the jurisdiction of the Board, are not in a position to challenge that jurisdiction. *Convent v. Winston-Salem,* 243 N.C. 316, 90 S.E. 2d 879. The petitioners' second assignment of error is not sustained.

It is difficult to understand why and for what purpose the petitioners challenge the zoning ordinance as being too vague and indefinite to be followed "in granting or denying a special use permit." If the provision for such permit is void for indefiniteness, then the Board is without authority to issue it and the petitioners are subject to the terms of the ordinance, which does not permit the use. A special permit is not a legal right but is a concession in exceptional cases which the Board, in the exercise of its discretion, may grant, subject to court review. G.S. 160-178; *Austin v. Brunnemer,* 266 N.C. 697, 147 S.E. 2d 182; *Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691; *In Re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1. The petitioners' third assignment of error is not sustained.

The judgment of the Superior Court is

Affirmed.

MOORE, J., not sitting.

CHARLES W. JOYNER, PETITIONER, v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF WINSTON-SALEM; AMOS SPEAS; J. A. HANCOCK; CARL DULL, JR.; ROY SETZER; A. T. HARRINGTON; C. C. SMITHDEAL AND DOUGLAS B. ELAM, RESPONDENTS.

(Filed 13 April, 1966.)

APPEAL by petitioner, Charles W. Joyner, from *Lupton, J.*, November 15, 1965 Civil Session, FORSYTH Superior Court.

The petitioner filed with the Zoning Board of Adjustment a request for a special use permit to park a mobile home on a lot near Huff Circle in an area zoned Rural. The Board denied the permit. Judge Lupton reviewed the record on *certiorari*, affirmed the decision of the Board, and dismissed the proceeding. The petitioner appealed.

Harold R. Wilson, Edward R. Green for petitioner appellant.

Womble, Carlyle, Sandridge & Rice by W. F. Womble for respondent appellees.

PER CURIAM. This appeal presents the same legal questions decided this day in the companion case of *John P. Craver and wife v. Board of Adjustment.* The two cases were argued together by the same counsel. On the authority of that decision, the judgment is

Affirmed.

MOORE, J., not sitting.

ARTHUR BRANCH v. LESTER GURLEY AND LEONARD OUTLAW.

(Filed 13 April, 1966.)

1. Trial § 48—

The trial court has the discretionary power to set aside the verdict on the issue of damages and order a new trial confined to this issue alone.

2. Automobiles § 41g— Sufficiency of evidence of negligence in entering intersection.

In this action by a passenger, evidence tending to show that a motorist driving on a dominant street, with knowledge that stop signs had been erected on the servient street, approached the intersection at a speed within the legal maximum, that he was faced with oncoming traffic and was under the necessity of watching for turns by such traffic, and that after his vehicle had traversed two-thirds of the way through the inter-

section it was struck on its right by a motorist entering the intersection from the servient street without stopping, *held* properly submitted to the jury on the issue of the negligence of the motorist entering the intersection from the servient street, but insufficient to be submitted to the jury on the issue of negligence of the driver along the dominant highway.

3. Evidence § 22—

Testimony by experts that X-ray photographs of defendant were made respectively by the witness or under the witness' direction or supervision, properly authenticates the X-ray photographs, and it is not error to permit the witnesses to use them in illustrating their testimony.

MOORE, J., not stiting.

APPEAL by each of the defendants from *Clark, J.*, January, 1966, and from *Hubbard, J.*, November, 1965 Sessions, LENOIR Superior Court.

The plaintiff instituted this civil action to recover for his physical injuries sustained in an automobile collision at the intersection of Memorial Drive and Hill Street in the Town of Warsaw. Plaintiff alleged and offered evidence tending to show that the collision occurred at 3:30 p.m. on February 16, 1962, as plaintiff was riding as a guest passenger in a 1949 Chevrolet being driven south on Memorial Drive by the owner, Leonard Outlaw. At the same time, the defendant, Lester Gurley, driving his 1958 Chevrolet east on Hill Street, struck the Outlaw vehicle on the right side, inflicting on the plaintiff serious and permanent injuries, including a fractured right hip, right thigh, and left wrist.

Memorial Drive is a dominant, and Hill is a servient street. Stop signs were in place on both sides of Hill Street at the intersection. The plaintiff alleged: At the time of the collision the streets were wet from a light rain; that the collision and his injuries were caused by the negligence of both defendants—Outlaw in driving too fast and failing to keep a proper lookout; Gurley in speeding into the intersection in violation of the stop sign and in failing to yield the right of way to Outlaw, driving on the dominant street.

Each defendant, by answer, denied negligence. Gurley charged that Outlaw's negligence was the proximate cause of the collision and that the plaintiff was negligent by acquiescing in Outlaw's negligence; and that acquiescence caused or contributed to the plaintiff's injuries.

Each of the parties introduced evidence. The court submitted these issues which the jury answered as indicated:

"1. Was the plaintiff injured by the negligence of defendant Lester Gurley?

Answer: Yes.

"2. Was the plaintiff injured by the negligence of defendant Leonard Outlaw?

Answer: Yes.

"3. What amount, if any, is plaintiff entitled to recover for personal injuries?

Answer: $5,000.00."

After the jury returned the verdict, Judge Hubbard, on plaintiff's motion, entered the following:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the third issue as to damages of the verdict rendered by the jury in the above entitled action be, and the same is hereby set aside in the discretion of the Court and the plaintiff have and recover judgment against the defendants for such damages as a jury may award on a new trial limited to said issue of damages."

Both defendants excepted to the order.

At the January, 1966 Session of the court, presided over by Judge Clark, the parties introduced evidence bearing on the issue of damages. The jury fixed the recovery at $10,000.00. From the judgment on the verdict, the defendants appealed, bringing forward their exceptions and assignments of error taken at the hearing before Judge Hubbard on the issues of negligence and before Judge Clark on the issue of damages.

Beech & Pollock by H. E. Beech for plaintiff appellee.

Whitaker, Jeffress & Morris by A. H. Jeffress for defendant Lester Gurley, appellant.

Wallace, Langley & Barwick by F. E. Wallace, Jr., for defendant Leonard Outlaw, appellant.

HIGGINS, J. The judgment here for review is based on the jury's answers (1) to the issue of negligence returned at the trial before Judge Hubbard, and (2) to the issue of damages returned at the trial before Judge Clark. Judge Hubbard, having set aside the verdict on the issue of damages only, as he had the right to do in his discretion, *Hinton v. Cline,* 238 N.C. 136, 76 S.E. 2d 162, the defendants are entitled to have us consider their assignments of error based on the exceptions to his rulings on the issues of negligence, and to Judge Clark's rulings on the issue of damages.

The evidence in the light most favorable to the plaintiff is sufficient to support a finding that the defendant Gurley, driving east

on Hill Street, failed to stop as required, but overran the stop sign, crashed into the side of the Outlaw vehicle in the southwest quadrant of the intersection, seriously injuring the plaintiff; and that in so operating his automobile he was guilty of actionable negligence. Judge Hubbard properly overruled the defendant Gurley's motion for nonsuit. *Rouse v. Jones,* 254 N.C. 575, 119 S.E. 2d 628; *King v. Powell,* 252 N.C. 506, 114 S.E. 2d 265; *Lake v. Express Co.,* 249 N.C. 410, 106 S.E. 2d 518. The defendant Gurley's objections to the rulings on the issues of negligence are not sustained. The objection to the charge on that issue likewise is not sustained.

The allegations of negligence against the defendant Outlaw are: (1) he was driving too fast on the wet street; (2) he failed to observe the approach of Gurley's vehicle and take proper steps to prevent the collision. The parties stipulated that the speed limit for traffic on Memorial Drive at the time was 35 miles per hour. The plaintiff's evidence with respect to Outlaw's speed at the time he entered the intersection was 20 to 30 miles per hour. As Outlaw approached the intersection from the north, two or three cars were approaching from the south. Motorists approaching the intersection from either direction on Hill Street were confronted with a stop sign. Of this the defendant Outlaw had knowledge. There might be danger that one or more of the motorists approaching from the south on Memorial Drive would signal for a turn on Hill. Hence Outlaw could not be expected to devote his close attention to traffic approaching on Hill, or to anticipate a motorist would violate the stop sign and enter the intersection. Outlaw had the right to assume and to act on the assumption that all motorists on Hill would obey the stop sign until he had, or should have had, notice to the contrary. According to the evidence, Outlaw was two-thirds of the way through the intersection before Gurley's vehicle crashed into his. *Powell v. Cross,* 263 N.C. 764, 140 S.E. 2d 393; *Wright v. Pegram,* 244 N.C. 45, 92 S.E. 2d 416. We conclude the evidence was insufficient to support a finding that Outlaw was guilty of actionable negligence. Judge Hubbard should have sustained his motion for nonsuit and dismissed the action as to him.

The defendant Gurley strenuously contends Judge Clark committed error by permitting Drs. Spigner and Rasmussen to use X-ray photographs in illustrating their testimony with respect to the plaintiff's injuries, broken bones, etc. Dr. Spigner testified: "I made several X-rays of his hip and his wrist. They were made at my direction and under my supervision." Dr. Rasmussen testified: "These X-rays were made at my direction. They were made while I was with the patient in the emergency room and transferred to the X-

ray department of the Duplin General Hospital. . . . These are X-rays of Arthur Branch."

We hold the X-ray photographs were properly authenticated for the use of the witnesses in illustrating their testimony. *State v. Norris*, 242 N.C. 47, 86 S.E. 2d 916. The case of *Spivey v. Newman*, 232 N.C. 281, 59 S.E. 2d 844, cited by the appellants, is not in point. The Court in that case rejected the X-ray "(F)or it did not appear by competent evidence that such X-ray photograph was actually a picture of the plaintiff's skull."

As to the defendant Gurley, the record fails to disclose error, either by Judge Hubbard on the issue of negligence, or by Judge Clark on the issue of damages.

On Outlaw's appeal, the Judgment is reversed.

On Gurley's appeal, No error.

MOORE, J., not sitting.

IN THE MATTER OF THE WILL OF CLAUDE E. JONES, DECEASED.

(Filed 13 April, 1966.)

1. Wills § 18—

The fact that questions asked a witness in regard to the mental capacity of testator refer to the time testator disposed of his property "by will" rather than referring to the time testator executed the paper writing probated in common form, while inexact, does not warrant a new trial when it appears that no prejudice resulted therefrom.

2. Same—

The striking of unresponsive answers of caveator to the effect that testator did not know anything about the making or signing of the paper writing caveated, made in response to interrogatories relating to the mental capacity of testator at the time of the execution of the paper writing, *held* not error.

3. Same—

It is not necessary for counsel to compress into a single question every element of approved factual tests of testamentary capacity, or lack of it, nor is it required that a witness include all of these elements in response, and general answers of witnesses to the effect that in their opinion testator was of sound mind or knew what he was doing with his property are competent.

4. Same—

A testamentary instrument executed by testator a short time prior to the execution of the paper writing caveated is properly admitted in evi-

dence on the question of testamentary capacity, the two instruments being substantially identical except that in the second instrument testator substituted a bequest to a beneficiary in lieu of property which testator had sold in the interim.

5. Wills § 22—

A charge stating conjunctively the tests of testamentary capacity in placing the burden of proof on caveator will not be held for prejudicial error when the court immediately and consistently thereafter instructs the jury to answer the issue in the negative if caveator had established by the greater weight of the evidence the lack of any single element of mental capacity, it appearing that the jury could not have been misled.

6. Appeal and Error § 42—

When the charge read contextually presents the law of the case to the jury in such manner as to leave no reason to believe the jury could have been misled, an exception thereto will not be sustained.

MOORE, J., not sitting.

APPEAL by caveator from *Lupton, J.*, November 15, 1965, Civil Session of FORSYTH.

This is a caveat proceeding instituted in the Superior Court of Forsyth County on 22 April 1965 by the widow, the second wife, of Claude E. Jones. The decedent was survived by his widow and by two sons and a daughter by a prior marriage. The purported will of Claude E. Jones, dated 24 April 1959, and a purported codicil thereto dated 22 December 1961, were admitted to probate on 28 June 1962 in common form in the office of the Clerk of Superior Court in Forsyth County, and letters testamentary were issued to the sons of the decedent.

The caveat alleges that the purported will and the codicil thereto are not the last will and testament of Claude E. Jones; that they were procured by undue influence, duress and fraud; that at the time these paper writings were purportedly executed the decedent lacked the testamentary capacity to make and execute a will; and that said paper writings were not executed and witnessed as required by law.

The decedent, according to the uncontradicted evidence, was a successful business man who had accumulated a sizeable estate as an officer and manager of a construction company; that he worked regularly and was active in the management of the business of the construction company until stricken with a heart attack on 22 March 1962, culminating in his death about two months later.

Likewise, there was uncontradicted evidence to the effect that decedent had executed a number of wills during his lifetime; that the codicil was executed the day after the decedent had sold his

interest in an apartment house which he had devised in his will to his daughter. The codicil added a bequest of stock to his daughter. A will executed by decedent on 3 December 1958 was admitted as evidence, which will was substantially the same as the purported will executed on 24 April 1959, except that the latter instrument omitted the devise to his widow, the caveator, of a vacant lot on Robin Hood Road and added a bequest of 400 shares of the capital stock of the Atlantic Greyhound Corporation to her.

At the trial the only evidence offered by the caveator was her own testimony and that of the executors, the two sons of the decedent. Some of the evidence of the caveator was favorable to the propounders, in that she testified that on 24 April 1959 the decedent knew what property he owned and the natural objects of his bounty. Most of her testimony, however, was contradictory and unresponsive to the questions propounded. Much of it was incompetent and was excluded upon objections by the propounders. Thirteen witnesses, including the sons of the decedent, the decedent's brother who was not a beneficiary, the decedent's physician of several years, business associates, social acquaintances, and others testified on behalf of the propounders. At the close of the evidence and the charge of the court the jury answered the issues submitted as follows:

"1. Was the paper writing dated April 24, 1959, offered for probate as the last Will and Testament of Claude E. Jones signed and executed according to law?

ANSWER: Yes.

"2. Did the said Claude E. Jones have sufficient mental capacity to make and execute a Will on April 24, 1959, and at the time of execution of the paper writing offered for probate as his last Will and Testament?

ANSWER: Yes.

"3. Is the paper writing propounded, dated April 24, 1959, and every part thereof, the last Will and Testament of Claude E. Jones?

ANSWER: Yes.

"4. Was the paper writing offered for probate as the codicil to the Last Will and Testament of Claude E. Jones, dated December 22, 1961, signed and executed according to law?

ANSWER: Yes.

"5. Did the said Claude E. Jones have sufficient mental capacity to make and execute a Codicil to his Will on December 22, 1961, and at the time of the execution of the paper writ-

ing offered for probate as a Codicil to his last Will and Testament?

ANSWER: Yes.

"6. Is the paper writing propounded, dated December 22, 1961, and every part thereof, a Codicil to the last Will and Testament of Claude E. Jones, deceased?

ANSWER: Yes."

Judgment was entered on the verdict and the caveator appeals, assigning error.

White, Crumpler, Powell, Pfefferkorn and Green for Caveator Appellant.

John R. Surratt for Propounders-Appellees.

DENNY, E.J. The caveator's first assignment of error is to the following question propounded to Dwight S. Jones, one of the sons of the decedent and one of the executors of his will: "From your association and conversation with Mr. Claude E. Jones, did you form an opinion satisfactory to yourself as to whether or not Mr. Claude E. Jones, on April 24 of 1959, the date he executed his will, had sufficient mental capacity to know and understand the nature and extent of his property, to know who were the natural objects of his bounty, and to realize the full force and effect of the disposition of his property by will?" This same question was propounded to this witness with respect to the mental condition of the decedent on 22 December 1961, the date the decedent executed the codicil to his will. The witness testified that he did have an opinion and that he felt the testator knew what he was doing.

It is clear, we think, the object of these questions was to establish the mental condition of the decedent on 24 April 1959 and on 22 December 1961. Moreover, there can be no question about the fact that the instruments dated 24 April 1959 and 22 December 1961 were the instruments under attack in this proceeding. This Court has held that where the execution of a will has been formally proven and admitted in evidence, such instrument is *prima facie* the will of the decedent and the caveator is required to put on evidence to impeach it. *In Re Broach's Will,* 172 N.C. 520, 90 S.E. 681. Ordinarily, however, in a caveat proceeding the purported will or codicil should be referred to as the "purported will or codicil" or the "paper writing" until the jury renders its verdict. *In Re Will of Isley,* 263 N.C. 239, 139 S.E. 2d 243. It is difficult to conceive, however, how the caveator was prejudiced by the questions as posed. This assignment of error is overruled.

The appellant's second assignment of error is based on a number of exceptions to the exclusion of certain testimony of the caveator. Her counsel propounded a number of questions to the caveator of which the following are typical:

"Q. Did he know who the normal, natural persons were to receive his gifts, who the next of kin were, his relatives were, what his responsibilities were?

"Q. Do you have an opinion?

"A. Yes.

"Q. All right, what is your opinion?

"A. That he was confused and did not realize or did not know anything about this will."

Objection sustained and motion to strike allowed. Exception.

"Q. Mrs. Jones, you really don't know anything at all about the signing or the execution of the will on April 24, 1959, do you?

"A. Mr. Jones did not tell me. His will was made in '58. He had gone over it with me numbers of times. But as for this will being made up at the office, and this codicil, he didn't tell me anything about it, because he didn't know anything about it."

THE COURT: "Now, members of the jury, you will not consider that portion of the witness' testimony in which she says that Mr. C. E. Jones did not know anything about the making or signing of the will in '59 or the codicil in '61."

To this instruction the caveator excepted.

"Q. Now, Mrs. Jones, the question I am asking is referring again to the natural objects of his bounty, which definition I explained to you previously. * * * Did he know his children, his wife, and responsibilities, and so forth?

"A. Oh, yes, I think he did."

This witness testified that the decedent worked regularly through 22 December 1961, that he went to the office every day, or practically every day, but he was not as active in the work as he was at one time. We find no prejudicial error in the exclusion of evidence to which exceptions were taken under this assignment of error, and it is overruled.

The caveator assigns as error the refusal of the court to strike answers of witnesses testifying for the propounders, each of whom testified that he or she had an opinion as to whether or not the

testator had sufficient mental capacity to know and understand the nature and extent of his property, to know who were the natural objects of his bounty, and to realize the full force and effect of the disposition of his property by will. The answers to which exceptions were entered were as follows: (a) "My opinion is that he knew what he was doing with his property." (b) "He was of sound mind." (c) "He had a sound mind." (d) "He was extremely aware of all that was going on and had a very acute business acumen and intellect." (e) "I think he was fully competent. I think he realized exactly what he was doing."

It is not necessary for counsel to compress into a single question every element of approved factual tests of testamentary capacity or lack of it. Nor is it required that a witness include all these elements in the response. The above answers were clearly admissible. *In re Will of Tatum,* 233 N.C. 723, 65 S.E. 2d 351; *In re Will of York,* 231 N.C. 70, 55 S.E. 2d 791, and cited cases. This assignment of error is overruled.

The caveator assigns as error the admission in evidence of propounders' Exhibit No. 3, a will of Claude E. Jones dated 3 December 1958, for the limited purpose of showing the mental capacity of the testator. The instrument dated 3 December 1958 was executed less than six months prior to the execution of the purported will dated 24 April 1959. Moreover, the caveator all through her testimony insisted that her husband's will was the one executed in 1958. As heretofore pointed out in the statement of facts, there is no substantial difference in the instrument dated 3 December 1958 and the purported will dated 24 April 1959, except that after the execution of the prior instrument the testator and his wife sold the lot on Robin Hood Road which had been devised to the caveator in the will dated 3 December 1958. Therefore, in the purported will executed on 24 April 1959 the decedent, in lieu of the property which had been sold, bequeathed to the caveator 400 shares of the capital stock of the Atlantic Greyhound Corporation. No other material change was made in the instrument executed on 24 April 1959.

In the case of *In re Will of Franks,* 231 N.C. 252, 56 S.E. 2d 668, the caveators challenged the admission of testimony by an attorney who had prepared a will for the testator in 1937 and redrafted the instrument at the request of the testator in 1940, making certain minor changes therein, none of which, according to the testimony, affected or in any way changed the devise under attack. This Court held the evidence was admissible on the issue of mental capacity and undue influence. In the instant case, however, there is no evi-

dence of undue influence and no issue was submitted in respect thereto.

We hold that the introduction of the previously executed will, which the caveator contended in her testimony was a valid will executed by the decedent, was not prejudicial, and this assignment of error is overruled.

The caveator assigns as error the following portion of the charge:

> "* * * rests upon the caveator to satisfy you, the jury, by the greater weight of the evidence that at the time the said Claude E. Jones signed and executed the paper writing on April 24, 1959, that has been offered in evidence as Propounders' Exhibit No. 1, that he was incapable by reason of his mental incapacity to know and comprehend the nature, character and extent of his property, who were the natural objects of his bounty, how he was disposing of his property, the effect such disposition would have upon his estate."

The above instruction was followed immediately by the following:

> "Now, members of the jury, later in my discussion of this issue I will tell you, or go into more detail as to what the caveator must establish.
>
> Now this, * * * has been expressed in a different way. A person has sufficient mental capacity to make a will if he comprehends the natural objects of his bounty, understands the kind, nature, and extent of his property, knows the manner in which he desires his act to take effect, and realizes the effect his act will have upon his estate. Now, * * * the lack of any one of those elements would render the testator incapable under the law of making a will."

The court further instructed the jury on issue No. 2 that the burden of proof was upon the caveator and:

> "* * * if the caveator has satisfied you from the evidence and by its greater weight that on April 24, 1959, Claude E. Jones signed and executed the paper writing which has been introduced in evidence as Propounders' Exhibit No. 1 as for his will and at the time he signed this paper writing he did not comprehend the natural objects of his bounty, or he did not understand the kind, nature, and extent of his property, or he did not know the manner in which he desired his act to take effect, or he did not realize the effect his act would have upon

his estate, then you will have found that Claude E. Jones did not have the mental capacity to make and execute his will, and it would be your duty to answer issue No. 2 'No.' "

A similar instruction was given on issue No. 5 with respect to the codicil.

In our opinion the jury was not misled by the instruction given in respect to the burden of proof on issues Nos. 2 and 5, for that, as pointed out above, immediately after giving the instruction upon which this assignment of error is based, the court charged the jury with respect to the elements necessary to show mental capacity to make a will and then added, "the lack of any one of those elements would render the testator incapable under the law to make a will." The court then on each of the issues Nos. 2 and 5 gave the proper instruction as to what the caveator must prove to negative testamentary capacity and recited the elements involved with the word "or" between each of the elements.

In the opinion in *In re Kemp's Will,* 234 N.C. 495, 67 S.E. 2d 672, the trial judge placed the burden on caveators to show all the essential elements of testamentary capacity. The trial court then stated the requirements for mental capacity in a proper form, which this Court said would have justified a holding to the effect that the improper statement was harmless upon a contextual interpretation of the charge except for the fact that after giving the correct instruction the trial court twice repeated the erroneous instruction.

In our opinion, when the charge of the court in the trial below is considered contextually it presented the law of the case to the jury in such manner as to leave no reason to believe the jury could have been misled. Strong's N. C. Index, Appeal and Error, § 42, citing *Newton v. McGowan,* 256 N.C. 421, 124 S.E. 2d 142; *Gathings v. Sehorn,* 255 N.C. 503, 121 S.E. 2d 873, and scores of other cases. See also *In re Will of Efird,* 195 N.C. 76, 141 S.E. 460.

An examination of the remaining assignments of error, in our opinion, presents no prejudicial error that would justify a new trial, and they are overruled.

In the trial below we find

No error.

MOORE, J., not sitting.

RICHARD LEE FREEMAN v. HARDEE'S FOOD SYSTEMS, INC.

(Filed 13 April, 1966.)

1. Judgments § 22—

A judgment by default final which is beyond the statutory authority of the clerk to enter, will be vacated on motion in the cause.

2. Judgments § 14—

Where, in an action for wrongful discharge, it appears that plaintiff employee left the municipality of his residence and moved to the municipality in which he was to be employed, losses sustained by the employee in selling his house and his expenses in moving back to his home town after the wrongful termination of his employment are not capable of ascertainment by computation, and a judgment by default final in favor of the employee in a sum including such losses is beyond the jurisdiction of the clerk to enter, and such judgment is properly set aside on motion in the cause. G.S. 1-209, G.S. 1-211.

3. Master and Servant § 10—

If an employer wrongfully discharges an employee before the expiration of the term fixed in the contract, the employee's recovery is not limited to the salary due at the time the action is commenced.

4. Judgments § 22—

Where the allegations are sufficient to state a cause of action for breach of contract entitling plaintiff to recover in some amount at the time of the institution of the action, judgment by default final is properly set aside when the amount due is not subject to computation, but plaintiff's action should not be dismissed.

MOORE, J., not sitting.

LAKE, J., concurs in result.

APPEAL by plaintiff from a judgment dated December 10, 1965, entered by *Cowper, Resident Judge,* in Chambers in Kinston, Lenoir County, in an action pending in WAYNE Superior Court.

Action by plaintiff-employee to recover damages on account of alleged wrongful discharge, heard below on defendant-employer's motion to vacate a judgment by default final entered November 4, 1965, by the Clerk of the Superior Court of Wayne County.

Plaintiff's allegations, summarized except when quoted, are set forth below.

On or about February 20, 1965, defendant employed plaintiff for a term of "at least two (2) years" upon the following terms: Plaintiff was to leave his home and employment in Goldsboro and move to Rocky Mount where he was to enter defendant's employment as its treasurer. Defendant agreed to pay plaintiff's moving costs and also reimburse plaintiff in the amount of $700.00 for "employment

fees" plaintiff had incurred. Defendant agreed to pay plaintiff $165.00 per week during the "first 52 weeks of employment" and $180.00 per week during "the second year of said employment."

Plaintiff sold his home in Goldsboro at a substantial loss and moved to Rocky Mount. He entered defendant's employment as its treasurer and continued therein until August 3, 1965, when he "was wrongfully, and without just cause discharged by the defendant." At the time of his discharge, defendant paid to plaintiff "salary equivalent for three (3) additional months subsequent to the discharge date, less approximately $100.00."

By reason of defendant's "breach of contract," defendant is indebted to plaintiff in the total sum of $12,686.00, consisting of these items: (1) "Sixteen (16) weeks salary at $165.00 per week," plus "Fifty-two (52) weeks salary at $180.00 per week," a total of $12,000.00; (2) damages in the sum of $600.00, "representing the amount of money which the plaintiff lost on the sale of his house at the time he moved to Rocky Mount, North Carolina"; and (3) damages of $86.00, being the amount of the expenses plaintiff incurred in moving "from Rocky Mount back to Goldsboro."

The judgment by default final entered by the clerk on November 4, 1965, recites that this action was instituted September 30, 1965; that the summons and complaint were served on defendant on October 4, 1965; that defendant had failed to file answer or otherwise plead; and that it appeared that the action was for "the breach of an express contract to pay a sum of money fixed by the contract, namely, the sum of $12,686.00." Thereupon, judgment was entered "that the plaintiff have and recover of and from the defendant the sum of $12,686.00, and the costs of this action."

On November 18, 1965, defendant moved to vacate said judgment on alternative grounds, to wit: (1) It is not supported by the allegations of fact set forth in the complaint; (2) plaintiff, if entitled to any judgment by default, would be entitled to judgment by default and inquiry rather than to judgment by default final; (3) defendant has a meritorious defense and its failure to plead within the prescribed time is on account of excusable neglect.

There appears in the record the affidavit of J. L. Rawls, Jr., defendant's president, sworn to and subscribed December 2, 1965, in which he sets forth facts on the basis of which defendant contends it has a meritorious defense and its failure to plead within the prescribed time is excusable.

The cause was heard by Judge Cowper on defendant's said motion.

The judgment entered by Judge Cowper sets forth the facts narrated above. The court made no findings related to defendant's asserted meritorious defense and excusable neglect. The judgment sets forth in detail the court's "CONCLUSIONS OF LAW." The judgment concludes as follows:

"It is therefore, ORDERED, ADJUDGED AND DECREED:

"1. The judgment by default final entered herein by the Clerk of the Superior Court for Wayne County is hereby vacated and set aside.

"2. Plaintiff having already been paid by defendant a sum of money in excess of that to which he is entitled upon his complaint by law, plaintiff shall have and recover nothing of the defendant by virtue of this action.

"3. The costs of this action shall be taxed to the defendant by the Clerk."

Plaintiff excepted to each of Judge Cowper's conclusions of law and to his judgment and appealed.

Herbert B. Hulse and Sasser & Duke for plaintiff appellant.

Spruill, Trotter & Lane and George K. Freeman for defendant appellee.

BOBBITT, J. When a clerk of superior court, without statutory authority, enters a judgment by default final, it is subject to attack by motion in the cause and will be vacated. *Cook v. Bradsher,* 219 N.C. 10, 12 S.E. 2d 690, and cases cited.

The authority conferred upon clerks of superior court by G.S. 1-209 and G.S. 1-211 includes authority to enter judgment by default final when the complaint sets forth a cause of action for "the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation." The judgment under attack herein discloses on its face that the clerk purported to act under said authority.

The court held, and rightly so, that defendant was not obligated under the terms of the alleged contract to pay for any losses plaintiff might incur in connection with the sale of his home in Goldsboro or for plaintiff's expenses in moving back to Goldsboro from Rocky Mount. Assuming, but not deciding, that plaintiff is entitled to recover damages on account thereof, the amount of such recovery is not fixed or capable of being ascertained by computation. Hence, the clerk had no authority to enter judgment by default final therefor.

With reference to amounts due plaintiff as salary under the alleged contract, decision rests upon a different legal principle, namely, that the clerk's judgment by default final shauld be vacated if the complaint does not allege facts sufficient to constitute a basis therefor. *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835, and cases cited. Applying this legal principle, the court held the facts alleged in the complaint disclosed that plaintiff, *as of the date of the commencement of the action,* had suffered no pecuniary loss in respect of salary payments.

The court, while vacating the clerk's judgment by default final, taxed defendant with the costs, presumably on the ground that plaintiff would be entitled to nominal damages on account of alleged breach of contract. *Bowen v. Bank,* 209 N.C. 140, 144, 183 S.E. 266.

With reference to amounts due plaintiff as salary under the alleged contract, the court noted that the following facts appear from plaintiff's allegations. The breach occurred August 3, 1965, when plaintiff was discharged. Plaintiff commenced this action September 30, 1965, nine weeks later, and for these nine weeks at the rate of $165.00 per week plaintiff would have been entitled to a total of $1,485.00. He was actually paid "salary equivalent for three (3) additional months subsequent to the discharge date, less approximately $100.00." The months of August, September and October contained thirteen weeks. Thus, at the time of the alleged breach on August 3, 1965, defendant paid plaintiff $2,045.00 ($2,145.00 less $100.00), that is, $560.00 more than the amount of salary plaintiff was entitled to receive as of the date he commenced this action.

The clerk's judgment by default final was entered November 4, 1965, approximately five weeks after the date this action was commenced. The payment made by defendant to plaintiff on August 3, 1965, was insufficient to the extent of approximately $265.00 to cover the amount due plaintiff as salary as of November 4, 1965, under the terms of the alleged contract.

The foregoing leads to the conclusion that plaintiff's allegations disclose affirmatively that defendant was not indebted to plaintiff under the alleged contract on September 30, 1965, or on November 4, 1965, if at all, in the amount of $12,000.00, the total amount of the salary due and to become due during the remainder of the two-year contract period. Hence, the clerk had no authority to enter the judgment by default final therefor.

While the court properly vacated the clerk's judgment by default final, the action should not have been dismissed if the amount plaintiff was entitled to recover under his allegations was determin-

able as of November 4, 1965, rather than as of September 30, 1965. Hence, it becomes necessary to consider the reason the court dismissed the action. This appears from the following conclusion of law set forth in the court's judgment, *viz.*: "3. Plaintiff's cause of action is to recover damages for the alleged breach of a contract of employment where the contract is entire and the services are to be paid for by installments at stated intervals. He elected to sue at once on the breach and accordingly can recover only his damages to the time of bringing suit."

In the quoted conclusion of law, Judge Cowper adopted the language of the opinion in *Robinson v. McAlhaney,* 216 N.C. 674, 6 S.E. 2d 517 (s. c., 214 N.C. 263, 199 S.E. 26), where, in relation to the contract then under consideration, it was held that the plaintiff's right to recover for wrongful breach of her employment contract was limited to 3½% of the gross receipts (the basis of her agreed compensation) prior to the date she commenced her action. The decision was based largely on *Smith v. Lumber Company,* 142 N.C. 26, 54 S.E. 788, particularly on this excerpt from the opinion therein: "(W)hen the contract is entire and the services are to be paid for by instalments at stated intervals, the servant or employee who is wrongfully discharged has the election of four remedies: 1. He may treat the contract as rescinded by the breach, and sue immediately on a *quantum meruit* for the services performed; but in this case he can recover only for the time he actually served. 2. He may sue at once for the breach, in which case he can recover only his damages to the time of bringing suit. 3. He may treat the contract as existing and sue at each period of payment for the salary then due. (We do not consider the right to proper deduction in this case, as it is not now presented.) 4. He may wait until the end of the contract period, and then sue for the breach, and the measure of damages will be *prima facie* the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned or might have earned by a reasonable effort to obtain other employment."

In *Robinson v. McAlhaney, supra,* it was held that the plaintiff had "elected to pursue the second remedy and (was) limited in recovery of damages to date of institution of the action." In *Smith v. Lumber Company, supra,* this Court was dealing specifically with a factual situation in which the plaintiff elected to pursue the third remedy, that is, the institution of a separate (successive) suit at the end of "each period of payment for the salary then due," a remedy described in 1 Labatt's Master & Servant, Second Edition, § 363 (c), p. 1145, as follows: "The latter alternative has so far found

favor with very few courts (see § 348, *ante*), and is clearly open to the serious, if not fatal, objections that its adoption involves the acceptance of an extremely disputable theory as to the apportionment of the contract, and that it disregards the salutary principle embodied in the maxim, *Interest reipublicœ ut finis sit litium.*"

It appearing that the rule stated in *Smith v. Lumber Company, supra,* and restated and applied in *Robinson v. McAlhaney, supra,* limiting recovery to the date the action is instituted, is at variance with the great weight of authority, reconsideration thereof seems appropriate.

The subject is fully discussed in the annotation, "Recovery of damages by employee wrongfully discharged before expiration of time period fixed in employment contract as embracing entire term of contract or as limited to those damages sustained up to time of trial," 91 A.L.R. 2d 682. It is there stated: "The rule that where an action for wrongful discharge is tried before the end of the employment term, the employee may recover damages for the entire term of the contract, beyond the date of trial, and his recovery is not limited to damages sustained up to the time of trial, has been supported or recognized in the great majority of the jurisdictions wherein the question has been considered." Decisions from twenty-seven jurisdictions are cited in support of this rule. It is approved in 5 Williston on Contracts, Revised Edition, § 1362, and in Labatt, *op. cit.,* § 363. The author of said annotation also states: "The rule that where an action for wrongful discharge is tried before the end of the employment term, the recovery by the employee is limited to damages sustained up to the time of trial, has been supported in a small number of jurisdictions." Decisions from seven jurisdictions are cited as supporting this rule. The annotation contains a reference to *Robinson v. McAlhaney, supra,* and a statement of the decision therein. The reasons in support of the majority rule and those in support of the minority rule are set forth in said annotation and in decisions cited therein and in Williston, *op. cit.,* and Labatt, *op. cit.,* and need not be repeated. It is noteworthy that Labatt, *op. cit.,* comments: "The doctrine embodied in a few cases is that no damages are recoverable except in respect to the period which had already elapsed when the action was commenced. (Citing, *inter alia, Smith v. Lumber Company, supra.)* But the preponderance of authority is so decidedly against this doctrine that it may safely be treated as erroneous, except in the jurisdictions in which it has been explicitly adopted."

On this appeal, it is sufficient to say that, under the facts herein, plaintiff, if entitled to recover, is not limited in respect of salary

payments due under the alleged contract to the amount, if any, due when this action was commenced. To this extent, the rulings in *Smith v. Lumber Company, supra,* and *Robinson v. McAlhaney, supra,* may no longer be considered authoritative. Decision as to whether this Court will adopt the majority view or the minority view or a variation of either is deferred until the question is directly presented and fully argued.

The judgment, to the extent it vacates the clerk's judgment by default final, is affirmed; but the judgment is modified by striking therefrom the provisions purporting to dismiss the action and tax defendant with the costs.

In the circumstances, the cause is remanded to the superior court for determination by the judge thereof in his discretion whether defendant should be granted leave to file answer, and, if not, whether judgment by default and inquiry should be entered. In this connection, it seems appropriate to call attention to the rule stated in *Thomas v. College,* 248 N.C. 609, 615, 104 S.E. 2d 175, relating to the measure of damages.

Affirmed, as modified, and remanded.

MOORE, J., not sitting.

LAKE, J., concurs in result.

SHEILA HEDRICK, BY HER NEXT FRIEND, MRS. DOROTHY M. HEDRICK, v. RALPH M. TIGNIERE AND MARION TIGNIERE D/B/A TIGNIERE'S SCHOOL OF DANCING.

(Filed 13 April, 1966.)

1. Negligence §§ 16, 20, 26—

Since a 13 year old child is rebuttably presumed incapable of contributory negligence, with the burden upon plaintiff to rebut the presumption, nonsuit may not be entered on the ground of contributory negligence of such minor.

2. Negligence § 24a—

Nonsuit is properly entered in a negligence action if plaintiff's evidence, interpreted in the light most favorable to him, is insufficient to support a finding of negligence by defendant which is a proximate cause of plaintiff's injury.

3. Negligence § 37b—

The proprietor of a dance school is not an insurer of the safety of his pupils, but owes them the duty to use ordinary care to maintain the premises in a condition reasonably safe for the contemplated use and the duty to warn pupils against dangers which are known or should be known to the proprietor and which are not readily apparent upon such observation as the pupils may reasonably be expected to employ.

4. Negligence § 37a—

A duly enrolled, tuition paying pupil of a dance school is an invitee of the proprietors while upon their premises for the purpose of attending and participating in the activities of the class in which he is enrolled.

5. Negligence § 37b—

What constitutes a reasonably safe condition of premises depends upon the uses which the proprietor invites his business guests to make of them and those which he should reasonably anticipate they will make, and also upon the known or reasonably foreseeable characteristics of the invitees.

6. Same—

The proprietor of a business establishment is not required to take precautions for his invitees' safety such as will make it impractical for him to operate his business or such as will destroy the attractiveness of his establishment for those who normally patronize such establishments.

7. Negligence § 37f—

The doctrine of *res ipsa loquitur* does not apply to the fall of a dance pupil upon the floor.

8. Negligence § 37b—

The waxing and polishing of the floor of a dance studio is not negligence *per se*.

9. Negligence § 37f—

Evidence tending to show that an experienced 13 year old dance pupil slipped and fell to her injury while performing a routine dance step with which she was familiar, that several other pupils had executed the step without mishap in the same area, without evidence that there was any spot or concentration of wax or other substance left undisturbed at the place where plaintiff fell, *held* insufficient to be submitted to the jury on the issue of the proprietors' negligence.

MOORE, J., not sitting.

APPEAL by plaintiff from *Latham, S.J.*, 30 August 1965, Schedule "C" Civil Session of MECKLENBURG.

Plaintiff sues for personal injuries sustained as the result of a fall in the defendants' dancing school, of which she was a tuition paying pupil. She alleges that the proximate cause of her fall was negligence by the defendants in that they placed upon the dance floor a polishing substance which they knew, or should have known, would and did render the floor slick and unsafe for dancing thereon

by children, plaintiff being 13 years of age, and instructed plaintiff to perform upon this floor a series of whirling dance steps, in the course of which she slipped and fell.

In their answer the defendants admit the plaintiff was a regularly enrolled, tuition paying pupil in their dancing school and that she fell upon the dance floor while performing a dance step during a period of instruction. They deny that they were negligent in any respect and, alternatively, allege that the plaintiff was guilty of contributory negligence in the performance of a routine dance step with which she was thoroughly familiar.

Plaintiff appeals from a judgment of nonsuit entered at the close of her evidence which, taken in the light most favorable to her, tends to show, in addition to the nature and extent of her injury:

The defendants, as partners, are engaged in the business of operating a school for the teaching of dancing to children and young people. Plaintiff, then nearing her fourteenth birthday, had been a pupil in this school for six years. September 13, 1962, the day of her injury, was the first day of a new dancing school year and plaintiff was duly enrolled for classes in tap, ballet and jazz dancing, which classes were also attended by a number of other children.

Arriving at the dancing school in the late afternoon, plaintiff and her classmates put on soft type ballet dancing shoes, all wearing the same type of shoe, and then went to the dance floor to be instructed by Mrs. Tigniere. The dance floor was composed of squares of a material called Linotile, which is made from asphalt, linoleum, plastic and probably other substances. Linotile is of medium hardness and is not a slick tile. The floor was composed on this day of the same tiles as on all other occasions throughout the plaintiff's six years as a pupil in the school, but she had never before seen it appear as it did on the day she fell. Normally, it appeared scuffed and dull, but on this occasion it was shiny as if it had just been waxed. Mrs. Tigniere told the children to be careful because the floor had just been waxed and was slick. She then told them to start doing their "warm-ups," which she prescribed.

The first "warm-up" ordered by Mrs. Tigniere required each pupil to start at one end of the dance floor and proceed to the other end of it in a series of what the plaintiff refers to as "pique turns." In each such turn the dancer steps out on the toes of the right foot and makes a complete 360 degree turn. The length of the floor permitted five or six such turns or steps. This is a basic dance step which the plaintiff had been performing for a number of years and she was thoroughly familiar with the proper manner of executing it.

The class of 15 girls lined up and, one by one, made their respective series of "pique turns" along the entire length of the dance floor, each proceeding down the center of the floor. The plaintiff being in the middle of the group, some six or seven of her classmates had completed the assignment without mishap before she started to follow them in the same general floor area. She put her right foot forward and started her first turn. Her right foot slipped from under her and she fell to the floor, injuring her left knee, whereupon she discontinued her participation in the lesson.

Mr. Tigniere, himself, cleaned and maintained the dance floor. His daily routine was to sweep the floor, remove foreign objects, such as gum and small tacks which dropped from the shoes of tap dancers, and then wet mop it with a mixture of hot water and a detergent, known as "Brighten All," which he had used for a number of years. This he did in the morning. No buffing machine had ever been used on the floor at the time of the plaintiff's fall.

None of the plaintiff's classmates was called as a witness. The record does not indicate that any of them fell either before or after the plaintiff's fall.

Parker Whedon and Richard M. Welling for plaintiff.
Carpenter, Webb & Golding by Fred C. Meekins for defendants.

LAKE, J. The plaintiff, being only 13 years of age at the time of her fall, is presumed to have been incapable of contributory negligence. *Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205; *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854. Though this presumption is rebuttable, the burden of rebutting it is upon the defendants. The judgment of nonsuit cannot be sustained upon the ground of contributory negligence by the plaintiff in her undertaking of the "pique turn" upon a dance floor, which appeared to her to be slick and which she was warned was slick, even if we assume that such a floor is not reasonably safe for this movement. *Hamilton v. McCash,* 257 N.C. 611, 127 S.E. 2d 214; *Wilson v. Bright,* 255 N.C. 329, 121 S.E. 2d 601; *Adams v. Board of Education, supra.*

Nevertheless, to withstand a motion for judgment of nonsuit, the evidence, interpreted in the light most favorable to the plaintiff, must be sufficient to support a finding of negligence by the defendants which was a proximate cause of the plaintiff's injury. The evidence presented by the plaintiff falls short in this respect.

The proprietor of a school operated for profit, like the proprietor of any other business establishment, owes to those whom he invites to enter and use his premises, for purposes connected with his

business, a duty to use ordinary care to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn the invitee against dangers, which are known to or should have been discovered by the proprietor and which are not readily apparent to such observation as may reasonably be expected of such an invitee to such an establishment. *York v. Murphy,* 264 N.C. 453, 141 S.E. 2d 867; *Jones v. Pinehurst, Inc.,* 261 N.C. 575, 135 S.E. 2d 580; *Berger v. Cornwell,* 260 N.C. 198, 132 S.E. 2d 317; *Norris v. Department Store,* 259 N.C. 350, 130 S.E. 2d 537; *Goldman v. Kossove,* 253 N.C. 370, 117 S.E. 2d 35; *Sledge v. Wagoner,* 248 N.C. 631, 104 S.E. 2d 195; *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652; *Coston v. Hotel,* 231 N.C. 546, 57 S.E. 2d 793; 78 C.J.S., Schools, § 10.

The sufficiency of a warning to the invitee of the existence of a condition upon the premises will depend, in part, upon whether the proprietor should know that the invitee, by reason of youth, old age or disability, is incapable of understanding the danger and of taking precautions for his or her own safety under such conditions. See: *Brosnan v. Sweetser,* 127 Ind. 1, 26 N.E. 555; *Brown v. Stevens,* 136 Mich. 311, 99 N.W. 12. A warning sufficient to alert an adult professional dancer to the condition of a dance floor may not be sufficient to absolve the proprietor from liability to a 13 year old pupil for a fall thereon.

The plaintiff, a duly enrolled, tuition paying pupil in the defendants' school, was an invitee of the defendants when upon their premises for the purpose of attending and participating in the activities of a class in which she was so enrolled. See: *Goldman v. Kossove, supra; Williams v. McSwain,* 248 N.C. 13, 102 S.E. 2d 464; *Pafford v. Construction Co.,* 217 N.C. 730, 9 S.E. 2d 408; 38 Am. Jur., Negligence, § 99; 65 C.J.S., Negligence, § 43(3).

Nevertheless, the defendants were not insurers of the plaintiff's safety from falling while upon their premises for such purpose. *Jones v. Pinehurst, Inc., supra; Norris v. Department Store, supra; Copeland v. Phthisic,* 245 N.C. 580, 96 S.E. 2d 697; 63 A.L.R. 2d 587; *Revis v. Orr, supra.* Even though she fell while engaged in carrying out an assignment given her in the course of her instruction, the defendants are not liable for her injury unless some negligent act or omission by them was the proximate cause of it.

The defendants instructed plaintiff to undertake the series of "pique turns," but the plaintiff does not contend that this basic dance step, which she had been performing for several years, was, in itself, dangerous for one of her age and dancing experience. Her contention is that it was dangerous to perform it upon this floor in

the condition it was in on this particular afternoon, which condition the defendants had produced. Thus, she contends the defendants are liable because they did not use reasonable care to have the dance floor in a condition safe for the "pique turns" which they knew the plaintiff would attempt to make thereon.

What constitutes a reasonably safe condition of premises depends, of course, upon the uses which the proprietor invites his business guests to make of them and those which he should anticipate they will make. 65 C.J.S., Negligence, § 45(b). It also depends upon the known or reasonably foreseeable characteristics of the invitees. 38 Am. Jur., Negligence, §§ 38, 40. A condition reasonably safe for invitees upon an ice skating rink is far different from a condition reasonably safe upon the stairway of a rest home for the aged, or in the aisle between the counters and display racks of a store whose proprietor hopes his invitees' attention will be attracted to the articles there displayed for sale. The rule of law is stated in the same words for all these situations — the proprietor must use the care a reasonable man similarly situated would use to keep his premises in a condition safe for the foreseeable use by his invitee — but the standard varies from one type of establishment to another because different types of businesses and different types of activities involve different risks to the invitee and require different conditions and surroundings for their normal and proper conduct. The proprietor of a business establishment is not required to take precautions for his invitees' safety such as will make it impracticable for him to operate or such as will destroy the attractiveness of his establishment for those who normally patronize such places. *Pierce v. Murnick*, 265 N.C. 707, 145 S.E. 2d 11; *Aaser v. Charlotte*, 265 N.C. 494, 144 S.E. 2d 610; *Revis v. Orr, supra.* "The measure of his duty in this respect is reasonable or ordinary care, and in determining whether such care has been exercised it is proper to consider the nature of the property, the uses and purposes for which the property in question is primarily intended, and the particular circumstances of the case." 65 C.J.S., Negligence, § 45(b).

The defendants operate a school for dancing. On this occasion they knew the invitees would be agile young girls, rather well trained and experienced in dancing. The doctrine of *res ipsa loquitur* does not apply to a fall in the aisle of a store. *Copeland v. Phthisic, supra.* Neither does it apply to a fall on a dance floor. It is not negligence *per se* to wax and polish the aisle of a store. Annotation: 63 A.L.R. 2d 591, 630. Neither is it negligence *per se* to wax and polish a dance floor. In *Fishman v. Brooklyn Jewish Center, Inc.*, 234 App. Div. 319, 255 N.Y.S. 124, the court said:

"Defendant's negligence is claimed to consist in having placed small pieces of wax upon the floor, whereon plaintiff and other guests were to continue to dance. That practice is too well founded to be condemned as negligent. Dance floors are intended to be made slippery, and plaintiff, with knowledge of the conditions, took the chance of slipping."

In *Kalinowski v. Y. W. C. A.*, 17 Wash. 2d 380, 135 P. 2d 852, 858, the court said:

"[N]egligence is not proven by showing that the [dance] floor had been waxed and 'as a result' was slippery * * * The placing of wax or similar substance on the floor to make it smooth for dancing has become an established custom, and unless the owner has been negligent in the materials he used or in the manner of applying them, he is not liable to a person who falls thereon because of its slippery condition."

There is no evidence in this record to indicate that the spot where the plaintiff fell was waxed or polished more than or differently from the rest of the floor. Nothing indicates that there was any smear or concentration of wax or other substance left undistributed at this point on the floor and upon which the plaintiff's foot rested when she slipped. The record indicates, on the contrary, that six or seven of her classmates executed exactly the same dance step over this area just before she did. None of the fourteen other pupils was called to testify as to the condition of the floor. The cause of the plaintiff's fall is left in the realm of conjecture.

Affirmed.

MOORE, J., not sitting.

DUPLIN COUNTY v. BESSIE C. JONES, H. E. PHILLIPS, TRUSTEE, AND HERMAN H. PHILLIPS.

(Filed 13 April, 1966.)

1. Taxation § 32—

Recital in a deed that the land is subject to prior encumbrances, including taxes, in a specified amount, cannot fasten upon the land an encumbrance not already upon it nor remove it from existing encumbrances not included in the stipulated amount, and, whatever may be its effect as between grantor and grantee, it cannot enlarge or diminish the lien for taxes existing at the time of the conveyance.

2. Same—

Where land held by the entireties is listed for taxation by the husband in his name alone as owner such land is not subject to a lien for taxes assessed against personal property listed by the husband at the same time in his own name, some of which personalty is owned by him and some by his wife individually, and no lien for personal taxes attaches to the land, G.S. 105-301(a), G.S. 105-304(a), G.S. 105-340(a), and the county may not foreclose the tax lien for personal taxes against the grantee of the land. G.S. 105-414.

3. Husband and Wife § 15—

An estate by the entireties is owned by both the husband and wife as one person and not by them as separate persons.

4. Taxation § 25—

Though liability for the payment of taxes does not arise out of contract, a tax is a debt of the taxpayer, and a lien for taxes cannot be fastened upon the land of a person other than the taxpayer liable for the tax. G.S. 105-272(7).

MOORE, J., not sitting.

APPEAL by plaintiff from *May, S.J.*, October 1965 Civil Session of DUPLIN.

Duplin County instituted this action under G.S. 105-414 to have a certain tract of land in the county, now owned by Bessie C. Jones, sold for the payment of taxes, together with interest, penalties and costs, levied on account of personal property then owned by Sam R. Jones and other personal property then owned by his wife, Annie Frances Jones. A jury trial was waived and the matter was submitted to the court upon stipulated facts, it being also stipulated that the court might find further facts necessary for a complete determination of the controversy.

The following is a summary of the material facts so stipulated and found, there being no exception to any additional finding of fact by the court:

1. In each year, 1962 to 1964, inclusive, Sam R. Jones listed, in his name only, one lot (the land now in question) and certain personal property for taxation by Duplin County.

2. At the time of each such listing, the land was owned by Samuel R. Jones and Annie Frances Jones, his wife, as tenants by the entireties by virtue of a deed to them duly recorded.

3. At the time of each such listing, all of the personal property so listed was owned either by Sam R. Jones, individually, or by Annie Frances Jones, individually, none of it being owned by them jointly.

4. At the time of the listing for the year 1964, there was a duly recorded deed of trust in effect upon the said land.

5. The said deed of trust was foreclosed and the land conveyed, subject to all prior encumbrances, including taxes, by deed from the trustee therein (H. E. Phillips) to H. H. Phillips, which deed is duly recorded.

6. Following the conveyance of the land to him by the trustee, H. H. Phillips paid to Duplin County $441.19, which was the total then due it by reason of all taxes assessed and levied by it on account of the said land for all of the said years, the county issuing to him partial payment receipts for each such year.

7. The sums claimed by the county in this action ($132.80 for 1961; $100.08 for 1962; $106.94 for 1963; and $92.30 for 1964) are for taxes assessed and levied on account of the personal property so listed by Sam R. Jones.

The answer alleges, and the plaintiff's brief in this Court states, that the land is now owned by Bessie C. Jones, presumably by virtue of a conveyance to her from H. H. Phillips prior to the institution of this action.

The court concluded as a matter of law that land owned by a husband and wife as tenants by the entireties is not subject to a lien for taxes levied on account of personal property owned by either individually, even though the property be listed for taxation by the husband in his own name as if he alone were the owner.

From a judgment that the tax lien sued upon by the county be discharged as to the land, and that a notation of such discharge be entered by the county upon its tax books and receipts for the said years, the county appeals, assigning as error the foregoing conclusion of law by the court.

Winifred T. Wells and Russell J. Lanier for plaintiff appellant.
H. E. Phillips for defendant appellees.

LAKE, J. G.S. 105-301(a) provides: "Except as hereinafter specified, real property shall be listed in the name of its owner * * *." G.S. 105-304(a) provides: "In general, personal property shall be listed in the name of the owner thereof on the day as of which property is assessed * * *." G.S. 105-340(a) provides: "The lien of taxes levied on property and polls listed pursuant to this subchapter shall attach to all real property *of the taxpayer* in the taxing unit as of the day as of which property is listed * * *." [Emphasis added.]

G.S. 105-414, under which this proceeding was brought by the county, provides: "A lien upon real estate *for taxes or assessments*

due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action *the court shall order a sale of such real estate,* or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due *on such lien,* together with interest, penalties and costs allowed by law, and the costs of such action * * *." [Emphasis added.] It is not necessary upon this appeal to consider whether the procedure authorized by this statute may be used to enforce a valid lien upon real estate for taxes levied upon the owner thereof on account of personal property also owned by him.

The recital in the deed from the trustee in the deed of trust to H. H. Phillips, the purchaser at the foreclosure sale, that the land was thereby conveyed "subject to all prior encumbrances and that prior encumbrances amount to $8,475.47, including taxes," cannot fasten upon the land an encumbrance not already upon it nor remove from it an encumbrance previously valid but not included within the stipulated amount. Whatever may be the effect of this provision as between the trustee and his grantee, it does not subject the land to a new encumbrance.

We are not here concerned with the personal liability of the husband to the county for taxes assessed and levied on account of property which he listed as if it were his own. Neither are we here concerned with the liability of the wife to the county for failure to list for taxation property owned by her. Again, we are not here concerned with the validity of a lien upon land, owned by husband and wife as tenants by the entireties, on account of taxes assessed upon such land, itself, when it is listed for taxation in the name of the husband only. The sole question we are here called upon to decide is: When land, owned by a husband and wife as tenants by the entireties, is listed for taxation by the husband in his name as owner is it subject to a lien for taxes assessed on account of personal property, listed by him at the same time in his own name, some of which is owned by him and some by his wife but none by both together? We answer that question, "No."

This is not a proceeding by the county to reach and subject to its claim against the husband his right to the rents and profits from land owned by him and his wife as tenants by the entirety. We, therefore, do not pass upon the right of the county to subject such rents and profits to the payment of taxes owing to it from the husband. This is a proceeding, as stated in the complaint, "to have said lands sold for the payment of the taxes." The county does not contend that Bessie C. Jones, the owner of the land now and at the time this action was instituted, is personally liable for the taxes due the county, but that when she acquired her title to the land it

was subject to a lien for such taxes, which lien it claims arose while the land was owned by Samuel R. Jones and Annie Frances Jones as tenants by the entirety.

The peculiar incidents of an estate by the entirety are consequences of the concept of husband and wife as one legal person. As Stacy, J., later C.J., said, in *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566, "This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person." Again, he said, in *Johnson v. Leavitt,* 188 N.C. 682, 125 S.E. 490, "This tenancy by the entirety is *sui generis,* and arises from the singularity of relationship between husband and wife. * * * As between them, there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole, and every part and parcel thereof." In *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466, Rodman, J., speaking for the Court, said, "They [the appellants] assume that a conveyance to 'J. E. Smith and wife, Emma Smith,' is a conveyance to two separate and distinct individuals. Their assumption does not accord with the theory on which the estate by entireties originated and which is recognized by us." In *Edwards v. Arnold,* 250 N.C. 500, 109 S.E. 2d 205, Bobbitt, J., speaking for the Court, said, "In such estate, the husband and wife are deemed to be seized of the entirety, *per tout et non per my.* The entire estate is a unit. Neither husband nor wife owns a *divisible* part." See also *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484; *Freeman v. Belfer,* 173 N.C. 581, 92 S.E. 486; 2 Blackstone's Commentaries, 182; Lee, North Carolina Family Law, 3 Ed., § 112; Annotation: 75 A.L.R. 2d 1172; 41 C.J.S., Husband and Wife, § 34(a).

While the husband, during coverture, has the right to the control of the property and to the rents and profits therefrom to the exclusion of the wife, this is not an incident of an estate in the land which he has as a person separate and apart from his wife, but is a right "enuring to the husband from the general principle of the common law which vests in the husband, *jure uxoris,* the right to the use and control of his wife's land during coverture and to take the rents and profits arising therefrom." *Johnson v. Leavitt, supra.*

As a result of this doctrine of the common law that the land is owned by both as one person and not by them as separate persons, neither spouse can by his or her separate deed convey an interest in the land, as distinguished from the husband's right to rents and profits during coverture. *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157; *Davis v. Bass, supra.* A laborers' and materialmen's lien upon the land cannot arise in favor of one who constructs im-

provements thereon pursuant to a contract with the husband alone. *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828. Neither the entire estate nor the interest of either spouse therein may be sold under excution to satisfy a judgment against one spouse only. *Grabenhofer v. Garrett,* 260 N.C. 118, 131 S.E. 2d 675. *Edwards v. Arnold, supra; Distributing Co. v. Carraway,* 189 N.C. 420, 127 S.E. 427. In the *Carraway* case the judgment was actually against the husband and against the wife but stated that it was a judgment against each "individually." This Court held that, because of the unity of husband and wife as one person in contemplation of the law with reference to an estate by the entirety, the land could not be sold under execution issued upon such judgment since they, together, owned the land and they, individually, were liable on the judgment.

Though the liability for the payment of taxes does not arise out of contract, a tax is a debt of the taxpayer. *Guilford v. Georgia Co.,* 112 N.C. 34, 17 S.E. 10. A lien for the payment of such tax cannot be fastened upon the land of a person other than the taxpayer liable for the tax. G.S. 105-272(7) defines "taxpayer" to mean "any person or corporation subject to a tax or duty imposed by the Revenue Act or Machinery Act, or whose property is subject to any *ad valorem* tax levied by the State or its political subdivisions." The wife is the "taxpayer" with reference to taxes levied on account of property owner by her alone. The husband is the "taxpayer" with reference to taxes levied on account of property owned by him alone. The husband and wife are, in contemplation of the law, a separate person from either with reference to land owned by them as tenants by the entirety. Consequently, no lien attaches to such land on account of a tax levied upon either on account of separately owned property. See Annot., 75 A.L.R. 2d 1196.

The Federal courts have reached the same conclusion with reference to liens for Federal taxes due from the husband alone. See *United States v. American National Bank,* 255 F. 2d 504 (5th Cir.), *Cert. Den.,* 358 U.S. 835, 79 S. Ct. 58, *Reh. Den.,* 359 U.S. 1006, 79 S. Ct. 1135; *Raffaele v. Granger,* 196 F. 2d 620 (3d Cir.); *United States v. Hutcherson,* 188 F. 2d 326 (8th Cir.); *Shaw v. United States,* 94 F. Supp. 245 (D. Ct. Mich.); *United States v. Nathanson,* 60 F. Supp. 193 (D. Ct. Mich.).

Since the taxes claimed by the county were levied by it on account of property owned by the husband, individually, and property owned by the wife, individually, and the land in question was never that of the husband or that of the wife but belonged to "that third person recognized by the law, the husband and the wife" *(Bruce v. Nicholson,* 109 N.C. 202, 13 S.E. 790), the county never

acquired a lien for these taxes upon such land and may not proceed in the present action against Mrs. Bessie C. Jones who now owns it.

Affirmed.

MOORE, J., not sitting.

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

(Filed 13 April, 1966.)

1. Appeal and Error § 60; Pleadings § 18—

Decision on appeal that demurrer for misjoinder of parties and causes should be sustained does not constrain the granting of a demurrer to the complaint in a subsequent action deleting one of the causes of action stated in the original complaint.

2. Religious Societies and Corporations § 3—

The courts have no jurisdiction of purely ecclesiastical controversies and will adjudicate such matters only to the extent necessary to determine property rights which are affected by the dispute.

3. Same—

A complaint alleging a cause of action by a faction of a congregation of a church to have such faction declared the true congregation and entitled to the sole control of the physical property of the church, and a cause of action by a governing body of the denomination to have the church declared a member of its organization and subject to its discipline, *held* to state a single cause of action relating to the right to use and control the church property and is not subject to demurrer for misjoinder of parties and causes, since the allegations relating to doctrinal matters and church discipline pertain to ecclesiastical matters which are not justiciable.

4. Pleadings § 18—

A complaint purporting to state two separate causes of action by separate plaintiffs against the same defendants, but which fails to state a justiciable cause of action on behalf of one of the plaintiffs, so that it alleges but a single justiciable action, is not subject to demurrer for misjoinder of parties and causes of action.

MOORE, J., not sitting.

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

APPEAL by defendants from *Walker, S.J.,* November 29, 1965 Session of CARTERET.

Demurrer interposed upon the grounds of a misjoinder of parties and causes of action.

This action grows out of a schism in the Davis Original Free Will Baptist Church (Davis Church), which is split between the Charlie Paul faction and the Clinton Piner faction. Plaintiffs are The Eastern Conference of Free Will Baptists of North Carolina, an unincorporated religious association (Conference) and those individual members of Davis Church composing the Charlie Paul faction. Defendants are the individuals belonging to the Clinton Piner faction.

In brief summary the complaint alleges: Davis Church was a charter member of Conference which was organized in 1895. Thereafter, until July 1960, Davis Church "adhered and submitted itself to the customs, practices, and usages of the Original Free Will Baptist Denomination," as set out in its Statement of Faith and Discipline (attached to the complaint as Exhibit A). In April 1961, led by T. O. Terry, the pastor of Davis Church, defendants began a campaign to take Davis Church out of Conference and to affiliate it with the Coastal Association of Free Will Baptists, which had been created to destroy Conference. At a church meeting on April 8, 1962, "as a culmination of many months of detailed activity" by the Piner faction of Davis Church, those members present voted 63 to 48 to leave Conference and join the Coastal Association. Since

April 1962, the Piner faction has asserted dominion over the physical properties of Davis Church and barred plaintiffs therefrom. In May 1963, at a meeting held in accordance with the rules of Conference, and after due notice to defendants (none of whom appeared), the executive committee of Conference heard voluminous and detailed evidence. It ruled that the Piner faction was in contempt of its authority and "had departed from the faith and rebelled against the form of church government practiced for many generations by the Original Free Will Baptists of North Carolina." It ruled, therefore, that the Charlie Paul faction, which was adhering to the original Free Will Baptist doctrine, was the true congregation, "entitled to the name, property, and privileges belonging to" Davis Church. Notwithstanding, defendants remain in the unlawful possession of the physical properties of the Church.

The prayer for relief is that: (1) Davis Church be declared a member of Conference and subject to its discipline; (2) The Charlie Paul faction be declared the true congregation and entitled to the sole control of the physical properties of the church "subject to the customs, laws, usages, and practices of the said church"; and (3) Defendants be permanently restrained from holding themselves out as the true congregation of Davis Church and from interfering with the proper operation of its activities.

Defendants demurred to the amended complaint for a misjoinder of parties and causes in that (1) plaintiff Conference seeks a declaratory judgment decreeing that Davis Church is subject to its rules and regulations and its minister subject to Conference discipline, while plaintiffs, constituting the Charlie Paul faction, seek to oust defendants from possession of the church properties; and (2) plaintiffs seek "to silence" T. O. Terry as a pastor holding himself out as an ordained minister of the Original Free Will Baptists of North Carolina. The demurrer was overruled, and defendants appealed.

John A. Wilkinson and Rodman & Rodman for plaintiff appellees.

Wheatly & Bennett; Boyce, Lake & Burns for defendant appellants.

SHARP, J. These same plaintiffs instituted an action against the Clinton Piner faction, T. O. Terry ("purported pastor" of Davis Church), and Davis Free Will Baptist Church, Inc. on April 22, 1964, and this same controversy was before the Court at the Spring Term 1965. At that time we reversed a judgment overruling the

individual defendants' demurrer which was grounded upon an asserted misjoinder of parties and causes of action. *Conference v. Piner,* 264 N.C. 67, 140 S.E. 2d 721. That action was then dismissed, and plaintiffs instituted this one on April 9, 1965, against the individuals composing the Piner faction. The single material difference between the complaint in the first action and the complaint (as amended) in the second suit is that, in the former, plaintiffs sought to restrain defendant T. O. Terry from occupying the pulpit of Davis Church and from holding himself out as a minister in good standing with the Original Free Will Baptists of North Carolina. In this action, T. O. Terry is sued only as a member of the Piner faction. He is not, as defendants contend, "one of two groups" of defendants. Plaintiffs have stated no cause of action against him individually, and they seek no relief against him which does not similarly affect every other member of the Clinton Piner faction. The opinion in the former case does not, therefore, control the decision here. Notwithstanding, defendants still insist that this action should be dismissed for a misjoinder of parties and causes, *Teague v. Oil Co.,* 232 N.C. 65, 59 S.E. 2d 2; *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345, for that two different plaintiffs, Conference and the Paul faction, have asserted two separate and distinct causes of action in which they seek different relief against defendants: Conference asks for a declaration of its authority over defendants in matters of faith, doctrines, and religious discipline; the Paul faction demands possession from defendants of the real property and other tangible assets of Davis Church.

In this action, it is clear that two different plaintiffs have *attempted* to assert separate and distinct causes of action against the same defendants, yet one of them, Conference, has not succeeded in stating any cause of action whatever. Civil courts have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies.

> " 'An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.' 76 C.J.S., Religious Societies, § 85, p. 872. . . ." *Conference v. Miles,* 259 N.C. 1, 10-11, 129 S.E. 2d 600, 606.

Freedom of religion means not only that civil authorities may not intervene in the affairs of the church; it also prevents the church from exercising its authority through the State. See Note, 30 N. Y. U. L. Rev. 1102, 1104 (1955). Courts, therefore, will not interfere with factional differences over dogmas, doctrines, and customs in a religious society unless property rights are affected by the dispute. This is true "whether a religious society is independent in government or is merely a part of a general ecclesiastical body. . . ." 45 Am. Jur., Religious Societies § 44 (1943). *Accord, Conference v. Miles, supra; Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619; *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114; 76 C.J.S., Religious Societies § 86 (1952). When property rights are at stake, and the factions—disregarding the injunction contained in I Corinthians 6:1, 7, 8 — "go to law," the court will adjudicate conflicting claims to church property just as it would to any other property. 45 Am. Jur., Religious Societies § 59 (1943).

In the Statement of Faith and Discipline, it is provided, at page 45, that the board of trustees of each local church "shall hold title to all property, maintain all legal rights to said property, convey said property in the discretion of a four-fifths majority" after notice to the regular quarterly conference of the church and to the public. Thus, Conference has no rights — and has alleged none — in the real or personal property of Davis Church. Whether or not Davis Church is a member of the Conference and subject to its rules and discipline is clearly an ecclesiastical matter. Conference has, therefore, no justiciable controversy with defendants. See *Conference v. Allen,* 156 N.C. 524, 525-26, 72 S.E. 617, 618. It follows that, since no cause of action is stated on behalf of plaintiff Conference, there is no misjoinder of parties or causes of action. *Wetherington v. Motor Co.,* 240 N.C. 90, 81 S.E. 2d 267. See *Shaw v. Barnard,* 229 N.C. 713, 51 S.E. 2d 295; 1 McIntosh, N.C. Practice & Procedure § 1188 (Supp. 1964).

The subject-matter of this action is the physical property of Davis Church. " 'The title to the church property of a divided congregation is in that part of it (whether a minority or a majority) which is acting in harmony with its own law; and the ecclesiastical laws, usages, and principles which were accepted among them before the dispute began are the standards for determining which party is right.' " *Dix v. Pruitt,* 194 N.C. 64, 70, 138 S.E. 412, 415. *Accord, Conference v. Miles, supra; Reid v. Johnston, supra.* See Note, 34 N.C.L. Rev. 337 (1956); Dusenberg, *Jurisdiction of Civil Courts over Religious Issues,* 20 Ohio St. L.J. 508 (1959). In a controversy over church property, the courts will inquire into ecclesiastical or

doctrinal questions to the extent necessary to determine the property rights of the parties. The ultimate question here, as it was in the *Creech* and *Miles* cases, *supra* (which involved an apparently identical controversy among the Original Free Will Baptists of North Carolina in the Western Conference), is whether the Paul faction or the Piner faction is the true congregation of Davis Church. The complaint should, therefore, be reformed to comply with the requirements of G.S. 1-122 to the end that the parties may concentrate on the issue and get on with the trial.

The judgment overruling the demurrer is

Affirmed.

MOORE, J., not sitting.

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

MRS. MAE LEFEVERS v. CITY OF LENOIR, NORTH CAROLINA, A MUNICIPAL CORPORATION.

(Filed 13 April, 1966.)

1. Eminent Domain § 11—

In an action to recover compensation for property taken by a municipality for a public use, the burden is on plaintiff to prove the location of that part of her land which she asserted had been taken, and when she fails to establish that the land taken was within the boundaries of the land owned by her, nonsuit should be entered.

2. Boundaries § 9—

Plaintiff's deed described her land by course and distance with reference to the corners of adjacent lots. *Held:* The boundaries may not be established by the running of a course and distance from an iron stake, even though she points out the stake and testifies that it had been there as long as she could remember, when she also testifies that no one had pointed out the corner to her and that she did not know its location of her own knowledge.

3. Ejectment § 7—

The burden is upon the party claiming land under a deed to fit the description in the deed to the land claimed.

MOORE, J., not sitting.

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

APPEAL by defendant from *McLean, J.*, October 1965 Session CALDWELL Superior Court.

In July, 1963 the City of Lenoir widened Spainhour Avenue and took a strip of land in front of the plaintiff's house, some fourteen feet wide and seventy-seven feet long. Mrs. LeFevers claimed that the property belonged to her and was part of the lands described in a deed to her husband and her from Helen Winkler Simmons, December 18, 1947, the description being as follows:

> Beginning on an iron stake formerly A. A. Craig's corner on the East edge of Spainhour Street, and runs with the edge of said street, South 21° West 77 feet to a stake at the intersection of extension of Realty Avenue; thence with said avenue south 65° 30″ East 56 feet; thence South 54° East 120 feet to an iron stake, Clarence Setzer's Southwest corner; thence with said Setzer's line North 44° East 71 feet to an iron stake, said Setzer's corner; thence a new line same course 37 feet to an iron stake an independent corner; thence West 4° East 39 feet to A. A. Craig's southeast corner; thence with said Craig's line north 65° west 202 feet to the beginning, containing .4 of an acre, more or less. As surveyed by James H. Isbell, February 18th, 1937.

This is the same description as contained in the deed to Helen Winkler in 1937 and in setting up her title with *mesne* conveyances going back to 1899, the description is approximately the same. No natural objects are called for in any of the deeds. The plaintiff filed claim with the city for the land taken and upon denial, instituted this action which was tried by consent of the parties, without a jury, resulting in an award to the plaintiff of $822.00.

The City claimed that Spainhour Avenue was 40 feet wide as shown on several maps and that it had merely extended the street to this width and that no part of the land used in doing so belonged to the plaintiff.

Dickson Whisnant and L. H. Wall attorneys for the appellant.
A. R. Crisp, Hal D. Adams attorneys for the appellee.

PLESS, J. Having made claim that the City has taken her land, Mrs. LeFevers has the burden of establishing its location, *Hill v. Dalton*, 140 N.C. 9, 52 S.E. 273, but it is apparent that she has been unable to do so. From the description given above it will be noted that her land begins on an iron stake, formerly A. A. Craig's corner on the east edge of Spainhour Street. She frankly confesses

she does not know where this corner is and none of her evidence locates it. Neither does her evidence locate A. A. Craig's Southeast corner, nor his line. She attempts to locate Clarence Setzer's Southwest corner, her surveyor saying that he began his survey at an iron pipe which Mrs. LeFever pointed out as her corner and which was the sixth and next to last call in her deed, and that by doing so, and running 202 feet toward Spainhour Street, he found the disputed property to be included in Mrs. LeFevers lands, but stated that there was nothing to indicate a line had been run and that nobody pointed out any corner to him except the one referred to above. He said he tried to plat Mrs. LeFevers deed but it will not close.

Mrs. LeFevers testified in her own behalf that there were two iron posts which had been there for as long as she could remember, some twenty-five or thirty years; that she did not know who put them there and that she had claimed one of them as her corner. In response to questions as to where she claimed in the street, she replied she didn't measure it and couldn't say where she claimed. On cross examination she said she did not know where her Southwest corner is and that the only corner she knew about are the two pipe stakes about 202 feet back from the street; that no one ever pointed out the pin to her and said she could not point out Clarence Setzer's Southwest corner and did not know of her own knowledge which it is. Her son also testified that the stake Mrs. LeFevers claimed had been there since he could remember but could not otherwise identify it. The remainder of Mrs. LeFevers' evidence dealt with the value of the land allegedly taken.

The office of the description in a deed is to furnish means of identifying the land intended to be conveyed. " 'Where a party introduces a deed in evidence, * * * he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession.' In other words, the plaintiff must not only offer the deed upon which he relies, he must by proof fit the description in the deed to the land it covers * * *". *Powell v. Mills,* 237 N.C. 582, 75 S.E. 2d 759, citing *Smith v. Fite,* 92 N.C. 319. "The general rule as to this is that in order to locate a boundary of land, the lines should be run with the calls in the regular order from a known beginning," *Powell v. Mills, supra,* and here the plaintiff starts at the 6th call of her deed which she says was her corner but has offered no evidence to support this claim. "It is error to allow a jury on no evidence, or on only hypothetical evidence, to locate the land described in a deed." *Skipper v. Yow,* 238 N.C. 659, 78 S.E. 2d 600.

The City offered evidence to the effect that J. H. Beall and G. F. Harper owned a considerable boundary of land in this vicinity,

which included the plaintiff's property, and that they had sold the pertinent property in 1899. They offered in evidence a map which was marked "map of J. H. Beall and G. F. Harper lands and suburban lots and streets of West Lenoir." The map was not registered, it was found among Mr. Beall's papers in the bank. This map showed a fifty foot right of way for Spainhour Avenue. The City also offered what was called the "Montgomery" map of the City of Lenoir which was made in 1911 but not recorded until 1964. It purported to be a map of the City of Lenoir as existed at that time and showed a forty foot right of way on Spainhour Avenue. This evidence, in the form presented, was not sufficient to show a dedication of the street, but does establish that the City was not acting arbitrarily or in bad faith in widening the thoroughfare. It must be remembered that the City had no burden of proving that the property taken was within the right of way shown on the maps.

The burden is upon Mrs. LeFevers but her evidence is so vague and uncertain that it will not support a finding in her favor. None of the corners or points in her deed refer to any natural object and since she confesses that she does not know where they are, it is ordered that the judgment in her favor be, and it is hereby

Reversed.

MOORE, J., not sitting.

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

ETTA PARDUE v. MICHIGAN MILLERS MUTUAL INSURANCE COMPANY.

(Filed 13 April, 1966.)

1. Automobiles § 42d—

Evidence tending to show that plaintiff struck a vehicle parked on a one-way street in a no-parking zone at a point where overhanging branches tended to obscure its presence, that the vehicle was without lights, flares or other warning of its presence, and that the collision occurred on a rainy and foggy night, *held* not to disclose contributory negligence as a matter of law on the part of plaintiff.

2. Trial § 37—

In an action against plaintiff's insurer upon an uninsured motorist's endorsement, statement by the court of plaintiff's contention that plain-

tiff had exhausted her remedies against the tort-feasor without satisfaction and that if she did not recover of defendant insurer she would be "out in the cold," must be held for prejudicial error, such contention being impertinent to the issues.

MOORE, J., not sitting.

APPEAL by defendant from *Crissman, J.*, January 1966 Civil Session of WILKES.

Plaintiff was injured July 18, 1964, about 3:15 a.m., when her 1959 Ford, operated by her eastwardly on "A" Street in the Town of North Wilkesboro, collided with the rear of the parked 1959 Chevrolet of one Joseph Ben Bullis (Bullis). Plaintiff's allegations and evidence are to the effect the collision and her injuries were proximately caused by the negligence of Bullis in parking his car on "A" Street, a one-way street for eastbound traffic, in a "no-parking" zone, at a point where overhanging branches of trees tended to obscure its presence, without lights, flares or other warning of its presence.

A prior action by plaintiff against Bullis was tried at April-May 1965 Session of Wilkes Superior Court. Therein the jury answered the negligence and contributory negligence issues in favor of plaintiff and awarded damages of $5,000.00. Bullis did not appeal.

After her efforts to collect said judgment by execution and otherwise had proved unsuccessful, plaintiff, on July 13, 1965, instituted this action to recover $5,000.00 from defendant under terms of the endorsement entitled "Protection Against Uninsured Motorist Insurance," attached to and a part of the liability insurance policy issued by defendant to plaintiff with specific reference to her said 1959 Ford.

The pleadings herein raised, the court submitted and the jury answered the following issues:

"1. Was the plaintiff injured in her person by the negligence of Ben Bullis, as alleged in the Complaint? ANSWER: Yes.

"2. If so, did the plaintiff, by and through her negligence, contribute to her own injuries as alleged in the Answer? ANSWER: No.

"3. What amount, if any, is the plaintiff entitled to recover of Ben Bullis? ANSWER: $5,000.00.

"4. Was the said Ben Bullis an uninsured motorist at the time plaintiff sustained her injuries complained of as alleged in the Complaint? ANSWER: Yes."

Upon said verdict and said uninsured motorist endorsement, the court entered judgment that plaintiff recover from defendant the sum of $5,000.00, plus interest and costs.

Ferree & Brewer for plaintiff appellee.

Jordan, Wright, Henson & Nichols and Karl N. Hill, Jr., for defendant appellant.

BOBBITT, J. Defendant contends plaintiff's action should have been nonsuited on the ground her testimony establishes her contributory negligence as a matter of law. In this connection, it is noted that evidence, in addition to that referred to in our preliminary statement, included testimony that it was rainy and foggy as plaintiff approached the scene of collision. Suffice to say, we are of opinion and hold that the evidence, when considered in the light most favorable to plaintiff, was sufficient to withstand defendant's motion for judgment of nonsuit and to require submission to the jury of all issues raised by the pleadings.

Defendant excepted to and assigns as error the following portion of the court's charge, *viz.:* "Now, members of the jury, the plaintiff on the other hand says and contends under this set of circumstances and this set of facts that if the plaintiff didn't recover from this defendant that she is out in the cold, that she can't recover, that she has attempted to recover from Ben Bullis, as this evidence shows. These executions were run and that nothing could be found and that she has exhausted her remedy and that therefore the only remedy she has is to collect from Michigan Millers Mutual Insurance Company."

The contentions referred to in the quoted excerpt are not pertinent to a determination of any of the issues raised by the pleadings. They urge a verdict against defendant based on sympathy for plaintiff rather than on plaintiff's right to recover. If made by counsel, it would be the duty of the court, upon objection, to instruct the jury that the matters referred to in these contentions should be disregarded and given no consideration in arriving at their verdict. *Hamilton v. Henry,* 239 N.C. 664, 80 S.E. 2d 485, and cases cited; *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656, and cases cited. The court, by its recital and review thereof, in effect sanctioned said contentions and advised the jury that plaintiff's dilemma and plight, in the event she failed to recover from defendant, were proper matters for consideration in arriving at their verdict. Under such an instruction, it seems probable the chivalry and compassion of the jurors of Wilkes would move them to take such action as might be necessary to keep plaintiff from being left "out in the cold." We are constrained to hold the court's inadvertent error materially prejudiced defendant and entitles it to a new trial.

Defendant's other assignments of error involve questions that may not arise upon the next trial. Discussion thereof in the context of the evidence in the present record is deemed unnecessary and inappropriate.

New trial.

MOORE, J., not sitting.

STATE v. COY CHILDRESS, ARVIL JOHNSON, JAMES WALLER, COLIN DEVENA, R. D. HOLCOMB, JACK MULLINAX, JERRY PREVETTE, AND WILLIAM CHINNIS.

(Filed 13 April, 1966.)

Criminal Law § 9; Property § 4—

Evidence identifying each defendant as a member of a group which acted in concert in breaking window panes at a prison camp and in damaging specified personal property in an amount greatly in excess of $10.00 is sufficient to be submitted to the jury on the question of each defendant's guilt as an aider and abettor, and justifies a sentence in excess of the limits prescribed by G.S. 14-127, notwithstanding damage committed by a single defendant may not have exceeded $10.00 in value, and notwithstanding that some of defendants were charged with malicious injury to real property while others were charged with malicious injury to personal property.

MOORE, J., not sitting.

APPEAL by defendants from *Armstrong, J.*, July 1965 Session ASHE Superior Court.

The defendants were charged in eight separate bills of indictment with malicious injury to property: the defendants Childress, Devena, Holcomb, and Prevette being charged with malicious injury to real property; to wit, 500 window panes; and the defendants Johnson, Waller, Mullinax and Chinnis being charged with malicious injury to personal property; to wit, an oil stove and a television set. The cases were consolidated for trial and all defendants were found "guilty as charged in the bill of indictment."

State's evidence tended to show that the eight defendants were prisoners at the Ashe County Prison Camp and that on July 20, 1964 about 4:30 p.m. a disturbance broke out among the inmates of the unit. The defendants Johnson and Holcomb fought with another inmate in the dining room of the camp and then went to the

dormitory area and began breaking out window panes. The other six defendants joined them and began doing the same. All of the defendants were observed by the prison guards breaking window panes. When the commotion had subsided, it was found that two television sets had been "torn up", three oil heaters damaged, five commodes damaged, "some" showers damaged and five hundred window panes broken out in the dormitory. The total damage was estimated at almost $1,000.00. At the close of State's evidence, each defendant moved for judgment as of nonsuit which was denied. The defendants offered no evidence and, upon conviction and sentence, each defendant appealed, assigning error.

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

W. B. *Austin, Robert E. Bencini, Jr., Joe D. Floyd, Paul Swanson, Wade E. Vannoy, Jr., by Joe D. Floyd for the defendants.*

PLESS, J. The jury accepted as true the evidence of the State to the effect that all eight of the defendants were present, engaging in acts which damaged the camp property, which permitted the finding that each was aiding and abetting the others in similar unlawful acts. In *S. v. Hobbs,* 216 N.C. 14, 3 S.E. 2d 431, this court upheld a charge to the effect that "if the defendant intentionally threw a brick at the prosecuting witness and struck and broke the windshield of the truck he was driving, although he may not have stricken the witness, the defendant was guilty of an assault with a deadly weapon, and further, that if the defendant was personally present aiding, abetting and encouraging another, who intentionally threw a brick at the prosecuting witness and broke the windshield of the truck he was driving, he was guilty of an assault with a deadly weapon." The import of this decision is that it makes no difference who commits the physical act of throwing the brick if two persons are present, each aiding and abetting the other in doing so and that rule would apply in this case. In *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d 272 the court quoted the following from *S. v. Williams,* 225 N.C. 182, 33 S.E. 2d 880:

> " 'Though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting.' "

In the next paragraph of that opinion the court said further:

"True, the evidence relied on here is largely circumstantial, but even so, such evidence is a recognized and accepted instrumentality in the ascertainment of truth. *S. v. Cash,* 219 N.C. 818, 15 S.E. 2d 277; *S. v. King,* 219 N.C. 667, 14 S.E. 2d 803."

The defense counsel challenges the judgments imposed under the provision of G.S. 14-127 which limits the punishment to a fine of $50.00 or imprisonment for thirty days unless the damage exceeds $10.00. While it is not shown that all of the defendants committed individual acts causing damage of more than $10.00, it is shown that each of them participated in damage to property which exceeded $900.00.

The entire charge is not included in the case on appeal, but in the defendants' brief it is shown that the trial judge in three places referred to the $10.00 provision and charged that unless the State had satisfied it beyond a reasonable doubt that the window panes were the value of $10.00 or more, etc., it should return a verdict of not guilty and similar reference was made as to all eight defendants.

The fact that four of the defendants were charged with malicious injury to real property; to wit, the window panes, etc., and the other four were charged with malicious injury to personal property; to wit, television sets, etc. would make no difference. The evidence amply supports the finding that all eight of the defendants were engaged in conduct of similar unlawful activities and the jury found each of them guilty as charged in the bill of indictment.

The evidence amply sustains the conviction of each of the defendants and in the trial we find

No error.

MOORE, J., not sitting.

J. C. WAYCASTER, ADMINISTRATOR OF R. J. WAYCASTER v. ED SPARKS.

(Filed 13 April, 1966.)

1. Trial § 21—

On motion to nonsuit, the evidence favorable to plaintiff must be accepted as true and considered in the light most favorable to plaintiff, disregarding all evidence in conflict therewith, including any contradictions in plaintiff's evidence.

2. Automobiles § 34—

The presence of small children at or near the edge of a highway is, itself, a danger signal to an approaching motorist, requiring the use of that degree of care which would be exercised by a reasonably prudent man in such circumstances.

3. Negligence § 26—

Nonsuit may not be granted upon the basis of contributary negligence of a child seven years old.

4. Automobiles § 41m—

Evidence *held* sufficient to be submitted to the jury on the issue of defendant motorist's negligence in striking a seven year old child on the highway.

MOORE, J., not sitting.

APPEAL by plaintiff from *Froneberger, J.*, September 1965 Session of MITCHELL.

R. J. Waycaster, seven years of age, was instantly killed when struck by a 1950 Ford truck owned and driven by the defendant. This is an action for damages by reason thereof, the complaint alleging that the defendant was negligent in that he drove the truck on the highway without keeping a proper lookout ahead, without sounding his horn, and without stopping or turning the truck so as to avoid colliding with the child, and in other respects not material to the decision of this appeal. From a judgment of nonsuit, entered at the close of the plaintiff's evidence, the plaintiff appeals, assigning as error the entry of such judgment and certain rulings of the court with reference to the admission of evidence.

The plaintiff offered evidence which, if true, would tend to show:

At approximately 8:00 a.m., 12 November 1964, the little boy, his two older sisters, and other children were playing in the yard of a neighbor on the west side of the Altapass Road, in Spruce Pine, while waiting for their public school bus. Another group of children were playing in an open field on the east side of the paved road. The bus passed, headed south, toward a turn-around point approximately 400 feet away. As the bus proceeded southwardly, it met the defendant's Ford truck, headed north, at the crest of a hill about 275 feet from the children. The bus then turned around and went back north toward the point where the children were to board the bus. In order to board the bus the children had to cross the road to the east side of it. There was no other traffic then upon the highway. The accident had already occurred before the bus returned to the point where the children were to board it.

As the bus passed, going south, the children were playing in the neighbor's yard, near the driveway leading from the paved road to the neighbor's house. Close beside this driveway was another driveway leading to the home of another neighbor. Between the two driveways were three or four mail boxes, these being from six to ten feet west of the paved road. A hedge began about eight to ten feet west of the mail boxes and ran thence west between the driveways. There were also some garbage cans and a power pole near the mail boxes, their exact location with reference to the mail boxes not appearing clearly from the record. A child standing at the mail boxes would be visible to the driver of a northbound automobile when it came over the crest of the hill, 275 feet to the south.

As the bus passed, going south, the little Waycaster boy ran from where the other children were playing northwardly toward the driveways and the mail boxes. The children went to get their books, preparatory to crossing the road and boarding the bus when it came back. The little boy's books were on one of the mail boxes and he went there to get them. After taking his books from the mail box, the little boy went to the edge of the road, looked both ways, and started across. He was struck on the paved road at a point south of the mail boxes and the hedge; that is, at a point on the side thereof from which the truck was approaching. The pavement is 18 to 20 feet wide. The truck was on its right side of the center of the pavement when it struck the child. His body fell to the road in the northbound lane and north of the driveway. The truck stopped about 50 feet north of his body.

The defendant did not observe any children at the mail boxes as he drove along the road toward them. He was traveling 20 miles per hour. He first saw the child as he ran in front of the truck and the truck struck him. He did not then have time to sound his horn or apply his brakes before striking the child. As he drove toward the point where the accident occurred he observed the children who were playing in the field on the east side of the road.

Warren H. Pritchard and G. D. Bailey for plaintiff.
Clarence N. Gilbert for defendant.

PER CURIAM. In reviewing a judgment of nonsuit we are required to consider the evidence in the light most favorable to the plaintiff, accept the evidence so construed as true, and disregard all evidence in conflict therewith, including any inconsistencies or contradictions in the plaintiff's evidence. *Thomas v. Morgan,* 262 N.C. 292, 136 S.E. 2d 700; *White v. Roach,* 261 N.C. 371, 134 S.E. 2d

651; *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338.

A motorist must operate his vehicle with the care which would be used by a reasonable man who saw what the defendant saw or could have seen. The presence of a seven year old child at or near the edge of the pavement of a highway is, itself, a danger signal to an approaching motorist. A nonsuit may not be granted upon the basis of contributory negligence by a child of that age.

Interpreted in accordance with the above mentioned rule, the evidence offered by the plaintiff was sufficient to require the submission of the case to the jury. In so ruling we do not, of course, suggest either that the evidence was true or that it presents the entire factual situation. These are questions for the jury to determine.

Since the case must go back to the Superior Court for another trial, it is not necessary for us on this appeal to consider the assignments of error relating to the admission of evidence. They may not arise on the second trial.

Reversed.

MOORE, J., not sitting.

STATE v. HUBERT HENRY HALL.

(Filed 13 April, 1966.)

1. Criminal Law § 18—

Where the record contains a stipulation that defendant was found guilty in a recorder's court and appealed to the Superior Court from the judgment pronounced, the appeal is not subject to dismissal for failure of the record to show the verdict, judgment or appeal entries in the recorder's court.

2. Criminal Law § 107—

The failure of the court to define the terms "presumption of innocence," "burden of proof," "*quantum*" and "reasonable doubt" will not be held for error in the absence of a special request.

3. Automobiles § 74—

A casual reference to narcotics by the court in its charge in a prosecution of defendant for operating his motor vehicle on a highway while under the influence of intoxicating liquor will not be held for prejudicial error when it is apparent from the record that the jury could not have been confused thereby.

4. Criminal Law § 161—

Where the charge, read contextually, presents the law fairly and clearly to the jury, an exception thereto will not be sustained, even though some of the excerpts standing alone, might be regarded as erroneous, it being apparent that no prejudice resulted to defendant.

MOORE, J., not sitting.

APPEAL by defendant from *McLean, J.*, August 23, 1965, Regular Criminal Session, CALDWELL Superior Court.

The defendant was charged in a warrant with operating a motor vehicle upon the public highways of the state while intoxicated, in violation of G.S. 20-138. He was tried in the Caldwell County Recorder's Court, found guilty, and appealed from the judgment pronounced. He was tried in the Superior Court and upon being convicted and fine imposed, appealed from that judgment to this Court.

The evidence for the state tended to show that on the 6th day of March 1965 Patrolman Garavanta, in response to certain information which he had received, made an investigation of traffic conditions on Highway 321 and found some eight cars traveling very slowly, following an automobile being driven by the defendant. It was weaving on the road and forced some oncoming cars to leave the road to avoid collision. Two other patrolmen saw the defendant at the scene and all of them testified that the defendant was staggering, had an odor of alcohol on his breath, had difficulty in finding his driver's license and was, in their opinion, under the influence of some alcoholic beverage.

The defendant admitted having had two drinks of liquor earlier in the day but insisted that his condition was primarily caused by fatigue; that his wife had failed to arrive the previous evening as expected; that there was a severe snowstorm and he feared she might be stranded in the snow; that he had spent the previous night seeking her and that his condition, when seen by the patrolman, was due to lack of sleep and extreme exhaustion. He also offered evidence of his good character.

Attorney General T. W. Bruton and Assistant Attorney General Bernard A. Harrell for the State.

Lila Bellar for the defendant appellant.

PER CURIAM. The record does not show the verdict, judgment, appeal, entries, or return to the appeal from the Caldwell County Recorder's Court, which is assigned as error by the appellant. However, the record contains a stipulation that the defendant was tried

in the Recorder's Court; was found guilty, and appealed from the judgment pronounced to the Superior Court of Caldwell County. The corollary of this situation appeared in *S. v. Hill,* 223 N.C. 753, 28 S.E. 2d 99, in which the record showed no appeal entries in the municipal court. The attorney general moved to dismiss the appeal for lack of jurisdiction of the Superior Court which was denied "for that it appears on the agreed case on appeal that the action originated in the municipal court of High Point and on appeal was tried in the Superior Court."

The remaining exceptions are to the effect that the court in the charge used phrases such as "presumption of innocence," "burden of proof," "*quantum*" and "reasonable doubt," but did not define or explain them to the jury. The record shows no request that these terms be defined and in *S. v. Browder,* 252 N.C. 35, 112 S.E. 2d 728, the court held that it did not constitute error to fail to define "reasonable doubt" in the absence of a request. A similar holding as to "presumption of innocence" appears in *S. v. Perry,* 226 N.C. 530, 39 S.E. 2d 460 and the same reasoning will apply to the other terms and phrases.

The defendant complains that in referring to the provisions of G.S. 20-138 the court said it provided against material loss of faculties from the use of intoxicants or narcotic drugs, since there was no claim that the defendant was under the influence of the latter. The court did not even intimate as much and his judicial mandate referred only to intoxication. "The charge of the court must be read as a whole * * *, in the same connected way that the judge is supposed to have intended it and the jury to have considered it * * *." *S. v. Wilson,* 176 N.C. 751, 97 S.E. 496. "Even if there is technical error, courts will not reverse where it clearly appears that it is not substantial and could not have affected the result." *State v. Davis,* 175 N.C. 723, 95 S.E. 48.

When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *S. v. Exum,* 138 N.C. 599, 50 S.E. 283.

The defendant could not have been prejudiced by the casual reference to the use of narcotics and, after consideration of the charge as a whole, we find

No error.

MOORE, J., not sitting.

IN THE MATTER OF TOMMY LEE McBRIDE.

(Filed 13 April, 1966.)

1. Criminal Law § 173—

No appeal lies from an order entered in a post-conviction hearing denying defendant a new trial, but a purported appeal may be treated as a petition for writ of *certiorari;* even so, the petition for *certiorari* must be denied in the absence of a showing of merit.

2. Criminal Law § 23—

The evidence at this post-conviction hearing *is held* to amply support the findings of the court that defendant had voluntarily, and after being advised of his rights, entered a plea of guilty, and that he was in no way coerced to enter the plea.

MOORE, J., not sitting.

PURPORTED appeal by Tommy Lee McBride, treated as petition for *certiorari,* from an order entered by *Johnston, J.,* on December 3, 1965. From FORSYTH.

At July 26 1965, Session of Forsyth Superior Court, before the Honorable Eugene G. Shaw, Judge Presiding, Tommy Lee McBride, then represented by Robert M. Bryant, Esq., his court-appointed counsel, pleaded guilty to a bill of indictment charging McBride and two others with (1) feloniously breaking into a building occupied by Edwin D. Shore and H. W. Shore, T/A Shore's Store, and (2) with the larceny of personal property of a value in excess of $200.00. Judgment imposing a prison sentence of five years was pronounced.

On September 20, 1965, McBride filed a petition asserting he was induced to enter said pleas under circumstances constituting a denial of his constitutional rights. The solicitor, answering, denied all of McBride's essential allegations. Since McBride's petition contained allegations relating to his said court-appointed counsel, the court appointed other counsel, namely, Eugene H. Phillips, Esq., to represent McBride in the post-conviction proceedings; and the matter was set for hearing at November 22, 1965, Session of Forsyth Superior Court before the Honorable Walter E. Johnston, Jr., the Presiding Judge.

At the hearing before Judge Johnston, the evidence consisted of the prior court records in the case and testimony as to what occurred when the pleas of guilty were entered at said July 26, 1965, Session, *viz.:* (1) The testimony of an attorney who, under court appointment, had represented a codefendant; (2) the testimony of Mr. Bryant; and (3) the testimony of the deputy sheriff assigned to courtroom duty at said July 26, 1965, Session.

At said hearing before Judge Johnston, McBride, while offered an opportunity to do so, of his own will and also in accordance with the advice of his counsel, Eugene H. Phillips, Esq., elected not to testify relating to the matters set forth in his petition.

At the conclusion of the hearing, Judge Johnston entered an order which, in material part, provides:

"And the Court further finds as a fact that in his trial before the Honorable Eugene G. Shaw at the July 26, 1965 Term of the Superior Court of Forsyth County upon a bill of indictment charging storebreaking and larceny, that he was represented by the Honorable Robert M. Bryant, a member of the North Carolina Bar, who had been appointed by the Court to represent this Petitioner as an indigent defendant; that he entered a plea of guilty to the charges of storebreaking and larceny after he had been advised by both his counsel and the Court that such carried with it a possible maximum punishment of twenty (20) years; that this plea of guilty was a voluntary act of the Petitioner; that he was in no way coerced by his counsel or by the Court nor was he promised any leniency or special consideration for entering such plea; that his counsel did nothing to undermine or in any way hamper his defense, but, to the contrary, conducted the defense in keeping with the standards of the North Carolina Bar.

"The Court is of the opinion that the Petitioner's constitutional rights have in no way been violated and denies his petition for a new trial.

"IT IS ORDERED that the Petitioner be remanded to the custody from which he was taken by this Court."

McBride excepted and gave notice of appeal.

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

Eugene H. Phillips for appellant-petitioner.

PER CURIAM. The record before us includes a transcript of the proceedings before Judge Shaw and of the proceedings before Judge Johnston. All of the findings of fact made by Judge Johnston are fully supported by the evidence and these findings of fact fully support Judge Johnston's order. Plaintiff failed utterly to support the allegations of his petition by his own testimony or otherwise.

No *appeal* lies from Judge Johnston's order. Judge Johnston's order is subject to review by this Court only upon allowance of its writ of *certiorari* as provided in G.S. 15-222. In the circumstances,

we treat McBride's purported appeal as a petition for writ of *certiorari;* and, when so considered, the petition is denied.

Appeal dismissed.

Petition for *certiorari* denied.

MOORE, J., not sitting.

HENRY S. BEASLEY v. THERESA S. WILSON AND RICHARD S. WILSON, JR., AND B. J. LLOYD.

(Filed 13 April, 1966.)

1. Trusts § 13—

The evidence tended to show that land held by the entireties was partitioned after the divorce of the parties, and that the wife promised orally and in writing to convey her part to a child of the marriage when he became 21 years of age. The evidence further tended to show that the son, in reliance on the promise, spent time and money improving the property. *Held:* Since the promise to convey was made after legal title had already vested in the wife, such promise cannot constitute the basis of a resulting trust, but at most constitutes a contract to convey.

2. Registration § 6—

An unregistered contract to convey is not enforceable against a grantee of the owner, even though the grantee had knowledge of the existence of such contract at the time of his purchase.

MOORE, J., not sitting.

APPEAL by plaintiff from *Mallard, J.,* September 1965 Civil Session of FRANKLIN.

The plaintiff appeals from a judgment sustaining a demurrer by the defendant Lloyd to the complaint and dismissing the action as to him.

The material allegations of the complaint may be summarized as follows:

The plaintiff is the son of Henry M. Beasley and the defendant, Theresa S. Wilson (formerly Theresa S. Beasley). While they were married a tract of land containing 162.5 acres, described in the complaint by metes and bounds, was conveyed by deed to Henry M. Beasley and Theresa S. Beasley (now Wilson), the deed being recorded in the office of the Register of Deeds of Franklin County. Subsequently, the Beasleys were divorced and thereafter the former

Mrs. Beasley married her co-defendant, Richard S. Wilson, Jr. The plaintiff, then sixteen years of age, elected to remain with his father upon the above mentioned farm. Following her divorce from Henry M. Beasley, the defendant Theresa S. Wilson filed a special proceeding for the partition of the land and it was divided into two parts, one of which, described in the complaint by metes and bounds, was allotted to Theresa S. Wilson. Both orally and in writing the defendant Theresa S. Wilson "told the plaintiff that her part of the farm, described above, was his and that she would convey it to him when he became 21 years old and that she wanted him to continue to live and work on said farm as her part of the farm was his." In reliance thereon the plaintiff continued to live upon the farm and, believing the land belonged to him, spent his time and money to improve the land. Thereafter, the defendants Theresa S. Wilson and Richard S. Wilson, Jr. executed a deed conveying to one Wilson P. Clay and wife the land which she had so promised the plaintiff she would convey to him. Before the land was so conveyed to them the Clays were advised and informed of Theresa S. Wilson's promise to the plaintiff, and so were not purchasers without notice thereof. Thereafter, Clay and wife conveyed the land to the defendant B. J. Lloyd by deed recorded in the office of the Register of Deeds of Franklin County. Prior to his purchase of the land, Lloyd was informed of the said promise by Theresa S. Wilson to the plaintiff and, therefore, was not a purchaser without notice of it. The plaintiff became 21 years of age 5 September 1963.

The prayer of the complaint is that the court adjudge that the defendant Lloyd holds the land as trustee for the plaintiff or that the defendants Wilson hold the proceeds of their sale of the land in trust for him.

The demurrer by the defendant Lloyd states as grounds therefor the failure of the complaint to state a cause of action against him and improper joinder of causes of action. The judgment does not specify the ground upon which the court sustained the demurrer.

Peoples & Allen for plaintiff appellant.
E. F. Yarborough and W. M. Jolly for defendant appellee.

PER CURIAM. We do not have before us on this appeal any question with reference to the rights, if any, of the plaintiff against the defendants Theresa S. Wilson and Richard S. Wilson, Jr., or with reference to the sufficiency of his complaint as against them.

The court below not having specified the ground upon which it

sustained the demurrer of the defendant Lloyd, it is deemed to have been sustained upon both grounds set forth in the demurrer.

In his brief the plaintiff contends that the statement to the plaintiff by Mrs. Wilson that her part of the farm was his and that she would convey it to him when he became 21 years of age constituted the declaration of a parol trust. This contention can not be sustained. According to the complaint, this statement was made after legal title had already vested in Mrs. Wilson. One who is already the holder of the legal title to land cannot create a valid trust therein by an oral declaration that he or she will hold the land in trust for another, or by an oral promise to convey the land to another at a future date. *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265; *Wolfe v. Land Bank,* 219 N.C. 313, 13 S.E. 2d 533; *Frey v. Ramsour,* 66 N.C. 466; II Mordecai's Law Lectures, 2d Ed., 992; Lee, North Carolina Law of Trusts, 68.

The complaint alleges, at most, a contract by Mrs. Wilson to convey to the plaintiff. Registration of this contract is not alleged in the complaint and the plaintiff's brief and oral argument indicate clearly that it was not recorded. It appears from the complaint that Clay and wife, if not Lloyd, were purchasers for value. An unrecorded contract to convey land is not valid as against a subsequent purchaser for value, or those holding under such a purchaser, even though he acquired title with actual notice of the contract. G.S. 47-18; *Bourne v. Lay & Co.,* 264 N.C. 33, 140 S.E. 2d 769.

The complaint, therefore, does not state a cause of action against the defendant Lloyd and the demurrer was properly sustained on this ground so that discussion of misjoinder of causes of action is unnecessary.

Affirmed.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. R. J. MOOSE, ALIAS JACK MOOSE.

(Filed 13 April, 1966.)

Rape §§ 17, 18—

The intent constituting an essential element of the crime of assault on a female with intent to commit rape is the intent of the male to satisfy his passion on the person of the woman at all events, against her will and notwithstanding any resistance she may make, and a charge that

such intent is the intent of the male to satisfy his passion on the person of prosecutrix without her consent and against her will, is insufficient.

MOORE, J., not sitting.

APPEAL by defendant from *Crissman, J.*, October 1965 Criminal Session of IREDELL.

Attorney General T. Wade Bruton, Assistant Attorneys General George A. Goodwyn and Millard R. Rich, Jr., for the State.

L. Hugh West, Jr., for defendant appellant.

PER CURIAM. Defendant was indicted for, and convicted of, an assault with intent to commit rape. He appeals from a prison sentence. Evidence for the State tended to show: Defendant, who had offered to take prosecutrix home from work after midnight on September 18, 1965, took her "down in a big old bottom," where he attempted to rape her; she escaped from the car. He pursued her, but she successfully eluded him. Defendant's version: He is a married man with "eleven children at home and one to come." He "was a minister for 18 years of honest to goodness preaching," but "just let another woman or two get in his way." The first time he saw prosecutrix, he concluded that she was a "push over." On the night in question they had an assignation, but when she resisted his advances he offered to take her home. Notwithstanding, she left his car and walked home, while he "escorted" her by driving along beside her.

Defendant assigns as error the following portion of his Honor's charge:

> "Now, members of the jury, an assault can be a threat to do harm, one does not have to even lay his or her hands upon another party to be guilty of an assault, but by the laying on or touching with the hand or accompanied by a threat, that becomes an assault and battery. Then, as I have stated, if a person lays his hand upon a woman or threatens a woman, with the intent at that time to satisfy his passion on her person, without her consent and against her will, and making threats, if that is not accomplished, that is an assault with intent to commit rape."

This assignment of error must be sustained. To convict one of the crime of an assault with intent to commit rape, the State must prove (1) an assault by a male upon a female (2) with the felonious intent to commit rape. "(T)he felonious intent is the intent to gratify his passion on the person of the woman *at all events against her will*

and notwithstanding any resistance she may make." State v. Overcash, 226 N.C. 632, 634, 39 S.E. 2d 810, 811. (Italics ours.)

The court thereafter correctly defined the offense, but we may not assume that the jurors accepted the correct statement of the law as their guide.

The error in the charge entitles the defendant to a

New trial.

MOORE, J., not sitting.

CARMEL T. ALLEN v. BERT WILEY SHARP, GRIFFITH LUMBER COMPANY AND ROBERT THOMAS WILLIAMS.

(Filed 13 April, 1966.)

Automobiles § 41— Defendant is not required to foresee that another motorist would recklessly drive his vehicle on wrong side of road.

Evidence that defendant driver of a tractor trailer stopped his vehicle in front of plaintiff's house and called to plaintiff for route information, that plaintiff came to the left side of the vehicle with his back to the front thereof and talked with defendant driver, that plaintiff heard another vehicle approaching from the opposite direction, that plaintiff placed his feet on the fender of the truck and was pulling himself into the truck when the automobile, driven to the left of its center of the highway, struck plaintiff, *held* insufficient to be submitted to the jury on the issue of defendant driver's negligence, since defendant driver was not under duty to foresee that another motorist would recklessly drive his car on the wrong side of the road when ample space on his right was available.

MOORE, J., not sitting.

APPEAL by plaintiff from *Latham, Special Judge,* October Session 1965, GRANVILLE Superior Court.

The plaintiff alleged that on April 22, 1962 about 1:55 p.m. the defendant Sharp was operating a tractor trailer truck owned by the Defendant, Griffith Lumber Company, on North Main Street in Creedmoor, North Carolina; that he stopped the truck in front of the plaintiff's house and called to the plaintiff to come to the truck and inform him as to what route he should follow to reach his destination. The plaintiff walked over to the truck and stood in the street with his back to the front of the truck and began a conversation with the defendant Sharp. While standing there, the defend-

ant Williams, operating his car in the direction opposite the defendant Sharp and on the wrong side of the road, struck the plaintiff, causing injury.

The defendants, Griffith Lumber Company and Sharp, demurred to the complaint, which was sustained, and the plaintiff appealed.

Watkins & Edmundson by R. Gene Edmundson attorneys for plaintiff appellant.

Royster & Royster by T. S. Royster, Jr., attorneys for defendants appellees.

PER CURIAM. If Sharp were negligent in calling the plaintiff into the street for the purpose of asking him directions, and this is not conceded, it was negligence for the plaintiff to voluntarily comply with his request. The defendant has no greater duty to protect the plaintiff than the plaintiff has for his own safety. "The law imposes upon every person the duty to exercise for his own safety that degree of care which a reasonably prudent person would employ in the circumstances." Strong's N. C. Index, Vol. 3, Negligence, § 11, p. 458. The plaintiff contends as negligence that Sharp did not warn him of the approaching car and that "he was oblivious to his surroundings and did not hear the (Williams) car approaching." However, his complaint refutes this position when he says in Paragraphs XI and XII that while he was conversing with Sharp he was "attracted by a noise in front of the truck . . . that he looked and saw the automobile . . . headed to the left and western side of said road, and that the plaintiff grabbed portions of said truck, placed his feet on the fenders of said truck and was pulling himself onto said truck when the automobile . . . struck the plaintiff from the side."

It is apparent that Sharp had no greater knowledge of the danger than the plaintiff; that the plaintiff actually had time to place his feet on the fenders and was pulling himself on to the truck when hit by the Williams car.

As stated in the headnote in *Basnight v. Wilson,* 245 N.C. 548, 96 S.E. 2d 699:

> "The failure of the driver of a car to warn a guest, alighting from the car, that a vehicle was approaching, is without significance when the guest already knew of the approaching vehicle."

Further:

"Assuming the sufficiency of plaintiff's evidence to warrant submission of the negligence issue on the crucial question posed, acceptance of this evidence in the light most favorable to plaintiff leads to the inescapable conclusion that plaintiff, with knowledge of all the facts, had equal, if not better, opportunity reasonably to foresee such intervening action on the part of the operator of the Munden car." *Ibid.*, p. 552.

Foreseeability being one of the necessary ingredients of proximate cause *(Griffin v. Blankenship,* 248 N.C. 81, 102 S.E. 2d 451) it would be placing an impractical burden on Sharp to foresee that Williams would recklessly drive his car on the wrong side of the road when ample space on his own side was available.

Based upon his complaint the plaintiff was injured by the sole and exclusive negligence of Williams, and no actionable negligence of Sharp and his employer is alleged.

The demurrer was properly sustained.

Affirmed.

MOORE, J., not sitting.

ARTHUR T. MOODY v. DENSEL AVERY WIDNER.

(Filed 13 April, 1966.)

APPEAL by plaintiff from *Crissman, J.*, November 8, 1965 Civil Session of DAVIDSON.

On the morning of April 18, 1964, the plaintiff procured a room at the Cavalier Motel located on the east side of U. S. Highway 29-70 (I-85) south of Lexington. The plaintiff and a man by the name of Yarborough, whose first name the plaintiff did not recall, and another man whose name he did not know, decided to do some drinking. They spent most of the day drinking white liquor, beer and bourbon. The last of the liquor or bourbon was consumed at the plaintiff's motel room by the three parties referred to above or by the plaintiff alone about 5:00 P.M. on the day in question.

The plaintiff went to sleep in his motel room about 5:30 or 6:00 o'clock and woke up about 9:30 or 10:00 o'clock, and went to Bill's Truck Stop located about one-half mile north of the Cavalier Motel, where he purchased a cup of coffee, a coca-cola and a ham-

burger. He remained at the restaurant for about an hour and a half and left there about 11:45 P.M. to return to his room. He had proceeded along the eastern shoulder of the two northbound lanes of the by-pass around Lexington to a point about 100 yards south of the intersection of 29-A and 29-70 (I-85) where the highway going north curves sharply to the left, at which time the plaintiff decided to cross the highway and proceed southward on the western side thereof. Plaintiff testified that he looked to the south, where he could see for a distance of 400 or 500 feet, and saw no car approaching. The northbound lanes were each 12 feet wide. He crossed the first lane and was about midway of the left northern lane when the defendant, who was in the act of passing another car, saw him and tried to turn to the right so as to miss him, but failed. At the time the defendant's car hit the plaintiff, he was approximately three or four feet from the western edge of the roadway. The plaintiff testified that he never saw the defendant's car approaching until it was only 75 feet away and he was about the middle of the left lane, in which the defendant was travelling. He further testified he never saw the car travelling in the right northern lane, which the defendant was passing.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was denied. The motion was renewed at the close of all the evidence and allowed. Plaintiff appeals, assigning error.

Phillips, Bower & Klass and Walser, Brinkley, Walser & McGirt for plaintiff appellant.

Jordan, Wright, Henson & Nichols and William D. Caffrey for defendant appellee.

PER CURIAM. After a careful review of the evidence adduced in the trial below we are of the opinion that the plaintiff's evidence is insufficient to establish actionable negligence against the defendant, and we so hold. The judgment as of nonsuit is

Affirmed.

MOORE, J., not sitting.

EARLY R. WILSON, ADMINISTRATOR OF THE ESTATE OF BUDDY ROSS WILSON, DECEASED, v. LAWRENCE LAWSON.

(Filed 13 April, 1966.)

APPEAL by defendant from *Walker, S.J.*, October 4, 1965 Civil Session, PERSON Superior Court.

This civil action was instituted by Early R. Wilson, Administrator of Buddy Ross Wilson, to recover damages for his intestate's wrongful death, allegedly caused by the actionable negligence of the defendant, Lawrence Lawson.

The pleadings and the plaintiff's evidence tended to show that on the night of August 22, 1964, at about 11:50, plaintiff's intestate was driving his 1954 Ford south on Highway 501 near Roxboro, slowed down, gave a left turn signal preparatory to entering Highway No. 1205. In making the turn, his Ford was demolished by a 1953 Buick, owned and being driven south by the defendant who attempted to pass on intestate's left as he was in the act of crossing to enter 1205. Intestate was killed instantly.

The highway patrolman who investigated the accident, testified. "To the north of the intersection . . . is a yellow line which indicates a 'no passing zone.'" The defendant crossed this line. The defendant's Buick left 202 feet of skid marks. A passenger in the Ford said the left turn signal light was blinking at the time the deceased attempted to make the left turn. The impact occurred as the intestate was in the act of completing his entry into the side road.

The defendant, by answer, denied negligence, pleaded the contributory negligence of the plaintiff's intestate in that he turned left without any sign of such intent. However, the defendant did not offer evidence. The jury answered issues, finding the defendant was guilty of actionable negligence, that the intestate was not guilty of contributory negligence, and fixed the award of damages at $10,000.00. From judgment in accordance with the verdict, the defendant appealed.

Haywood, Denny & Miller by George W. Miller, Jr., James H. Johnson, III, Donald J. Dorey for plaintiff appellee.

Charles B. Wood for defendant appellant.

PER CURIAM. The pleadings raise issues of negligence, contributory negligence, and damages. The evidence was sufficient to support the issues of defendant's negligence and the damages to the intestate's estate. The evidence does not show contributory negli-

gence as a matter of law. The burden of such a showing was on the defendant, which he did not attempt to carry by introducing evidence.

No error.

MOORE, J., not sitting.

NORENE ALLEN MOSSELLER v. CITY OF ASHEVILLE.

(Filed 20 April, 1966.)

1. Municipal Corporations § 12—

The burden of proof is upon a pedestrian seeking to recover from a municipality for a fall on a street to introduce evidence which, considered in the light most favorable to her, is sufficient to show negligence on the part of the city and that such negligence was a proximate cause of the fall and injury.

2. Municipal Corporations § 15—

The operation of a waterworks system is a proprietary function of a municipality and it is held to the same liability for injury therefrom as a privately owned water company would be.

3. Same; Municipal Corporations § 12—

In order to recover from a city for injury resulting from a defect in a city street or a defect in the city's water system, plaintiff must show that the city had actual notice of the defect or that the defect had existed for such a length of time that the city should have discovered it in the exercise of reasonable inspection, and that it failed to remedy such defect in a reasonable time after such notice.

4. Same—

A municipality is under duty to exercise reasonable care to maintain a reasonable and continuing supervision over its streets, and the city is held to have knowledge of a defect which such inspection would have disclosed.

5. Same—

Evidence tending to show that a water main under the end of a dead-end street leaked for a period of two weeks and that a small volume of water from such leak flowed down the gutter of such street for one block to the intersecting street, is insufficient to charge the city with constructive notice of the defect.

6. Same— Evidence held insufficient on issue of negligence of municipality in deferring repair of small leak in its water main.

The evidence tended to show on the day prior to the accident defendant municipality was given actual notice of a leak in its water main, result-

ing in a flow of a small volume of water down the gutter of one block of a dead-end street, that on the day of the accident the ground was covered with about an inch of soft snow, that plaintiff walked from her door to the curb and stepped into the street, that her foot slipped on a thin sheet of ice concealed by the snow, causing her to fall to her injury as she was entering a car at the curb. *Held:* The evidence is insufficient to be submitted to the jury on the issue of the city's negligence in failing to repair the defect on the day it received actual notice thereof, since injury from such defect to a person using the street in a normal manner could not have been reasonably anticipated from the delay in repairing the defect for a few days.

MOORE, J., not sitting.

APPEAL by plaintiff from *Martin, S.J.*, 6 December 1965 Regular Civil Session of BUNCOMBE.

Plaintiff sues for personal injuries sustained when she slipped and fell upon the street in front of her residence as a result of stepping upon a sheet of ice concealed by a light covering of new fallen snow. She alleges that the city was negligent in that it permitted its water main to continue to leak without repairing the same so that water ran upon the street and froze thereon, thus creating a hazard to persons using the street. She alleges that the city knew, or by the exercise of reasonable diligence should have known, of the condition upon the street. The plaintiff presented her claim to the city and demanded compensation for her injuries prior to instituting the suit. The city, in its answer, denies all allegations of negligence by it and pleads contributory negligence by the plaintiff, alleging that she knew, or should have known, of the presence of the water upon the street and of the prevailing temperature and weather conditions.

The plaintiff offered evidence tending to show the following facts, in addition to evidence as to the nature and extent of her injuries:

On 6 March 1962, she and her husband resided at 11 Furman Court in the City of Asheville. Furman Court is a short, dead-end street running down hill from the dead-end to Furman Avenue. A city water main runs under the dead-end portion of Furman Court. It and other like mains are used by the city in supplying water to the public for compensation. For approximately two weeks prior to her fall, she observed water running from the dead-end down Furman Court upon the same side of the street as her residence. At no time, prior to her fall, had she observed any ice formed upon this stream of water.

When she arose on 6 March 1962, she noted that a light snow had fallen, covering the ground to a depth of approximately one

inch. She was employed by the American Red Cross and, as she left home for work that morning, she wore low heeled shoes and rubber boots or overshoes, which had "pebbled," flat soles and heels. She walked down several steps from her porch, thence along the walkway leading through her yard to the street, the footing being firm and not slippery. An automobile was waiting at the curb to carry her to work. Reaching the curb, she stepped down to the street level with her right foot and as she took her left foot from the curb, her right foot slipped from under her and she fell, sustaining fractures of the right leg.

While lying upon the street, she put her hand down and found there was a thin sheet of ice under the snow. This sheet of ice extended out into the street approximately two feet from the curb. Until she stepped upon it, the ice was concealed by the new fallen snow, the total depth of snow and ice not being sufficient to change the contour of the street noticeably. In walking down the porch steps, out to the street and off the curb onto the street, she stepped carefully because of the snow, which was dry and fluffy, not slippery. There was no ice upon the porch steps or upon the walkway leading from the steps to the curb.

The records of the City Water Department show that the city repaired a leak at 20 Furman Court on 8 March 1962, two days after the plaintiff fell, the repair being made within the street itself. The superintendent's best opinion is that he went to Furman Court and observed the need for repairs three days before the repairs were made, which would be on the day before the plaintiff fell. Had he then observed what he considered a "big leak," he would have put someone on the job of repairing it immediately. His visit to Furman Court on that occasion was in consequence of some complaint that had been made concerning the water leak.

In times of bad weather, such as icy conditions or snow, the city keeps its Water Department employees on stand-by duty and tries to correct the more serious leaks first. There was no rain, snow or other precipitation on 5 March 1962.

The water, which froze and became the ice on which the plaintiff fell, came out of a break in the city's water main, rose from the broken main to the surface of Furman Court and then flowed down hill, past the plaintiff's residence, toward Furman Avenue. The flow of water was about two and a half feet in width, extending out into the street from the curb, the depth of the water being very slight.

At the conclusion of the plaintiff's evidence the defendant moved for judgment of nonsuit, which motion was allowed. From such judgment the plaintiff appeals, assigning as error the granting of such motion and the entry of such judgment.

Williams, Williams & Morris for plaintiff appellant.

Van Winkle, Walton, Buck & Wall by O. E. Starnes, Jr., for defendant appellee.

LAKE, J. The judgment of nonsuit must be sustained unless the evidence offered by the plaintiff, considered in the light most favorable to her, is sufficient to show negligence by the city which was the proximate cause of the plaintiff's fall and injury. The burden is upon the plaintiff to establish such negligence and causation. *Walker v. Wilson,* 222 N.C. 66, 21 S.E. 2d 817.

When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage resulting from such operation to the same extent and upon the same basis as a privately owned water company would be. *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14; *Candler v. Asheville,* 247 N.C. 398, 101 S.E. 2d 470; *Woodie v. North Wilkesboro,* 159 N.C. 353, 74 S.E. 924; McQuillin, Municipal Corporations, 3rd Ed., § 53.104; 56 Am. Jur., Waterworks, § 38. It is not an insurer against injury or damage by water leaking from such system. It is liable only if the escape of the water was due to its negligence either as to the initial break in the water line or in its failure to repair or cut off the line so as to stop the flow. 94 C.J.S., Waters, § 309. The reasonable care which is required of the city when engaged in such operation, like that required of a privately owned water company, includes the exercise of ordinary diligence to discover breaks in its lines and to correct such defects of which it has notice, or which it could have discovered by the exercise of reasonable inspection. Since the record is silent as to what caused the leak to develop in the water line, the plaintiff, in order to recover from the city as the operator of a system of waterworks, must show that the city was negligent in its failure to take steps to stop the flow of water after it had actual or constructive notice of the leak.

As an alternative theory upon which to recover for her injury, the plaintiff asserts the failure of the city to keep its public street in a safe condition. While the city is not an insurer of the safety of one who uses its streets and sidewalks, it is under a duty to use due care to keep its streets and sidewalks in a reasonably safe condition for the ordinary use thereof. G.S. 160-54. The controlling principles of law are thus stated by Parker, J., now C.J., in *Smith v. Hickory,* 252 N.C. 316, 113 S.E. 2d 557:

"The governing authorities of a town or city have the duty imposed upon them by law of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who use them in a proper manner. Liability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect in the street or sidewalk and the injury: he must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travellers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care."

To the same effect see: *Faw v. North Wilkesboro, supra; Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799; *Bailey v. Winston,* 157 N.C. 252, 72 S.E. 966; *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309.

It will be observed that in this case the water did not escape from the city's property and invade the property of another. It flowed from the break in the pipe, which was under the street, up to the surface of the street and thence down the gutter line of the street, eventually passing, presumably, into the city's system of storm sewers. Thus, there is no question here of trespass or of property damage. The evidence indicates that one observing the flow of water would have no reason to anticipate damage to any property thereby.

The plaintiff must recover, if at all, on the theory that the city was negligent in failing to stop the flow of water down the gutter line of its street because it should have foreseen danger of personal injury to a user of the street if the flow continued. This is true whether she rests her case upon the duty of the city as the operator of a water system or upon the duty of the city to keep its streets in a reasonably safe condition. In order to hold the city liable, it must appear that the city knew or should have discovered the water was so running upon the street; that it should have foreseen danger of personal injury to one using the street if the flow of water was not checked; and that it failed to act to stop the flow within a reasonable time.

It is the duty of the city to exercise a reasonable and continuing supervision over its streets in order that it may know their condition and it is held to have knowledge of a defect which such inspec-

tion would have disclosed to it. *Faw v. North Wilkesboro, supra; Bailey v. Winston, supra.* However, the city's duty to inspect and discover defects in its streets does not go beyond the duty to exercise reasonable care in that respect. *Jones v. Greensboro,* 124 N.C. 310, 32 S.E. 675. No arbitrary rule can be laid down with reference to how frequently the city must inspect its streets. *Revis v. Raleigh,* 150 N.C. 348, 63 S.E. 1049.

The evidence indicates that the flow of water along the side of Furman Court was not large in volume. If an officer or employee of the city had passed the end of this one-block, dead-end street and had observed the flow of water along the line of the gutter, he might easily have failed to conclude therefrom that it was anything more than a temporary condition, or that its point of origin was a defect in the system of waterworks. The evidence is that the water so ran down this one-block street for approximately two weeks. The evidence is not sufficient to show constructive notice to the city of the leak in its water main.

There is, however, evidence of actual notice to the superintendent of the Water Department. In response to a complaint, he went to Furman Court and found the water main was leaking, but this was not until the day before the plaintiff fell. The evidence does not show at what hour of the day his visit to the scene occurred. There is nothing in the evidence to indicate that he did not go to Furman Court promptly upon receipt of the complaint. The leak was repaired on the third day after he went there and saw the leak, the plaintiff having fallen in the meantime. His testimony, on adverse examination, was that the leak was not what he considered a "big leak." The plaintiff's husband testified that on the day when the superintendent observed the leak there was "no indication of bad weather."

It is not every defect in a street or sidewalk which will render a city liable to a person who falls as a result thereof. Trivial defects, which are not naturally dangerous, will not make the city liable for injuries occasioned thereby. *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424. To recover, the plaintiff must not only show that the city knew of the defect but must go further and show that "the character of the defect was such that injuries to travellers using its street or sidewalk in a proper manner might reasonably be foreseen." *Smith v. Hickory, supra; Fitzgerald v. Concord, supra; Revis v. Raleigh, supra.*

In *Oliver v. Raleigh,* 212 N.C. 465, 193 S.E. 853, Barnhill, J., later C.J., speaking for the Court, said:

"All portions of a public street from side to side and end to end are for the public use in the appropriate and proper method, but no greater duty is cast upon the city than that it shall maintain the respective portions of its streets in a reasonably safe condition for the purposes for which such portions of the streets are respectively devoted. [Citations omitted]. A municipality is only required to maintain the respective portions of the streets in reasonably safe condition for the purposes to which they are respectively devoted; thus, the driveway must be kept in such a state of repair as to be reasonably safe for horses and vehicles, but not necessarily pedestrians. [Citations omitted].

"In each case the way is to be pronounced sufficient or insufficient as it is, or is not, reasonably safe for the ordinary purposes of travel under the particular circumstances which exist in connection with that particular case."

When the superintendent of the Water Department actually observed this water flowing from the leak in the water main, there being no evidence of actual notice to the city prior to that day, he observed a flow down the gutter line of the street which was "not big." The water was not escaping from the street. So long as the flow of water continued as it then was, it could not be reasonably foreseen that it would cause injury to a person using the street in the normal manner. There was then no indication of "bad weather." While it might have been foreseen that water trickling along a paved street in Asheville over night, during the first week of March, might freeze, this, in itself, would not make the street so hazardous as to impose upon the city the duty to call out its repair crew and correct the leak immediately. It was the fall of a thin covering of dry, fluffy snow upon the thin sheet of ice which made the surface of the street at that point exceedingly slippery and caused the plaintiff's footwear to be less effective than it otherwise would have been in preventing her from slipping.

Assuming that the plaintiff slipped and fell upon the street, without any fault of her own, this does not, of itself, impose liability upon the city, either as the operator of the leaky water main or as the custodian of the street. There was nothing in the situation shown to have confronted the superintendent of the Water Department, when he stood at the scene of the leak on the preceding day, which made it unreasonable for him to defer sending the repair crew to this particular leak.

In *Carl v. New Haven,* 93 Conn. 622, 107 Atl. 502, the plaintiff

fell upon a sidewalk coated with ice, which, itself, was covered with new fallen snow. The Supreme Court of Errors of Connecticut said:

> "The notice, actual or implied, of a highway defect causing injuries which a municipality must receive as a condition precedent of liability for those injuries, is notice of the defect itself which occasioned the injury, and not merely of conditions naturally productive of that defect and subsequently in fact producing it. 'Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient.' [Citations omitted]. Were it otherwise, and municipalities were charged with notice of defects which the future should develop upon the strength alone of their knowledge of such conditions as were calculated to produce them, the expansion of municipality liability for highway defects would be enormous, the burden of repair and remedy cast upon them would be vastly enlarged, and a wide field of uncertainty opened up in which triers might wander comparatively unrestrained in speculations as to causes and anticipated results."

The evidence, viewed in the light most favorable to the plaintiff, does not show negligence by the city in deferring the repair of the leak in the water main from the day before the plaintiff's injury to a time shortly thereafter. Consequently, the judgment of nonsuit was proper.

Affirmed.

MOORE, J., not sitting.

ALLEN BENNIE BRYAN, EMPLOYEE-PLAINTIFF, v. FIRST FREE WILL BAPTIST CHURCH, EMPLOYER; INSURANCE COMPANY OF NORTH AMERICA, CARRIER, DEFENDANT.

(Filed 20 April, 1966.)

1. Master and Servant § 53—

In order for an employee to be entitled to recover compensation under the North Carolina Workmen's Compensation Act he must show that he sustained personal injury by accident and that his injury arose in the course of his employment and that the injury arose out of his employment.

2. Master and Servant § 54—

There must be a causal relation between the injury and the employment in order for the injury to arise out of the employment.

8. Master and Servant § 93—

Whether an accident arose out of the employment is a mixed question of law and fact.

4. Master and Servant § 54— Evidence held insufficient to support finding that injury arose out of employment.

The evidence tended to show that plaintiff was employed as a minister by defendant church and was furnished a parsonage as part of his remuneration, which parsonage was also used for church functions. The evidence further tended to show that claimant agreed for the benefit of the church to move out of the parsonage two weeks before the termination of his employment in order that repairs might be made to the parsonage, and that while claimant was moving his stove from the parsonage prior to the termination of his employment he suffered a back injury. *Held:* Claimant's injury cannot be traced to his employment as minister as a contributing proximate cause, since the evidence plainly shows his injury arose out of the performance of an act personal to himself and his family.

5. Master and Servant § 94—

Where the employer's exceptions to a conclusion of the Industrial Commission and its predicate findings must be sustained for lack of any competent evidence to support the findings, it is not necessary to pass on an assignment of error to another conclusion of the Commission, and the judgment of the Superior Court affirming the award must be reversed and the cause remanded to the Industrial Commission.

MOORE, J., not sitting.

APPEAL by defendants from *Clark, S.J.*, 17 January 1966 Civil Session of LENOIR.

Claim for compensation under Workmen's Compensation Act.

Forrest H. Shuford, II, the hearing commissioner, based upon stipulations entered into by the parties at the hearing, found the jurisdictional facts; that Insurance Company of North America was the compensation insurance carrier on the risk at the date of the alleged injury by accident on 17 August 1964; and that plaintiff's average weekly wage was $85. The essential findings of fact of the hearing commissioner are as follows:

"1. On and prior to 17 August 1964 plaintiff was regularly employed by the defendant employer as its minister. In addition to receiving a salary plaintiff was furnished with a home in which to live which was called the parsonage. The parsonage was owned by defendant employer and was used for many church functions including marriage, counselling, and other activities.

"2. Sometime prior to 17 August 1964 it was determined that plaintiff's employment with defendant employer would be

terminated as of 1 September 1964. As of such date plaintiff was to assume the duties as minister of the Core Creek Free Will Baptist Church and was also to become associated with the State Convention of the Church.

"3. The parsonage where plaintiff lived was in need of repairs including the replacement of some flooring. At the request of the Governing Board of defendant employer, plaintiff agreed to move out of the parsonage approximately two weeks prior to the termination of his employment with defendant employer. This was to be done in order that repairs could be made to the parsonage before the new minister of defendant employer moved into the parsonage.

"4. In accordance with the above stated arrangement plaintiff undertook to move his household and kitchen furniture out of the parsonage on 17 August 1964. The moving of the furniture at such time was for the benefit of defendant employer in order that its parsonage could be vacant so that repairs could be made.

"5. On 17 August 1964 some members of the Core Creek Church, into whose church parsonage plaintiff was to move, assisted plaintiff in moving his furniture from the defendant employer's parsonage. Plaintiff and one of the members of such church attempted to move plaintiff's two-hundred-pound electric stove from the parsonage. Plaintiff walked backward while holding one end of the stove with the other end being carried by another. The stove was carried through a passageway in the parsonage. Because of the narrowness of the passageway, plaintiff had to put one hand on the bottom and one hand on the top of the stove. While so going through the narrow passageway, a door on the stove came open, and while still holding one end of the two-hundred-pound stove and trying to close the door, plaintiff had a pain in his back.

"6. The lifting of the stove was not a part of the plaintiff's usual and customary work and was out of the ordinary for him. Plaintiff sustained, as described above, an injury by accident.

"7. The moving of the stove from the defendant employer's parsonage at the time that it was being done was primarily for the benefit of defendant employer; it was done while plaintiff was still minister of the defendant employer and on the payroll of his employer; and it occurred upon defendant's premises. Plaintiff's injury by accident arose out of and in the course of his employment with defendant employer.

"8. Following his accident plaintiff continued to have back pain which became more severe on 27 September 1964. Plaintiff thereupon consulted with Dr. John T. Langley, orthopedic surgeon of Kinston. Dr. Langley treated plaintiff conservatively at home for a period of time but in that plaintiff did not recover he was hospitalized on 1 November 1964 and a myelogram was done. The findings of such myelogram were positive and Dr. Langley operated upon plaintiff for removal of a ruptured disc on 4 November 1964.

"9. Plaintiff sustained no loss of wages or salary as a result of his injury by accident and thus sustained no temporary total disability. Plaintiff does have a five per cent permanent partial disability of the back as a result of the injury by accident."

The hearing commissioner's conclusions of law are as follows:

"1. On 17 August 1964 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer. G.S. 97-2(6).

"2. As a result of the injury by accident giving rise hereto plaintiff sustained no temporary total disability. G.S. 97-2(9); G.S. 97-29.

"3. As a result of the injury by accident giving rise hereto plaintiff sustained a five per cent permanent partial disability of the back, for which he is entitled to compensation at the rate of $37.50 per week, for a period of fifteen weeks, commencing 28 December 1964. G.S. 97-31(23)."

Based upon his findings of fact and conclusions of law, the hearing commissioner awarded plaintiff compensation, to be paid to him in a lump sum, subject to a fee allowed to his counsel to be deducted from compensation awarded plaintiff.

Defendants appealed to the Full Commission, which adopted as its own the findings of fact and conclusions of law of Commissioner Shuford, together with the result reached by him, and affirmed the award.

Whereupon, defendants appealed to the superior court which entered a judgment overruling each and every exception and assignment of error by defendants, and affirmed the award of the Full Commission.

From this judgment defendants appeal to the Supreme Court.

Wallace, Langley & Barwick by P. C. Barwick, Jr., for defendant appellants.

Aycock, LaRoque, Allen, Cheek & Hines by F. Fred Cheek, Jr., and John M. Hines for plaintiff appellee.

PARKER, C.J. Defendants assign as errors the trial judge's overruling their exception to the hearing commission's finding of fact No. 6, which was affirmed by the Full Commission; the trial judge's overruling their exception to the hearing commissioner's finding of fact No. 7, which was affirmed by the Full Commission; and the trial judge's overruling their exception to the hearing commissioner's conclusion of law No. 1, which was affirmed by the Full Commission, which challenged findings of fact and challenged conclusion of law are set forth verbatim above.

To obtain an award of compensation for an injury under the North Carolina Workmen's Compensation Act, an employee must show that he sustained a personal injury by accident, that his injury arose in the course of his employment, and that his injury arose out of his employment. *Lewis v. Tobacco Co.*, 260 N.C. 410, 132 S.E. 2d 877; *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265; *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668. The requirement of the Act that an injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment is known and referred to as the rule of causal relation; *i.e.* that an injury to be compensable must arise from his employment. The rule of causal relation is "the very sheet anchor of the Workmen's Compensation Act," and has been adhered to in our decisions, and prevents our Act from being a general health and insurance benefit act. *Duncan v. Charlotte*, 234 N.C. 86, 66 S.E. 2d 22; *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643.

This is said in *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680:

> ". . . The words 'in the course of,' as used in the statute, refer to the time, place and circumstances under which the accident occurred, while 'out of' relates to its origin or cause.
>
> " 'Arising out of' means arising out of the work the employee is to do, or out of the service he is to perform. The risk must be incidental to the employment. [Citing authority.]
>
> "In order to entitle the claimant to compensation the evidence must show that the injury by accident arose out of and in the course of his employment by the defendant. Both are necessary to justify an award of compensation under the Workmen's Compensation Act. [Citing authority.]"

This is said in *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294:

> "So it has been stated as a general proposition that the phrase 'out of and in the course of the employment' embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business."

It is settled law that "where an injury cannot fairly be traced to the employment as a contributing proximate cause . . . it does not arise out of the employment." *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751; *Lockey v. Cohen, Goldman & Co.*, 213 N.C. 356, 196 S.E. 342; *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89.

Whether an accident arose out of the employment is a mixed question of law and fact. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E. 2d 218.

The case of *Van Devander v. West Side M. E. Church*, 10 N.J. Misc. 793, 160 A. 763, is apposite. This was a proceeding under the Workmen's Compensation Law by Don J. Van Devander, opposed by the West Side M. E. Church. To review a judgment of the Compensation Bureau awarding compensation, the employer brought *certiorari* for determination of a judgment of the Compensation Bureau awarding compensation to Van Devander for injuries alleged to have been sustained by him as the result of an accident arising out of and in the course of his employment by the West Side M. E. Church, the employer. The facts as stated in the opinion of the Supreme Court of New Jersey are as follows: Van Devander is a Methodist minister and was assigned by the bishop to and employed as pastor by West Side M. E. Church. His salary was $3,450 per annum and he was housed in the church parsonage (and was apparently required to live there), for which the sum of $700 was deducted from his salary. He was furnished no janitor service for the parsonage, and was required to do all house work, ground keeping, and care of the furnace himself. On 11 November 1930 while removing a barrel of ashes from the cellar of the parsonage, he strained his back. The only testimony, outside of medical evidence, was that of the petitioner. He testified that he was required to keep the parsonage in condition for use by the members of the congregation, and that it was used for weddings, christenings, and other parish meetings. The Court said in its opinion:

> "We are inclined to think that it was error to hold that the accident arose out of the employment. Petitioner was performing a household duty for his own benefit which he would have

been required to perform if he lived in a house owned by himself. In *Bryant v. Fissell,* 84 N.J. Law, 72, 86 A. 458, 460, the act was said to cover risks 'which are within the ordinary scope of the particular employment in which the workman is engaged.'Now the employment here was that of a minister. Carrying ashes is certainly not incidental to that office, directly or indirectly. Petitioner takes the position that the church imposed certain additional duties, namely, care of the parsonage. But it does not seem that this is so. Care of a dwelling house ordinarily falls upon the occupant and does not have to be so 'imposed.' What the church did was to refuse to furnish service which would relieve him of this burden.

* * *

". . . . In the instant case we think that at the time of the accident the respondent was performing an act personal to himself and his family, and not connected with his employment as a minister.

"The award is set aside, with costs."

See also *Lauterbach v. Jarett,* 189 App. Div. (N.Y.) 303, 178 N.Y.S. 480, 481, which the Supreme Court of New Jersey cites in its opinion as a case that seems to be in point.

In the instant case claimant's employment by First Free Will Baptist Church was that of minister. He was not employed to move his furniture out of his employer's parsonage, when he terminated his employment as minister with First Free Will Baptist Church. Claimant testified in part: "The agreement with the church is when I am dismissed as a minister that my responsibility is to move out of the parsonage. . . . The parsonage needed some repairs to the floor and around the area from where the automatic washer sat. The board had gotten together and we had gotten together and agreed that I should move out of the parsonage about two weeks prior to that time, in order for repairs to be done at the parsonage. . . . I was not paid anything to move my furniture from the parsonage. I did not pay anyone to move the furniture but the church that I was moving to volunteered to help me transfer the furniture." He stated in part on redirect examination: "Some of the furniture in the parsonage belonged to the church — some scattered pieces of furniture. . . . Most of the furniture that the church itself owned was located in the living room. It was necessary to move some of this furniture out of the way so that we could move through with the other furniture."

In our opinion, and we so hold, the findings of fact by the hearing commissioner, affirmed by the Full Commission, clearly show

that claimant's injury did not arise out of and in the course of his employment by First Free Will Baptist Church as its minister, or in other words the findings of fact plainly show that claimant's injury cannot fairly be traced to his employment as a minister as a contributing proximate cause. The findings of fact by the hearing commissioner, affirmed by the Full Commission, plainly show that although the moving of the stove from the parsonage was for his employer's benefit, and although he was still minister and on the payroll of his employer, his injury arose out of his performing an act personal to himself and his family in moving the stove to his new church, probably its parsonage, and it was not connected with his employment as minister by First Free Will Baptist Church.

The trial court erred in overruling defendants' exception to the finding of fact by the hearing commissioner, affirmed by the Full Commission, that "plaintiff's injury . . . arose out of and in the course of his employment with defendant employer," and in overruling defendants' exception to the hearing commissioner's conclusion of law, affirmed by the Full Commission, that "on 17 August 1964 plaintiff sustained an injury . . . arising out of and in the course of his employment with defendant employer."

Therefore, it is unnecessary for us to pass on defendants' assignment of error to the trial court's overruling their exception to the conclusion of law by the hearing commissioner, affirmed by the Full Commission, that plaintiff sustained an injury by accident. As to injury by accident, see *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747.

For the reasons stated above, the judgment of the court below is reversed, and the superior court will remand this cause to the Industrial Commission for an order in compliance with this opinion.

Reversed.

MOORE, J., not sitting.

GILLIAM FURNITURE, INC., v. BENTWOOD, INC. AND ACCURATE FABRICATING COMPANY, INC., AND E. L. LOWE.

(Filed 20 April, 1966.)

1. Pleadings § 25—

Both under common law and by statute, G.S. 1-163, the Superior Court has discretionary power to permit an amendment to the pleadings, and the extent of a permissible amendment must be left in a large degree to the court's discretion, and the court may allow an amendment introducing a new cause of action provided the facts constituting such new cause arise out of or are connected with the transaction on which the original pleading is based.

2. Same— Order allowing amendment held within the discretionary power of the trial court.

Plaintiff brought suit against the corporate debtor and corporate guarantor of payment. The president of the guarantor was made a party defendant and he alleged that the guarantee of payment was without consideration and of no legal effect. Plaintiff then alleged that if the president was not authorized to obligate the guarantor, the president's letter to that effect was fraudulently executed, that plaintiff had relied upon it, and that the president was estopped to plead his own wrongdoing as a defense. Plaintiff thereafter sought an amendment to allege new facts coming to its knowledge that the president of the guarantor had executed a written instrument agreeing to take over the operation of the principal debtor and to assume all of its indebtedness. *Held:* The court had discretionary power to allow the amendment.

3. Same; Pleadings § 10—

A cause of action must be alleged in the complaint and may not be alleged in the reply, and therefore when plaintiff requests an amendment setting up a new cause of action plaintiff should be directed to recast the complaint rather than be permitted to amend his reply.

MOORE, J., not sitting.

APPEAL by defendant Lowe from *Crissman, J.*, September 1965 Session, IREDELL Superior Court.

Plaintiff brought suit against Bentwood, Inc. and Accurate Fabricating Company, Inc. (Accurate) upon the allegation that Accurate had, through its President, E. L. Lowe, guaranteed the payment of the account of $26,949.88 owed by Bentwood. The defendant Lowe, upon motion of the plaintiff, was later made a party defendant. Lowe answered that the alleged guarantee was to "save face" for L. S. Gilliam, Sr. who was Chairman of the Board of Gilliam Furniture, Inc. and who was being criticized by his stockholders for extending credit to Bentwood and that the same was without consideration and of no legal effect. The plaintiff replied that if Lowe was not authorized to obligate Accurate, his letter was fraudulently

executed; that it had relied upon its contents and that Lowe was estopped to plead his own wrongdoing as a defense. Thereafter Lowe died and his co-executors were made parties to the action. Then the plaintiff moved to be allowed to make an addition to its reply because "certain additional facts" have come to its knowledge which are material to the controversy in this action.

Judge Crissman allowed the motion and the following was added: "that the defendant, E. L. Lowe, executed a written instrument wherein he agreed to take over the operation of Bentwood, Inc. and wherein he further agreed to assume all financial responsibilities for indebtedness of Bentwood, Inc."

From the signing of the order allowing the motion and the filing of the amendment, Lowe's co-executors appeal, assigning error.

Collier, Harris & Collier by Robert L. Collier, Jr., attorneys for plaintiff appellee.

Battley and Frank by Jay F. Frank, attorneys for defendant appellant.

PLESS, J. G.S. 1-163 provides "the judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by inserting other allegations material to the case." Many annotations under this statute show that even without the statute the Superior Court possesses an inherent discretionary power to amend pleadings at any time and that amendments should be liberally allowed. It is said in *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565:

> "* * * (T)he powers of amendment conferred by this statute * * * are by its very terms left to be exercised in the discretion of the court. Therefore no inflexible rule applicable to all cases can be laid down. Necessarily each case must to some extent be decided upon its particular facts."

It was said in *Bassinov v. Finkle,* 261 N.C. 109, 134 S.E. 2d 130:

> "The allowance of an amendment which only adds to the original cause of action is not such substantial change as to amount to an abuse of discretion."

In *Mica Industries v. Penland,* 249 N.C. 602, 107 S.E. 120 the court says:

> "* * * (I)t * * * (is) permissible under G.S. 1-163 to allow plaintiff to introduce a new cause of action by way of

amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based."

In this case the deceased, E. L. Lowe, having been made an additional party defendant after the institution of the action, filed an answer in which he denied that his corporation had guaranteed Bentwood's account, but asserted that his action was merely a device intended to prevent further questioning and also to "save face" for L. S. Gilliam, Sr. It was entirely appropriate for the plaintiff under these conditions to act to hold Lowe (or rather his estate) liable to it and, it must be recalled that in the first Reply (to which no exception has been taken) the plaintiff seeks to recover of defendant Accurate Fabricating Company and/or E. L. Lowe, the sum of $26,949.88, *et cetera.* The proposed amendment will permit introduction of evidence if available tending to show Mr. Lowe's individual liability that might not have been competent without the amendment.

The plaintiff's cause of action, however, must be alleged in the complaint and not in the reply, *Phillips v. Mining Co.*, 244 N.C. 17, 92 S.E. 2d 429. Since the plaintiff first stated a cause of action against Lowe in his "first reply," we will treat both replies as amendments to the complaint, *Scott v. Bryan,* 96 N.C. 289, and the plaintiff is directed to recast his pleadings accordingly.

The action of the lower court, except as hereinabove modified is Affirmed.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. THEODORE ROOSEVELT BRIDGERS.

(Filed 20 April, 1966.)

1. Criminal Law § 126—

A motion to set aside the verdict on the ground that it is contrary to the weight of the evidence is addressed to the discretion of the trial court, and the denial of the motion is not reviewable on appeal.

2. Criminal Law § 99—

Upon motion to nonsuit and motion for a directed verdict, the evidence must be interpreted in the light most favorable to the State, giving the State the benefit of all reasonable inferences favorable to it.

3. Automobiles § 59—

Evidence in this case *held* amply sufficient to sustain verdict of defendant's guilt of manslaughter resulting from culpable negligence in the operation of an automobile.

4. Criminal Law § 107—

Where the State introduces eyewitness' testimony of the reckless and culpable negligent operation of a motor vehicle by defendant and the wreck of the vehicle causing the death of a passenger, together with corroborative circumstantial evidence that the vehicle seen a few moments prior to the accident being operated in a reckless manner was the same vehicle as that found at the scene of the wreck, it will not be held for error that the court failed to charge with reference to the nature of circumstantial evidence and the weight to be given it.

5. Criminal Law § 50—

Where a witness identifies by color and make the automobile which defendant was driving when it passed the witness, and the color and make of the vehicle at the scene of the wreck which the witness saw one minute thereafter, it will not be held for error that the witness was permitted to give his opinion that the vehicles were the same, the testimony being a "shorthand" statement of fact.

APPEAL by defendant from *Bailey, J.*, November 1965 Assigned Criminal Session of WAKE.

The defendant was indicted for manslaughter in connection with the death of Earline Williams on 4 September 1965. Through his court appointed counsel he entered a plea of not guilty. The jury found him guilty of involuntary manslaughter and he was sentenced to imprisonment in the State's Prison for a term of ten years. From this judgment he appeals, assigning as error the denial of his motion for judgment of nonsuit, both at the conclusion of the State's evidence and again at the conclusion of all the evidence; the denial of his motion for a directed verdict of not guilty; the denial of his motion that the verdict be set aside as contrary to the weight of the evidence; the failure of the court to charge the jury upon the law of circumstantial evidence; permitting the State's witness, Robert Clay, to state an opinion as set forth below; and the entry of the judgment.

The record shows that at the trial in the superior court it was stipulated that Earline Williams died as the result of an injury received in an automobile wreck on 4 September 1965.

In addition to this stipulation, the evidence offered by the State may be summarized as follows:

Robert Clay, an attorney practicing in Raleigh, testified that at approximately 9:30 p.m. on 4 September 1965, he was driving eastwardly on Highway 64 near the eastern city limits of Raleigh. When

near the Longview shopping center, the Clay vehicle was in the eastbound lane nearest the median strip separating the two eastbound lanes from the two westbound lanes of the highway. The Clay vehicle was overtaking another car in the right, or outer, lane for eastbound traffic, being about two car lengths behind it. A third car overtook the Clay vehicle and, at a high speed, swerved into the right or outer, eastbound lane, passed the Clay car, and cut sharply back in front of it, proceeding thence on in front of the Clay vehicle and, for a while, within the beams of its headlights. This third car was a green and white 1958 Ford operated by a Negro man, with a Negro woman as passenger in the right front seat. The Clay vehicle was then traveling 45 miles per hour, the established speed limit in that area. The green and white Ford was traveling in excess of 70 miles per hour. It disappeared from Mr. Clay's sight around a curve and over the crest of a hill. Approximately one minute later Mr. Clay saw "it again," at which time it was sitting still and smoking, having gone into the median strip of the highway and crashed there. The body of a woman was lying on the median strip some 20 feet from the car, and the body of a man was lying about six feet from the left front door of the car. This car was a 1958 green and white Ford and was in a wrecked condition.

At this point Mr. Clay was permitted, over objection, to testify that he had an opinion satisfactory to himself as to whether the wrecked car was the same car which had passed him approximately a minute earlier, that opinion being "that it was the same car."

Between the point where the green and white 1958 Ford, which passed him, disappeared from his sight and the point where Mr. Clay observed the wrecked green and white 1958 Ford, there were two entrance drives leading into Wake Memorial Hospital, an intersecting street, two cross-overs, and one other driveway coming into Highway 64. The area in which the green and white 1958 Ford passed the Clay automobile was well lighted by the lights of the shopping center and the headlights of the Clay automobile and those of the other automobile which Mr. Clay was about to overtake and pass. Mr. Clay did not observe any person in or around the wrecked green and white 1958 Ford other than the man and woman lying on the median strip of the highway. He observed no one moving away from the vicinity of the wreck.

Melvin Johnson testified that he was driving a taxicab east on Highway 64, near the hospital, when a 1957 Ford passed him traveling approximately 80 miles per hour. It never escaped from his sight from the time it passed him until it went into the median. Just before the point at which the Ford went into the median strip the

highway curved. In the opinion of this witness the Ford car was a two-tone green—light and dark. When the witness reached the point where the Ford had "landed in the embankment," he saw a woman and a man lying "on the embankment." There were no other people moving around near the Ford and he saw no one leaving the vicinity.

State Highway Patrolman Barefoot testified that at 9:45 p.m. he went to the scene of the accident and found a 1957 Ford wrecked in the median. He also found Earline Williams, who was dead, and the defendant. The Ford was green and white. At that point the westbound lanes are at a level some six feet higher than the eastbound lanes of the highway and the Ford had run into the embankment between them. The entire car was damaged extensively. The right front door was torn off the car. Earline Williams' body was found 57 feet from the car back toward Raleigh. The defendant was found 16 feet from the car. The top of the car indicated it had turned over. There were 632 feet of skid marks on the concrete and on the turf of the median strip. The car had struck a concrete culvert in the median. There was an odor of alcohol about the defendant. The accident had happened prior to the patrolman's arrival at 9:45 p.m.

The defendant's brother was the only witness called in his behalf. He testified, in summary:

At approximately 7:15 p.m. on 4 September 1965, he took his brother, the defendant, to his home, the defendant being unable to walk due to drinking. He put the defendant on a couch where the defendant "passed out." Thereafter, Earline Williams aroused the defendant and, with the help of his brother and another man, put the defendant in the right-hand seat of a 1957 Ford, which Earline Williams thereupon drove away from the home of the witness, which was in the City of Raleigh, a considerable distance from the place where the wreck occurred. The defendant and Earline Williams left the house of the witness at approximately 9:00 p.m.

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

Gordon B. Kelley for defendant appellant.

PER CURIAM. The defendant's motion to set aside the verdict on the ground that it is contrary to the weight of the evidence was addressed to the discretion of the trial court and is not reviewable upon appeal. *State v. Wagstaff*, 219 N.C. 15, 12 S.E. 2d 657; Strong, N. C. Index, Criminal Law, § 126.

There was no error in the denial of the motions for nonsuit and

the motion for a directed verdict of not guilty. Upon such motion the evidence must be interpreted in the light most favorable to the State, and all reasonable inferences favorable to the State must be drawn therefrom. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169. So considered, there is ample evidence in the record of each element of the offense with which the defendant was charged and of which he has been found guilty.

There was no error in the failure of the court to instruct the jury with reference to the nature of circumstantial evidence and the weight to be given it. The witness Johnson testified that he did not lose sight of the Ford automobile from the time it passed him, traveling 80 or 90 miles per hour, until he saw it in the median, at which point he and others found the automobile wrecked and the body of the deceased lying a few feet from the car. *State v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409; *State v. Flynn,* 230 N.C. 293, 52 S.E. 2d 791.

There was no error in allowing the witness Clay to state that in his opinion the wrecked automobile was the same one which had passed him and disappeared from his sight only one minute before he found it wrecked. The same witness had already testified, without objection, to the same effect. In any event, under the circumstances related by this witness, it would be absurd to require the witness to describe in minute detail the appearance of the automobile observed by him in each position, instead of simply stating that it was the same car in both places. Any testimony as to identity of an object said to have been seen on different occasions is an expression of opinion by the witness, but such expression is a mere shorthand summary of, perhaps, innumerable attributes of the object observed by the witness and leading him to such opinion. If the defendant had desired to do so he could, of course, have cross examined the witness as to the basis for such opinion.

The exception to the entering of the judgment is merely formal and is without merit.

No error.

MOORE, J., not sitting.

STATE v. OLLIE MELVIN DAVIS.

(Filed 20 April, 1966.)

1. Constitutional Law § 36—

Punishment within the limits fixed by statute cannot be considered cruel and unusual in a constitutional sense.

2. Forgery § 2—

Contention that the punishment for the forgery of a check in a sum less than $200, G.S. 14-119, G.S. 14-120, by analogy to G.S. 14-72, should be limited to that for a misdemeanor, *held* untenable, since it is not so denominated in the statute.

3. Larceny § 10—

Plea of guilty to the larceny of a sum less than $200 does not support sentence of ten years' imprisonment, and the imposition of such sentence must be vacated. G.S. 14-72.

MOORE, J., not sitting.

APPEAL by defendant from *Bailey, J.*, 27 September 1965 Criminal Session of WAKE.

Criminal prosecution on four indictments as follows: (1) An indictment in case No. 11747 in two counts, the first count charging defendant on 15 May 1965 with the forgery of a check in the amount of $22, a violation of G.S. 14-119, and the second count charging defendant on the same date with uttering the same forged check alleged in the first count, a violation of G.S. 14-120; (2) an indictment in case No. 11748 in two counts, the first count charging defendant on 14 April 1965 with the forgery of a check in the amount of $50.13, a violation of G.S. 14-119, and the second count charging defendant on the same date with uttering the same check alleged in the first count, a violation of G.S. 14-120; (3) an indictment in case No. 11749 in two counts, the first count charging defendant on 15 April 1965 with the forgery of a check in the amount of $61.54, a violation of G.S. 14-119, and the second count charging the defendant on the same date with uttering the forged check alleged in the first count, a violation of G.S. 14-120; and (4) an indictment in case No. 11751 in three counts, the first count charging defendant on 15 May 1965 with feloniously breaking into and entering a dwelling house occupied by Edith Estelle Jones with intent to commit larceny, a violation of G.S. 14-54, and the second count charging defendant on the same date with the larceny of certain articles of personal property specified of the value of $129 of the goods and chattels of one....., and the third count charging defendant on the same date with receiving certain designated personal property of the value of $129 of the goods, chattels, and moneys of

Edith Estelle Jones, well knowing at the time that the said goods, chattels, and moneys had been feloniously stolen, taken and carried away.

Defendant, who was an indigent and was represented by court-appointed counsel Richard O. Gamble, a member of the Wake County Bar Association, entered a plea of guilty as charged in the indictments in cases Nos. 11747, 11748, and 11749, and a plea of guilty to breaking, entering, and larceny as charged in the first and second counts in the indictment in case No. 11751. Defendant testified in his own behalf in substance as follows: He is now serving a sentence of 7 to 9 years on three counts of forgery imposed by the Superior Court of Durham County. As to the three forgeries in the instant case, he and his friends were drinking pretty heavily, and they wanted money from these forged checks to buy more whisky. He participated in cashing these checks, forgery, and everything. He got the money, and then he and his friends split it up. He has been convicted of other forgeries and false pretenses before, and one time of the larceny of an automobile and for this he was put in the Federal prison. About the breaking and entering the house of his sister-in-law, Estelle Jones, she owed him some money. He went to her and asked her for the money and she said she did not have it, and that she was not going to pay him if she did have it. So he broke into her apartment and took the radios and TV set. He traded them to a bootlegger for $30 and some liquor.

In case No. 11747, on the first count charging forgery, the trial judge ordered that defendant be imprisoned in the State's prison for a term of 10 years, this sentence to commence at the expiration of the 7 to 9 year sentence imposed in the Superior Court of Durham County on 5 October 1965 on the charge of forgery and uttering. On the second count in case No. 11747, and on both counts in case No. 11748, and on both counts in case No. 11749, and on the first two counts in case No. 11751, the trial judge ordered that on each one of these counts defendant be imprisoned in the State's prison for a term of 10 years, the sentence on each one of these counts to run concurrently with the sentence imposed on defendant on the first count in case No. 11747.

From the judgments, defendant appealed to the Supreme Court. Before the appeal was perfected, Richard O. Gamble was appointed substitute judge of the city court of Raleigh, North Carolina, and has taken the oaths of office. Consequently, the court allowed him to withdraw as counsel for defendant, and appointed Sheldon L. Fogel, a member of the Wake County Bar Association, to serve as counsel for defendant on the appeal to the Supreme Court.

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

Sheldon L. Fogel for defendant appellant.

PER CURIAM. Defendant has one assignment of error that the judgment of imprisonment of the court on each count of each bill of indictment was excessive, and violates the constitutional prohibition against cruel or unusual punishment. A violation of G.S. 14-119 is a felony, and the statute provides that the punishment shall be imprisonment for not less than four months nor more than ten years, or by a fine in the discretion of the court. A violation of G.S. 14-120 is a felony, and the statute provides that the person so offending shall be imprisoned for not less than four months nor more than ten years. A violation of G.S. 14-54 is a felony, and the statute provides for a violation thereof imprisonment for a term of not less than four months nor more than ten years. 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. Stubbs,* 266 N.C. 295, 145 S.E. 2d 899; *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 further contends in his brief as follows: The sentences imposed on the forgery and uttering charges in the three indictments are excessive in view of the relatively small amounts of the checks involved. The General Statutes of North Carolina divide the crime of larceny into two degrees, one a misdemeanor, where the larceny or receiving of stolen goods is of a value of less than $200, and that in the case of forgery or uttering an analogy should be drawn; and that, in view of G.S. 14-72 dividing larceny into two degrees, punishment for forgery of a sum less than $200 should likewise be considered as a misdemeanor. This contention is untenable, for the very simple reason that the Court has no power to amend an Act of the General Assembly.

The second count in case No. 11751, to which defendant pleaded guilty, charges simply the larceny of certain designated personal property of the value of $129 and does not specify the name of the owner. The plea of guilty to this count was a plea of guilty to a misdemeanor. *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. Imprisonment on this larceny count for ten years is excessive and not authorized by G.S. 14-72. The sentence on the larceny count is reversed and vacated.

The trial judge ordered that Wake County, pursuant to the provisions of G.S. 15-4.1, pay the costs of providing for the defendant's

counsel a trial transcript, and that the County pay the costs of mimeographing the case on appeal and defendant's brief.

Affirmed as to all the judgments, except the judgment on the larceny count which is reversed and vacated.

MOORE, J., not sitting.

STATE v. SARAH WHITTED.

(Filed 20 April, 1966.)

Infants § 7—

Where the warrant charges defendant with using a minor to assist her in the sale of illicit liquor, but the evidence shows only that the minor was used to carry nontaxpaid liquor from a neighboring shed to defendant's house, without any finding that defendant sold illicit liquor on the occasion in question, is insufficient to support the particular offense charged in the warrant, and judgment of nonsuit should have been entered.

MOORE, J., not sitting.

APPEAL by defendant from *Bailey, J.,* November 1965 Assigned Criminal Session of WAKE.

Criminal prosecution on a warrant charging that defendant, on or about August 24, 1965, "did wilfully contribute to the delinquency of Donald Lee Whitted, a minor, age 12, in that she used him to assist her in the sale of illicit liquor," tried *de novo* in the superior court after appeal by defendant from conviction and judgment in the Domestic Relations Court of Wake County. Upon return of a verdict of guilty as charged, judgment imposing a prison sentence was pronounced. Defendant excepted and appealed, assigning as error, *inter alia,* the denial of her motion for judgment as in case of nonsuit.

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

George M. Anderson and E. Ray Briggs for defendant appellant.

PER CURIAM. A Raleigh Police Officer was the only witness. He testified that defendant and Donald Lee Whitted, defendant's twelve-year-old grandson, lived at 708 Carroll's Alley. He also testified to observations made by him on August 24, 1965, about 9:00

p.m., when he and other officers had taken a position "across a branch about 25 to 30 feet from the back of the house at 708 Carroll's Alley." He also testified to the result of the search some 45-55 minutes later of the shed at the rear of 710 Carroll's Alley and of the house at 708 Carroll's Alley and of the person of Donald.

Conceding, without deciding, the circumstantial evidence on which the State relied was sufficient to support a finding that Donald left 708 Carroll's Alley, went to the shed in back of 710 Carroll's Alley and got two half-gallon jars of nontaxpaid (illicit) liquor from the shed and brought them back to 708 Carroll's Alley and handed them to defendant, the evidence was insufficient, in our view, to support a finding that defendant *sold* illicit liquor and "used (Donald) to assist her in the sale" thereof, the only accusation in the warrant as to the way and manner in which she wilfully contributed to the delinquency of Donald.

Since the evidence relates solely to what occurred on said occasion on August 24, 1965, and is insufficient to support the particular offense charged in the warrant, the court's denial of defendant's motion for judgment as in case of nonsuit constitutes reversible error.

Reversed.

MOORE, J., not sitting.

STATE v. HARRY EDWARD PINDELL.

(Filed 20 April, 1966.)

APPEAL by defendant from *Bailey, J.*, December Criminal Session 1965 of WAKE.

The defendant, Harry Edward Pindell, along with three other persons, was charged in a bill of indictment with the felonious breaking and entering of the Raleigh Loan Office on 5 August 1965, which business establishment is owned by Isadore Golden. In a second count in the bill of indictment the defendant and others were charged with the larceny of certain itemized articles of merchandise owned by Isadore Golden, trading as Raleigh Loan Office, of the value of $2,000.

The jury returned a verdict of guilty as charged. From the judg-

ments imposed on the respective counts the defendant appeals, assigning error.

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

Earle R. Purser for defendant.

PER CURIAM. The defendant assigns as error the failure of the court below to sustain his 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 State's evidence was sufficient to require the submission of the charges of breaking and entering and larceny to the jury. This assignment of error is overruled.

The remaining assignments of error have been carefully examined and in our opinion they present no prejudicial error. In the trial below we find

No error.

MOORE, J., not sitting.

F. JOHN WARD, PLAINTIFF, v. KOLMAN MANUFACTURING COMPANY; JOHN L. HEALY; C. A. DUBBE; ED. F. BURG; PATRICK J. HEALY; F. N. KOLBERG; MRS. F. N. KOLBERG; AND MRS. BLANCHE ZETTERLUND, EXECUTRIX, DEFENDANTS.

(Filed 4 May, 1966.)

1. Process § 9—

Where notice of the levy is served upon the garnishee promptly and publication of the notice is timely made in a newspaper, the fact that the affidavit of the printer is not made within the time prescribed is not sufficient to justify defendants' motion to dismiss.

2. Garnishment § 1—

In order for a debt to be subject to garnishment, the garnishee must have such residence or agency within this State as to render it amenable to the process of our courts, and the party against whom garnishment is laid must have the right to sue the garnishee in this State, and it must appear that the *situs* of the debt is in this State.

3. Same; Process § 9—

Findings that the garnishee was a domesticated corporation, that it owed a debt, evidenced by a note, to a foreign corporation, that the note was assignable to the stockholders of the foreign corporation, that the foreign corporation owed a debt to plaintiff, that plaintiff, in his suit against the

foreign corporation, duly garnished the debt and by amendment had the individual stockholders of the foreign corporation made parties, warrant the court in denying defendants' motion to dismiss for want of jurisdiction.

4. Appearance § 2—

Since the enactment of G.S. 1-134.1, motion to dismiss for want of jurisdiction does not waive defendants' objections upon procedural grounds.

MOORE, J., not sitting.

APPEAL by defendants from *Copeland, S.J.*, March 7, 1966 Non-Jury Civil Session, WAKE Superior Court.

The plaintiff instituted this civil action in the Superior Court of Wake County on July 9, 1965, by filing affidavit for service of process by publication of notice to the defendants, all of whom are nonresidents of North Carolina. The plaintiff seeks to obtain jurisdiction over the defendants by attachment and garnishment of debts due the defendants by Athey Products Corporation, chartered in Illinois but domesticated in North Carolina where all of its officers reside and where the major part of its property is located and its business transacted. After the publication of the notice to the defendants and the service of the garnishment proceedings on Athey, the defendants entered special appearances and moved to dismiss the cause for lack of jurisdiction over either the defendants or the cause of action.

The allegations of the complaint in short summary are as here stated: F. John Ward, the plaintiff, is a resident of Minnesota. The defendant Kolman Manufacturing Company is a South Dakota corporation. The individual defendants are all of the officers and shareholders of the corporate defendant. All reside in Sioux Falls, South Dakota.

On April 23, 1964, the defendant corporation entered into a written agreement with the plaintiff, F. John Ward, whereby he became the exclusive agent of the corporation "for the sale of all or part of the stock or assets of Kolman Manufacturing Company." The contract was entered into at the home office of the corporation in South Dakota. It provided for commissions to be paid to Ward according to a graduated scale: One per cent of the sale price up to two million dollars; 20 per cent of the next $300,000.00; 22½ per cent of the next $200,000.00; 30 per cent of the excess over $2,500,000.00.

As a result of the plaintiff's effort, on October 1, 1964, Athey Products Corporation, chartered in Illinois, agreed to purchase all of the assets of Kolman. The sale included the right to use and sell machines made under a designated U. S. patent. The plaintiff's

commission amounted to $142,168.74. That amount is due, subject to a credit of $50,000.00 and certain other small adjustments depending on the amount of cash paid, to be paid at the closing of the transaction. The foregoing commissions are now due, or past due, and are unpaid.

Attached to the complaint as exhibits are: (1) The letter and acceptance which constitute the contract between the plaintiff and Kolman. All officers and stockholders of the corporation approved the contract. (2) The purchase agreement between Athey Products Corporation and Kolman Manufacturing Company. By the purchase agreement Athey acquired all the assets and property of Kolman, agreed to assume all its obligations and to pay $440,000.00 cash at closing, $200,000.00 in cash on February 1, 1965, and to execute and deliver to Kolman its note for $850,000.00, payable in nine equal annual installments. The purchase agreement recites that F. John Ward has acted as broker for Kolman "and that it (Kolman) will indemnify and save harmless Athey against . . . all claims and liabilities arising from F. John Ward . . ."

The court conducted a hearing on the motion to dismiss based upon the pleadings and affidavits. The court found that neither the corporate defendant nor any of the individual defendants have ever done any business or lived in North Carolina. Service on the defendants was made by publication pursuant to G.S. 1-99.2. The jurisdiction of the court to hear and render judgment upon the cause of action alleged is predicated solely upon the attachment of defendants' property pursuant to garnishment proceedings, notice and levy thereunder were served upon the Athey Products Corporation which filed answer, admitted its indebtedness to Kolman as of February 1, 1965, in the principal sum of $755,555.56 due by note. The note stipulated it may be assigned at any time to the stockholders of Kolman under a plan of liquidation. On February 26, 1965, Athey "received notice which was construed as an assignment of said note to the stockholders of Kolman, . . . payments to be made to the Trust Department, Northwestern National Bank, Sioux Falls, South Dakota," pursuant to an escrow agreement between the stockholders of Kolman and the bank. The court further found: "Athey presently owns no property and conducts no business in the State of Illinois. All of its officers reside in Wake County, North Carolina." Two-thirds of its physical assets are located here. Athey maintains its principal office and place of business at its plant in Raleigh, North Carolina. Though chartered in Illinois, it transacts its business in this State where it is duly domesticated.

The court concluded: (1) "Athey Products Corporation is indebted to the defendants in the amount set forth in . . . the

Findings of Fact." (2) Such debts have a *situs* in North Carolina. (3) The defendants could bring suit in North Carolina against Athey Products Corporation to enforce the collection of such debts which have been brought within the jurisdiction of the court by the complaint, garnishment proceeding, and the publication of the notices as the law requires. Upon the findings and conclusions, Judge Copeland entered an order denying the motion to dismiss. The defendants excepted and appealed.

Poyner, Geraghty, Hartsfield & Townsend by John Q. Beard for plaintiff appellee.

Purrington, Joslin, Culbertson & Sedberry by William Joslin for defendant appellants.

HIGGINS, J. Both the corporation and the individual defendants base their motions to dismiss upon these grounds: (1) The "property" the plaintiff attempts to attach is a note executed by an Illinois corporation (Athey) payable to and held by a South Dakota corporation (Kolman) under a contract made in South Dakota, to be performed there. (2) The note has been assigned to the individual defendants who also reside in South Dakota. (3) The *situs* of the note is not in North Carolina and the North Carolina court cannot acquire jurisdiction either of the note or of the defendants. The defendants' motions to dismiss do not challenge the court's findings of fact or its order on any ground except lack of jurisdiction. The court has undertaken to acquire jurisdiction of the indebtedness and deal with the defendants' interest in it. Since the defendants are non-residents and not personally served, *in personam* judgments cannot be rendered against them. The court must act upon their property rights but can do so only if the property is in the court's custody. *Church v. Miller,* 260 N.C. 331, 132 S.E. 2d 688.

In their brief the defendants argue that the affidavit of the newspaper showing the publication of the notice, and the sheriff's endorsement and return showing the levy in the garnishment proceeding, were not timely filed as the law required. The record, however, shows the sheriff served the notice of the levy upon the garnishee (Athey) promptly and that the affidavit of the printer, though made late, nevertheless shows timely publication of the notice in the newspaper. After the court acquired control of the debt by the garnishment order, the objections are not sufficient to justify a motion to dismiss. *Jenette v. Hovey,* 182 N.C. 30, 108 S.E. 301; *Mills v. Hansel,* 168 N.C. 651, 85 S.E. 17. The court has power, in its dis-

cretion, to allow amendments. *Thrush v. Thrush,* 245 N.C. 63, 94 S.E. 2d 897.

The plaintiff filed his original complaint against the corporation alone. When it appeared there was, or might be an attempt to dissolve the corporation and require Athey, under the terms of the note to pay the amount due to the shareholders rather than to the corporation, the plaintiff amended his complaint, making the stockholders defendants. The condition of the record indicates that Athey owes the note, either to the Kolman corporation or to its stockholders. The plaintiff seeks to have the interests of both before the court so that the garnishee may be ordered to pay to the plaintiff rather than to Kolman or its stockholders. This case is now in the pleading stage. When the facts are developed in the trial, one or both of the defendants may be found to have an interest in the debt of which the note is but evidence. Both the corporation and the individual stockholders signed the agreement to pay the plaintiff. Garnishment is a proper ancillary remedy by which to discover intangible property rights and subject them to attachment.

In order to subject a debt to garnishment and to give the court jurisdiction to act with respect thereto, "(T)hree things should occur: (a) The corporation who is the garnishee in this case must have such a residence and agency within the State as renders it amenable to the process of the court; (b) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery of the debt; (c) it must appear that the *situs* of the debt is in this State." *Goodwin v. Claytor,* 137 N.C. 224, 49 S.E. 173.

The facts found by Judge Copeland, and which are not challenged, fully justify him in denying the motion to dismiss. According to the allegations of the complaint, the defendants owe the plaintiff. Athey, the garnishee, owes the defendants. The garnishee is located in Raleigh where the defendants could sue on the debt. All requirements discussed in *Goodwin* are present.

The defendants fail to make objection in the court below upon procedural grounds but relied exclusively upon the lack of jurisdiction. Since the enactment of G.S. 1-134.1, challenge on other grounds would not waive the objection to jurisdiction. *Finch v. Small Business Administration,* 252 N.C. 50, 112 S.E. 2d 737. Conceding, but not deciding, that the defendants may raise procedural objections for the first time in this Court, nevertheless we have examined the grounds argued in the brief. We do not discover in this voluminous

record anything which would justify dismissing the action. The defendants will have time to answer.

Affirmed.

MOORE, J., not sitting.

CITY OF RANDLEMAN, PETITIONER, v. MYRTLE HINSHAW, DEFENDANT.

(Filed 4 May, 1966.)

1. Constitutional Law § 24—

Notice and an opportunity to be heard are a fundamental requirement of due process, and while service of original process constitutes notice of subsequent regular proceedings in the trial court at term, such service cannot constitute notice of a final order entered by the clerk prior to the time allowed for filing answer. Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Federal Constitution.

2. Eminent Domain § 7a—

The constitutional requirements of notice and an opportunity to be heard apply to condemnation proceedings.

3. Statutes § 4—

If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional or involving serious doubt as to constitutionality, the former interpretation will be adopted.

4. Eminent Domain § 7a—

In a special proceeding by a municipality to condemn an interest in land, the summons together with a copy of the petition must be served at least ten days prior to the hearing upon all persons whose interests are to be affected, G.S. 14-12, and the court must hear proof and allegations of the respective parties and order the appointment of appraisers only in the event no sufficient cause is shown against granting the petition, G.S. 40-16, and ten days' notice of the meeting of the commissioners must be given to the land owner, G.S. 40-17. The statutes do not contemplate a mere perfunctory proceeding but are designed to give the land owner notice and an opportunity to be heard.

5. Same—

After service of summons and petition for the condemnation of an easement upon defendant, but prior to the time extended for the filing of answer to the petition, the clerk appointed appraisers who met and filed their report some nine days before defendant was required to answer, and final judgment was entered thereon, all without notice to defendant. *Held:* Defendant land owner was not given notice and an opportunity to be heard as required by fundamental law, and therefore his motion to set aside the judgment of confirmation may not be denied on the ground that

no exception to the commissioners' report was filed within twenty days. G.S. 40-19.

6. Appeal and Error § 40—

The rule that a new trial will not be granted when there is no reasonable probability that the result would be materially affected does not apply when appellant is seeking to set aside a final judgment on the ground that it was entered without any hearing whatever.

7. Eminent Domain § 2—

The laying by a city of a water main or sewer line in the right of way of a State highway is an additional burden upon the fee, and the owner of the fee is entitled to just compensation for the additional easement, less benefits to his property resulting from construction of the proposed improvements.

MOORE, J., not sitting.

APPEAL by defendant from *Gambill, J.*, 8 November 1965 Civil Session of RANDOLPH.

On 14 April 1965, the city of Randleman instituted a special proceeding before the Clerk of the Superior Court of Randolph County for the purpose of acquiring "rights-of-way, privileges or easements for the construction and operation of sewer and/or water lines" across two tracts of land which the city alleges are owned by the defendant in fee simple and which it describes by metes and bounds in its petition. The proposed rights-of-way or easements are described by metes and bounds in the petition and are located entirely within the right-of-way of North Carolina State Highway No. 2133. The city seeks permanent easements. It alleges in its petition that it has been unable to negotiate with the defendant concerning the purchase of such rights-of-way and easements and that the same can not be purchased for a reasonable price. The petition alleges that the Board of Aldermen of the city has ordered that the said rights-of-way and easements be acquired by condemnation in accordance with the laws of the State. The prayer of the petition is that commissioners of appraisal be appointed to view the premises, "hear the proof and allegations of the parties," determine the compensation, if any, which ought to be made by the city to the defendant, and report to the court to the end that the said rights-of-way and easements may be condemned for the use of the city upon compensating the defendant as provided by law.

Upon application by the defendant, the clerk entered an order extending her time for filing an answer through 14 May 1965. On that date she filed her answer. In it she admits the right of the city to acquire by condemnation the easements sought in the petition,

but alleges that the city has refused to pay her just compensation therefor. The prayer of the answer is that the defendant be awarded just compensation for the taking of her land, which she alleges is $2.00 per running foot for the total length of the easements sought.

In the meantime, on 28 April 1965, the clerk issued an order appointing commissioners to appraise the property proposed to be taken. This order directed the commissioners to hold their first meeting in the office of the clerk at 10:00 a.m. on 28 April 1965, the date of their appointment. It further ordered the commissioners to view the premises, "hear the proofs and allegations of the parties, if any, and reduce the testimony, if any is taken by them, to writing, and after the testimony is closed, * * * ascertain and determine the compensation which ought justly to be made by the City of Randleman to the party owning or interested in said real estate." The order further directed the commissioners to report to the court within ten days from the date of the order.

The commissioners filed their report with the clerk on 5 May 1965, this being nine days before the expiration of the time allowed the defendant to answer the petition and before the filing of her answer. The report states that the commissioners met at 10:00 a.m. on 28 April 1965 in the office of the clerk and, having first been duly sworn, "subsequently visited the premises of the defendant, and after taking into full consideration the quality and quantity of the land involved, and all inconveniences likely to result to the defendant from the condemnation of said rights-of-way, privileges or easements across the same," assessed the defendant's damages at $ —0—, and estimated that the special benefits which the defendant would receive from the construction of the proposed sewer and water lines, or both, would be $7,500.

On 12 July 1965, the clerk entered judgment confirming the report of the commissioners, granting the city perpetual rights-of-way, privileges and easements as prayed for in the petition, and adjudging that the defendant is not entitled to receive anything as damages. The judgment of the clerk states that the court found as a fact that more than 20 days had expired since the filing of the report of the commissioners and no exceptions or objections thereto had been filed or made.

On 19 July 1965, the defendant filed a motion before the clerk that the judgment of the clerk be set aside, that new commissioners be appointed and that the defendant be allowed to present evidence at a hearing before the commissioners. In support of the motion, the defendant asserts that her receipt of a copy of this judgment of 12 July 1965 "was the first information or notice of any proceedings that the landowner or the landowner's attorney had concerning this

matter since filing the answer May 14, 1965." She asserts that she was never notified of the appointment of the commissioners or of their meeting or of the filing of their report. She contends that she is entitled to notice of the meeting of the commissioners in order that she may present evidence to them and be represented by counsel.

The motion to set aside the judgment was overruled by the clerk on the ground that "no exceptions have been filed by the defendant to the report of the commissioners duly filed on April 5, [*sic*] 1965," and that no sufficient evidence was introduced and no sufficient showing was made to justify the setting aside of the judgment.

To these rulings by the clerk the defendant excepted and appealed. The matter then came on for hearing before the judge, who found the facts above summarized, and also found that the defendant was given no "additional notice" of the meeting of the commissioners or of the filing of their report. The court, being "of the opinion that even if technical error was committed there is no reasonable probability that any additional appraisals, hearings, or trials in this connection would result in any recovery on the part of the defendant," dismissed the appeal from the clerk and refused to allow the motion of the defendant that she be permitted to examine the three commissioners, the clerk and the city attorney. From this order the defendant appeals to this Court.

Ottway Burton for defendant appellant.
L. T. Hammond, Sr., for petitioner appellee.

LAKE, J. As long ago as *Hamilton v. Adams,* 6 N.C. 161, Hall, J., speaking for the Court, said:

> "It is a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the Constitution [*i.e.*, the Constitution of North Carolina]. Hence it is that no court will give judgment against any person unless such person have an opportunity of showing cause against it. A judgment entered up otherwise would be a mere nullity."

As recently as *McMillan v. Robeson County,* 262 N.C. 413, 137 S.E. 2d 105, Rodman, J., speaking for the Court, said:

> " 'The law of the land' and 'due process of law' provisions of the North Carolina and U. S. Constitutions require notice and an opportunity to be heard before a citizen may be deprived of his property."

Speaking more specifically of condemnation proceedings, Adams,

J., speaking for the Court, in *Highway Commission v. Young,* 200 N.C. 603, 158 S.E. 91, said:

> "The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard."

Again, in *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138, Devin, J., later C.J., speaking for the Court and quoting from *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306, 94 L. Ed. 865, said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709, this Court affirmed an order of the superior court judge which dismissed an appeal from a judgment of the clerk confirming the report of commissioners in a condemnation proceeding. The decision of this Court was that, since the appellant's attack upon the judgment of the clerk was for irregularity therein, the question should have been presented by a motion in the cause and not by an appeal. In a scholarly and detailed opinion, Ervin, J., speaking for the Court, said:

> "The notice required by these constitutional provisions [North Carolina Constitution, Art. I, § 17; United States Constitution, Fourteenth Amendment] in such proceedings [judicial proceedings in a North Carolina court] is the notice inherent in the original process whereby the court acquires original jurisdiction, and not notice of the time when the jurisdiction vested in the court by the service of the original process will be exercised. 12 Am. Jur., Constitutional Law, § 594. After the court has once obtained jurisdiction in a cause through the service of original process, a party has no constitutional right to demand notice of further proceedings in the cause."

The opinion by Ervin, J. then continues as follows:

> "The law does not require parties to abandon their ordinary callings, and dance 'continuous or perpetual attendance' on a

> court simply because they are served with original process in a judicial proceeding pending in it. *Blue v. Blue,* 79 N.C. 69. The law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice. For this reason, the law establishes rules of procedure admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to resist such steps and principles of natural justice demand that his rights be not affected without an opportunity to be heard."

It was then observed in that case that the rule respecting procedural notice had been disregarded.

We reserve for another occasion a decision upon the question of whether Article I, § 17, of the Constitution of North Carolina, or the Due Process Clause contained in the Fourteenth Amendment to the Constitution of the United States, would be violated by statutes establishing condemnation procedures which require no notice save that given by service of the original process in the special proceeding and which permit the appointment of commissioners, their meeting, the determination by them of the value of the property taken, the making by them of their report to the clerk, and, in absence of exceptions by the landowner, the entry of a final judgment by the clerk, all without notice to the landowner. As in the *Collins* case, this question is not now before us.

If a statute is susceptible of two interpretations, one constitutional and the other not, the former will be adopted. *Finance Co. v. Leonard,* 263 N.C. 167, 139 S.E. 2d 356; *Nesbitt v. Gill,* 227 N.C. 174, 41 S.E. 2d 646. Even to avoid a serious doubt as to constitutionality, the rule is the same. *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352; 16 Am. Jur. 2d, Constitutional Law, § 146.

Chapter 40 of the General Statutes confers the right of eminent domain upon municipalities operating water and sewer systems. If such corporation is unable to agree with a landowner for the purchase of land it needs for such purpose, it may acquire the land, or an easement therein, by following the procedure there set forth. G.S. 40-12 provides that the municipality may present a petition to the clerk praying for the appointment of commissioners of appraisal. A summons, as in other cases of special proceeding, must be served,

together with a copy of the petition, upon all persons whose interests are to be affected by the proceeding "at least ten days prior to the *hearing* of the same by the court." [Emphasis added.] G.S. 40-16 provides that any person whose interests are to be affected may answer the petition, show cause against the granting of its prayer, and disprove any of the facts alleged therein. It further provides that the court "shall *hear* the proofs and allegations of the parties, and *if* no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders * * * *and shall fix the time and place for the first meeting of the commissioners.*" [Emphasis added.]

It is apparent that these statutes do not contemplate a perfunctory proceeding, leading automatically to the granting of the petition. They do not contemplate a landowner standing helpless before the demand of a unit of government. He may deny any of the allegations in the petition and is entitled to a hearing before commissioners are appointed to appraise the damages he will sustain if his property is taken. "The implication is plain that the clerk is to hold the hearing on the challenge only after notice to the parties." *Collins v. Highway Commission, supra.* "A party in court is fixed with notice of all orders and decrees taken at term, for it is his duty to be there in person or by attorney; but he is not held to have notice of orders out of term; *nor of orders before the clerk.*" [Emphasis added.] *State v. Johnson,* 109 N.C. 852, 13 S.E. 843. All motions made before the clerk, other than those grantable as a matter of course or those specifically provided for by law, require notice to the parties affected thereby. *In Re Drainage District,* 254 N.C. 155, 118 S.E. 2d 431; *Collins v. Highway Commission, supra.*

The record in the present proceeding does not show any notice to the defendant of any such hearing by the clerk or of the order of the clerk appointing the commissioners and fixing the time for their first meeting. On the contrary, such order was issued 28 April 1965, sixteen days before the defendant was required to answer and did answer the petition.

G.S. 40-17 provides that whenever the commissioners meet, except by the appointment of the court or pursuant to an adjournment, "they *shall* cause ten days notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent." [Emphasis added.] This section requires that the commissioners view the premises, "*hear* the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing." [Emphasis added.] They are then required to determine the

compensation which ought to be paid and to report the same to the court within ten days. Clearly, this statute contemplates notice to the landowner of the meeting of the commissioners at which they are to "hear" his proofs and allegations.

If the landowner be given notice of the hearing before the clerk, this would, no doubt, be sufficient to charge him with notice of an order entered by the clerk, at such hearing, appointing commissioners and fixing the time and place for their first meeting. In turn, this would charge him with notice of actions of the commissioners at such first meeting, including the adjournment of such meeting to another time and place. In the record before us there is no showing of any notice of any of these actions. On the contrary, the clerk appointed the commissioners by an order entered 28 April 1965 and they met, pursuant to his order, in his office at 10:00 a.m. the same day. This was sixteen days prior to the time when the defendant was required to answer and did answer the complaint.

The clerk ordered the commissioners to "view the premises described in the petition, hear the proofs and allegations of the parties, if any, and reduce the testimony, if any is taken by them, to writing, and after the testimony is closed," to determine the compensation to be paid and to report the same to the court within ten days. The report of the commissioners was filed 5 May 1965. This was nine days before the defendant was required to answer the city's petition. No notice of the findings of the commissioners or of their report to the clerk was given to the defendant.

Furthermore, the report does not show compliance with the order of the clerk. It simply states that the commissioners met on 28 April 1965 at 10:00 a.m. in the office of the clerk and "subsequently visited the premises of the defendant, and after taking into full consideration the quality and quantity of the land involved, and all inconveniences likely to result to the defendant from the condemnation of said rights-of-way," asserted the damages at zero. It does not purport to show any hearing by the commissioners of "the proofs and allegations of the parties," as required both by the statute and by the order of the clerk.

G.S. 40-19 gives the landowner the right to file exceptions to the report of the commissioners within twenty days after the report is filed. He is entitled to be heard upon these exceptions.

This statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet, to determine the damages and report the same to the clerk, and the clerk twenty days later to

enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired.

In her motion in the cause, before the clerk, to set aside the judgment of confirmation, the defendant states that "the first information or notice of any proceeding that the landowner or the landowner's attorney had concerning this matter since filing the answer May 14, 1965" was the receipt of a copy of the judgment of confirmation. The motion, which was promptly filed thereupon, was denied by the clerk upon the ground that more than twenty days had expired since the filing of the report and no exception to the report had been filed.

In *Gatling v. Highway Commission,* 245 N.C. 66, 95 S.E. 2d 131, the facts were quite similar. Speaking for the Court, Winborne, C.J., said:

> "If notice of the meeting, at which the report was signed, had been given to the parties, petitioner would have known of it. Hence in absence of notice it may not be held that petitioner failed to file his exceptions within twenty days after the report was filed."

It is true that new trials are not granted on account of mere technical error when there is no reasonable probability that the result of a new trial would be materially different. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657; *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159; *Call v. Stroud,* 232 N.C. 478, 61 S.E. 2d 342. However, the defendant is not asking for a *new* hearing. She has had no hearing at all. This is not a technical error. This is a denial of a fundamental right.

We are not unmindful of the fact that, according to the petition, the city proposes to lay the sewer and water lines in the right-of-way of a state highway. The city alleges, in its petition, that the defendant is the owner of the fee in this land. As such, she is entitled to just compensation for an additional burden beyond that of the original easement for the highway. *Grimes v. Power Co.,* 245 N.C. 583, 96 S.E. 2d 713; *Rouse v. City of Kinston,* 188 N.C. 1, 123 S.E. 482. The laying of a water main or sewer line in the right-of-way of a highway is an additional burden upon the owner of the fee. *Rouse v. Kinston, supra.* Of course, in determining the compensation to be paid to the landowner, account must be taken of benefits to his property from the construction of the proposed improvement.

In affirming the clerk's denial of the motion to vacate the judgment of confirmation, the court below said that there is no reason-

able probability that any additional appraisals, hearings, or trials would result in any recovery on the part of the defendant. Under the statutes, that is not for the court below or for us to determine. That can be determined only by commissioners who are appointed after the notice and hearing contemplated by G.S. 40-16 and who thereupon proceed as directed by G.S. 40-17.

The motion in the cause to set aside the judgment confirming the report of the commissioners should have been allowed. The matter should thereupon be remanded to the clerk for a new appointment of commissioners and for a determination by them of the defendant's damage, if any, and a report by them to the clerk, all as provided in G.S. 40-17.

Since the answer, which has now been filed, does not deny the right of the city to acquire the desired easements by condemnation and raises no issue save that of just compensation, the only matter to be determined by the clerk at the initial hearing is the selection and appointment of the commissioners and the fixing of the time and place for their first meeting.

The defendant may or may not be able to get to first base, but she is entitled to her time at bat. She may not lawfully be called out on strikes before the contest is scheduled to begin. The judgment below is, therefore, reversed and the matter is remanded to the superior court with instructions to enter an order in accordance with this opinion.

Reversed and remanded.

MOORE, J., not sitting.

VIRGINIA-CAROLINA LAUNDRY SUPPLY CORPORATION, PLAINTIFF, v. LEROY SCOTT, TRUSTEE; AND ELIZABETH M. STANLEY AND HER HUSBAND, J. C. STANLEY, DEFENDANTS.

(Filed 4 May, 1966.)

1. Fraudulent Conveyances § 3—

In an action by a judgment creditor against the judgment debtors and the trustee to set aside as a fraudulent conveyance the deed of trust executed by the judgment creditors to secure a note payable to bearer unknown to the judgment creditor, the *cestui que trust* is not a necessary party.

2. Trial § 21—

Upon motion to nonsuit, the evidence offered by plaintiff is to be considered as true and all reasonable inferences favorable to plaintiff are to be drawn therefrom.

3. Evidence § 20—

Where plaintiff in an action to set aside a deed of trust as fraudulent to creditors alleges that the deed of trust was voluntary in the sense of being without consideration, and defendants do not object to the admission in evidence of an excerpt from their answer admitting that the instrument was voluntary, without the introduction of other allegations in the answer disclosing that defendants were using the word "voluntary" in the sense of being without compulsion, and defendants do not amend, the excerpt from the answer is properly admitted as an unqualified admission that the deed of trust was voluntary in the technical sense.

4. Fraudulent Conveyances § 3—

In an action to set aside a deed of trust as being fraudulent to plaintiff creditor, the burden is on plaintiff to prove that the instrument, even though voluntary, was executed with actual fraudulent intent or that the creditors did not retain property sufficient to pay their then existing debts.

5. Same—

Evidence tending to show that defendant creditors did not list for taxation in one county real or personal property then sufficient to pay plaintiff's claim is alone insufficient to show that the creditors did not retain property sufficient to pay their then existing debts, but where plaintiff introduces in evidence the admission in defendants' answer that the deed of trust was voluntary there is sufficient evidence tending to show an intent to delay, hinder, and defraud creditors to carry the case to the jury. G.S. 39-17.

MOORE, J., not sitting.

BOBBITT and SHARP, J.J., dissent.

APPEAL by plaintiff from *Parker, J.*, September 1965 Session of BEAUFORT.

This is an action to set aside and have declared void a deed of trust upon a house and lot in the City of Washington, North Carolina, on the ground that it was and is a fraudulent conveyance.

The following facts are alleged in the complaint and admitted in the answer:

In May 1963 the plaintiff recovered a judgment against Elizabeth M. Stanley and J. C. Stanley, her husband, jointly and severally, for $4,737.21, which is duly docketed in the office of the Clerk of the Superior Court of Beaufort County. This judgment was for the unpaid portion of the purchase price of certain cleaning plant equipment sold by the plaintiff to Mr. and Mrs. Stanley in 1960. On 5 April 1962 the plaintiff, by registered mail, made de-

mand on Mr. and Mrs. Stanley for payment of the balance so due to it from them. On 16 April 1962 there was recorded in the office of the Register of Deeds for Beaufort County the deed of trust in question from Mr. and Mrs. Stanley to LeRoy Scott, Trustee, which recites that it is for the purpose of securing payment of a note made by Mr. and Mrs. Stanley, payable to bearer on demand in the amount of $10,000. At the time the deed of trust was executed, Mrs. Stanley was the owner of the house and lot and did not own any other real property. The deed of trust was a voluntary conveyance. (Apparently this was not intended by the defendants as an admission that the conveyance was "voluntary" in the technical, legal sense of being without consideration, since the answer alleges elsewhere that the deed of trust was given in good faith to secure a bona fide indebtedness.)

The following is alleged in the complaint and denied in the answer:

The deed of trust was executed and delivered in bad faith and with the fraudulent intent to defeat, hinder, delay and impair the rights of the plaintiff, as creditor of Mr. and Mrs. Stanley. The note which the deed of trust purports to secure is a false and fictitious instrument made in bad faith and with the fraudulent intent to deprive the plaintiff of its rightful collection of the indebtedness so owed to it by Mr. and Mrs. Stanley. Mr. and Mrs. Stanley, at the time of executing and delivering the said deed of trust, fraudulently failed to retain sufficient property for the satisfaction of the plaintiff's claim, which was subsequently reduced to the above mentioned judgment.

In addition to the portions of the answer containing the above mentioned admissions by the defendants, the plaintiff offered in evidence exhibits consisting of the said judgment, the deed of trust, and the tax records of Beaufort County for the years 1962, 1963 and 1964, showing the property listed in those years by Mr. and Mrs. Stanley, formerly Mrs. Elizabeth B. Odom, for taxation in Beaufort County. These tax listings include no real property other than the house and lot described in the said deed of trust, and the total of personal property so listed is substantially less than the balance due upon the plaintiff's judgment. The plaintiff also offered evidence to show that the house and lot in question are worth $6,500.

The deed of trust so offered in evidence by the plaintiff recites that the grantors, Mr. and Mrs. Stanley, are justly indebted to the bearer of a note under seal in the sum of $10,000, dated 15 July 1961, payment of which note the deed of trust secures. The deed of trust is also dated 15 July 1961, but it was not filed for registration

until 16 April 1962. The deed of trust, if valid, also conveyed to the trustee for the said purpose a boat and motor, two automobiles and a diamond ring.

The plaintiff assigns as error the allowance of the defendants' motion for judgment as of nonsuit at the conclusion of the plaintiff's evidence.

Frazier T. Woolard for plaintiff appellant.
Carter & Ross for defendant appellees.

LAKE, J. The first question to be determined is whether the holder of the note which the deed of trust purports to secure is a necessary party to this action. In *Hancock v. Wooten,* 107 N.C. 9, 12 S.E. 199, certain creditors, in behalf of themselves and all other creditors of the grantor, attacked as a fraud upon creditors a deed of assignment to a trustee to secure payment of claims specified therein. One of the creditors so preferred died. The trustees contended that her representative was a necessary party to the action. Shepherd, J., later C.J., speaking for the Court, said:

> "[W]e will consider the single question here presented, to wit, whether in an action brought by a creditor to set aside an alleged fraudulent trust or assignment, it is *necessary,* upon the trial of an issue as to the validity of the trust of assignment, that the *cestuis que trustent* should be made parties defendant; and whether the trustee, as a matter of right can, in all cases, have them made co-defendants. In *Barrett v. Brown,* 86 N.C. 556, cited by the appellants, there is a general expression favoring the affirmative of the proposition, but it will be noted that the plaintiff in that case was seeking to *enforce* the trust by having an account taken, in order that she might have her *'pro rata* share of her claim,' and the court very properly decided that the trustee had a right to have each *cestui que trust* present, in order that he might contest the claims of others, and thus protect the trustee, and have a complete settlement of the whole litigation. Quite different is the case before us.
>
> * * *
>
> "Adhering, as we do, to the principle as laid down, that the *cestuis que trustent* are not *necessary* parties in actions to set aside deeds of trust or assignments for the benefit of creditors, we think that we are authorized, under the liberal provisions of The Code, to say that a creditor *may* join the *cestuis que trustent* in such an action, and that the *cestuis que trustent* may

themselves apply to be made parties defendant. But while they may thus be made parties, we do not think that the death of any, or all, of them, pending the suit, should be a cause of delaying the trial of the issue touching the validity of the deed, unless it appears that the trustee is not defending in good faith, or that the ends of justice will be better subserved by having the representatives present. This is addressed to the wise discretion of the court, to be exercised in view of the particular circumstances attending each case."

In *Moorefield v. Roseman,* 198 N.C. 805, 153 S.E. 399, suit was brought to have certain conveyances of land by mortgages and deeds of trust declared void as against the plaintiff, a judgment creditor of the grantor, on the ground that they were made with intent to hinder, delay and defraud the plaintiff in the collection of his judgment. The plaintiff moved that the beneficiaries "named in the mortgages and deed of trust" be made parties defendant. The motion was allowed and the defendants demurred to the complaint. This Court said:

"There was no error in the judgment overruling the demurrer for that the facts stated in the complaint are not sufficient to constitute a cause of action, or for that several causes of action have been improperly united. The facts stated in the complaint constitute a cause of action against the defendant, R. L. Roseman [debtor grantor]; the other defendants are necessary parties for a complete determination of the action."

It will be noted the "other defendants" were joined on the motion of the plaintiff and also that they were specifically named as beneficiaries of the conveyance attacked. A holding that they were proper parties would have been equally sufficient to support the decision.

In 37 C.J.S., Fraudulent Conveyances, § 346(f), it is said:

"It has been held that *cestuis que trust* are not necessary defendants in a bill to set aside a conveyance in trust, but there is other authority to the contrary. Likewise the authorities are not uniform on the question as to whether, in an action to set aside as fraudulent a deed of trust made for the purpose of preferring certain creditors, such preferred creditors are necessary parties or not. In some decisions it is held that it is sufficient to make the trustee a party defendant, while other decisions hold that such preferred creditors are necessary parties even where the trustee is made a defendant."

In 24 Am. Jur., Fraudulent Conveyances, § 205, Supp., note 16.53, it is said:

> "Where the trustee is a party defendant, he may be regarded as representing the beneficiaries and as having the right to defend the action for them, with the result that, in an action brought in opposition to the trust, or to set aside the instrument by which it was created, the suit may be maintained against the trustee alone, without making the *cestuis* parties defendant."

In the present case, the note which the deed of trust purports to secure is payable to bearer. The plaintiff alleges it is "a false and fictitious paper writing," and that the identity of the supposed bearer "remains unknown to plaintiff." The trustee in the deed of trust which purports to secure the payment of such note is a party to the action and has participated actively in its defense. Under these circumstances, whatever may be the situation where the holder of the indebtedness is named in the deed of trust and known, the holder of the alleged note cannot be deemed a necessary party to the action to set aside the deed of trust which purports to secure it. We do not have before us the question of the right of the trustee, or of the plaintiff, to disclose to the court the identity of such holder and to make the holder a party to the action.

We come next to the question of whether the evidence introduced by the plaintiff is sufficient to survive the motion for judgment as of nonsuit. It is elementary that upon such motion the evidence offered by the plaintiff is to be considered as true and all reasonable inferences favorable to the plaintiff are to be drawn therefrom.

If, in order to survive a motion for judgment of nonsuit in this action, the plaintiff must offer evidence sufficient in itself to show that its debtors, the defendant grantors in the deed of trust, did not retain property sufficient to pay their indebtedness to the plaintiff (no other debts being shown in the record), the judgment of nonsuit must be sustained since the only evidence offered by the plaintiff, upon this point, consisted of the tax listings by such defendants of their tangible properties in Beaufort County. Such listings tend to show that these defendants owned no land in Beaufort County, other than the land described in the deed of trust, and did not own tangible personal property in Beaufort County sufficient to pay the judgment held by the plaintiff. (There was also evidence that the value of the land described in the deed of trust is less than the face amount of the note which the deed of trust purports to secure.) Such tax listings do not negative the possibilities that these defend-

ants, after executing the deed of trust in question, retained, and still retain, bank accounts or other intangible properties in Beaufort County or elsewhere, or tangible property, real or personal, located in another county, sufficient to pay the claim of the plaintiff and whatever other indebtedness these defendants may owe. Therefore, the evidence introduced by the plaintiff is not sufficient, alone, to show that the defendant grantors did not retain property sufficient to pay their debts when they executed the deed of trust now under attack.

However, paragraph 22 of the complaint alleges, "[T]he conveyance made by the grantors was voluntary and made with the actual intent to defraud this plaintiff creditor." The answer filed jointly by the defendant grantors and the defendant trustee of the deed of trust states, with reference to this allegation:

> "It is further admitted * * * that the conveyance made by the Grantors was voluntary. It is denied that said conveyance was made with intent to defraud the plaintiff. The said note and deed of trust are bona fide instruments executed in good faith for a fair consideration."

Elsewhere in their answer, these defendants allege that the deed of trust "was given in good faith to secure a bona fide indebtedness," and deny that the note is a "false and fictitious" paper writing.

The plaintiff offered in evidence, in addition to the judgment under which it claims and the deed of trust it attacks, various allegations of the complaint and the corresponding admissions in the answer. Among other things, these admissions are sufficient to support a finding that the deed of trust in question, though dated earlier, was recorded some ten days after a letter to the grantors from the plaintiff stating that if the plaintiff's claim was not settled it would be referred to an attorney for handling. Included among the portions of the answer so offered in evidence was the following excerpt from paragraph 22:

> "It is admitted that the defendants Stanley occupy part of the house and lot described in said deed of trust. It is further admitted that there are no entries upon the face of said deed of trust to show that any principal or interest on the consideration has been paid, *and that the conveyance made by the Grantors was voluntary.*" [Emphasis added.]

In their brief the defendants say:

> "In making this admission, defendant was giving a lay, general or literal interpretation of the meaning of the word 'volun-

tary,' and has not considered the legal usage of the word as being descriptive of a conveyance which is made 'without any consideration whatsoever, or upon a consideration which is not substantial.' "

Language in paragraph 22 and other paragraphs of the answer, not offered in evidence, would indicate that the defendants, when preparing and verifying their answer, were not advertent to the meaning of "voluntary conveyance," as customarily used in connection with suits to set aside alleged fraudulent conveyances. However, it is apparent that the plaintiff did use the term in its technical, legal sense.

In *McCaskill v. Walker,* 147 N.C. 195, 61 S.E. 46, this Court held that a plaintiff, over objection by the defendant, may not introduce in evidence a portion of an allegation in the answer when such portion, considered alone, will not enable the jury to see, by reasonable interpretation, what the defendant intended to say. However, in the present case, the defendants did not object to the introduction in evidence of only a portion of their statement. They made no effort to amend their answer. The result is that the plaintiff's evidence in the present record contains an unqualified admission by the defendants that the deed of trust under attack was "voluntary." Interpreting this evidence in the light most favorable to the plaintiff, and drawing therefrom all inferences reasonable to it, as we are required to do in reviewing a judgment of nonsuit, we are brought to the conclusion that the plaintiff's evidence is sufficient to support a finding that the deed of trust was a voluntary conveyance in the technical sense.

G.S. 39-17 reads as follows:

"*Voluntary conveyance evidence of fraud as to existing creditors.*—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper."

In *Hood v. Cobb,* 207 N.C. 128, 176 S.E. 288, this Court held that even though it was shown that a conveyance by a debtor was voluntary (that is, not for value), the burden of proof is, nevertheless, upon the plaintiff to show that the grantor did not retain property sufficient to pay his debts. Speaking through Schenck, J., the Court said:

> "The effect of this statute [G.S. 39-17] is to destroy any presumption of vitiating fraud in the making of a voluntary gift or settlement solely from the indebtedness of the donor or settler, and to make the failure to retain property fully sufficient and available for the satisfaction of creditors a requisite of such presumption. Hence it was necessary for the plaintiff to allege, as he did allege, not only that the male defendant was indebted, but also that said defendant, the grantor in the deed attacked, failed to retain such sufficient and available property. The *allegata* being a requisite, it follows that the *probata* was also a requisite."

In *Shuford v. Cook,* 169 N.C. 52, 85 S.E. 142, Clark, C.J., speaking for the Court, said:

> "[T]he Act of 1840, now Revisal, 962 [G.S. 39-17], provides that the court, where there is any evidence tending to show that at the time of the alleged fraudulent conveyance the grantor retained property fully sufficient and available for the satisfaction of his then creditors, shall submit the question to a jury 'with such observations as may be right and proper.' The presumption formerly arising from a voluntary conveyance made by a party indebted is thus removed and the indebtedness in such case is to be taken and held, in the language of Revisal, 962 [G.S. 39-17], 'to be evidence only from which an intent to delay, hinder, and defraud creditors may be inferred.' "

In *Hood v. Cobb, supra,* the Court also said:

> "C.S., 1007 [G.S. 39-17], continues: '* * * but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.' Pursuant to this latter provision of the statute, under the third issue [intent to defraud], the court submitted, with

proper observations, to the jury the admitted indebtedness of the male defendant as evidence tending to show an intent to delay, hinder, and defraud creditors. There was no exception taken to the charge as it related to this issue."

Earlier decisions of this Court are to the effect that, notwithstanding this statute, there is a presumption of fraudulent intent in the case of a voluntary conveyance by a debtor and the burden rests upon the party seeking to uphold the voluntary conveyance to show retention by the grantor of property sufficient to pay his then debts. *Hobbs v. Cashwell,* 152 N.C. 183, 67 S.E. 495; *Brown v. Mitchell,* 102 N.C. 347, 9 S.E. 702; *McCanless v. Flinchum,* 89 N.C. 373; *Warren v. Makely,* 85 N.C. 12. These cases may no longer be regarded as correct statements of the law of this jurisdiction with regard to the question of which party must ultimately bear the burden of proof upon the question of retention by the grantor of sufficient property to pay his then existing debts. *Hood v. Cobb, supra,* places that burden upon the party attacking the conveyance. However, in *Garland v. Arrowood,* 177 N.C. 371, 99 S.E. 100; Walker, J., speaking for the Court, said:

"The jury have found that there was no actual intent to defraud, or, in other words, no *mala mens,* but if the defendant, the donor of the gift, failed to retain property fully sufficient and available for the satisfaction of his then creditors, the gift was void in law, without regard to the intent with which it was made. [Citations omitted.] The burden of at least going forward with proof of such retention of property is upon the defendant, where, as found in this case by the jury, there is a voluntary gift or settlement."

Therefore, though the ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay their then existing debts, when the plaintiff introduced an admission by the defendants that their deed of trust was "voluntary," and introduced evidence that they were then indebted to the plaintiff, which debt has not been paid, this was evidence tending to show an intent to delay, hinder and defraud creditors sufficient to carry the case to the jury for its determination of the issue, and the judgment of nonsuit was improperly granted.

Reversed.

MOORE, J., not sitting.

BOBBITT, and SHARP, J.J., dissent.

CAROLINA COOLING & HEATING, INC., PLAINTIFF, AND STATE OF NORTH CAROLINA, EX REL. I. L. CLAYTON, COMMISSIONER OF REVENUE, INTERVENING PLAINTIFF, V. CHARLES F. BLACKBURN, TRUSTEE; CITIZENS BANK & TRUST COMPANY, NOTEHOLDER; THEODORE A. GRANGER, TRUSTEE FOR ASCO-ASSOCIATED COMPANIES; THEODORE A. GRANGER, T/A ASCO-ASSOCIATED COMPANIES, AND ELIZABETH T. GRANGER, DEFENDANTS.

(Filed 4 May, 1966.)

1. Mortgages and Deeds of Trust § 19—

Payment of a note secured by a deed of trust extinguishes the right of the trustee to foreclose the instrument.

2. Mortgages and Deeds of Trust § 20—

A judgment creditor, as well as a junior mortgagee, is entitled to enjoin foreclosure of a prior deed of trust when there is a *bona fide* controversy as to whether the note secured by the prior deed of trust had been paid and the power of the trustee to sell thereby divested.

3. Mortgages and Deeds of Trust § 19—

Allegations to the effect that the building on the property subject to the deed of trust had been destroyed and that the trustee had received the proceeds of insurance policies exceeding the amount of the note secured, are sufficient to state a cause of action to restrain foreclosure of the deed of trust, and the dissolution of the temporary restraining order issued in the cause prior to the filing of answer is error; the temporary restraining order should be continued to the hearing for the determination of the controversy upon the merits.

4. Injunctions § 13—

Where plaintiffs' allegations are sufficient to make out its primary equity, the temporary restraining order issued in the cause should not be dissolved upon affidavits prior to the filing of answer, but the order should be continued for determination of the controversy upon the merits.

MOORE, J., not sitting.

APPEAL by plaintiffs from judgment entered by *Hobgood, J.*, in Chambers, VANCE County Superior Court, on October 30, 1965, dissolving a temporary order restraining a trustee's sale under a deed of trust executed by the defendant, Theodore A. Granger, Trustee for Asco-Associated Companies, Theodore A. Granger, individually, and his wife, Elizabeth T. Granger, to Charles F. Blackburn, Trustee. The deed of trust was executed May 15, 1959, and conveyed to the trustee a specifically described tract of land in Vance County to secure a note in the sum of $50,000.00, payable to bearer but held by Citizens Bank & Trust Company and due May 15, 1960.

The plaintiffs alleged that the trustors began the erection of a large manufacturing plant on the described land. In connection with the construction of the building, Theodore A. Granger, trading as

Asco-Associated Companies, and individually, purchased through the insurance department of Citizens six policies of insurance of the face value of $190,000.00. Three of the policies in the sum of $90,000.00 provided builder's risk coverage, including loss by windstorm, payable to the insured or Citizens "as interest may appear." The other policies in the sum of $100,000.00 contained union mortgage clauses payable to Citizens as mortgagee . . . "as their respective interests may appear."

On February 13, 1960, the building then under construction was destroyed by windstorm. Theodore A. Granger, Trustee, and individually, and Citizens Bank & Trust Company instituted civil actions against the six insurance companies and obtained judgments against them for a total of $160,863.00.

On November 29, 1961, the Carolina Cooling & Heating, Inc., (the original plaintiff) obtained a judgment against Theodore A. Granger in the sum of $3,184.27 (apparently for fixtures in the plant). The lien of the judgment attached to Granger's equity in the land but did not attach to the proceeds of the insurance policies.

The State of North Carolina was permitted to intervene as an additional party plaintiff. The State alleged it has a judgment for $599.14, docketed on February 14, 1961, against Theodore A. Granger which is a lien upon his equity in the land covered by the deed of trust but is not a lien upon the proceeds of the insurance policies. Other than his equity, Granger has no other real estate or property out of which either party may obtain satisfaction of its judgment.

The plaintiffs further alleged that the Citizens Bank & Trust Company received from the proceeds of the insurance policies funds in excess of the amount owing on said note and deed of trust and that in fact the deed of trust and the note secured thereby were paid and satisfied. The trustee, therefore, has no right to offer the lands for sale; that Granger is insolvent and the sale of the land under the deed of trust will defeat the collection of plaintiffs' judgments, leaving them without adequate remedy at law. The plaintiffs alleged that Asco-Associated Companies is in fact Theodore A. Granger.

The defendants, without filing answer, moved upon the basis of affidavits for judgment dissolving the restraining order. The court stated its conclusions that the motion to dismiss should be allowed. The court's order provided, however, if the plaintiff elects to appeal, the restraining order shall be continued until there is a final decision by the Supreme Court. The plaintiffs excepted and appealed.

Zollicoffer and Zollicoffer for Carolina Cooling & Heating, Inc., plaintiff appellant.

Perry, Kittrell, Blackburn & Blackburn by Robert G. Kittrell, Jr., Bennett H. Perry, Jr., for defendant Citizens Bank & Trust Company and Charles F. Blackburn, Trustee, appellees.

HIGGINS, J. The plaintiffs' allegations by verified complaint are not denied by answer. The challenge is by motion to dissolve the restraining order. The procedure on the part of the defendants is equivalent to a demurrer based on the legal grounds stated in the motion, supplemented by the affidavits. In substance the allegations in the complaints are that the note for $50,000.00 secured by the deed of trust has been paid in full. Consequently, the payment of this note extinguishes the power of the trustee to sell the land, and entitles the mortgagor to cancellation. The payment of the note in full divests the trustee of all authority to foreclose. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785; *Barbee v. Edwards,* 238 N.C. 215, 77 S. E. 2d 646; *Fleming v. Land Bank,* 215 N.C. 414, 2 S.E. 2d 3; *Crook v. Warren,* 212 N.C. 93, 192 S.E. 684.

In *Pinnix v. Casualty Company,* 214 N.C. 760, 200 S.E. 874, this Court said: "The right of a junior mortgagee to resort to injunction to stay a foreclosure proceeding under a senior mortgage having a lien upon the same land, until a *bona fide* controversy as to the amount due on the senior mortgage has been ascertained, is not questioned." Whether the junior lien is by another mortgage, deed of trust, or by docketed judgment, would appear to be without significance.

The plaintiffs' complaints allege sufficient facts to entitle them to restrain the proposed sale and give them the opportunity to establish their allegations that the $50,000.00 note has been paid. The allegations furnish solid foundation upon which to base an order continuing the restraint until the defendants at least place them at issue by answer. "It is generally proper, when the parties are *at issue* concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when . . . dissolution . . . or the refusal . . . will virtually decide the case upon its merits and deprive the plaintiff of all . . . relief, even though he should be afterwards able to show ever so good a case." *Delmar Studios v. Goldston,* 249 N.C. 117, 105 S.E. 2d 277; *Roberts v. Cameron,* 245 N.C. 373, 95 S.E. 2d 899.

The record now before us discloses that the Superior Court committed error in determining that the restraining order should be dis-

solved. The cause is remanded with direction to continue the restraint until the cause may be heard on the merits. The defendants will be entitled to a reasonable time in which to file answer.

Reversed.

MOORE, J., not sitting.

NOLA H. ALTMAN v. ELLA MAE SANDERS AND ROBERT SANDERS.

(Filed 4 May, 1966.)

1. Master and Servant § 86—

If one employee inflicts a negligent injury on another employee, both being in the course of the employment, the remedy to recover for such injury is under the Workmen's Compensation Act, and the injured employee may not maintain an action at common law against the other employee, notwithstanding the negligent act may not be imputable to the employer at common law.

2. Same—

The allegations and findings were to the effect that the employer furnished a parking lot for his employees, that plaintiff employee, after parking her car and while walking to the plant to report for work, was struck by a vehicle operated by another employee who was then backing into a parking space preparatory to reporting for work. *Held:* The accident arose in the course of the employment, precluding an action at common law by the one employee against the other.

3. Same; Automobiles § 55— Compensation Act does not preclude one employee from suing the principal of another employee when dual agency exists.

One employee injured another in an accident in a parking lot furnished by the employer under circumstances precluding an action at common law by the injured employee against the other. The allegations and findings were to the effect that the alleged negligent employee was operating the car with the consent of her husband and that the husband owned and maintained the car as a family purpose vehicle. *Held:* While the alleged negligent employee is immune to suit at common law by virtue of the Compensation Act, the statutory immunity is not based on the absence of negligence on her part and does not preclude a suit at common law by the injured employee against the husband on the principle of agency under the family purpose doctrine.

MOORE, J., not sitting.

APPEAL by plaintiff from *May, S.J.*, January 1966 Civil Session of HARNETT.

This is an action for personal injuries alleged to have been sustained by the plaintiff when she was struck by an automobile. The complaint alleges that the automobile was owned by and registered in the name of Robert Sanders and was maintained by him as a family purpose vehicle. It is alleged that Ella Mae Sanders, his wife, was driving the vehicle at the time of the accident as the agent of her husband for such family purpose, and that her negligence, as specified in the complaint, in the driving of the automobile was the proximate cause of the plaintiff's injuries.

The answer denies negligence, pleads contributory negligence and, as a further answer and plea in bar, alleges that the plaintiff and Ella Mae Sanders were employees of Watson's Seafood & Poultry Company; that the accident occurred upon a parking lot provided by it for the use of the employees while at work; that the plaintiff, the defendant and their employer were subject to and bound by the provisions of the Workmen's Compensation Act; that any injury sustained by the plaintiff arose out of and in the course of her employment and was compensable under the Workmen's Compensation Act; that Ella Mae Sanders was acting in the course and scope of her employment by Watson Seafood & Poultry Company and, by virtue of the provisions of the said Act, is not liable to the plaintiff, these provisions being pleaded in bar of the plaintiff's right to maintain this action.

The plea in bar was heard by the court, without a jury, and the following facts (summarized) were found by the court, there being no exception to any such finding:

On the day of the accident the plaintiff and Ella Mae Sanders were both employed by Watson Seafood & Poultry Company, which was subject to the provisions of the Workmen's Compensation Act and had a policy of compensation insurance. The Watson Company maintained upon its premises a parking lot for the use of its employees, who entered its plant from the parking lot after passing through a gate where they were required to show identification badges before going into the plant. Both the plaintiff and Ella Mae Sanders were to report for work at the plant at midnight on the day of the accident. The plaintiff parked her automobile in the parking lot and at approximately 11:50 p.m. was walking toward the plant. At the same time, Ella Mae Sanders was backing the automobile of Robert Sanders, her husband, into a parking space in such parking lot preparatory to going into the plant so as to report for work. The plaintiff, while so walking toward the plant, and the automobile driven by Ella Mae Sanders and owned by Robert Sanders, while so backing, collided. At that time neither the plain-

tiff nor Ella Mae Sanders had actually reported for work inside the plant. Ella Mae Sanders was operating her husband's automobile in which four other employees of the Watson Company were riding as passengers. The Watson Company paid no part of the cost of their transportation in such automobile, such expense being shared by Ella Mae Sanders and her passengers.

Upon these facts, the court concluded as a matter of law that the plaintiff's injuries are the result of an accident arising out of and in the course and scope of her employment by the Watson Company and the alleged negligence of a fellow employee, acting in the course and scope of her employment by the Watson Company. The court further concluded as a matter of law that the defendants in this action are immune to suit by the plaintiff for such injuries, her exclusive remedy being against the Watson Company and its insurance carrier for compensation as provided in the North Carolina Workmen's Compensation Act. To these conclusions of law the plaintiff excepted and from the judgment of the superior court, entered pursuant to such findings and conclusions, sustaining the defendants' plea in bar and dismissing her action, the plaintiff appeals.

It was stipulated that Robert Sanders owned the automobile, that it was registered in his name, that it was a family purpose car and, that at the time of the occurrence in question, it was being driven with his permission by Ella Mae Sanders.

Wilson & Bowen for plaintiff appellant.

Young, Moore & Henderson by J. Allen Adams for defendant appellees.

LAKE, J. There has been no determination of the merits of this action. Thus, it has not been determined that Ella Mae Sanders was negligent in any respect, or that the plaintiff sustained an injury, or that, if she did, it was proximately caused by negligence of Ella Mae Sanders, or that the plaintiff was or was not contributorily negligent.

The judgment now before us for review dismisses the plaintiff's action against both defendants on the ground that even if Ella Mae Sanders was negligent in the operation of the automobile, if such negligence was the proximate cause of injuries to the plaintiff, if the plaintiff did not by her own negligence contribute to her injuries, and if Ella Mae Sanders was operating the automobile within the limits of the family purpose for which her husband, its owner, maintained it, the plaintiff may not recover either from Ella Mae

Sanders or from her husband, Robert Sanders, by reason of the North Carolina Workmen's Compensation Act.

The pertinent provision of that Act is found in G.S. 97-9, which reads as follows:

> "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified."

Where, as is true of the Watson Company in the present case, the employer maintains insurance coverage, as specified in the above statute, an employee, who is subject to the provisions of the Workmen's Compensation Act and who sustains an injury, arising out of and in the course of his or her own employment, cannot maintain an action at common law against another employee whose negligence, while conducting the employer's business, was the proximate cause of the injury. *Warner v. Leder,* 234 N.C. 727, 69 S.E. 2d 6. See also *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610.

In *Essick v. Lexington,* 232 N.C. 200, 60 S.E. 2d 106, this Court said that the phrase, "those conducting his [the employer's] business," which appears in the above statute, should be given a liberal construction. One must be deemed to be conducting his employer's business, within the meaning of this statute, whenever he, himself, is acting within the course of his employment, as that term is used in the Workmen's Compensation Act. It is not necessary, in order to bring an employee within the protection of this statute, to show that his act was such as would have been imputed to the employer at common law.

In *Davis v. Manufacturing Co.,* 249 N.C. 543, 107 S.E. 2d 102, this Court held that when an employer maintains upon his premises a parking lot for the use of his employees, an employee, who arrives upon the lot at a reasonable interval prior to the time when he is to report for work and who is injured by an accident upon such lot while proceeding to the plant to report for duty, is entitled to compensation under the provisions of the Workmen's Compensation Act. In *Maurer v. Salem Co.,* 266 N.C. 381, 146 S.E. 2d 432, this Court likewise held that an employee, injured by an accident upon such parking lot while preparing to leave the premises within a reasonable time after the termination of his day's work, is entitled to compensation under the Act.

The plaintiff, having parked her car in the parking lot, maintained by her employer (Watson Company) upon its premises, approximately ten minutes prior to the time when she was required to be at her post of duty, was injured by an accident while walking to the plant to report for work, assuming she was injured as she alleges. Assuming these to be the facts, the plaintiff would be entitled to compensation under the Workmen's Compensation Act. That is, the plaintiff was in the course of her employment as that term is used in the Act when she was injured. It is equally true, however, that had Ella Mae Sanders sustained an injury in the same collision she also would have been entitled to compensation therefor under the Act. That is, Ella Mae Sanders was then in the course of her employment as that term is used in the Act. Consequently, even if Ella Mae Sanders was negligent in the operation of the automobile and such negligence by her was the proximate cause of injuries sustained by the plaintiff, the plaintiff may not maintain an action against Ella Mae Sanders on account of those injuries. Thus, the dismissal of the action against Ella Mae Sanders was proper.

It does not follow, however, that the plaintiff may not maintain an action against Robert Sanders. It is stipulated that he was the owner of the automobile, that it was a family purpose car and was being operated by Ella Mae Sanders, his wife, with his permission. In *Lyon v. Lyon,* 205 N.C. 326, 171 S.E. 356, Connor, J., speaking for the Court, said:

> "It is well settled as the law in this State that where a husband owns an automobile, which he keeps and maintains for use by his wife for her pleasure, and the wife while driving the automobile, by her negligence causes injuries to a third person, such person may recover of the husband damages for his injuries. * * * The wife, as the driver of the automobile, is the representative of the husband, and although she is driving the automobile for her pleasure, is engaged in his business, while driving the automobile for the purposes of its ownership. The relationship between the husband and the wife, with respect to the automobile, is analogous to that of master and servant, or principal and agent, and not that of bailor and bailee."

In *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427, Denny, J., later C.J., speaking for the Court, said:

> "In our opinion, the mere allegation that a car owned by a defendant is a family purpose car is an insufficient allegation upon which to recover under the family purpose doctrine.

> "Ordinarily, a cause of action based solely on the family purpose doctrine is stated by allegations to the effect that at the time of the accident the operator was a member of his family or household and was living at home with the defendant; that the automobile involved in the accident was a family car and was owned, provided, and maintained for the general use, pleasure, and convenience of the family, and was being so used by a member of the family at the time of the accident with the consent, knowledge, and approval of the owner of the car. [Citations omitted.] Allegations which, if proven, are sufficient to invoke the family purpose doctrine, are sufficient to establish agency."

In the present case, the complaint is sufficient to meet the test so laid down in the *Lynn* case, but the stipulation, considered alone, is not so extensive. It merely states that Robert Sanders was the owner of the automobile, which was registered in his name, and that it was a "family purpose car," and was being operated by Ella Mae Sanders with the permission of Robert Sanders at the time referred to in the complaint. This stipulation should be read, however, in the light of the pleadings. When so read, it is sufficient to establish the agency relation between the defendants upon the basis of the family purpose doctrine.

One may be the servant or agent of another and acting within the course of his employment so as to make such employer or principal liable, under the doctrine of *respondeat superior,* for injuries proximately caused by his negligence, and at the same time be also in the course of his employment by another employer within the meaning of the Workmen's Compensation Act. See *Leggette v. McCotter,* 265 N.C. 617, 144 S.E. 2d 849.

By reason of the fact that Ella Mae Sanders was within the course of her employment by the Watson Company at the time of the alleged injury to the plaintiff, G.S. 97-9 throws about her a cloak of immunity from suit on account of such injury even if it was caused by her negligence in the operation of the automobile. The statute does not, however, extend this immunity to her husband, if it be established that she was driving the automobile as his agent and within the course of such employment.

It is well settled that when, as here, an employer and his employee are sued upon the ground that negligence or other misconduct of the employee was a proximate cause of injury to the plaintiff and that the employer is liable under the doctrine of *respondeat superior,* a judgment in favor of the employee upon the ground that the employee was not at fault compels a judgment in favor of the

employer also. *Morrow v. R. R.*, 213 N.C. 127, 195 S.E. 383; *Whitehurst v. Elks*, 212 N.C. 97, 192 S.E. 850; *Nichols v. Fibre Co.*, 190 N.C. 1, 128 S.E. 471.

The same result is reached when the judgment in favor of the employee has been rendered in a prior action between such employee and the third party who thereafter institutes an action against the employer. *Reid v. Holden*, 242 N.C. 408, 88 S.E. 2d 125; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164; *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570. This is an exception to the general rule that a judgment ordinarily binds only the parties and those in privity with them. *Coach Co. v. Burrell*, 241 N.C. 432, 85 S.E. 2d 688. In *Pinnix v. Griffin, supra*, it is said, "The exception is only an exemplification of the broad rule by which one whose liability is wholly derivative may claim the benefit of a judgment in favor of him from whom his liability is derived."

In *Stone v. Coach Co.*, 238 N.C. 662, 78 S.E. 2d 605, there was a collision between the plaintiff's truck and the defendant's bus, resulting in injuries to the plaintiff and to the bus driver. The bus driver sued the plaintiff; a settlement was reached and a consent judgment was entered under which a payment was made to the bus driver. In the plaintiff's subsequent suit against the Coach Company, recovery was denied, this Court saying:

> "This defendant was the employer of Parker [the bus driver], who was about his master's business at the time of the collision. It is liable to plaintiff, if at all, under the doctrine of *respondeat superior*. A judgment which constitutes a release of Parker from further liability to plaintiff likewise releases this defendant, for it is legally liable only for damages proximately resulting from his negligence."

In *Pinnix v. Griffin, supra*, the third party sued both the employer and the employee in the same action. She recovered a judgment for $1,000 from the employee and a judgment of nonsuit was entered as to the employer. She appealed from the nonsuit only and it was reversed. On the second trial, she obtained a verdict against the employer for $5,000, but it was held that she could recover from the employer only $1,000, the former judgment against the employee, from which she did not appeal, fixing the amount for which the employer was liable. This Court said, "The plaintiff can have but one satisfaction — payment of the damages caused by the wrongful act of Griffin [the employee]."

When an employer is sued for damages on account of the negligence of his employee and there is no allegation of negligence, or

other fault, on the part of the employer himself, the employee's liability, if any, rests upon the doctrine that the act of the employee, in the course of his employment, is the act of the employer, just as if the employer were personally present and performing the act. *Qui facit per alium facit per se.* Consequently, a judgment that the employee's act was not negligent, or otherwise wrongful, destroys the basis upon which the plaintiff must proceed in order to recover against the employer. The employer is not liable because there has been no wrongful act or omission by him, acting through his employee.

A different situation is presented by the present case. Here, the judgment in favor of Ella Mae Sanders, the employee or agent of her husband, does not rest upon the ground that she was not negligent. It rests upon the ground that the statute makes her personally immune from suit on account of her negligence because, at the time of her negligent act or omission, she was in the course of her employment by the Watson Company. This statutory immunity has no connection with her employment by her husband to drive his automobile. He was acting, through her, in the driving of the automobile, if she was operating it with his consent and pursuant to the family purpose for which he maintained the automobile. It is as if he were personally present driving the vehicle in the same manner. Obviously, if he had brought his wife to her work, and had driven as she is alleged to have done, the Workmen's Compensation Act would not have made him immune to suit by the plaintiff for he was not conducting the Watson Company's business. He is equally subject to suit when, by the fiction of the law, he so drives by and through his wife as his agent. Though she, his agent or employee, is immune to suit by the plaintiff, he is not. *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676; *Wright v. Wright*, 229 N.C. 503, 50 S.E. 2d 540. It was, therefore, error to dismiss the action as against Robert Sanders.

Affirmed as to Ella Mae Sanders.

Reversed as to Robert Sanders.

MOORE, J., not sitting.

WILLIAM EDWARD COOK v. ROBERT LANIER, T/A LANIER'S WHOLESALE MEATS, AND HUBERT PERRY.

(Filed 4 May, 1966.)

1. Malicious Prosecution § 1—

To make out a case of malicious prosecution, the plaintiff must allege and prove that the defendant instituted, or procured, or participated in, a criminal prosecution against him maliciously, without probable cause, which ended in failure.

2. Malicious Prosecution § 6—

The dismissal of a criminal proceeding by reason of the failure of the complainant to appear and prosecute is a sufficient termination thereof to support an action for malicious prosecution based thereon.

3. Malicious Prosecution § 4—

In an action for malicious prosecution, probable cause does not depend upon the guilt or innocence of the person accused but upon whether defendant had reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense of which he is charged.

4. Malicious Prosecution § 5—

In an action for malicious prosecution, malice may be inferred from want of probable cause.

5. Trial § 23—

A *prima facie* showing takes the case to the jury but does not compel a recovery, it being for the jury to determine whether or not the crucial and necessary facts have been established.

6. Malicious Prosecutions § 11— Evidence held sufficient for jury on question of liability of principal and agent for malicious prosecution.

Evidence that plaintiff gave defendant a paper writing in the form of a check for merchandise delivered, with the understanding that it would not be presented for payment but was to constitute a mere memorandum of the debt, that plaintiff thereafter sent defendant principal a cashier's check for the amount of the debt, which was endorsed by the principal and duly paid, and that thereafter the principal requested the agent to swear out a warrant against the plaintiff for issuing a worthless check, that the agent did so and that the prosecution was dismissed for failure of the complainant to appear and prosecute, *held* sufficient to make out a *prima facie* case of malicious prosceution in an action against the principal and against the agent for the recovery of compensatory damages.

7. Damages § 10—

While punitive damages need not be pleaded *eo nomine*, it is required for the recovery of punitive damages that plaintiff allege facts tending to establish actual malice, or oppression, or gross and wilful wrong or negligence, or a reckless and wanton disregard of plaintiff's rights. Allegation that there was wanton and wilful misconduct on the part of defendants states a mere conclusion of the pleader and cannot supply allegation of the predicate facts supporting this conclusion.

MOORE, J., not sitting.

COOK *v.* LANIER.

APPEAL by plaintiff from *Brock, S.J.*, 31 January 1966 Civil Session of CABARRUS.

Civil action for malicious prosecution.

From a judgment of compulsory nonsuit entered by the court on motion of defendants at the close of plaintiff's evidence, plaintiff appeals.

Thomas K. Spence for plaintiff appellant.

Williams, Willeford & Boger by John Hugh Williams for defendant appellees.

PARKER, C.J. The complaint, filed 11 December 1964, alleges in substance: Plaintiff is a resident of Cabarrus County; defendants are residents of Davidson County. On 28 September 1964 defendant Hubert Perry, acting in the course and scope of his employment as an employee of defendant Robert Lanier, T/A Lanier's Wholesale Meats, falsely, maliciously, and without probable cause, swore out a complaint before F. W. Pharr, a justice of the peace for Cabarrus County, against him charging him with making, uttering, issuing, and delivering to another a check on a bank for the payment of $23, he, the said William Edward Cook, knowing at the time of making and issuing said check he did not have sufficient funds on deposit in the bank to pay the same, with intent to cheat and defraud the receiver of the check, which was not paid upon tender to the bank, and no provision had been made for payment of the check, contrary to G.S. 14-106 and G.S. 14-107. Whereupon justice of the peace Pharr issued a warrant for the arrest of plaintiff on the charge set forth in Perry's sworn complaint, and plaintiff was arrested by the sheriff of Cabarrus County by virtue of the warrant. Plaintiff was arraigned and examined by justice of the peace Pharr upon the charges in the complaint and warrant and was fully discharged of said charges and accusations by the justice of the peace. By reason of defendants' actions, plaintiff has been injured in his good name, wounded in his feelings, involved in expenses, and subjected to insult and oppression to his damage in the sum of $8,000. By reason of defendants' wanton and willful misconduct, defendants, and each one of them, are liable to him for punitive damages in the sum of $4,000. Wherefore, the plaintiff prays that he recover from the defendants, and each one of them, a judgment for compensatory and for punitive damages.

Defendants filed a joint answer denying all the allegations of the complaint, except that they admit the residence of the parties.

Plaintiff offered evidence in substance, except when quoted, as

follows: He is 61 years of age, and has resided in Cabarrus County all of his life. During part of the year 1964 he operated a business known as Little Farm Curb Market in Mount Pleasant. In this business he sold meats, sandwiches, fruit, candy, and "stuff like that." While operating this business he obtained some of the goods or merchandise that he sold from Lanier Meat Packing Company. He first began buying goods from Lanier Meat Packing Company when Hubert Perry came to his store. Perry said he was working for Lanier Meat Packing Company, and the truck he was driving had on its side "Lanier Meat." Perry said he would like to have some of his business, and he gave him an order. Thereafter, he bought meats from Perry every week in different amounts. The average purchase was somewhere between $25 and $35 a week. At first he gave him a couple of checks, and afterwards he paid him cash. On a Wednesday night Perry brought him some meat, and asked him if he wanted any meat the next week. He said, "Yes, I'd like to have some . . . I don't have enough money in the bank to take care of a check." Perry said, "You don't need to worry about that, just give me a check and I'll keep it till I come around next week, and you can pay me then." He said, "I ain't got enough money in the bank at the present time to cover the check." Perry said, "I just want something to show where the stuff was sold." Perry left the meat and a crate of eggs, and he gave Perry a check dated 24 June 1964, drawn on the Concord National Bank, payable to Lanier Meats in the sum of $23, signed Little Farm Curb Market, by W. E. Cook. Perry never came back. He had a chance to sell his business and he did. On 16 July 1964 he had Cabarrus Bank and Trust Company to issue a cashier's check payable to Lanier Meat Company in the sum of $23. He sent this check to Lanier Meat Packing Company in July 1964 because he owed it $23 for the check he had given it. This check bearing the endorsement "Lanier Meat Packing Company" was paid by Cabarrus Bank and Trust Company on 28 July 1964. The sheriff's deputies came to his house and served the warrant on him. He was not placed in jail nor required to give bail. He agreed to appear in court at the time stated in the warrant.

Plaintiff offered in evidence, what is called in the record, "Deposition of Adverse Examination of Robert Lanier." In this deposition defendant Robert Lanier testified in substance, except when quoted: He is in the wholesale meat business. He is the only owner of the business known as Lanier's Wholesale Meats. His driver, Hubert Perry, did business with Little Farm Curb Market. He never had any dealings in person with plaintiff; all the dealings of his company with plaintiff were by defendant Perry. He does not keep

the books for his business. The account of the Little Farm Curb Market with his company on 28 September 1964 was paid up other than a bad check. He asked defendant Perry to contact Cook, and see if he would take up the bad check. Perry came back and said that Cook had gone out of business and he could not contact him, and he asked Perry to swear out a warrant against Cook for giving him a worthless check. Later he asked Perry when the trial was going to be. He testified: "He [Perry] told me it had come up and had been thrown out because the check had come through and been signed and already received the check and he didn't meet the Justice of the Peace because he didn't figure it would be necessary. Mr. Perry told me he thought we didn't have anything against Mr. Cook and it wouldn't be necessary for him to appear." He endorsed the cashier's check drawn on Cabarrus Bank and Trust Company dated 16 July 1964, made payable to Lanier Meat Packing Company. He did not realize the cashier's check had been paid. The swearing out of the warrant was an honest mistake.

F. W. Pharr, justice of the peace, testified in substance, except when quoted: He issued the warrant upon which Cook was arrested for giving a worthless check. The warrant was issued by him on 28 September 1964, and defendant Perry signed the warrant. He set the date for trial at 4 p.m. on 19 October 1964, and notified defendant Perry of the trial date. Perry did not appear at the time set for the trial. He testified: "I did not find Mr. Cook guilty of the charges. I dismissed the case for lack of evidence." He testified on cross-examination: "Mr. Perry came in with a bad check which he had been given by Mr. Cook. I took out a warrant against Mr. Cook for Mr. Perry. I didn't set any trial date then. Mr. Cook had made the check good by getting a cashier's check. Since nobody showed up, I figured that it would have been paid, and I dismissed it."

On 1 October 1964 The Concord Tribune had a circulation of 10,490. On page 2A of that paper for Thursday, 1 October 1964, was an item reading as follows: "One arrest. County deputies reported only one arrest: that of William Cook, here, Wednesday. The sixty-year-old Cook, of 30 St. Mary Street, was charged with issuing a worthless check in the amount of Twenty-three ($23.00) Dollars."

To make out a case of malicious prosecution the plaintiff must allege and prove that the defendant instituted, or procured, or participated in, a criminal prosecution against him maliciously, without probable cause, which ended in failure. *Greer v. Broadcasting Co.*, 256 N.C. 382, 124 S.E. 2d 98; *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609; *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446.

The dismissal of the criminal proceeding here by reason of the failure of the complainant to appear and prosecute is a sufficient termination thereof to support an action for malicious prosecution based thereon. 54 C.J.S., Malicious Prosecution, § 57, a; 34 Am. Jur., Malicious Prosecution, § 34.

Probable cause for a criminal prosecution does not depend upon the guilt or innocence of the accused of the crime charged, nor upon the fact as to whether a crime has actually been committed, but depends on the prosecutor's honest belief in such guilt based on reasonable grounds. It is a case of apparent, rather than actual, guilt. *Dickerson v. Refining Co., supra;* 54 C.J.S., Malicious Prosecution, §§ 27 and 28. In North Carolina, and it seems in a large number of jurisdictions, probable cause for a criminal prosecution is defined in the sense in which the term is used in actions for malicious prosecution, in substance, but with some verbal differences, as a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense with which he is charged. *Dickerson v. Refining Co., supra; Stacey v. Emery,* 97 U.S. 642, 24 L. Ed. 1035; 54 C.J.S., Malicious Prosecution, § 26; 34 Am. Jur., Malicious Prosecution, § 47.

"Probable cause, in cases of this kind [malicious prosecution], has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." Hoke, J., in *Morgan v. Stewart,* 144 N.C. 424, 57 S.E. 149.

In order to give a cause of action for malicious prosecution, such prosecution must have been maliciously instituted. *Wingate v. Causey,* 196 N.C. 71, 144 S.E. 530; *Stancill v. Underwood,* 188 N.C. 475, 124 S.E. 845; 54 C.J.S., Malicious Prosecution, § 40. Malice alone is not sufficient to support an action for malicious prosecution. *Fowle v. Fowle,* 263 N.C. 724, 140 S.E. 2d 398. Although a want of probable cause may not be inferred from malice, the rule is well settled that malice may be inferred from want of probable cause, *e.g.,* as where there was a reckless disregard of the rights of others in proceeding without probable cause. *Dickerson v. Refining Co., supra;* 54 C.J.S., Malicious Prosecution, § 43.

"Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest, *e.g.* . . . to enforce collection of a debt . . . is admissible, both to show the absence of probable cause and to create an inference of malice, and such evidence is sufficient to establish a *prima facie* want of probable cause." Stacy, C.J., in *Dickerson v. Refining Co.,*

supra; Curley v. Automobile Finance Co., 343 Pa. 280, 23 A. 2d 48, 139 A.L.R. 1082, and Annotation thereto; 54 C.J.S., Malicious Prosecution, § 32.

Of course, a *prima facie* showing does not necessarily mean that the plaintiff is entitled to recover. It is sufficient to carry the case to the jury *(Brock v. Insurance Co.,* 156 N.C. 112, 72 S.E. 213), and it is for the jury to say whether or not the crucial and necessary facts have been established. *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398; *Cox v. R. R.,* 149 N.C. 117, 62 S.E. 884. It neither insures nor compels a recovery. *White v. Hines,* 182 N.C. 275, 109 S.E. 31.

"Want of probable cause is regarded as a mixed question of law and fact." *Taylor v. Hodge,* 229 N.C. 558, 50 S.E. 2d 307. ". . . [W]hen the facts are admitted or established, the question of probable cause is one of law for the court." *Carson v. Doggett, supra.*

In *Mitchem v. Weaving Co.,* 210 N.C. 732, 188 S.E. 329, Stacy, C.J., said for the Court:

> "In *Brown v. Martin,* 176 N.C. 31, 96 S.E. 642, Allen, J., delivering the opinion of the Court, said: 'The rule is established in *Stanford v. Grocery Co.,* 143 N.C. 419, that legal malice, which must be present to support an action for malicious prosecution, may be inferred by the jury from the want of probable cause, and that it is sufficient as a basis for the recovery of compensatory damages, but that when punitive damages are claimed, the plaintiff must go further and offer evidence tending to prove that the wrongful act of instituting the prosecution "was done from actual malice in the sense of personal ill will, or under circumstances of insult, rudeness, or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right." ' "

The adverse examination of defendant Lanier offered in evidence by the plaintiff is to the effect that defendant Lanier asked defendant Perry on or about 28 September 1964 to swear out a warrant against plaintiff for giving him a worthless check, and that Perry swore out the warrant as requested. Plaintiff's evidence, considered in the light most favorable to him, would permit a jury to find that when he wrote and delivered the paper writing dated 24 June 1964 in the form of a check to defendant Perry, which is the basis of the criminal complaint and warrant here, it was not intended by either plaintiff or Perry to be a check, and was not in fact a check, because Perry stated, "I just want something to show where the stuff was sold." Plaintiff's evidence would further permit a jury to find that on 16 July 1964 he had Cabarrus Bank and Trust

Company to issue a cashier's check payable to Lanier Meat Company in the sum of $23, and he sent this check to Lanier Meat Packing Company in July 1964 because he owed it $23 for the paper writing in the form of a check he had given to defendant Perry, and that this check bearing the endorsement of Lanier Meat Packing Company was paid by Cabarrus Bank and Trust Company on 28 July 1964. The adverse examination of Robert Lanier, offered in evidence by plaintiff, is to the effect that defendant Lanier testified he endorsed this cashier's check drawn on Cabarrus Bank and Trust Company dated 16 July 1964, made payable to Lanier Meat Company. Plaintiff's evidence also shows the justice of the peace issued the warrant on 28 September 1964, and defendant Perry signed the warrant. Plaintiff's evidence, considered in the light most favorable to him, would permit a jury to find the chief purpose of defendant Perry who swore out the warrant, and of defendant Lanier who requested him to swear out the warrant, was to collect a debt, and that both were acting in concert to collect a debt, and that the defendants were not moved by considerations of the public interest in instituting the criminal prosecution. The prosecution, here in question, ended in failure, as neither Lanier nor Perry appeared to prosecute it when it was set for trial. *Prima facie,* therefore, the prosecution here in question was without probable cause, and malice in the sense in which it is used in actions for malicious prosecutions is inferable from the absence of probable cause. This suffices to carry the case to the jury as against both defendants on the issue of compensatory damages.

While it seems that punitive damages need not be specially pleaded by that name in the complaint, it is necessary that the facts or elements justifying a recovery of such damages be pleaded. Though no specific form of allegation is required, the complaint must allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages, for instance, actual malice, or oppression, or gross and willful wrong or negligence, or a reckless and wanton disregard of plaintiff's rights. *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333, and authorities cited; *Roth v. News Company,* 217 N.C. 13, 6 S.E. 2d 882; 25 C.J.S., Damages, § 133 (1966); 22 Am. Jur. 2d, Damages, § 293; 1 McIntosh, N.C. Practice and Procedure, 2d Ed., § 1079, pp. 600-01.

Construing the complaint here liberally, as we are required to do by G.S. 1-151, it does not contain allegations of facts or elements sufficient to support an award of punitive damages. The allegations of paragraph 7 of the complaint reading, "that by reason of the

premises, there was wanton and willful misconduct for which the defendants, and each one of them, are liable for exemplary and punitive damages," are mere conclusions of the pleader with no allegations of facts or elements in the complaint to support such conclusions, and are not a substitute for essential allegations disclosing factual elements justifying an award of punitive damages.

The judgment of compulsory nonsuit below is

Reversed.

MOORE, J., not sitting.

WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER A LIVING TRUST AGREEMENT WITH MARY R. HANES, ALEXANDER S. HANES, JR., AND ELIZABETH H. STRUBING, DATED AUGUST 5, 1944, v. ANNE WRIGHT HANES HUNT, ALEXANDER STEPHEN HANES, III, AND CHARLES ROBINSON HANES, II, BY HIS GUARDIAN *Ad Litem*, LLOYD C. CAUDLE.

(Filed 4 May, 1966.)

1. Wills § 57—

A devise or bequest of all of testator's real or personal property, or both, is general.

2. Wills § 39—

A power of appointment is general when there is no restriction imposed upon the donee as to the amounts or persons he may appoint; a power of appointment is special when there is any limitation on the donee as to those who may be appointed.

3. Same—

The intent to exercise the power of disposition may be either express or implied, or supplied by statute.

4. Same—

G.S. 31-43 applies to the exercise of general powers of disposition and not to the exercise of special powers.

5. Same— General devise is not exercise of special power of appointment unless intent to do so appears, expressly or impliedly from the will.

The trust in question gave the life beneficiary the power to dispose of the *corpus* to such person or persons within a class composed of the grantors' issue and the spouses thereof as the beneficiary should designate and appoint in his will. The beneficiary's will bequeathed and devised to his wife all of his property, both real and personal. The beneficiary owned a large estate *aliunde* the trust property over which he had power of disposition. *Held:* Since the power of disposition was special, G.S. 31-43 does

not apply, and since the will does not refer to the power, and the exercise of the power is not essential to the efficacy of the will as a testamentary instrument, an intent to exercise the power may not be implied.

6. Trusts § 10—

Where a trust provides that it should continue until the issue of the life tenant shall severally obtain the age of 21 years, whereupon the property then constituting each of such issue's share should be distributed to him or her, each child is entitled to his share upon obtaining the age of 21 years.

MOORE, J., not sitting.

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

APPEAL by defendants Alexander Stephen Hanes, III, and Charles Robinson Hanes, II, from *Crissman, J.*, February 8, 1965, Civil Session of FORSYTH, docketed in the Supreme Court as Case No. 437 and argued at the Fall Term 1965.

Action by plaintiff trustee for a declaratory judgment decreeing the distribution of trust funds. The parties waived a jury trial, and the facts are not in dispute.

On August 5, 1944, Mary R. Hanes (58) and her two children, Elizabeth H. Strubing (35) and Alexander S. Hanes, Jr. (31), delivered to plaintiff trustee $70,920.63, which it agreed to administer for them under the terms of a "Living Trust Agreement." The provisions of the trust agreement pertinent to this appeal are as follows:

"(1) The net income from the trust shall be paid at convenient intervals to Mary R. Hanes during her lifetime. Upon her death the properties then constituting the trust shall be divided into two equal parts which shall be further administered and disposed of as follows:

"(2) One of such equal parts shall be held as a separate trust and the net income therefrom shall be paid at convenient intervals to Alexander S. Hanes, Jr. during his lifetime. Upon his death if he shall survive Mary R. Hanes, or upon her death if he shall not survive her, the properties then constituting the trust shall be administered for or distributed to such person or persons (other than himself or his estate) within a class composed of the Grantors' issue and the spouses thereof as Alexander S. Hanes, Jr. shall designate and appoint in his will and in such amounts or proportions and upon such terms and conditions as he shall therein specify. If this power of appointment shall not be effectually exercised as to all or any portion

of the properties then constituting the trust, then and in such event so much of said properties as shall not be disposed of by the effectual exercise of this power of appointment, shall be disposed of as follows:

"(a) If Alexander S. Hanes, Jr. shall have issue then living, the trust shall continue and the net income therefrom or the principal thereof shall be applied in such manner and at such intervals and in such amounts as the Trustee in its sole discretion shall deem desirable or requisite for the benefit of such issue *per stirpes,* until such issue shall severally attain the age of twenty-one years, whereupon the properties then constituting each of such issue's share shall be distributed to him or her, discharged of all trusts."

The agreement made an identical disposition of the other half of the corpus in favor of Elizabeth H. Strubing.

Alexander S. Hanes, Jr., died testate on July 12, 1955. For estate tax purposes, his adjusted gross estate (debts and expenses deducted) was valued at $481,829.30, including a value of $100,149.75, for the trust property which is the subject of this action. Surviving him were his wife, Anne Wright Hanes (now Hunt), and two children, defendant Alexander Stephen Hanes, III (now of age), and defendant Charles Robinson Hanes, II, born on December 16, 1945, and represented in the action by his guardian *ad litem,* Lloyd C. Caudle.

Paragraph I of the will of Alexander S. Hanes, Jr. (the only part pertinent to this appeal), is as follows:

"I do hereby bequeath and devise unto my beloved wife, Anne Wright Hanes, all of my property, both real and personal, and wheresoever situate in fee simple."

Mary R. Hanes died on March 24, 1964. At that time the fair market value of the assets held by the trustee was approximately $456,000.00.

The trustee, being uncertain as to who is entitled to the one-half of the trust properties designated as the share of Alexander S. Hanes, Jr., instituted this action for instructions from the court. Specifically, the trustee seeks answers to three questions: (1) Whether the wife of Alexander S. Hanes, Jr., was within the class to whom he could appoint his share; (2) If so, whether he exercised his power of appointment in her favor; and (3) If not, whether Alexander Stephen Hanes, III, is entitled to the immediate distribution of his share, or must the trustee hold it until Charles Robinson Hanes, II, attains the age of 21 or shall sooner die?

The trial court answered the first two questions YES and entered judgment that the share of Alexander S. Hanes, Jr., in the trust belongs to Anne Wright Hanes Hunt. Defendants Alexander Stephen Hanes, III, and Charles Robinson Hanes, II, excepted to the judgment and appealed.

Womble, Carlyle, Sandridge & Rice for plaintiff appellee.

Herbert, James & Williams for Anne Wright Hanes Hunt, defendant appellee.

Wardlow, Knox, Caudle & Wade for Alexander Stephen Hanes, III, and Charles Robinson Hanes, II, by his guardian ad litem, Lloyd C. Caudle, defendant appellants.

SHARP, J. The first question which we must consider is not whether Anne Wright Hanes (now Hunt), as the spouse of Alexander Stephen Hanes, Jr. (one of the grantors and the issue of another grantor), is within "a class composed of grantors' issue and spouses thereof" and therefore a possible appointee of her husband, Alexander S. Hanes, Jr. Conceding *arguendo* that she was, yet she cannot take under his special power of appointment unless he exercised it in her favor by his general devise "unto my beloved wife, Anne Wright Hanes, all of my property. . . ." A devise or bequest of all of testator's real or personal property, or both, is general. *In re Marinos' Estate,* 39 Cal. App. 2d 1, 102 P. 2d 443. 38 C.J.S., p. 762 (1943); 96 C.J.S., Wills § 1130 (1957).

Special powers of appointment are those in which the donee of the power is restricted to passing on the property to specified beneficiaries, to members of a specific class of beneficiaries, or to any beneficiaries except those specifically excluded. 41 Am. Jur., Powers § 4 (1942). "A power is general where no restriction is imposed upon the donee as to the person or persons to whom he may appoint or the amount which each person shall receive." *O'Hara v. O'Hara,* 185 Md. 321, 325, 44 A. 2d 813, 815, 163 A.L.R. 1444, 1448. Clearly the power of appointment with which we are here concerned was a special power.

To support the execution of any power of appointment, except where the intent is supplied by statute, the donee's intention to execute the power must appear. Where such intention does appear, either expressly or impliedly, in an instrument suitable to the execution of the power, the power is effectually exercised. 72 C.J.S., Powers § 40 (1951).

In *Carraway v. Moseley,* 152 N.C. 351, 353-54, 67 S.E. 765, 766 (a case involving a special power of appointment which the court

held had not been exercised by a special devise of property), Walker, J., stated the rule in the following widely quoted language:

> "The rule generally accepted is that if the donee of the power intends to execute it, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution full and operative; the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation; and if it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution of the power. It is not necessary, therefore, that the intention to execute the power should appear by express terms or recitals in the instrument, but it is sufficient that it appears by words which, when fairly construed, indicate the intention of the donee to execute the power. Three classes of cases have been held to be sufficient demonstrations of such intention: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property which is the subject on which it is to be executed; (3) or where the provision in the will, or other instrument executed by the donee of the power, would otherwise be ineffectual or a mere nullity, or, in other words, it would have no operation except as an execution of the power. . . . This Court adopted the rule in *Taylor v. Eatman,* 92 N.C. 601, and held that, as a general rule, in executing a power, the deed or will should regularly refer to it expressly, and it is usually recited; yet it is not necessary to do this if the act shows that the donee had in view the subject of the power at the time. . . . It has generally been held that a will need not contain express evidence of an intention to execute a power. If the will be made without any reference to the power, it operates as an appointment under the power, provided it cannot have operation without the power. The intent must be so clear that no other reasonable one can be imputed to the will, and if the will does not refer to a power or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then, unless the intention to execute the power be clearly expressed, there is no execution of it. For this statement of the law we have the authority of Chancellor Kent. 4 Kent's Commentaries, (13 Ed.) marg. p. 335."

See annotation incorporating the above in 1914 D Ann. Cas. 586.

Applying these principles to the will of Alexander S. Hanes, Jr.,

no intention to execute the power in question is disclosed. The instrument contains no reference to the power or to the trust property itself. Furthermore, irrespective of the power, the will operated to vest in Anne Wright Hanes other property valued at $381,679.55. It was, therefore effectual "on its own" without construing it to be an exercise of the power. See *Ryder v. Oates,* 173 N.C. 569, 574, 92 S.E. 508, 511.

To supply the necessary intent lacking in the will itself, appellees rely upon G.S. 13-43, which provides:

> "General gift by will an execution of power of appointment.—A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

This statute (Pub. L. 1844, ch. 88, § 5) is identical with § 27 of the English Wills Act of 1837 (7 Wm. IV & 1 Vict., Ch. 26). It has been suggested that this Act was passed to guard against the inadvertence of a life tenant with a general power of appointment. Accustomed throughout his life to treating the land as if it were his in fee, he might overlook making a specific appointment of the particular property and attempt to dispose of it by a general devise. In such event, if he owned other property which would pass under the devise, the power remained unexecuted and his devisees lost the property by his default.

Construing the Wills Act of 1837, the English courts have held that § 27 is applicable only to general powers of appointment. In *In re Byron's Settlement, Williams v. Mitchell,* [1891] 3 Ch. 474, *B* conveyed lands in trust for her daughter *R* and "for such person or persons (not being her said present husband, or any friend or relation of his) as *R* shall by deed or will appoint." In default of ap-

pointment, the ultimate remaindermen were the heirs of the grantor. At the time of her death *R* owned real estate other than the trust property. By her will she devised all of the property to her sister *A* and certain of *A's* descendants. In holding that *R* had not exercised her power and that her will was inoperative with reference to the trust property, Kekewich, J., said:

"(T)he 27th section of the *Wills Act* . . . enacts that a general power of appointment by will may be exercised by a general devise. This is not intended apparently to overlook or alter the distinction between property and power; but on the other hand it was intended to recognise what is familiar to all lawyers, namely, that a general power of appointment, though in technical character certainly different from property, is in substance and practice so nearly resembling it that injustice may easily be done by preserving technical rules and insisting on their application. The Act interposes to prevent that injustice, and says in effect that a man who has a general power of appointment — that is, a power to dispose of property in any way he thinks fit — is really the owner in fee simple of the property the subject of the power, and, that being so, it is only right and fair that he should be at liberty to devise the property, and to exercise over it the right of ownership instead of exercising the power of appointment. That, in my opinion, is the effect of the Act.

"Thus regarded, one understands without any difficulty the intention and meaning of the words, 'which he may have power to appoint in any manner he may think proper.' Anything less than a power to appoint as he thinks fit is not equivalent to ownership. A power so to appoint, but with an exception, is something less than proprietorship. A man is not any more the proprietor of land or money if he has power to appoint to all the world except to the children of *A.* than he is if he has power to appoint to the children of *B.* It is, in either case, a power of selection, not ownership; the appointor cannot deal with the property as he pleases. . . . It is a power to appoint in any manner the donee may think proper except in a particular manner which is specified; and, there being a specified exception, the generality of the power is gone.

* * *

"Upon the construction of the Act, and upon principle, it appears to me that we have here a power not general — that is to say, it is not a power to appoint 'in any manner' the donee

may think proper, but it is a power to appoint 'in any manner' with an exception, which exception destroys the generality of the power.

* * *

". . . I am, therefore, of opinion that the power of appointment . . . was not a general power, and not such a power as could be exercised by a general devise under sect. 27 of the *Wills Act*. . . ."

Accord, Cloves v. Awdry, 12 Beav. 604, 50 Eng. Rep. 1191.

Our research has revealed only one North Carolina case involving the exercise of a limited power in which the opinion refers to G.S. 31-43 (then Rev. § 3143). In *Ryder v. Oakes, supra,* by a deed of settlement, *W* conveyed certain hotel property in trust for his wife for life with remainder over. He reserved "power to reappoint the property" in the event he survived his wife. By his will, he devised the residue of his estate to his wife for life, remainder to his children. *W* did not survive his wife; so no power existed. Notwithstanding, it was strenuously argued in the briefs that the hotel property had passed under his will. The comment of Clark, C.J., upon this contention was:

"In this will there is no reference to the power, nor any distinct references to the Central Hotel property, and the will is effectual without construing it to be an exercise of the power, because the testator at his death owned a large amount of property besides the Central Hotel property. *Revisal, 3143, does not apply, because that refers only to general powers,* and the power here reserved is special. It is the power to appoint to other 'uses and trusts,' while the will does not undertake to declare any uses and trusts at all, but disposes simply of the fee. It does not purport in terms, or by reasonable construction, to be an execution of the power by will." *Id.* at 574, 92 S.E. at 511. (Italics ours.)

In *Holt v. Hogan,* 58 N.C. 82, this Court, without mentioning the statute, held that a general devise of "the residue" of the estate of testatrix (who owned property in her own right) was not an effective exercise of a special power.

Appellees rely upon *Johnston v. Knight,* 117 N.C. 122, 23 S.E. 92, which they cite as authority for their contention that "the rule of G.S. 31-43 is equally applicable where the power to appoint by will is limited to a certain class, if a general gift by will is made to a member of the class." We do not so interpret that case. In *Johnston,*

T devised her estate to her sister *H* for life, remainder to *P* and the heirs of *K*, *L* and *M* (all brothers and sisters of *T*), in such proportion as *H* should appoint by her will. By her will, after making several specific legacies, *H* devised the balance of her estate to be equally divided among those persons named in the special power of which she was donee. In holding that *H* had exercised her power, the court, without mentioning Rev. § 3143, concluded that the will itself disclosed *H's* intention to exercise the power. The opinion pointed out that she had devised to *all* of the identical persons designated in the will of *T* and to no others and that she could have devised the property to no one else. We think that case merely applied the rule that where the donee of a power, general or special, clearly manifests an intention to execute it, effect will be given to his intent. *Taylor v. Eatman,* 92 N.C. 601. It did not extend the application of the statute to special powers. See *Schaeffer v. Haseltine,* 228 N.C. 484, 46 S.E. 2d 463; *Walsh v. Friedman,* 219 N.C. 151, 13 S.E. 2d 250.

The effect of both § 27 of the English Wills Act and G.S. 31-43, then, is that a general devise or bequest shall be construed to include any real or personal property which the testator may have power to appoint *in any manner he may think proper* and shall operate as an execution of such power unless a contrary intention appears in the will. 41 Am. Jur., Powers § 43 (1942). A power to appoint in any manner the donee may think proper is a power upon which no restrictions are imposed — a general power. G.S. 31-43 thus applies only to general powers of appointment. We hold, therefore, that the general devise by Alexander S. Hanes, Jr., to his wife cannot be construed to include the trust property over which he had a special or limited power of appointment, since (1) his will discloses no intent to execute the power and (2) G.S. 31-43 applies only to general powers. There having been no effectual exercise of the power by Alexander Hanes, Jr., it is necessary to answer the trustee's third question. Paragraph (2)(a) of the trust agreement provides that, after the death of Mary R. Hanes and Alexander Stephen Hanes, Jr. (the latter not having exercised his power), the income from his part shall be used for the benefit of the issue of Alexander S. Hanes, Jr., *per stirpes* "until such issue shall *severally* attain the age of 21 years, whereupon the properties then constituting each of such issue's share shall be distributed to him or her, discharged of all trusts." Alexander Stephen Hanes, III, having already attained the

age of 21 years, is entitled to the immediate distribution of his one-half interest in the subject property.

Error and remanded.

MOORE, J., not sitting.

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

CALVIN C. CLINE v. SIDNEY EUGENE ATWOOD AND BUFORD B. SCOTT.

(Filed 4 May, 1966.)

1. Evidence § 54—

Where plaintiff introduces in evidence a part of the adverse examination of his adversary he makes his adversary his witness, and while plaintiff retains the right to contradict his adversary by the testimony of other witnesses, plaintiff is not allowed to impeach his adversary by attacking his credibility.

2. Automobiles §§ 41c, 43— Evidence held insufficient on issue of negligence of motorist confronted by vehicle approaching on wrong side of road.

In this action by the passenger, plaintiff introduced the adverse examination of the driver of the car in which he was riding which tended to show that the driver was traveling on his right side of the highway at a lawful speed, and that when an oncoming vehicle was some 100 feet away the driver thereof turned left in his lane of travel, that plaintiff's driver thought the oncoming vehicle was turning into a filling station, and that the driver of the car in which plaintiff was riding turned left to avoid a head-on collision, but that the oncoming vehicle hit his car on its right-hand side. Plaintiff also introduced the adverse examination of the driver of the other car which was insufficient to contradict the testimony of plaintiff's driver as to how the accident occurred, but did give ambiguous testimony that plaintiff driver was traveling at excessive speed. *Held:* Even conceding evidence that the speed of plaintiff's driver was excessive, the evidence discloses that the negligence of the other driver was the sole proximate cause of the accident, and the motion to nonsuit entered by plaintiff's driver should have been allowed.

MOORE, J., not sitting.

APPEAL by defendant Scott from *Johnston, J.*, January Session 1966 of FORSYTH.

The accident involved herein occurred on State Highway 67 about four miles west of Winston-Salem. Plaintiff Cline and the

defendant Scott were regular employees of Bassick-Sack in Winston-Salem, and on 8 May 1964 were working on the second shift, which ended at 10:30 P.M. These parties had been commuting to their place of employment from their homes in Yadkin County for a number of years, one driving his car one day and the other the next day. On 8 May 1964 the defendant Scott was driving his 1963 Ford automobile and the plaintiff Cline was sitting to his right on the front seat of the car. Highway 67, where the collision occurred, runs in an east-west direction. The road was "pretty straight" and level for about one-half mile. An Esso filling station was located on the north side of the road and a little farther west a Phillips 66 filling station was located on the south side of the highway. The defendant Scott was traveling west on the said highway at a speed of approximately 50 to 55 miles per hour, according to his evidence, and defendant Atwood was driving his 1955 Ford truck in an easterly direction at a speed of 30 to 35 miles per hour according to his evidence. The collision occurred about 11:05 P.M. at or near the entrance to the Esso filling station. The weather was clear and the road was dry.

The plaintiff introduced in evidence the adverse examination of the defendant Scott. Scott in this examination testified that the road was straight and he could see up the road for half a mile; that he saw the Atwood truck coming all the way up the road; that he noticed Atwood turn into his (Atwood's) left lane and figured he was going to the Esso station. Scott was asked if Atwood was on his (Scott's) side of the road the whole time he was coming and Scott answered, "The whole time," but he immediately corrected his answer and said, "He was on his (Atwood's) side when I first saw him all the way down the road, just as straight as you ever saw. I was, maybe, 100 feet from him when he first turned to the other side of the road. * * * when I saw him turning, the only thing I had time to do, I remember letting up on the gas and that's it. * * * I turned * * * across a little bit just to keep from hitting him head-on. Yes, I turned over * * * to my left. It's two lanes with a white line in the middle. * * * Well, my car was over the line some when the cars came together; just a very little the front end was over it. The back end wasn't over it * * *. Yes, I say the front end of my car at the time it was hit was a little bit over to the south side of the dividing line * * *."

According to the evidence, the Atwood truck hit the defendant Scott's car at the windshield on its right side near the door. The evidence further tends to show that as defendant Scott turned his car to the left in an effort to avoid a head-on collision, the defendant Atwood also turned his truck to his left and hit the defendant

Scott's car as stated above. After the collision the front end of the defendant Scott's car was facing north about half-way across the south lane, with the rear end of the car off the pavement. The defendant Atwood's truck was in the northern lane (Atwood's left-hand lane).

Plaintiff likewise introduced in evidence the adverse examination of the defendant Atwood. Atwood testified: "I was out sick for two weeks before the accident occurred. I had not worked for two weeks. I was going home at the time the accident happened. I had been up to Green Park Tavern about one and one-half miles from where the accident occurred. I had half a glass of beer at the tavern. I had been there about an hour. * * * Yes, I was sick with arthritis." It appears from the evidence of this witness that he was at the Green Park Tavern earlier that evening. He got another party, he testified, to buy him either six or twelve cans of beer on his first visit, because, he testified, "The man who ran the place told me he thought I was drinking too much and he told me I ought to leave * * *." This defendant further testified: "* * * Before the accident happened * * * I was coming on down the road there was a '63 Pontiac behind me, and I slowed up * * * so he would go around me * * * I proceeded on down the road about 35 or 40—I might have got up to 50 miles an hour before I seen * * * Mr. Scott coming, and I slowed down to approximately 30 or 35 miles an hour and stayed on my side of the road all the way and I dimmed my lights about 500 or 600 feet before I got to him and he did also, and I could tell he was going pretty fast, so I was watching my side of the road; in fact, I was concentrating on my side of the road more than anything else, and about 250 feet is the last I remember because I was looking on my side of the road." On cross-examination this witness testified: "I have no recollection at all what happened that last 250 feet. No, sir, I don't know whether I went straight, or went across the road, or to the right or to the left or what." The witness admitted he had been convicted of driving while under the influence of intoxicants, for reckless driving, and other traffic offenses; that the patrolman investigating the collision involved herein told him that he was under the influence of intoxicants but that the patrolman did not file any charge against him. The witness further testified: "I saw the other car (Scott's car) probably a mile and a half or two miles during the time it was approaching me. Well, I saw it come over the hill and go down in the valley and come over the next hill on the level stretch. Yes, I do have an opinion satisfactory to myself as to how fast that car was travelling. Q. What is that opinion? A. You mean how fast I think he was going? Q.

Yes. A. I'd say 90 or better. Now, that's just my opinion how fast I think he was going."

Mr. Woods, the State Highway patrolman who investigated the accident, testified that shortly after the collision the defendant Scott said: "We were coming up the road and he (Atwood) was headed straight toward me on my side of the road. He wasn't completely on my side to begin with, he was just easing over on my side and I wheeled over to miss him and he just came * * * right into the side of me. I believe I was completely on his side of the road when we collided."

The patrolman did not talk with the defendant Atwood at the scene of the collision, but testified that he detected some odor on his breath, a moderately strong odor of alcohol. He later talked to Atwood at the hospital and testified that he asked Atwood if he had been drinking, that he replied "Yes." He said he had been to Old Town Superette, that "some Negroes gave me a drink of whiskey, but I don't remember whether I took it or not."

The plaintiff did not recall anything about the collision. The jury answered the issues of negligence against both defendants and awarded plaintiff substantial damages. Judgment was entered on the verdict. The defendant Scott appeals, assigning error.

Elledge & Mast for plaintiff appellee.
Deal, Hutchins and Minor for defendant Scott, appellant.

DENNY, E.J. This appellant assigns as error the refusal of the court below to sustain his motion for judgment as of nonsuit made at the close of the plaintiff's evidence and renewed at the close of all the evidence.

The plaintiff alleges in Paragraph 3 of his complaint that as the defendant "Sidney Eugene Atwood operated his 1955 Ford truck in an easterly direction toward the approaching Ford, he pulled his truck over into the lefthand or northern lane of traffic. As the two vehicles approached each other in the northern lane, both the defendant, Buford Scott and the defendant, Atwood, suddenly cut their vehicles toward the southern lane of the highway, thereby causing a violent collision in which both vehicles were totally destroyed and in which the plaintiff Calvin C. Cline was seriously injured * * *."

In Paragraph 5 of the complaint the plaintiff alleges, among other things, that Atwood "was operating his truck while he was under the influence of intoxicating liquor to such an extent that his physical and mental faculties had been appreciably impaired, in violation of G.S. 20-138; that he was driving upon the highway

without keeping a proper lookout * * * and without keeping the vehicle which he was driving under proper control; he failed to turn from the path of the approaching vehicle until it was impossible to avoid a collision * * *."

Among the plaintiff's allegations with respect to the negligence of defendant Scott, it is alleged that Scott "failed to turn his automobile from the main travelled section of the highway onto the wide shoulder and driveways which were quite ample and safe when he knew or should have known that such failure would bring injury to his passenger, the plaintiff * * *."

The plaintiff offered in evidence the adverse examination of the defendant Scott, which examination was taken before the trial. When this adverse examination of Scott was introduced in evidence, the plaintiff made him his witness and represented that he was worthy of belief. *Powell v. Cross,* 263 N.C. 764, 140 S.E. 2d 393; *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473. A party does not make his adversary his witness by taking his adverse examination, unless he offers the adverse examination, or part of it, in evidence at the trial. *State v. Tilley, supra.* Furthermore, when a plaintiff makes a party in the litigation his own witness, he is not allowed to impeach him by attacking his credibility, but retains the right to contradict him by the testimony of other witnesses whose testimony may be inconsistent with his. *Helms v. Green,* 105 N.C. 251, 11 S.E. 470; *State v. Tilley, supra.*

What does the testimony of the defendant Scott tend to show on his adverse examination? The evidence tends to show that the collision occurred on a straight, level portion of Highway 67 and that the defendants could see the respective vehicles involved approaching each other for about one-half mile; that defendant Scott was traveling west in the northern lane of the 22-foot paved highway at a speed of about 50 or 55 miles per hour; that the defendant Atwood was traveling eastwardly in the southern lane of said highway (at a speed of 30-35 miles per hour according to Atwood's testimony); that when Atwood's truck was about 100 feet from defendant Scott's car, Atwood turned his vehicle into Atwood's left lane in front of Scott's car. Scott further testified that when Atwood turned his truck to Atwood's left, he thought he (Atwood) was turning into the Esso station. Scott further testified that when he saw Atwood's truck approaching him in his, Scott's, lane of travel, less than 100 feet away, he turned his car to the left in an effort to avoid a head-on collision; that not more than half of Scott's car had crossed the center line to Scott's left when Atwood's truck ran into the Scott automobile on its right-hand side near the windshield and the right door.

Atwood's adverse examination was also introduced in evidence by the plaintiff, and Atwood testified that he recalled nothing that occurred after he reached a point about 250 feet from Scott's car, and gave as his reason for not knowing what happened, "because I was looking on my side of the road." Therefore, Scott's evidence that Atwood crossed into the northern lane in front of Scott's car when the vehicles were only about 100 feet apart is uncontradicted. Moreover, Atwood, just prior to testifying with respect to the speed of the Scott car, had testified on cross-examination that "(I)t's hard to tell the speed of a car approaching me, too. I couldn't tell the speed, but I could tell he was going a lot faster than I was."

In the case of *Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808, Butner was traveling in a southerly direction on the Bethania-Rural Hall highway and the Spease truck was traveling northward. The two motor vehicles were approaching each other at night on a straight, level stretch of road with the headlights visible for a distance of three-quarters of a mile. They collided at the entrance of a side road heading westward to Tobaccoville. When the Butner car approached the "mouth" of this side road, which was approximately 45 or 50 feet wide, and when the two vehicles were about 40 feet apart, the Spease truck suddenly turned to its left to enter the side road at its southern edge. The front of the Butner car struck the right side of the truck "just in front of the rear fender," knocked it over a fill and caused it to turn over several times. Spease testified the Butner car was traveling 70 to 75 miles per hour. Stacy, C.J., speaking for the Court, said:

> ". . . Indeed, the only suggestion of negligence on the part of the driver of the southbound car is the speed at which he was going. The evidence of the defendant Spease in regard to this may be taken with some allowance, because he frankly says that he misjudged the speed of the Butner car; that it is hard to estimate the speed of a car at night when it is coming towards you, and that he was practically in the act of turning when he first saw the car. Nevertheless, conceding the speed of the Butner car to be in excess of 45 miles per hour, and therefore *prima facie* unlawful, it is manifest that its speed would have resulted in no injury but for the "extraordinary negligent' act of the defendant Spease — in the language of the Restatement of Torts, sec. 447. *Powers v. Sternberg, supra* (213 N.C. 41, 195 S.E. 88). Hence, the proximate cause of the collision must be attributed to the gross and palpable negligence of the driver of the northbound vehicle. *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108; *Beach v. Patton,* 208 N.C. 134,

179 S.E. 446; *Hinnant v. R. R., supra* (202 N.C. 489, 163 S.E. 555); *Herman v. R. R., supra* (197 N.C. 718, 150 S.E. 361); *Burke v. Coach Co.,* 198 N.C. 8, 150 S.E. 636; *Lavergne v. Pedarre* (La. App.), 165 So. 17."

In *Capps v. Smith,* 263 N.C. 120, 139 S.E. 2d 19, D. Capps was driving his truck in a westerly direction on a rural paved road at 45 miles per hour. The defendant Smith was driving his Plymouth automobile in an easterly direction at a speed of 60 miles per hour. Capps lost control of his truck and ran off the pavement on the right shoulder of the road, and in getting back on the road "angled across the pavement in front of defendant's car." When the truck cut back on the highway in front of defendant, the defendant was 100 feet from the truck. This Court in a *per curiam* opinion said, among other things: "If two vehicles are 100 feet apart and one of them is traveling 45 miles per hour, and the other 60 miles per hour, they must, of course, necessarily meet in less than three seconds — as a matter of fact, in approximately 0.65 second. Even if one of the vehicles were at a dead stop, the vehicle traveling 60 miles per hour would traverse the distance of 100 feet in approximately 1.14 seconds. * * * Considering all the evidence in the light most favorable to plaintiff, the motion for nonsuit was properly sustained."

Clearly the defendant Atwood created the sudden emergency with which the defendant Scott was faced. The plaintiff alleges and contends that Scott was negligent in that he did not drive his car entirely off the traveled portion of the highway onto the shoulder and driveways to his right and thus avoid the collision. Under the facts in this case, in our opinion the negligence of the defendant Atwood was the sole proximate cause of plaintiff's injury, and we so hold. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Butner v. Spease, supra; Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919; *Capps v. Smith, supra.*

The factual situation in the case at bar is distinguishable from those in the cases of *Davis v. Jessup,* 257 N.C. 215, 125 S.E. 2d 440, and *Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241.

The defendant Scott's motion for judgment as of nonsuit should have been sustained.

Reversed.

MOORE, J., not sitting.

arising on the evidence; and the court, although defendant made no request therefor, was required to give such instruction. *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53, and cases cited. Absent such instruction, the verdict did not fix the value of the stolen property as in excess of $200.00. Hence, the judgment imposing a prison sentence permissible only upon conviction of *the felony* of larceny was erroneous and constitutes ground for a new trial."

The decision in *S. v. Cooper, supra,* was in accord with the decision in *S. v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393, where the defendant was convicted of receiving stolen property knowing it to have been stolen. The indictment charged the property was "of the value of more than $100.00." (The alleged crime was committed prior to the effective date of Session Laws of 1961, Chapter 39, in which G.S. 14-72 was amended by substituting "two hundred dollars" for "one hundred dollars.") In awarding a new trial for failure of the court to instruct the jury "that before they could convict the defendant of the crime charged, they must find beyond a reasonable doubt that the goods received by the defendant were of the value of more than one hundred dollars," Winborne, C.J., for the Court, said: "In the bill of indictment the defendant was charged with a felony, that is, receiving goods of the value of more than one hundred dollars. G.S. 14-71 and G.S. 14-72. In order for the defendant to be found guilty under G.S. 14-71, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than one hundred dollars. This is an essential element of the crime because G.S. 14-72 specifically provides that 'the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars is hereby declared a misdemeanor.' "

In *S. v. Holloway,* 265 N.C. 581, 144 S.E. 2d 634, this Court quoted with approval from the opinion in *S. v. Cooper, supra,* and applied the principles of law decided and declared therein.

In *S. v. Brown,* 266 N.C. 55, 145 S.E. 2d 297, the defendant was convicted of entering with intent to commit a felony, a violation of G.S. 14-54, as charged in the first count, and of larceny as charged in the second count. In *S. v. Stubbs,* 266 N.C. 274, 145 S.E. 2d 896, the defendant was convicted of breaking and entering with intent to commit a felony, a violation of G.S. 14-54, and of larceny as charged in the second count. I disagreed with the majority opinions only with reference to the second (larceny) count. The majority opinions seem to hold that, with reference to the second (larceny) count in such a two-count bill, if all the evidence tends to show larceny by breaking and entering, a general verdict of guilty as charged establishes that the defendant is guilty *of the felony* of

larceny even though the second count does not allege the larceny was by breaking and entering and even though there is no instruction that the jury must find the larceny was by breaking and entering as prerequisite to a conviction of the felony or larceny. The majority opinions mention, but the Court did not expressly pass upon, the defendant's contention that the trial judge erred in failing to instruct the jury it was incumbent upon the State to prove beyond a reasonable doubt before returning a verdict of guilty of the felony of larceny that the value of the stolen property was more than $200.00.

In *S. v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36, and in *S. v. Ford,* 266 N.C. 743, 147 S.E. 2d 198, the defendant was tried on a two-count bill charging (1) feloniously breaking and entering a certain building and (2) larceny of property of a value less than $200.00. The second (larceny) count did not allege the larceny was committed pursuant to a felonious breaking and entering. It was held a verdict of guilty of larceny as charged would not support a judgment imposing a sentence permissible only upon conviction of the felony of larceny notwithstanding all the evidence tended to show the larceny was accomplished by means of a felonious breaking and entering. See also *S. v. Smith,* 266 N.C. 747, 147 S.E. 2d 165, and *S. v. Davis,* 267 N.C. 126, 147 S.E. 2d 570.

This statement appears in the majority opinion in *S. v. Brown, supra:* "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."

The present criminal prosecution relates to a single count of larceny, to wit, the alleged larceny of a 1961 Chevrolet of the value of $1,200.00. The only evidence with reference thereto is that the value of the Chevrolet exceeded $200.00. This is the State's evidence. Defendant did not testify. The testimony of the only defense witness related to alibi, not value.

My dissent is not based on the ground that the court should have submitted to the jury whether defendant was guilty of the misdemeanor of larceny, that is, the larceny of property of the value of $200.00 or less. This is required only where the evidence as to value is equivocal or is in conflict. *S. v. Cooper, supra; S. v. Summers, supra.*

The ground of my dissent is simply the elementary proposition that the jury must pass on the credibility of the testimony. Testimony that the value of the car was more than $200.00 merely affords a basis for the jury to so find. In my opinion, it was the duty of the trial judge to instruct the jury that in order to return a verdict of guilty of the felony of larceny (or a verdict of guilty as charged) they must find from the evidence beyond a reasonable doubt that the value of the stolen property was more than $200.00. For error in failing to so instruct the jury, I vote for a new trial.

Conceding it is improbable the jury would have returned a different verdict if the court had given the instruction I deem essential to a proper charge, I much prefer an occasional new trial on account of inadvertence of the trial judge in this respect to the erosion of sound legal principles.

SHARP, J., joins in this dissenting opinion.

OUTBOARD MARINE CORPORATION v. ARNOLD FUTRELL, BENSON S. FUTRELL, JR., AND IRENE F. MULLINIX, TRADING AS BISCOE DISTRIBUTING COMPANY, A PARTNERSHIP; BISCOE DISTRIBUTING COMPANY, INC., AND SUSIE FUTRELL AND ROBY FUTRELL, EXECUTORS OF B. S. FUTRELL.

(Filed 4 May, 1966.)

1. Pleadings § 34—

A motion to strike an entire defense is tantamount to a demurrer, and upon such motion the pleader must be given the benefit of every reasonable intendment in his favor.

2. Same—

Where two paragraphs of an answer state but a single defense, both paragraphs must be considered in determining the correctness of a judgment sustaining a demurrer and granting a motion to strike, even though the lower court grants the demurrer and motion to strike in regard to one of the paragraphs and denies them as to the other.

3. Same; Guaranty— Where, in the state of the record, plaintiff will not be prejudiced by retention of matters, motion to strike should be denied.

In a suit on a guaranty of payment, defendants alleged in one paragraph that after the guarantor had revoked the agreement the plaintiff accepted promissory notes from the debtor in settlement of the debts existing prior to the termination of the guaranty and that such acceptance novated the debt and discharged the guarantor, and in the succeeding para-

graph alleged that plaintiff, by its acceptance of the said notes, materially altered and changed the contract without the consent of the guarantor and did so after the guaranty had been revoked, and that this discharged the guarantor of any obligations. The court overruled the demurrer and denied the motion to strike the first paragraph and allowed the demurrer and motion to strike the second, and defendants appealed. *Held:* The paragraphs state but a single defense and both must be considered in determining the correctness of the judgment sustaining the demurrer to and striking the second paragraph, and when so considered the allegations are sufficient to withstand the demurrer and motion to strike, and that part of the judgment sustaining the demurrer and granting the motion to strike the second paragraph must be reversed, leaving the question of whether the guaranty covered the renewal notes executed after revocation of the guaranty to be resolved in relation to the facts evolved and established at the trial.

MOORE, J., not sitting.

APPEAL by defendant executors from *Hasty, Special Judge,* January 17, 1966, Civil Session of DAVIDSON.

The hearing below was on plaintiff's demurrer to and motion to strike paragraphs 2 and 3 of the further answer of defendant executors. The individual and corporate defendants are not parties to this appeal. Their pleadings, if any, are not in the record before us.

A summary of the allegations of the amended complaint necessary to an understanding of the answer and further answer of defendant executors is narrated (except when quoted) below.

On March 26, 1962, the individual defendants, having purchased the assets and assumed the liabilities thereof, continued to operate a retail and wholesale business under the name of Biscoe Distributing Company, a partnership, in the Town of Biscoe, North Carolina, and continued to purchase merchandise on open account from plaintiff.

On April 2, 1962, B. S. Futrell, in consideration of plaintiff's agreement to extend credit to said partnership, executed a guaranty agreement (Exhibit A) in words and figures as follows:

"For value received and the further consideration of any credit you may extend hereunder, I, B. S. Futrell, do hereby guarantee the full and punctual payment to you of all indebtedness which Biscoe Distributing Company has incurred or may incur for the purchase of merchandise from you; provided, that the liability of the undersigned hereunder at any one time shall not be for a greater sum than $70,000.00 and lawful interest. The liability of the undersigned hereunder shall not be affected by the amount of credit extended hereunder nor by any change in the form of said indebtedness, by note or otherwise, nor by any extension or renewal thereof. Notice of acceptance of this guaranty, of extension

of credit hereunder, of default in payment, of change in form, of renewal or extension of any of said indebtedness, or of any matter with respect thereto is expressly waived. This guaranty shall continue in full force and effect until such time as you shall receive the undersigned written notice of revocation, and such revocation shall not in any way relieve the undersigned from liability for any indebtedness incurred prior to the actual receipt by you of said notice."

Plaintiff, in consideration of the execution of said guaranty agreement by B. S. Futrell, continued to extend credit to said partnership. On February 1, 1964, B. S. Futrell revoked his said guaranty as to credit extended subsequent to February 1, 1964. Plaintiff, subsequent to said revocation, continued to sell and deliver merchandise to said partnership.

On June 10, 1964, said partnership was indebted to plaintiff for merchandise sold and delivered in the amount of $225,483.02. It was agreed that $178,032.37 of this indebtedness would be paid, "according to a schedule of payments," at intervals of one month. "In order to establish this schedule," a series of (nine) notes (Exhibits B, C, D, E, F, G, H, I and J) was executed, each note referring to specific invoices. The nine notes were dated June 10, 1964, and were executed in the name of Biscoe Distributing Company by Arnold Futrell. All were in the form of Exhibit B, being a note for $10,168.63 due July 31, 1964.

The pertinent portion of Exhibit B is as follows:

"Biscoe, N. C., June 10, 1964 $10,168.63

"July 31, 1964 without grace, for value received, the undersigned promise to pay to Outboard Marine Corporation or order, at Galesburg, Illinois Ten Thousand One Hundred Sixty Eight and 63/100 **********Dollars with interest at the rate of 6% per annum.

"This note is in payment of the following invoices:

"DM696700

"3070-80

"89898."

The amounts and maturity dates of the other eight notes are as follows: Exhibit C, $20,000.00, due August 31, 1964; Exhibit D, $21,231.55, due September 30, 1964; Exhibit E, $20,000.00, due October 30, 1964; Exhibit F, $20,207.96, due November 30, 1964; Exhibit G, $20,138.45, due December 31, 1964; Exhibit H, $21,536.70, due January 31, 1965; Exhibit I, $21,955.98, due February 28, 1965; and Exhibit J, $22,793.10, due March 31, 1965.

On July 1, 1964, the corporate defendant purchased the assets and assumed the liabilities of said partnership. It continued to purchase merchandise on open account from plaintiff.

The first maturing note (Exhibit B) was paid by said partnership. With reference to the second maturing note (Exhibit C), plaintiff on September 15, 1964, received a payment of $10,000.00 and a new note for $10,000.00 executed *by the corporate defendant.* With reference to the third maturing note (Exhibit D), plaintiff on September 30, 1964, received a payment of $10,615.78 and a new note for $10,615.77 executed *by the corporate defendant.*

The total amount of the indebtedness "which accrued during the period" the guaranty agreement was in effect was $156,708.88. The estate of B. S. Futrell is indebted to plaintiff under said guaranty to the extent of $70,000.00.

Plaintiff is entitled to judgment against the individual and corporate defendants in the amount of $224,051.57 and to judgment against defendant executors in the amount of $70,000.00.

Allegations relating to the solvency of the corporate defendant, the necessity for appointment of a receiver, etc., are not pertinent to decision on this appeal. The record does not disclose the status of the litigation in respect of these matters.

Defendant executors, answering, admitted B. S. Futrell executed said guaranty agreement, and admitted (asserted) that he revoked said guaranty on February 1, 1964. Otherwise, they denied all allegations purporting to impose liability on the estate of B. S. Futrell.

As a further answer, defendant executors alleged:

"1. That they are not indebted to the plaintiff in any amount whatsoever.

"2. That on the 1st day of February, 1964, B. S. Futrell, now deceased, revoked and terminated the instrument executed by him on April 2, 1962, as hereinbefore more fully set out, and that on or about the 10th day of June, 1964, approximately four months and nine days after the revocation and termination of said agreement, the plaintiff accepted promissory notes from Biscoe Distributing Company, a partnership, said notes being identified as Exhibits B, C, D, E, F, G, H, I and J, and in the amounts indicated in paragraph XI of the complaint and payable at the times indicated in said paragraph XI of the complaint in full settlement of the indebtedness of the Biscoe Distributing Company, a partnership, which was due at the time of the execution of said notes, and that the said B. S. Futrell, now deceased, was thereupon discharged from any obligation existing under the instrument dated April 2, 1962, these defendants saying that the plaintiff by the acceptance of said notes extending the time for payment of the original indebtedness, after the instrument dated April 2, 1962, had been revoked for a period of more than four months, novated the original debt

and in law discharged the said B. S. Futrell and these defendants as Executors.

"3. That the plaintiff by its acceptance of the said notes hereinabove referred to, namely the exhibits identified as B, C, D, E, F, G, H, I and J materially altered and changed the contract between Biscoe Distributing Company and the plaintiff without the consent of B. S. Futrell and changed and altered the said contract after the said B. S. Futrell had fully and completely terminated and revoked the said instrument dated April 2, 1962, and that the said plaintiff by its act in changing and altering the said contract after the revocation of the instrument dated April 2, 1962, released and discharged the said B. S. Futrell and these defendants from any obligation whatsoever."

Plaintiff demurred to and moved to strike "paragraphs 2 and 3 of the further answer" filed by defendant executors. Plaintiff asserted: "The grounds upon which this demurrer is filed are that the further answer fails to state a valid defense which would bar the plaintiff's right of recovery . . . and, therefore, said paragraphs 2 and 3 of the further answer should be stricken."

Thereafter, defendant executors demurred to the amended complaint.

At the hearing below, the court considered defendants' said demurrer to the amended complaint and plaintiff's demurrer to and motion to strike paragraphs 2 and 3 of the further answer of defendant executors.

The court, after recitals, entered judgment as follows:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

"(1) The demurrer of the defendants Susie Futrell and Roby Futrell, Executors of B. S. Futrell, to the complaint for failure to state a cause of action is overruled.

"(2) The demurrer to and motion to strike paragraph 2 of the Further Answer of the defendants Susie Futrell and Roby Futrell, Executors of B. S. Futrell, is overruled and denied.

"(3) The demurrer to and motion to strike paragraph 3 of the Further Answer of the defendants Susie Futrell and Roby Futrell, Executors of B. S. Futrell, is sustained and allowed.

"(4) The Executor Defendants are granted 30 days to file amended pleadings."

Defendant executors excepted generally to "the foregoing judgment" and gave notice of appeal.

Garland S. Garris, Stoner & Stoner and Walser, Brinkley, Walser & McGirt for plaintiff appellee.

DeLapp, Ward & Hedrick for defendant executors, appellants.

BOBBITT, J. Appellants assign as error the portion of the court's judgment (paragraph "(3)") sustaining plaintiff's "demurrer and motion to strike" as to paragraph 3 of appellants' further answer.

Whether the court erred in overruling appellants' demurrer to the amended complaint is not presented. It is noted that plaintiff excepted to the portion of the court's judgment (paragraph "(2)") overruling plaintiff's "demurrer and motion to strike" as to paragraph 2 of appellants' further answer. Plaintiff did not give notice of appeal. It would seem the parties were advertent to our Rule 4(a).

Upon this record, the parties discuss questions considered in the Annotation, "Guaranty as covering renewals, after revocation, of claims within coverage at time of revocation," 100 A.L.R. 1236. There is a division of authority. Cases generally favorable to appellants include: *Hughes v. Straus-Frank Co.*, 127 S.W. 2d 582 (Tex.); *Straus-Frank Co. v. Hughes*, 156 S.W. 2d 519 (Tex.); *Merchants' Nat. Bank v. Cressey*, 146 N.W. 761 (Iowa); *Bedford v. Kelley*, 139 N.W. 250 (Mich.); *National Eagle Bank v. Hunt*, 13 A. 115 (R.I.); *Gay v. Ward*, 34 A. 1025 (Conn.); *Home Nat. Bank v. Waterman's Estate*, 29 N.E. 503 (Ill.). Cases generally favorable to appellee include: *Corn Exchange Bank Trust Co. v. Gifford*, 197 N.E. 178 (N.Y.), 100 A.L.R. 1233; *Exchange Nat. Bank v. Hunt*, 135 P. 224 (Wash.); *Wise v. Miller*, 14 N.E. 218 (Ohio).

The facts alleged in the further answer do not provide a sufficient basis for application or discussion of the broad questions discussed in the briefs. Decision must relate to a definite factual situation. Such definite factual situation is not before us on this appeal.

Appellants, in paragraph 1 of their further answer, simply assert they are not indebted to plaintiff in any amount whatsoever. This general denial of plaintiff's claim is surplusage and is not germane to the further defense.

In our view, it was error to consider appellants' pleading as asserting two separate and distinct defenses. Paragraphs 2 and 3 must be considered together as a single affirmative defense. Nothing in paragraph 3 suggests any material change in the contractual relations between plaintiff and Biscoe Distributing Company other than that alleged in paragraph 2, namely, the alleged acceptance by plaintiff of the nine promissory notes "in full settlement of the indebtedness of the Biscoe Distributing Company, a partnership, which was due at the time of the execution of said notes." Paragraph 3 asserts this material change was "without the consent of B. S. Futrell."

It is noted that plaintiff demurred to the further answer on the ground it asserted "an affirmative defense," asserting the allegations

of paragraphs 2 and 3 of the further answer failed to state "a valid defense."

Plaintiff's "demurrer and motion to strike" must be considered a demurrer to appellants' further answer, namely, paragraphs 2 and 3 thereof, considered as one further defense. Hence, in construing the allegations of the further answer, appellants must be given the benefit of every reasonable intendment in their favor. When so considered, we are of opinion, and so decide, that the allegations of the further answer, particularly when considered in connection with the quoted portion of paragraph 3, are sufficient to withstand the demurrer.

We are advertent to the fact that plaintiff has not been heard in this Court in respect of whether the court erred in overruling plaintiff's "demurrer and motion to strike" as to paragraph 2 of the further answer. Even so, disposition of appellants' appeal requires that the further answer be considered in its entirety. The questions debated on this appeal will be resolved in relation to the facts developed and established at trial. Plaintiff will not be prejudiced by this course.

The result of the foregoing is that the portion of the court's judgment (paragraph "(3)") sustaining plaintiff's "demurrer and motion to strike" as to paragraph 3 of appellants' further answer is reversed.

Whether the portion of the court's judgment reversed by this decision materially prejudiced appellants is questionable. In any event, we deemed it appropriate to entertain the appeal on account of the confusion that might result from the fact that a demurrer to paragraph 3 of the further answer was sustained on the theory that it alleged a separate and independent affirmative defense. Under the circumstances, the costs on this appeal will be taxed one-half to appellants and one-half to appellee.

Reversed.

MOORE, J., not sitting.

STATE v. JAMES ALLEN STAFFORD.

(Filed 4 May, 1966.)

1. Criminal Law § 195—

Exceptions not set out in the brief and in support of which no argument or authority is stated are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 71— Evidence held to support finding that confession offered in evidence was freely and voluntarily made.

Testimony of an officer that defendant did not request counsel and was not refused the right to communicate with a relative and counsel, that defendant was advised of his right not to make any statement, and that the officer made no promise and offered no threat, coercion, or duress, and that defendant then made the statement offered in evidence, *held* to support the court's findings and conclusion that the confession was freely and voluntarily made, notwithstanding defendant's testimony that a prior confession made to other officers was made because defendant was threatened and the officers would not allow him to call a relative and refused to let him talk to a lawyer and was promised probation if he made the statement, the prior confession not being entered in evidence and the officers to whom it was made not being examined.

MOORE, J., not sitting.

PARKER, C.J., dissenting.

APPEAL by defendant from *Hall, J.*, November 1965 Session, WAKE Superior Court.

Defendant was tried under a bill of indictment charging breaking and entering with intent to steal, larceny and receiving stolen goods.

The State's evidence was to the effect that on or about the first day of June, 1953, Brawley Jewelry Company of Raleigh, North Carolina, was broken into and 119 to 129 watches, valued at around $5,400.00, were taken. The defendant was apprehended about one month later in Bexley, Ohio, and was extradited to North Carolina for trial. Defendant was convicted, sentenced and served a portion of that sentence but escaped December 7, 1953. He was charged with committing another offense in Ohio, at which time he let it be known that he was an escapee from North Carolina. Upon his return here on November 25, 1964, he was granted a new trial under G.S. 15-217.

Captain Goodwin testified with respect to the details of the crime as told to him by the defendant: that the defendant had arrived in Raleigh some 10 days prior to June 1st, 1953, and had taken a room there; that he had visited Brawley Jewelry Company on two occasions prior to the break in; that on the day of the break in, he

went in a bank building and went on the roof and waited until nighttime before cutting a hole in the bathroom roof of the Jewelry Company and gaining entry thereto; that he then filled a paper bag with watches from the display counters and left by the same way; that he then traveled by bus to Wilson, North Carolina, Rocky Mount, North Carolina, and Norfolk, Virginia, where he began selling the watches; that from Norfolk, Virginia, he traveled to several other cities selling watches until he was apprehended in Bexley, Ohio.

The defendant challenged the admissibility of his alleged confession but, the judge upon *voir dire* found as a fact that all the essentials necessary to constitute a voluntary confession were present. His findings are further considered in the opinion.

Defendant put on no evidence except during the *voir dire* to show that he had not made any statement to the police.

Upon being found guilty of breaking and entering and larceny, and sentenced, defendant appeals, assigning error.

T. W. Bruton, Attorney General, Millard R. Rich, Jr., Assistant Attorney General, for the State.

Robert T. Hedrick Attorney for the defendant appellant.

PLESS, J. While the case on appeal contains eight assignments of error, the defendant in his brief brings forth only Exception No. 1, which relates to the voluntariness of his alleged confession, and 3, 4 and 8 which he groups, and which relate to his motions for nonsuit and his formal exceptions to the judgment. The remaining exceptions are not set out in the brief and no argument or authority is stated in regard to them. Under Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. 810, they are deemed abandoned. Nevertheless, we have given them consideration and find them without merit.

In response to the defendant's claim, represented by Exception No. 1, that his alleged confession was not voluntary, the trial judge excused the jury and made a full investigation as to the circumstances under which it was made. It had been reported to the officers that he had made a confession in Ohio which they discussed with him and which he did not deny. The officer, Captain R. E. Goodwin of the Raleigh Police Department, testified that he had warned the prisoner of all of his rights and stated that he had offered no promises, inducements or threats to obtain the confession. The defendant denied having made a confession in Ohio and stated that the confession was made in North Carolina to Captain Goodwin because "I was threatened and they wouldn't let me call my sister who lived in

Wilson, North Carolina, and they refused to let me talk to a lawyer * * * and they told me that if I would make a confession they would get me out on probation. Mr. Goodwin did not say that. It was Mr. Bowers, I believe, who promised this to me, but it has been so long I do not remember it." The trial judge made full findings of fact to the effect that the defendant made no request for counsel; that he was not denied the right to communicate with counsel or friends, was otherwise advised of his rights, and his statement was made freely and voluntarily, without any promise, threat, undue influence, coercion or duress. The record amply supports the findings of the Judge and the exception is not sustained.

The defendant has a long record of violations of the law, starting in 1944, having been convicted in Kentucky, Virginia, New Mexico and Texas, of crimes similar to the one here charged. It is not likely that one with his long experience with the courts would believe that a police officer, rather than the judge, would determine the question of probation.

The evidence in support of the charge is set forth in the statement of facts. No evidence was offered by the defendant. He cannot successfully contend that the evidence is not sufficient to prevail upon the motion to nonsuit, and that being true, his formal exception to the judgment is without merit.

No error.

MOORE, J., not sitting.

PARKER, C.J., dissenting: Upon the hearing in the absence of the jury in respect to the admission in evidence of a purported confession by defendant here, the defendant testified in substance: Mr. Bowers and Mr. Upchurch went to Bexley, Ohio, and brought him back to Raleigh. He had made no confession in respect to the instant case before he was brought back to Raleigh. The officers treated him very well on their way back to North Carolina. After he got back to North Carolina, they wanted him to make a confession, and he would not do so. No violence was used by these two officers and he was not threatened, but they would not let him call his sister in Wilson, North Carolina, and they refused to let him talk to a lawyer, saying "You ain't got no money and a lawyer ain't going to talk to you when you ain't got no money." These officers told him that if he would make a confession they would get him out on probation. Later on he made a taped recording, which was a confession. He was promised probation eventually if he would make this statement. It was Mr. Bowers, he believes, who promised this to him, but it has been so long he does not remember. It must have been Mr. Bowers

or Mr. Upchurch. Captain R. E. Goodwin of the detective division of the Raleigh police force testified in respect to a confession the defendant made to him. Captain Goodwin testified: "I don't know what Sergeant Bowers or Sergeant Upchurch may have promised Mr. Stafford." Captain Goodwin testified that Sergeant Bowers is sick in bed, and has been in bed for several days with influenza. There is no evidence to indicate that Sergeant Upchurch was not available as a witness. Judge Hall found that defendant's confession was made freely and voluntarily, and is, therefore, admissible in evidence. In my opinion, Judge Hall should have heard the testimony of Sergeant Bowers and Sergeant Upchurch, or at least one of them, before he found that the confession here was freely and voluntarily made. If Sergeants Bowers and Upchurch, or either one of them, induced the confession by either threats or a promise of securing probation for defendant, it is incompetent, and it is to be presumed that those influences still operated upon defendant when he confessed to Captain Goodwin. I express no opinion as to whether Sergeant Bowers or Sergeant Upchurch used any threats or promises to secure a confession from defendant. In my opinion, the facts do not support Judge Hall's ruling that the confession was freely and voluntarily made and is admissible in evidence, in the absence of any testimony by Sergeants Bowers and Upchurch, or either of them. My vote is to hold the confession incompetent upon the showing before us, and to award defendant a new trial. Upon a new trial the court can hear the evidence of Sergeants Bowers and Upchurch, and adequately and safely determine the admissibility of this confession.

IN THE MATTER OF THE ESTATE OF MARY ALICE WALLACE.

(Filed 4 May, 1966.)

1. Pleadings § 29—

An issue of fact arises whenever a material fact, which is one which constitutes a part of plaintiff's cause of action or defendant's defense, is maintained by one party and controverted by the other. G.S. 1-196, G.S. 1-198.

2. Constitutional Law § 24—

Where the pleadings raise an issue of fact respecting property in controversy, such issue of fact must be tried by a jury, Constitution of North

Carolina, Art. I, § 19; G.S. 1-172, unless a jury trial is waived or a reference ordered, Constitution of North Carolina, Art. IV, § 13, G.S. 1-184.

3. Appeal and Error § 21—

An appeal and assignment of error to the judgment presents whether error of law appears on the face of the record.

4. Clerks of Court § 1—

Where an issue of fact is joined before the clerk, the clerk must transfer the proceeding to the Superior Court for trial. G.S. 1-174.

5. Same; Constitutional Law § 24— Jury trial is required on appeal from clerk's order determining controverted issue of fact raised by pleadings.

Petitioner sought to recover a sum of money, petitioner claiming that at the sale by the administrator c. t. a. she had purchased both the real estate and personal property on the premises of the decedent, and that the money had been taken from her and placed in the hands of the clerk for determination of ownership. Respondent denied the allegation that the sum of money was part of the personal property purchased by petitioner. The clerk ordered that the money be turned over to the administrator c. t. a. of the estate, and petitioner appealed. *Held:* The pleadings raise an issue of fact for the determination of the jury, and it was error for the court to affirm the order of the clerk without a jury trial.

6. Claim and Delivery § 1—

A writ of claim and delivery may be issued only in a pending civil action.

MOORE, J., not sitting.

APPEAL by Nonnie E. Hadlock from *McConnell, J.*, September 1965 Session of MOORE.

Nonnie E. Hadlock filed a petition with the clerk of the Superior Court of Moore County alleging in substance: There has been deposited in the office of the clerk of the Superior Court of Moore County the sum of $1,283.95, which fund was taken from the home of the late Mary Alice Wallace after petitioner purchased her home place. At the sale conducted by H. F. Seawell, Jr., the personal property on the premises, together with the real estate, was purchased at said sale, and petitioner avers that the said money was a part of the personal property purchased by her at said sale. The clerk of the Superior Court holds said fund for determination of its ownership. Wherefore, petitioner prays that the said $1,283.95 be delivered to her.

H. F. Seawell, Jr., administrator c.t.a. of the last will and testament of Mary Alice Wallace, filed an answer to the petition, alleging in substance: It is admitted that the clerk of the Superior Court of Moore County has in his possession the sum of $1,283.95, which

sum belongs to the estate of Mary Alive Wallace and should be paid over to him as administrator c.t.a. It is admitted that this sum of money came from the home of Mary Alice Wallace and was her money. The petitioner herein swore under oath in the Superior Court of Moore County that this sum of money did not belong to her, and this may be found in the record of testimony in *Williams v. Hadlock,* page 18 of the record. Respondent denies the allegation in the petition that this sum of money was a part of the personal property purchased by petitioner when she purchased the home place of Mary Alice Wallace. Wherefore, respondent prays that the money be forthwith paid to him as administrator c.t.a. of Mary Alice Wallace for distribution less costs as provided by law.

On 12 June 1965 Bessie Beck, assistant clerk of the Superior Court of Moore County, entered an order in substance as follows: After hearing the evidence, the court is of the opinion that the $1,283.95 now on deposit in the office of the clerk of the Superior Court of Moore County were the funds of the late Mary Alice Wallace, and the court finds as a fact that said funds should be paid to H. F. Seawell, Jr., administrator c.t.a. of the last will and testament of Mary Alice Wallace. Wherefore, it is ordered that the said $1,283.95 be distributed to the said H. F. Seawell, Jr., as administrator c.t.a. of the last will and testament of Mary Alice Wallace. From this order petitioner appealed, and "same is transferred to Civil Issue Docket." (Quoted verbatim from the order.)

On appeal Judge McConnell entered an order as follows:

> "This matter coming on to be heard on an appeal by Nonnie E. Hadlock from an order of the Clerk of Superior Court of Moore County dated the 12th day of June 1965, wherein the said Clerk finds as a fact that the sum of $1,283.95 was found, and that said funds had been deposited with the Clerk of Superior Court for a determination as to the ownership of said funds, and in the Clerk's order, the funds were ordered to be distributed to H. F. Seawell, Jr., as Administrator of the said Mary Alice Wallace.
>
> "After hearing the evidence, the court affirms the order of said Clerk."

From Judge McConnell's order, Nonnie E. Hadlock, petitioner, appealed to the Supreme Court.

Gavin, Jackson & Gavin by H. M. Jackson, and Barrett & Wilson by P. H. Wilson for petitioner appellant.

Seawell & Seawell & Van Camp by James R. Van Camp for respondent appellee.

PARKER, C.J. Petitioner has one assignment of error, which is as follows: "To the action of the Court in signing the Judgment in the proceeding."

An issue of fact arises upon the pleadings whenever a material fact is maintained by one party and controverted by the other. G.S. 1-196 and 1-198; *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16; *Baker v. Construction Corp.,* 255 N.C. 302, 121 S.E. 2d 731. "A material fact is one which constitutes a part of the plaintiff's cause of action or the defendant's defense." *Wells v. Clayton, supra.*

The North Carolina Constitution, Art. I, sec. 19, states in relevant part: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Under this constitutional provision, "trial by jury is only guaranteed where the prerogative existed at common law or by statute at the time the Constitution was adopted." *Belk's Dept. Store, Inc. v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897; 2 McIntosh, N. C. Practice and Procedure, 2d Ed., §§ 1431, 1432, 1433. G.S. 1-172 provides in relevant part: "An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered." *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 357. The North Carolina Constitution, Art. IV, sec. 13, provides in relevant part: "In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury. . . ." G.S. 1-184 provides for waiver of trial by jury. G.S. 1-174 reads in relevant part: "All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term. . . ." G.S. 1-273 reads as follows: "If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court." "If issues of fact are raised in special proceedings before the clerk, the cause is transferred to the civil issue docket, to be tried as in an ordinary civil action." 2 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1432, p. 4.

The sole assignment of error here is to the signing of the judgment, and appellate review is limited to the question of whether error of law appears on the face of the record proper. 1 Strong's N. C. Index, Appeal and Error, § 21, and supplement to Vol. I, Appeal and Error, § 21. It is now our task to apply the rules of law above stated to the instant appeal.

These facts appear on the face of the record proper: The petition and answer here present a controversy "at law respecting property," and raise an issue of fact as to the ownership of the $1,283.95 in money deposited in the office of the clerk of the Superior Court of

Moore County. This is the appeal entry to the order of Bessie Beck, assistant clerk of the Superior Court of Moore County, signed by her: "To the foregoing order the petitioner appeals and same is transferred to Civil Issue Docket." There is nothing in the record before us to indicate that petitioner and respondent have waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury. North Carolina Constitution, Art. IV, sec. 13; G.S. 1-184. Here, there is no question of reference. Therefore, Judge McConnell had no authority to enter an order affirming the order of the assistant clerk of the Superior Court of Moore County, which in effect is a determination by Judge McConnell of the issue of fact raised by the pleadings and a finding by him that the $1,283.95 deposited in the office of the clerk of the Superior Court of Moore County were funds belonging to the late Mary Alice Wallace, and an order that said money be distributed to H. F. Seawell, Jr. as administrator c.t.a. of the last will and testament of Mary Alice Wallace. This error of law appears on the face of the record proper. In consequence, Judge McConnell's order is set aside. The ordinary procedure in such cases is to remand the proceeding for a new trial to the end that the determinative issue of fact raised by the pleadings here may be submitted to a jury for decision. *Sparks v. Sparks, supra.* However, this appears in the testimony of Nonnie E. Hadlock in the record. On her direct examination she testified: "I do not have the money; the Sheriff came and took it away from me that evening serving a search warrant, and this money is now on deposit with the Clerk of Superior Court of Moore County." On cross-examination she testified: "Claim and delivery papers were served on me, but I didn't give any bond for it, and the money was turned over to the Sheriff who took it from my house." There is nothing in the record to indicate who caused the search warrant or the claim and delivery writ to be issued. Claim and delivery "is only a writ or order issued in a pending civil action for the recovery of specific personal property." 2 McIntosh, N. C. Practice and Procedure, 2d Ed., § 2151. If Nonnie E. Hadlock was correct in stating the money was taken from her by virtue of a claim and delivery writ, it is manifest she was not plaintiff in the said action in which the claim and delivery writ was issued. We cannot determine from the confused state of the record before us as to whether there is another and prior action pending between the same parties for the same cause. If Nonnie E. Hadlock was not correct in stating the money was taken from her by virtue of a claim and delivery writ, but was correct in saying "the Sheriff came and took it away from me that evening serving a search warrant," there is nothing in the record to indicate who caused the search warrant to be issued or

under what circumstances it was issued or in what proceeding. Therefore, in the confused state of the record, we content ourselves with setting aside Judge McConnell's order.

Order set aside.

MOORE, J., not sitting.

J. ARTHUR JOHNSON, M. CARL JOHNSON, LELIA J. SIMMONS, LOTTIE J. PIERCE, EVELYN J. STAKES, REBA B. HUFFMAN, CONNIE B. WORD, PRESTON J. BLACKWELDER, JR., EARL THORNTON BLACKWELDER, JR., MAMIE B. WALLACE, RUBY B. CROWE, SALLIE B. COOKE, MAGGIE B. SMITH, VIRGINIA B. BUCK, JUNE COKER, EDWARD METHVIN BLACKWELDER, WILLIE B. HALL, DAVID EUGENE BLACKWELDER, BUFORD MARTIN BLACKWELDER, MYRTLE E. MORGAN, MAMIE E. AGNER, ADA FRANCES EFIRD BROWN, ZULA B. SHELTON, DARA W. SANDERS, VIVIAN WALTER, RUTH W. HORTON, PAULINE W. TOWNSEND, BLANCH W. WEBBER, VERNON C. BLACKWELDER, LOMA B. GARVER, RAYMOND A. BLACKWELDER, EMMA B. PLANT, R. D. BLACKWELDER, KATHRINE B. WEBB, MILDRED B. BRINKLEY, AND MYRTLE B. RITCHIE, v. LELA J. BLACKWELDER, ADMINISTRATRIX OF J. M. BLACKWELDER, DECEASED, AND LELA J. BLACKWELDER, INDIVIDUALLY.

(Filed 4 May, 1966.)

1. Descent and Distribution § 1—

Under the provisions of G.S. 29-14 the widow is entitled to the net estate if the intestate is not survived by a child, children, or lineal descendant of a deceased child or children, or by a parent.

2. Same; Constitutional Law § 23—

An estate must be distributed in accordance with the law in effect at the time of the death of intestate, and a person is charged with knowledge that the statutes of distribution are subject to change by the General Assembly.

3. Descent and Distribution § 1—

The fact that a decedent became mentally incompetent to make a will prior to the effective date of the Intestate Succession Act and died after its effective date, does not affect the rule that his estate must be distributed in accordance with the laws in effect at the time of his death, and the contention that he was satisfied with the law of distribution at the time he became mentally incompetent but that he would not have been satisfied after the change in the law and would have made a will had he then been competent to do so, relates to matters wholly within the realm of speculation and is untenable.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Gambill, J.*, September 1965 Session of ROWAN.

The hearing below was on demurrer to complaint for failure to state facts sufficient to constitute a cause of action.

Plaintiffs' allegations, summarized, are as follows:

James Michael Blackwelder (Intestate) died June 18, 1962, intestate, leaving an estate consisting of real and personal property of a value in excess of $150,000.00. He was survived by his widow, Lela J. Blackwelder, who qualified as administratrix of her husband's estate. She is defendant herein as administratrix and individually. Intestate was also survived by collateral relatives, plaintiffs herein. They are lineal descendants of Intestate's brothers and sisters.

Prior to June 10, 1959, Intestate became mentally incompetent to make a will or to in any way alter or change the disposition of his property, which condition existed and continued without change or interruption until his death.

Plaintiffs assert they are the owners of and entitled to one-half of the residual personal estate of Intestate, after payment of the reasonable cost of administration and $10,000.00 to the widow, and that they are the owners of all of the real estate of Intestate, subject to the dower interest of the widow. Plaintiffs pray that judgment be entered directing the administratrix to distribute the personal estate of Intestate "in accordance with the provisions of the intestate succession laws of the State of North Carolina as said laws existed on the 9th day of June 1959," and that the court enter appropriate orders to safeguard and protect plaintiffs' asserted rights.

The court, being of opinion that "the defendant, Lela J. Blackwelder, is entitled to his entire net estate as his surviving widow inasmuch as there were no lineal descendants of the said J. M. Blackwelder," sustained the demurrer and dismissed the action. Plaintiffs excepted and appealed.

Hartsell, Hartsell & Mills and K. Michael Koontz for plaintiff appellants.

Alexander & Brown and Williams, Willeford & Boger for defendant appellees.

BOBBITT, J. Section 15 of Chapter 879, Session Laws of 1959, known as the Intestate Succession Act, now codified as G.S. Chapter 29, provides: "This Act shall become effective July 1, 1960, and shall be applicable only to estates of persons dying on or after July 1, 1960."

Intestate died June 18, 1962.

G.S. 29-13 provides: "All the estate of a person dying intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of State inheritance taxes, as provided in this chapter."

G.S. 29-14, in pertinent part, provides: "The share of the surviving spouse shall be as follows: . . . (4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent, all the net estate." See *Tolson v. Young,* 260 N.C. 506, 509, 133 S.E. 2d 135. There being no lineal descendents, under G.S. 29-14 the surviving widow was entitled to "all the net estate" of Intestate.

It is well settled that "an estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor." 23 Am. Jur. 2d, Descent and Distribution § 21, citing, *inter alia, Wilson v. Anderson,* 232 N.C. 212, 59 S.E. 2d 836, 18 A.L.R. 2d 951, and *s. c.* on rehearing, 232 N.C. 521, 61 S.E. 2d 447, 18 A.L.R. 2d 959.

Intestate had no vested right in the statutes of descent and distribution in effect prior to the ratification on June 10, 1959, of the Intestate Succession Act. He was charged with knowledge that these statutes were subject to change by the General Assembly. "The power of the Legislature to determine who shall take the property of a person dying subsequent to the effective date of a legislative act cannot be doubted." *Bennett v. Cain,* 248 N.C. 428, 431, 103 S.E. 2d 510, and cases cited.

Plaintiffs base their contention on the allegation that Intestate became mentally incapable of making a will prior to ratification of the 1959 Act and that such mental incapacity continued until his death.

Plaintiffs' contention assumes: Before he became mentally incapable of making a will, Intestate had knowledge of and was pleased with the statutes of descent and distribution; and, if he had made a will, he would have disposed of his estate as provided by the statutes then in effect. He would have been displeased with the provisions of the 1959 Act; and, but for his mental incapacity, would have made a will disposing of his estate as provided by the statutes in effect prior to ratification of the 1959 Act.

The successive assumptions underlying plaintiffs' contention are unwarranted. They relate to matters that lie wholly within the realm of speculation.

The determinative fact is that Intestate made no will. Hence, his estate "shall descend and be distributed" in accordance with the statutes in effect on June 18, 1962, the date of his death, namely,

G.S. Chapter 29. The court properly sustained the demurrer; and, it appearing affirmatively that plaintiffs have no cause of action as alleged heirs and distributees of Intestate, properly dismissed the action. Hence, the judgment of the court below is in all respects affirmed.

Affirmed.

MOORE, J., not sitting.

FRANK HUNTER McCLURE, PETITIONER, v. STATE OF NORTH CAROLINA.

(Filed 4 May, 1966.)

1. Rape §§ 12, 17—

Former virginity of a female child is an essential element of the offense of carnal knowledge of a female virgin between 12 and 16 years of age and her consent is not a defense, G.S. 14-26, while in a prosecution for assault with intent to commit rape, the virginity of the female over 12 years of age is not an element of the offense, and the intent of defendant to gratify his passion on the person of the female at all events, notwithstanding any resistance on her part, is an essential element of that offense; the offenses are separate and distinct and the one is not a less degree of the other.

2. Indictment and Warrant § 7; Constitutional Law § 28—

There can be no adjudication of guilt of a felony unless the defendant is put to trial upon an indictment duly found by a grand jury. Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Federal Constitution, § 1.

3. Same; Criminal Law § 23—

In a prosecution under an indictment charging defendant with carnal knowledge of a female virgin between 12 and 16 years of age, G.S. 14-26, the court may not accept a plea of guilty of assault on a female with intent to commit rape, G.S. 14-22, since there is no indictment to support the sentence upon the plea of guilty.

4. Criminal Law § 173—

Where it appears upon a post conviction hearing that defendant was sentenced upon his plea of guilty to an offense not included in the charge, so that the sentence entered upon the plea of guilty is not supported by the indictment, the order of the lower court denying petitioner any relief under the Post Conviction Hearing Act must be vacated as a nullity.

MOORE, J., not sitting.

CERTIORARI to review a final order denying petitioner any relief, entered by *Campbell, J.*, in a post conviction hearing held pursuant

to the provisions of G.S. 15-217 *et seq.* at the October 1965 Criminal Session of HENDERSON.

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

William H. Stepp, Jr., for petitioner.

PARKER, C.J. On 31 December 1964 petitioner filed with the Superior Court of Henderson County a petition pursuant to the provisions of G.S. 15-217 *et seq.*, seeking a review of the constitutionality of his trial at the October 1960 Criminal Session of Henderson County, Froneberger, J., presiding. On 27 February 1965 Clarkson, J., pursuant to G.S. 15-219, appointed Kenneth Youngblood, a member of the Henderson County Bar, to represent petitioner, an indigent, at the post conviction hearing. The material facts alleged in the petition, admitted in the answer thereto of the Attorney General, shown by the evidence, and found by Judge Campbell in his order are not in dispute, and are as follows:

At the October 1960 Criminal Session of Henderson, petitioner was called for trial on an indictment charging him in June 1960 with unlawfully, wilfully and feloniously carnally knowing Evelyn B. Hyder, a female child, over twelve and under sixteen years of age, who had never before had sexual intercourse with any person, he, the said Hunter McClure, a male person, being at the time over eighteen years of age, a violation of G.S. 14-26. McClure was represented by Paul K. Barnwell, a lawyer employed for him by his father and mother. Petitioner entered a plea of guilty to an assault with intent to commit rape, a violation of G.S. 14-22, and was sentenced to imprisonment for a term of not less than twelve nor more than fifteen years. There was, so far as the record before us discloses, no formal and sufficient accusation in the Superior Court of Henderson County at the October 1960 Criminal Session charging petitioner with the offense of an assault with intent to commit rape. Petitioner is still in prison serving this sentence.

In the hearing before Judge Campbell, petitioner testified, *inter alia*, in substance: In June 1960 he was 35 years old. Evelyn B. Hyder was his sister's child, was "right at 14" years, and was willing for him to have sexual intercourse with her. His lawyer Barnwell told him "we'll enter a plea of guilty to assault." He thought he was pleading guilty to an assault; no one told him he was pleading guilty to an assault on a female with intent to commit rape.

Judge Campbell in his order found the following facts:

"8. That at the time of the trial, the defendant was not under the influence of any narcotics, drugs, alcohol and had

not been threatened, placed under duress or promised anything by any court official, law enforcement officer, solicitor or Judge, and that the defendant freely and voluntarily and at a time when he knew or should have known what he was doing in open Court as disclosed by the Minutes of said Court. 'The defendant, through his Attorney, Paul Barnwell enters a plea of guilty of assault with intent to commit rape.' That said plea was entered freely and voluntarily and that the Court in open Court entered Judgment: 'Let the defendant be confined in the State's Prison at Raleigh for not less than 12 nor more than 15 years.'

* * *

"11. That the defendant with his long and varied experience in the trial of criminal cases and as the accused in criminal cases and as a felon knew what he was doing when he entered the plea of guilty and he did so at a time when he had full opportunity to confer with his mother and other members of his family and with his privately employed attorney."

Based upon such findings Judge Campbell ordered and adjudged "that none of the defendant's constitutional rights were in any way violated and that he received a fair trial in accordance with due process of law and the sentence rendered conforms with the law and was rendered by a Court of competent jurisdiction and that the defendant is now properly in the custody of the prison authorities of the State of North Carolina.

After Judge Campbell had entered his final order, he entered an order discharging Kenneth Youngblood as attorney for petitioner, for the reason that Kenneth Youngblood asked to be released as petitioner's attorney because of petitioner's attitude.

On 20 October 1965 Judge Campbell entered an order appointing William H. Stepp, Jr., as counsel for petitioner to apply for a writ of *certiorari* to this Court to review Judge Campbell's final order.

On 15 February 1966 we allowed McClure's petition for a writ of *certiorari.*

The felony set forth in G.S. 14-26 (carnal knowledge of female virgins between twelve and sixteen years of age) is a distinct and separate felony from the felony set forth in G.S. 14-22 (assault with intent to commit rape). The essential elements of G.S. 14-22 and G.S. 14-26 are not identical. In G.S. 14-26 former virginity of the female child is an essential element of the charge, and her consent is not a defense. *S. v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424. Punishment for a violation of G.S. 14-26 shall be a fine or imprisonment

in the discretion of the court, and imprisonment cannot exceed ten years. *S. v. Grice,* 265 N.C. 587, 144 S.E. 2d 659; *S. v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880 (1963). The *Blackmon* case overruled *S. v. Swindell,* 189 N.C. 151, 126 S.E. 417 (1925), which upheld a sentence of imprisonment for thirty years based upon defendant's conviction for violating C.S. 4209, now G.S. 14-26. Punishment for a violation of G.S. 14-22 shall be imprisonment in the State's prison for not less than one nor more than fifteen years. In a prosecution for a violation of G.S. 14-22 if the female victim is over 12 years of age (see G.S. 14-21), her virginity is not an essential element of the offense, and in order to convict the State must show by evidence beyond a reasonable doubt "not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part." *S. v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191, 52 A.L.R. 2d 1181; 1 Wharton's Criminal Law, Anderson Ed. (1957), § 302, pp. 629-31. Consent by the female victim obtained by the use of force or fear due to threats of force is void and no consent. Wharton, *ibid,* § 311; *S. v. Carter,* 265 N.C. 626, 144 S.E. 2d 826. The felony set forth in G.S. 14-22 is not a less degree of the felony set forth in G.S. 14-26.

G.S. 15-137 reads in relevant part: "No person shall be . . . put on trial before any court, but on indictment found by the grand jury, unless otherwise provided by law."

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." 42 C.J.S., Indictments and Informations, § 1; *S. v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381; *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

When the court at the October 1960 Criminal Session of Henderson County Superior Court sentenced petitioner to imprisonment for a term of not less than twelve nor more than fifteen years upon his plea of guilty to an assault with intent to commit rape when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, it would seem to be without precedent, and the sentence of imprisonment was a nullity, and violates petitioner's rights as guaranteed by Art. I, sec. 17, of the North Carolina Constitution, and by section 1 of the 14th Amendment to the United States Constitution. See *S. v. Jordan,* 226 N.C. 155, 37 S.E. 2d 111.

The Attorney General in the State's brief candidly states that

petitioner "in this case is entitled to relief as this Court may order."

Judge Campbell's conclusion of law to the effect that none of petitioner's constitutional rights were in any way violated, and that he received a fair trial in accordance with due process of law and the sentence rendered conforms with the law, and that defendant is now properly in the custody of the prison authorities of the State of North Carolina is erroneous. Final order of Judge Campbell is reversed, and sentence of imprisonment of petitioner imposed at the October 1960 Criminal Session of Henderson County Superior Court is vacated as a nullity.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. MYRTLE COLEMAN GODWIN.

(Filed 4 May, 1966.)

1. Telephone Companies § 5; Criminal Law § 33—

In a prosecution for making indecent telephone calls to a female, testimony that defendant frequently followed the car of the prosecuting witness and would cut in front of her so close as to constitute harassment is competent for the purpose of showing intent and attitude of defendant toward the prosecuting witness.

2. Criminal Law § 67—

Tape recordings of telephone conversations between defendant and the prosecuting witness made by a tape recorder attached to the telephone by a police officer at the instance of the prosecuting witness are competent in evidence when the prosecuting witness identifies the voices and states that the tapes were a fair and accurate representation of the conversations, and admission of such testimony does not violate the wiretapping statute. G.S. 14-155, G.S. 14-372, G.S. 15-27.

3. Criminal Law § 107—

The words "annoy," "molest," and "harass" have a well understood meaning to the average person and it is not required that the court define the words in the absence of a special request.

MOORE, J., not sitting.

APPEAL by defendant from *Bailey, J.*, December 1965 Regular Session, WAKE Superior Court.

Defendant was tried in the City Court of Raleigh under a warrant charging that she "did unlawfully and wilfully repeatedly

telephone (on or about 17 November 1965) a female person, to wit, Mrs. Louise Combs Wall, for the purpose of annoying, molesting and harassing said female person, in violation of the N. C. General Statute, Chapter 14, Section 196.1, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." Upon conviction she appealed to the Superior Court, where she was again found guilty.

The State's evidence tends to show that the defendant and Mrs. Wall had known each other for several years, and following the death of the defendant's husband in 1962 she began telephoning Mrs. Wall frequently, and so much so that Mrs. Wall conferred with the Raleigh Police Department about the phone calls and began to keep a log of them in April, 1964. They continued with regularity until November 16, 1965, at which time the defendant called her twelve times and on November 17 called her eight times. A tape recorder was attached to Mrs. Wall's phone and the defendant's conversation recorded on it. It is not necessary to repeat the nature of the conversations but they were of a type that evinced unnatural tendencies on the part of the defendant and were revolting and disconcerting to Mrs. Wall. The record shows that they were of a type and quantity to annoy, disturb and irritate any normal person.

The defendant entered a general denial of Mrs. Wall's testimony and insisted that she had not called her as many times as Mrs. Wall had testified.

The defendant was found guilty as charged and upon a sentence to Women's Prison with recommendation for psychiatric treatment, she appealed, assigning error.

Carl C. Churchill, Jr., attorney for the defendant.

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

PLESS, J. Over a period of three years Mrs. Wall received disconcerting and frequent telephone calls from the defendant and had taken action to stop them, or decrease their number, without result. To show the attitude of the defendant towards her, the court permitted Mrs. Wall to testify that the defendant had attempted to block her car in the parking lot of the supermarket, that she had frequently followed her to such places as the hospital, school, etc. and would cut her car in front of Mrs. Wall's "at least once a week, sometimes more than that, and many times was very very close. It is just a miracle that I didn't hit her car or didn't have a wreck and most of the times I had my children with me." The defendant as-

signs this evidence as error but it was competent for the purpose of showing the intent of the defendant and her attitude toward the prosecuting witness. *S. v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. Her conduct in blocking Mrs. Wall's car and cutting in front of it showed the defendant's intent to harass, annoy and molest her and is competent as interpreting the reasons for her frequent telephone calls which were alleged to be for the same purpose.

The defendant further complains that the Court permitted the State to introduce tape recordings allegedly containing telephone conversations by the defendant with Mrs. Wall but the State has laid the requisite foundation for their admissibility. Mrs. Wall identified them as being the voice of the defendant, and stated that they were a fair and accurate representation of the conversations she had with the defendant. The exceptions are overruled. *S. v. Walker,* 251 N.C. 465, 112 S.E. 2d 61; *Olmstead v. U. S.,* 277 U.S. 438, 72 L. Ed. 944. The defendant claims that these recordings are incompetent because they violate the North Carolina Wiretapping Statute G.S. 14-155 and also G.S. 14-372 and G.S. 15-27. However, these statutes were not enacted to prevent introduction of evidence obtained in a case similar to this and are not relevant here.

Another exception is that the court did not define the words "annoy, molest and harass," and also complains of another portion of the charge, including some of its contents and its alleged failure to comply with G.S. 1-180. It is not to be assumed that the jurors were ignorant and the words, "annoy, molest and harass," are in such general usage and so well understood by the average person that it would have been a waste of time to define them. Had the defendant thought their definition of sufficient importance to request it, it is quite likely that the court would have defined them but the failure to make such request waives any possible error. *S. v. Caudle,* 208 N.C. 249, 180 S.E. 91; *S. v. Holland,* 216 N.C. 610, 6 S.E. 2d 217.

All of the remaining exceptions have been fully considered and found to be without merit.

No error.

MOORE, J., not sitting.

HUBERT THYRONE BREWER v. OLDEN DONNELL GARNER AND MAGDALENE HUGHES GARNER.

(Filed 4 May, 1966.)

1. Appeal and Error § 60—

Decision to the effect that the evidence is sufficient to be submitted to the jury on an issue is the law of the case unless the evidence at the second trial is materially different from that introduced at the former.

2. Automobiles § 42f—

Plaintiff's evidence to the effect that he was traveling at a lawful speed on his side of the highway, that he saw defendant's car approaching about 18 inches to its left of the center line, that plaintiff at no time crossed the center line, and that the collision occurred in plaintiff's proper lane of travel, *held* not to disclose contributory negligence as a matter of law on the part of plaintiff.

MOORE, J., not sitting.

APPEAL by plaintiff from a judgment of involuntary nonsuit entered by *Gambill, J.*, at the October, 1965 Civil Session, RANDOLPH Superior Court.

At the first trial at the October, 1964, Civil Session of the court, the jury found the defendants were guilty of negligence and that the plaintiff was guilty of contributory negligence. On appeal, this Court ordered a new trial for errors in the admission and exclusion of evidence. The decision is reported in 264 N.C. 383, where the pleadings and the evidence at the first trial are reviewed.

At the second trial both parties introduced evidence. At its conclusion the court sustained the demurrer to the evidence and dismissed the action against Magdalene Hughes Garner. The court's order discloses the disposition of the case against the other defendant:

"THIS CAUSE COMING ON FOR TRIAL at the October 25, 1965, Civil Session of Superior Court of Randolph County before the undersigned Judge Presiding and a jury duly sworn and empaneled, and at the conclusion of the plaintiff's evidence, the defendant Olden Donnell Garner moved for the entry of judgment of nonsuit, which demurrer and motion were overruled and denied, and the defendant Olden Donnell Garner having offered his evidence and rested and having again demurred to the evidence and moved for judgment of nonsuit, which demurrer and motion were again overruled and denied, and the plaintiff having offered rebuttal testimony and rested and the defendant Olden Donnell Garner having again demurred to the evidence and moved for judgment of nonsuit which demur-

rer to the evidence and motion for judgment of nonsuit was again overruled and denied, and after arguments of counsel for the parties and the charge of the Court but before the jury had arrived at a verdict, the Court concluded that the demurrer to the evidence and motion for judgment of nonsuit of the defendant Olden Donnell Garner should be sustained and allowed: Plaintiff excepts."

The court ordered the action dismissed.
The plaintiff excepted and appealed.

Ottway Burton for plaintiff appellant.
Jordan, Wright, Henson & Nichols by G. Marlin Evans for defendant appellees.

HIGGINS, J. The sufficiency of the evidence to go to the jury on the issues of negligence and contributory negligence was not seriously challenged at the first trial. The case went back because of errors in the admission and exclusion of evidence. Not directly, but by implication the decision recognized the right of the plaintiff to have the jury pass on the issues involved. Of course, where the evidence is materially different at a second trial, the former ruling does not control, and does not become the law of the case. *George v. R. R.*, 217 N.C. 684, 9 S.E. 2d 373.

At the trial now under review, the plaintiff testified: "As I approached the Garner automobile I was going east at approximately forty to forty-five miles per hour and I was on my side of the road. The Garner car was coming from west. It was about eighteen inches across the line. The line I am talking about is the white center line. The collision occurred in my proper right-hand lane. I at no time got across the center line." The plaintiff does not swear himself out of court. *Rouse v. Peterson*, 261 N.C. 600, 135 S.E. 2d 549; *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360.

The defendant, with respect to the collision, testified "I don't know anything about it. I don't even know whether I was in the collision or not. I do know the day before the headlights were bad on the car. We ran around all Friday evening with them bad and didn't fix them. We ran all Friday evening with them needing to be fixed."

The plaintiff's evidence required the jury to pass on the issues as to Olden Donnell Garner. Judge Gambill so ruled at the close of the plaintiff's evidence; and again at the close of all the evidence. However, after the jury had deliberated an appreciable length of time without arriving at a verdict, Judge Gambill changed his mind, re-

called the jury, and entered the judgment of involuntary nonsuit. We are forced to conclude the evidence raised issues of fact which must be passed on by the jury. The court cannot decide them as matters of law. We regret to send this case back for another trial but find it necessary to do so as to Olden Donnell Garner for the reasons assigned. The nonsuit is affirmed as to Magdalene Hughes Garner.

As to Olden Donnell Garner — New trial.

MOORE, J., not sitting.

DORIS W. KING, ADMINISTRATRIX OF THE ESTATE OF ROBERT ODELL KING, DECEASED, v. LOUIE E. BONARDI, JR., AND JOHN THOMAS BONARDI.

(Filed 4 May, 1966.)

1. Trial § 21—

On motion for compulsory nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact reasonably deducible from the evidence, and defendant's evidence which tends to establish a different state of facts or impeach or contradict plaintiff's evidence is not to be considered.

2. Same—

Discrepancies in plaintiff's evidence do not warrant nonsuit.

3. Automobiles § 49—

Defendants' evidence that shortly before the accident in suit plaintiff's intestate who was a passenger in plaintiff's car, was intoxicated is not to be considered on the question of intestate's contributory negligence, since defendants' evidence in this respect tends to show another and different state of facts from that of plaintiff.

4. Automobiles § 41p—

The identity of the driver of a vehicle at the time of the accident may be established by circumstantial evidence, either alone or in combination with direct evidence.

5. Same—

Evidence tending to show that defendant drove up to a filling station and removed the keys from the ignition, intestate remaining in the vehicle, that defendant returned to the car and got in on the driver's side and drove off in a big hurry, and that the accident in suit occurred a few minutes thereafter, is sufficient to support an inference that defendant was operating the vehicle at the time of the accident.

6. Automobiles § 41a—

Negligence is not presumed from the mere fact of an accident, and evidence that the vehicle being driven by defendant left the road on a straight stretch of highway is alone insufficient to raise an inference of negligence, but is sufficient for that purpose in combination with evidence tending to show that the vehicle was being driven in a careless and reckless manner and at unlawful and excessive speed at the time.

7. Same— Evidence that vehicle ran off road because of excessive speed and reckless driving takes issue of negligence to jury.

Evidence that defendant driver ran off the highway on a straight stretch of road, with evidence of physical facts that the highway was wet with rain at the time, that after leaving the highway the vehicle traveled 294 feet across the yards of two residences, turned over several times, uprooted several pine trees about two inches in diameter before it came to rest, *is held* sufficient to permit an inference that the vehicle was being operated in a careless and reckless manner and at a dangerous and unlawful rate of speed under the circumstances, and that such acts of negligence were the proximate cause of the accident.

8. Negligence § 21—

The burden of proof on the issue of contributory negligence is upon defendant.

9. Automobiles § 46.1—

The refusal of the court to submit a separate issue as to whether defendant was the operator of the vehicle at the time of the accident will not be held for error when the court instructs the jury to the effect that in order to answer the issue of negligence in the affirmative they must find by the greater weight of the evidence that defendant was driving the vehicle at the time of the accident, the burden of proof being upon plaintiff.

MOORE, J., not sitting.

APPEAL by defendant John Thomas Bonardi from *Froneberger, J.*, December 1965 Special Civil Session of LEE.

Civil action to recover damages for the wrongful death of plaintiff's intestate.

The complaint alleges in substance: About 10 p.m. on 2 November 1962 his intestate was riding as a guest passenger on the right hand side of the front seat of an automobile owned by Louie E. Bonardi, Jr., and driven by John Thomas Bonardi, with the owner's consent, on U. S. Highway #421, which has a paved portion 20 feet wide. John Thomas Bonardi was negligent in the operation of the automobile in that (1) he operated it carelessly and heedlessly in willful and wanton disregard of the rights and safety of others, and without due caution and circumspection, and at a speed of more than 70 miles per hour, and in a manner so as to endanger persons and property; (2) he failed and neglected to keep the automobile

under proper and reasonable control; (3) he operated the automobile at a speed greater than was reasonable under the conditions then existing when the road was wet and slick; and (4) he drove the automobile from the main traveled portion of the highway at a high, dangerous and unlawful speed, which caused said automobile to overturn six times, thereby wrecking the automobile and killing his intestate. Such negligence of John Thomas Bonardi was the sole and proximate cause of the wrecking of the automobile and the death of plaintiff's intestate.

Defendants filed a joint answer denying that John Thomas Bonardi was driving the automobile at the time alleged, and denying any negligence on their part. As a further answer and defense, they allege in substance that if they were negligent in any respect in the operation of the automobile, then and in that event plaintiff's intestate was also negligent in voluntarily continuing to ride in defendants' automobile when he knew that the driver of defendants' automobile was under the influence of intoxicating liquor and that the automobile was being operated at a fast, dangerous and unlawful speed, and that such negligence on the part of plaintiff's intestate was a proximate cause of his own death, and is a bar to any recovery in this action.

Plaintiff and defendants offered evidence in support of the allegations in their pleadings. At the close of all the evidence the court allowed the motion of defendant Louie E. Bonardi, Jr., for a judgment of compulsory nonsuit, and denied a similar motion made by John Thomas Bonardi.

The following issues were submitted to the jury and answered as indicated:

"1. Was the plaintiff's intestate Robert Odell King killed as a result of the negligence of the defendant John Thomas Bonardi, as alleged in the complaint?

"Answer: Yes.

"2. If so, did the plaintiff's intestate Robert Odell King, by his own negligence, contribute to his own death, as alleged in the answer?

"Answer: No.

"3. What amount of damages, if any, is the plaintiff entitled to recover?

"Answer: $10,000.00."

From a judgment entered in accordance with the verdict, defendant John Thomas Bonardi appeals.

Smith, Leach, Anderson & Dorsett by C. K. Brown, Jr., for defendant appellant John Thomas Bonardi.

Pittman, Staton & Betts by W. W. Staton for plaintiff appellee.

PER CURIAM. Defendant John Thomas Bonardi assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

On a motion for judgment of compulsory nonsuit, plaintiff's evidence is to be taken as true, and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. Plaintiff's evidence must be considered in the light of his allegations to the extent the evidence is supported by the allegations. Defendant's evidence which tends to impeach or contradict plaintiff's evidence is not to be considered. Discrepancies and contradictions in plaintiff's evidence do not justify a nonsuit, because they are for the jury to resolve. 4 Strong's N. C. Index, Trial, § 21; Supplement to Vol. 4, *ibid,* § 21.

Considering plaintiff's evidence according to the rule, it tends to show the following facts: Between 9 and 10 p.m. on 2 November 1962 defendant John Thomas Bonardi drove a station wagon owned by his brother, Louie E. Bonardi, Jr., to the Jonesboro Drive-In Grill in Jonesboro, and parked it close to the gas pump, headed out towards Main Street, which street is U. S. Highway #421. This grill is located on U. S. Highway #421, and is west of the scene where the wrecked station wagon was found. Plaintiff's intestate was a passenger in the station wagon. It was drizzling rain. John Thomas Bonardi got out of the station wagon, and went into the rest room in the grill. Plaintiff's intestate stayed in the station wagon. Bonardi stayed inside the grill two or three minutes, went to the station wagon in a "pretty big hurry," got in the station wagon on the driver's side, and left in a big hurry. When he left, plaintiff's intestate was on his right as a passenger. When he drove out of the driveway of the grill, his tires were squealing. When the station wagon crossed the railroad tracks about 45 or 50 feet from the grill, it was going 50 or 55 miles an hour, and the back of the car jumped down and up. About two or three blocks from the railroad tracks is a Sinclair station; when the station wagon passed this Sinclair station, it was still picking up speed, and was headed towards Shallow Well Church. A little bit later an ambulance turned down Main Street going in the direction of Shallow Well Church.

Bobby William Baker, a witness for plaintiff, on the night in question was working at the Jonesboro Drive-In Grill, and testified to the effect that he saw John Thomas Bonardi drive the station

wagon up to the grill, and drive it away. On cross-examination he testified:

> "When they stopped Johnny Bonardi turned the ignition off and got out. He went around the back of the car and went in the front door of the grill. I was standing there all this time and I saw him. I had no conversation with him. As to whether I observed anything about it, I am not a doctor or anything like that. He might have been drinking. He acted something like it.
>
> "I observed the way he walked. He just walked like somebody is drunk. I did not have any conversation with him. I didn't speak to him at all. He walked by me. He did not speak to me. He walked on into the grill. After he got in the grill he might have straightened up some then. There is a booth on each side of the door in the grill. I didn't get in front of him close enough to smell any alcohol on his breath. I didn't see his facial appearance, his eyes or anything of that nature.
>
> * * *
>
> "I didn't observe anything about Bobby King. I did look at him. I didn't form any impression or have any opinion about his condition that night."

Jerry Baker, a witness for plaintiff, testified in effect that on the night in question he saw John Thomas Bonardi drive the station wagon away from the Jonesboro Drive-In Grill, and saw a passenger on the front seat with his head slumped down against the window. He testified:

> "I saw the car when it first started off. It started off pretty fast. The way it started off — I know when a man is sober and not sober — I was trying to tell in what manner he drove the car. I just said it was like a drunk would drive a car. It started off faster than any sober person would start off."

Traveling east on U. S. Highway #421, Mary C. Underwood lives on the right of the highway about 1.8 miles east of the Jonesboro Drive-In Grill. To the west of her home on the same side of the highway is Mrs. Wade Coley's home, which is about 60 feet from the paved portion of the highway. West of the Coley home on the same side of the highway is Shallow Well Church manse. The paved portion of the highway at this place is 20 feet wide. About 10 p.m. on the night in question Mary C. Underwood heard a noise like a roaring and then an explosion. She went outside. She saw the body of John Thomas Bonardi three or four feet from her bedroom window and about 40 or 50 feet east of where the car stopped. She saw

the body of Bobby King lying in the ditch to the right of the driveway. She called a patrolman and asked him to send an ambulance, and he said he would.

Bobby Price, a member of the State Highway Patrol, was a witness for plaintiff. When he arrived at the scene of the wreck about 10:15 or 10:20 p.m., the bodies of King and Bonardi had been removed. The wrecked station wagon had not been moved when he arrived. He gave testimony in substance as follows: The station wagon was torn all to pieces; the right rear door was torn off. It had dirt or mud on its top. It was up beside the Coley house. About two feet of it was on the east side of the Coley house. The station wagon was headed south. The station wagon was on its wheels. It had a flat tire. He testified in detail as to tire marks, as to the ground being very wet, and as to dug-out places where the tire tracks were. The dug-out places were "like a heavy object struck the ground." The testimony of the State patrolman would permit a jury to find that the station wagon left the highway on a straight stretch of road, which was wet with rain, west of Shallow Well Church manse, traveled 294 feet across the yards of two residences, turned over several times, uprooted several small pine trees as much as two inches in diameter in the yard of the Coley house, and came to rest up beside the east side of the Coley house headed south.

Counsel for plaintiff and defendants stipulated that the speed limit at the scene of the wreck was 55 miles an hour.

Defendants offered evidence tending to show that a short time before the wreck of the station wagon Bobby King and John Thomas Bonardi were intoxicated. This evidence tends to establish another and different state of facts from the evidence offered by plaintiff, or tends to contradict or impeach the evidence presented by plaintiff, and in ruling upon appellant's motion for judgment of compulsory nonsuit it is our duty to ignore it. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

Dr. James H. Byerly, who practices medicine in Sanford, saw plaintiff's intestate in the Lee County Hospital about 10:30 or 11 p.m. on the night in question. He was dead when he saw him. He examined him, and in his opinion the cause of his death was a fractured skull. On the same night Dr. M. C. Covington, who practices medicine in Sanford, saw John Thomas Bonardi lying on a stretcher and unconscious in the emergency room of the same hospital.

Appellant contends that his motion for judgment of compulsory nonsuit should be allowed for the reason that plaintiff has no evidence as to who was driving the station wagon at the time of the wreck, and no evidence as to the negligence of the driver, whoever he was, and further that if his motion for judgment of compulsory

nonsuit is not allowed on these grounds, then it should be allowed on the ground that plaintiff's evidence shows her intestate was guilty of contributory negligence as a matter of law in remaining in the station wagon when he knew John Thomas Bonardi was intoxicated. Appellant's contentions are untenable.

Circumstantial evidence, either alone or in combination with direct evidence, is sufficient to establish the crucial fact here as to who was driving the station wagon when it overturned. *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492, and cases cited. "Evidence of actionable negligence need not be direct and positive. Circumstantial evidence is sufficient, either alone or in combination with direct evidence." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411.

Negligence is not presumed from the mere fact that there has been an accident and injury. *Johns v. Day,* 257 N.C. 751, 127 S.E. 2d 543. What is said in *Yates v. Chappell,* 263 N.C. 461, 139 S.E. 2d 728, is relevant here:

> "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.]"

Considering plaintiff's evidence, as we are required to do on a motion for judgment of compulsory nonsuit as above stated, it is sufficient to carry the case to the jury that John Thomas Bonardi was the driver of the station wagon at the time it wrecked, and the physical facts at the scene of the wreck and the extent of damage are sufficient to support inferences of negligence that the station wagon at the time it wrecked was being operated by Bonardi in a careless and reckless manner, at a high, dangerous and unlawful rate of speed which was greater than was reasonable under the conditions then existing when the road was wet and slick, and that Bonardi did not keep the station wagon under proper and reasonable control, and that such negligence of John Thomas Bonardi in the operation of the station wagon was a proximate cause of the death of plaintiff's intestate. *Bridges v. Graham, supra; Thomas v. Morgan,* 262 N.C. 292, 136 S.E. 2d 700; *Randall v. Rogers,* 262 N.C. 544, 138 S.E. 2d 248; *Yates v. Chappell, supra; Drumwright v. Wood,* 266 N.C. 198, 146 S.E. 2d 1.

The burden of proof on the issue of contributory negligence is upon defendant appellant. Nonsuit on the ground of contributory negligence should be allowed only when plaintiff's own evidence, taken in the light most favorable to him, so clearly establishes this defense of contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. 3 Strong's N. C. Index, Negligence, § 26, p. 476. Nonsuit on the issue of contributory negligence should be denied when opposing inferences are permissible from plaintiff's evidence. *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743; *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33. In our opinion, and we so hold, plaintiff has not proved herself out of court so as to be nonsuited on the issue of contributory negligence. *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601. The court was correct in denying appellant's motion for judgment of compulsory nonsuit.

Appellant assigns as error the trial court's refusal to submit an issue tendered by appellant as follows: "Was the defendant, John Thomas Bonardi, the operator of the 1960 Plymouth station wagon at the time the injuries were inflicted on Robert Odell King on November 2, 1962, as alleged in the complaint?" The court in its charge on the first issue submitted to the jury instructed the jury to the effect that to answer the first issue yes, the burden of proof was on plaintiff to satisfy the jury that appellant was the driver of the station wagon at the time it wrecked. This assignment of error is overruled.

Appellant's assignments of error to the admission of evidence have been examined and all are overruled, because the admission of the challenged evidence is not sufficiently prejudicial, if prejudicial at all, to disturb the verdict and judgment below.

Appellant has many assignments of error to the charge. After considering these assignments of error and after reading the charge as a whole, prejudicial error is not shown. All assignments of error to the charge are overruled.

The jury, under application of settled principles of law, resolved the issues of fact against appellant. All appellant's assignments of error have been examined and all are overruled. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment will be upheld.

No error.

MOORE, J., not sitting.

J. H. CARSON AND WIFE, CHARLOTTE M. CARSON, v. IMPERIAL '400' NATIONAL, INC., ANDREW COLLINS, LILLIAN COLLINS AND MOTOR HOTEL PROPERTIES, INC. T/A CHARLOTTE IMPERIAL '400' MOTEL, A LIMITED PARTNERSHIP.

(Filed 4 May, 1966.)

1. Landlord and Tenant § 10—

Provisions in a lease authorizing lessor to terminate the lease and repossess the property upon the appointment of a receiver for lessee or an adjudication that lessee is a bankrupt are not contrary to public policy and are valid, and the right of lessor to repossess the property may not be defeated by the fact that lessee sublets the property to a solvent sublessee.

2. Contracts § 12—

The courts may not under the guise of construction rewrite contracts executed by litigants.

3. Landlord and Tenant § 8—

Where the lessee "assigns" the lease for only a part of the unexpired term, the transaction is not an assignment of the lease but a subletting, and the relationship of landlord and tenant continues to exist between the lessor and lessee.

MOORE, J., not sitting.

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

APPEAL by Imperial '400' National, Inc. (hereinafter Imperial) and Edward F. Walsh, Receiver for Imperial (hereinafter Receiver), from *Pless, J.*, September 6, 1965, Schedule A Session of MECKLENBURG.

This action was, as authorized by G.S. 42-26, begun before a justice of the peace to have defendants removed from Lot 1025 on South Tryon Street in Charlotte, leased by plaintiffs to Imperial on June 1, 1962, for a term of 54 years beginning September 1, 1962.

Process was served on Andrew Collins, a general partner in the limited partnership of Charlotte-Imperial '400' Motel. The magistrate rendered judgment for plaintiffs. The partnership appealed.

On August 25, 1965, an order was entered with the consent of plaintiffs and defendant partnership waiving trial by jury and setting the cause for trial during the week beginning September 12, 1965. On September 10, 1965, a stipulation signed by counsel for plaintiffs, by counsel for the partnership and defendants Collins and by counsel for receiver for Imperial was filed and made a part of the record. The stipulation recited "All defendants are properly before the Superior Court on appeal from judgment of summary ejectment

in this action on August 6, 1965, by His Hon. T. J. Fletcher, Justice of the Peace * * *."

The court, as authorized by the waiver of jury trial, made extensive findings of fact.

Cansler & Lockhart for plaintiff appellees.
Lane and Helms for Imperial '400' National, Inc., appellant.

PER CURIAM. The findings necessary for a decision are:

On June 1, 1962, plaintiffs and Imperial, after extensive negotiations, executed a written lease demising to Imperial for a term of 54 years beginning September 1, 1962, Lot No. 1025 on South Tryon Street in Charlotte. In drafting the lease, Imperial's standard form was used. Pertinent interlineations were made so as to modify the printed form to conform to the terms agreed upon by the parties. Imperial agreed that it would erect a two-story building on the lot to be used as a motel. Pertinent to a decision in this case are the provisions of Sections 7 and 12. They are as follows:

"7. Lessor acknowledges that Imperial will require financing applicable to the construction and equipping of the above mentioned motel and by reason thereof, Lessor agrees that Imperial shall have the right during the term of this lease to place real estate mortgages on all or any portion of the property as security for the loans or extensions of credit not to exceed in the aggregate (exclusive of interest and/or finance charges) a sum equal to forty-five hundred dollars ($4,500) per motel unit to be constructed * * *. Such mortgages shall provide for repayment within sixteen (16) years from March 1, 1963 * * *."

"12. Lessor reserves the right to terminate this Lease, and to re-enter and repossess the whole of the property without further notice or demand:

(1) Upon any general assignment for the benefit of the creditors of Imperial; *or if a receiver shall be appointed for Imperial;*

(2) Or upon the adjudication that Imperial is bankrupt; * * *." (The italicized portion of Section 12 was an amendment to the standard form.)

Imperial was given the right to assign its interest in the lease subject to the express limitation that Imperial should not "be relieved of its obligations hereunder except with the express written consent of Lessor" and with the further provision that the assignment could only be made "to a co-venture or co-partnership engaged in a business similar to Imperial."

On March 18, 1963, Imperial borrowed $184,500 and pursuant

to the provisions of Section 7 of the lease, plaintiffs secured the sums so borrowed by their mortgage on the demised property.

On November 21, 1963, Imperial, defendants Collins and Motor Hotel Properties, Inc. (hereinafter Properties) executed a limited partnership agreement. Imperial and defendants Collins were general partners. Properties was a limited partner. Imperial owned 50% of the partnership, defendants Collins 30%, and Properties 20%. The name given the partnership was Charlotte Imperial '400' Motel (hereinafter Motel).

By an undated "Assignment of Motel" acknowledged by Imperial and Properties on July 20, 1964, and by defendants Collins on July 24, 1964, Imperial assigned, transferred and set over unto Motel all of Imperial's "right, title and interest in and to the Motel located at premises 1025 South Tryon Street, Charlotte, North Carolina, including the Motel building, appurtenances thereto and furniture, fixtures and equipment located in, on or about said premises and assignor's right, title and interest for a period of 35 years commencing on the date hereof." Plaintiffs were not informed of the execution of the "Assignment of Motel." They learned of the transfer on or about June 14, 1965.

On June 3, 1965, Imperial and Properties filed a petition under Chapter XI of the Federal Bankruptcy Act in the United States District Court of New Jersey. Petitioners there alleged they could not pay their debts as they matured. They asked for the appointment of a receiver for their properties. On June 4, 1965, an order was entered in the District Court "Appointing Edward F. Walsh, Receiver for Imperial and vesting him with full power of administration as contemplated by Section 48-A2 of the Bankruptcy Act, rather than as a mere custodian."

Plaintiffs learned of the appointment of a receiver for Imperial on June 9, 1965. They promptly gave notice of the termination of the lease because of the breach of the provisions of Section 12.

While the record on appeal stated that Imperial and the receiver were regularly before the court and appealed from the judgment rendered by the Superior Court, there is nothing in the record other than the stipulation to establish that fact, and there is nothing in the record to show that the bankruptcy court had authorized the receiver to enter an appearance in this action. This fact was called to the attention of counsel for appellants on oral argument.

Subsequent to the oral argument counsel for Receiver filed a motion in this Court asking that Walsh as Receiver be made a party and that he be allowed to ratify and approve the notice of appeal given by his counsel.

Subsequently an amended motion was filed by Thomas J. O'Neill, Trustee of the Estate of Imperial '400' National, Inc., alleging that he is a necessary party to the action and as such desires to be made a party and to ratify the action of counsel purporting to represent Walsh as Receiver.

His petition is supported by: (1) An order of the United States District Court of New Jersey dated February 21, 1966, appointing Mr. O'Neill as Trustee of the properties of Imperial as provided by Chapter 10 of the Bankruptcy Act. The order of the District Court directed Walsh as Receiver to transfer and convey the properties of Imperial to O'Neill, as Trustee. (2) The order of the United States District Court of New Jersey specifically authorized O'Neill as Trustee to continue the employment of counsel to represent the interest of Imperial in this litigation. (3) A letter from O'Neill, as Trustee, to Lane & Helms expressing approval of the work theretofore done by them and authorizing them to continue to represent Imperial and its interest in this litigation.

The motion of O'Neill, Trustee, is allowed. The Clerk of this Court is directed to cause the motion and supporting documents to be mimeographed and made a part of the record in this cause.

Appellants have not excepted to any of the findings of fact made by the court. The only question for decision is: Do the findings support the judgment awarding possession of the demised premises to plaintiffs?

The provisions of Section 12 authorizing plaintiffs-lessors to terminate the lease and repossess the property upon the appointment of a receiver for Imperial or adjudication that it was a bankrupt are not void. They are not contrary to public policy nor prohibited by statute. To the contrary, similar provisions are frequently inserted in leases, particularly when of long duration. *Finn v. Meighan,* 325 U.S. 300, 89 L. Ed. 1624, 65 S. Ct. 1147; *415 Fifth Avenue Co., Inc. v. Finn,* 146 F. 2d 592; *In Re Clerc Chemical Corporation,* 142 F. 2d 672; *Floro Realty & Investment Co. v. Stemm Electric Corp.,* 128 F. 2d 338; *Urban Properties Corporation v. Benson, Inc.,* 116 F. 2d 321; *In Re Walker, et al,* 93 F. 2d 281; 51 C.J.S. 632; 32 Am. Jur., 735.

Appellants do not challenge the validity of the provision of Section 12 of the lease. Their position is that the parties to the lease intended that the provision should apply to Imperial only if it had the immediate right of possession when a receiver was appointed for it or it was adjudged a bankrupt. They say provisions for forfeiture are to be strictly construed, and a provision authorizing a lessor to cancel upon the appointment of a receiver for lessee should be con-

strued to mean cancellation only if a receiver is appointed for the person or entity presently rightfully in possession. *Flagg v. Andrew Williams Stores,* 273 P. 2d 294, typifies the line of cases on which appellants rely.

The answer to appellants' position is: There is no ambiguity in the language the parties used to express their agreement. By express language the right is given to terminate if *Imperial* should be adjudged a bankrupt. If the parties had intended to limit the right to terminate to the bankruptcy of the entity having the right to possession, it would have been easy to have used words limiting lessor's right. The provisions with respect to cancellation names Imperial. The court found that prior to the execution of the lease plaintiffs had made an extensive investigation as to the financial responsibility of Imperial and, based on its investigation, believed Imperial "was a financially sound and substantial enterprise." This finding is supported by the fact that lessors mortgaged their properties to permit Imperial to borrow nearly $200,000. Lessors permitted Imperial to assign the lease to a limited class of assignees, *viz,* co-ventures or a co-partnership engaged in a business similar to that of Imperial. Here the court found that the partnership was an alter ego of Imperial. This finding is not challenged by an exception. Courts cannot under the guise of construction rewrite contracts executed by the litigants. *Parks v. Oil Company,* 255 N.C. 498, 121 S.E. 2d 850; *Casualty Co. v. Teer,* 250 N.C. 547, 109 S.E. 2d 171.

The provisions of Section 13 relating to assignments do not include sublettings. There is nothing in the lease directed to sublettings. Imperial had the right to sublet. *Hargrave v. King,* 40 N.C. 430.

Here the partnership acquired the right to occupy the premises for only a portion of Imperial's term. It was a sub-tenant, not an assignee. The relationship of landlord and tenant between plaintiffs and Imperial continued to exist notwithstanding the transfer made by Imperial in July 1964. *Millinery Co. v. Little-Long Co.,* 197 N.C. 168, 148 S.E. 26. If the appellants' position is sound, we would have the strange situation of the leasehold estate being valid for the next 34 years, invalid for the remaining 17 years of the term because of a present violation of the lessor's right to terminate the lease. Certainly the parties never contemplated such a strange situation when they executed the lease. The facts found support the court's conclusion that Imperial's bankruptcy and the appointment of a receiver for its properties authorized lessor's act in declaring the lease terminated.

The judgment of the Superior Court is
Affirmed.

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

MOORE, J., not sitting.

IN THE MATTER OF THE WILL OF LUKIE DALE LYNN, DECEASED.

(Filed 4 May, 1966.)

1. Wills § 20—

Evidence in this case *held* insufficient to raise the issue of undue influence in the execution of the paper writing caveated, and the evidence failed to show that there was any fiduciary relationship between testatrix and the persons alleged to have exerted undue influence.

2. Evidence § 56—

The court's refusal to admit in evidence a document tending to corroborate a witness of the adverse party, and competent solely for the purpose of corroborating the testimony of the witness, cannot be prejudicial.

MOORE, J., not sitting.

APPEAL by caveators from *Hall, J.*, November 1965 Civil Session of WAKE.

Caveat proceedings.

Miss Lukie Dale Lynn died August 8, 1964, then 84 years of age, leaving an estate of a value in excess of $100,000.00. On September 2, 1964, Raymond A. Sorrell presented to the Clerk of the Superior Court of Wake County for probate three paper writings, (1) one dated November 28, 1956, purporting to be the last will and testament of Lukie Dale Lynn, in which Raymond A. Sorrell was appointed executor; (2) one dated March 6, 1957, purporting to be a codicil to her said will, providing for the appointment of John Warren Lynn, her nephew, as executor in the event Raymond A. Sorrell should become incapacitated and unable to serve; and (3) one dated July 29, 1957, purporting to be a codicil to her said will. Thereupon, the said three paper writings were probated in common form as the holographic will of Lukie Dale Lynn and as holographic codicils thereto and letters testamentary were issued to Raymond A. Sorrell.

In the paper writing dated November 28, 1956, Lukie Dale Lynn makes specific monetary bequests to named relatives and friends, monetary bequests "to the three missionaries supported by the Daily Devotional Program, Inc.," and disposes of the residue of her estate, much the greater part in value, in these words: "And I wish and desire that the residue of my Estate be equally devided *(sic)* between the two Missions as described below.

"American Board of Commissioners for Foreign Missions of the Congregational Christian Church 14 Beacon Street Boston Massachusetts, Said residue to be added to the permanent funds of the Board as a memorial to B. Frank Lynn, Lukie Dale Lynn and Amelia Myrtle Lynn and that the income from Said residue be used for the support of the Mission Work of the Board of Commissioners for Foreign Missions. The second half of residue to go to The Lords Treasury, Inc., of Star-N. C. Said residue to be added to the regular fund of said incorporation as a Memorial to B. Frank Lynn, Lukie Dale Lynn and Amelia Myrtle Lynn and that the income from said residue be used for the support of Foreign Mission Work of The Lords Treasury Inc.,

"It is understood that said residue is never to be used as personal profit in any manner."

On October 29, 1964, Thurla Lynn Johnson, a niece, and Thomas Clyde Rogers, a nephew, filed a caveat to said purported will, treating the three paper writings as constituting a single document. The caveators alleged: (a) That the signature of Lukie Dale Lynn to said document "was obtained by Mrs. Evelyn Clark Sorrell, wife of Raymond A. Sorrell, Executor; Dr. Stanley Harrell, former Pastor of the Congregational Christian Church of the City of Durham, North Carolina; and Mr. Ernest Hancock, Manager and Controller of the Lords Treasury, Inc., Star, North Carolina, through undue and improper influence and duress upon the said Lukie Dale Lynn"; and (b) that, at the time of the execution of said document, Lukie Dale Lynn "was by reason of old age, disease, and both mental and physical weakness and infirmity not capable of executing a last will and testament, which condition existed and continued to exist until" her death.

Answers, in which the essential allegations of the caveat were denied, were filed by Raymond A. Sorrell, Executor, by the Lord's Treasury, Inc., and by The United Church Board for World Ministries, also known as The American Board of Commissioners for Foreign Missions. In said answers, these beneficiaries joined in the prayer of said executor that said paper writings be adjudged the last will and testament of Lukie Dale Lynn.

Pendente lite, to wit, on May 28, 1965, Raymond A. Sorrell died. Thereafter, John Warren Lynn qualified as substitute executor, was served with process and filed answer in which he denied the essential allegations of the caveat and prayed that said writings be adjudged the last will and testament of Lukie Dale Lynn.

The caveators tendered, and the court refused to submit, the following issue: "Was the execution of said paper writings dated November 28, 1956; March 6, 1957, and July 27, 1957, procured by the exercise of undue influence over Lukie Dale Lynn, as alleged by the caveators?"

The issues submitted and the answers thereto are as follows:

"1. Were the paper writings propounded by propounders, and dated respectively the 28th day of November, 1956, the 6th day of March, 1957, and the 29th day of July, 1957, all executed by Miss Lukie Dale Lynn, according to the formalities of the law required to make a valid last will and testament? ANSWER: Yes.

"2. At the time of signing and executing each of these paper writings, did said Lukie Dale Lynn have sufficient mental capacity to make and execute a valid last will and testament? ANSWER: Yes.

"3. Are the paper writings propounded by propounders, and dated the 28th day of November, 1956, the 6th day of March, 1957, and the 29th day of July, 1957, and every part thereof, the Last Will and Testament of Lukie Dale Lynn, deceased? ANSWER: Yes."

Upon said verdict, it was ordered, adjudged and decreed "(t)hat the paper writings dated the 28th day of November, 1956; the 6th day of March, 1957, and the 29th day of July, 1957, propounded for probate, and every part thereof, are the last will and testament of Lukie Dale Lynn, deceased, and the same are hereby admitted to probate in solemn form."

The caveators excepted and appealed.

Brooks & Brooks for appellants.

Emanuel & Emanuel and Hofler, Mount & White for executor, appellee.

Everett, Everett & Everett and H. F. Seawell, Jr., for charitable beneficiaries, appellees.

PER CURIAM. The paper writing of primary significance is the purported will of November 28, 1956. The purported codicils do not affect appreciably its dispositive provisions.

Uncontroverted evidence tends to show the facts narrated below.

The principal asset of the estate consists of inherited land in the Research Triangle area. In recent years, Lukie Dale Lynn, and her sister, Amelia Myrtle Lynn, and her brother, Frank Lynn, lived in the six-room house on said land. Frank died in 1945 or 1946. Amelia died in January, 1955, and Lukie Dale Lynn qualified and served as executrix of Amelia's estate. Thereafter, until she suffered a stroke in July, 1962, Lukie Dale Lynn lived alone in said house, occupying only two rooms thereof, although during much of this period various neighbors and relatives would stay with her from time to time. After her stroke, she was in Watts Hospital or Hillcrest Rest Home until she died.

On November 28, 1956, Lukie Dale Lynn was 77. This was nearly six years before she suffered the stroke.

In May of 1963, based on Lukie Dale Lynn's then incompetency, John Warren Lynn (substitute executor of Lukie Dale Lynn's estate) qualified as her guardian and thereafter served in that capacity. On May 31, 1963, an inventory was made of the contents of Lukie Dale Lynn's safe deposit box at Wachovia Bank and Trust Company in Durham. When said inventory was made, said three paper writings, wholly in her handwriting and later probated as Lukie Dale Lynn's last will and testament, were in the box. After the inventory, said three paper writings were put back in the box and remained there until Lukie Dale Lynn's death.

There was no conflict in the evidence relating to the first issue.

As to the second (mental capacity) issue, the evidence was in sharp conflict. The jury, under proper instructions, answered this issue in favor of the propounders.

The first and second issues having been answered, "Yes," by the jury, the court, as stipulated, answered the third issue, "Yes."

Caveators assign as error the court's refusal to submit their tendered issue relating to alleged undue influence and the court's failure to instruct the jury as to undue influence. These assignments are without merit. Careful consideration fails to disclose any evidence that the signature of Lukie Dale Lynn to said paper writings was obtained "through undue and improper influence and duress upon the said Lukie Dale Lynn" by Mrs. Sorrell or by Dr. Harrell or by Mr. Hancock. Moreover, we find nothing in the evidence sufficient to support caveators' contention that there existed a fiduciary or confidential relationship between any of these persons and Lukie Dale Lynn.

Caveators assign as error the court's refusal to admit in evidence the verified petition dated May 7, 1963, filed by J. W. Lynn in the proceeding in which he was appointed guardian of the affairs of

Lukie Dale Lynn. J. W. Lynn testified as a witness *for the propounders*. The petition of May 7, 1963, was competent only to corroborate or to contradict J. W. Lynn. In fact, it tended to corroborate him in respect of an uncontroverted fact, namely, that Lukie Dale Lynn was suffering from senile dementia and was mentally incapable of managing her affairs *in May of 1963*.

Other assignments of error are directed to adverse rulings in relation to the admission or exclusion of evidence. Suffice to say, careful consideration of these assignments fails to disclose prejudicial error.

No error.

MOORE, J., not sitting.

STATE v. JUNIOR REX HODGE
AND
STATE v. BOBBY JUNIOR WHITE.

(Filed 4 May, 1966.)

1. Constitutional Law § 28— Record held to disclose that defendants had ample time to decide whether to waive indictment.

Where defendants represented by counsel voluntarily sign a written waiver to the finding of a bill of indictment and agree to trial upon a bill of information, and the record discloses that, even though the time during which defendants had access to counsel may have been insufficient for the preparation of a contested case, the time was amply sufficient for defendants to decide whether they should enter a plea or contest the charges, and there is no suggestion that defendants needed more time either to prepare a defense or to present evidence in mitigation of punishment, an attack of the waiver of indictment on the ground that counsel had insufficient time to prepare defendants' defense is untenable. G.S. 15-140.1.

2. Criminal Law § 23—

Counsel has no duty to advise a client against entering a plea of guilty solely for the purpose of delaying the date of judgment.

3. Constitutional Law § 28— Waiver of finding of indictment embraces waiver of return of indictment also.

Where defendants sign a written waiver to the finding of an indictment and agree to trial upon the bill of information, and enter a plea of guilty to a charge carrying less punishment than might have been imposed for the offense set out in the original warrants, and the court, upon a hearing, finds that the nature of the waiver and the meaning of the charges had been fully explained to defendants and that defendants, with understanding, voluntarily assented to the waiver and entry of plea of guilty, *held*,

the contention that the waiver was to the findings of a bill of indictment and not a waiver of its return, is untenable, the equivalent of a "return" being supplied by the hearing of the court as to the voluntariness and understanding of the waiver.

4. Criminal Law § 23—

A plea of guilty to a valid information charging a felony presents for review only whether the facts charged constitute an offense punishable under the laws and constitution.

MOORE, J., not sitting.

APPEAL by defendants from *Gambill, J.*, September 13, 1965 Session of ROWAN.

In warrants issued by the Rowan County Court on July 7, 1965, defendants were separately charged with the felonious possession of implements of housebreaking (G.S. 14-55) and with unlawfully attempting to open a safe belonging to North Carolina Theatres, Inc. (G.S. 14-89.1). After the hearing in the County Court, on two separate occasions in July, defendants attempted to escape from the Rowan County Jail. As a result, they were transferred to the State's Prison in Raleigh to await trial in the Superior Court. At the September Session, the solicitor prepared a bill of indictment in which defendants were only charged with nonburglarious breaking and entering the premises of North Carolina Theatres, Inc., a violation of G.S. 14-54. On September 15th, Judge Gambill appointed counsel for each defendant; Clinton Eudy, Esquire, to represent defendant white and George L. Burke, Jr., Esquire, to represent defendant Hodge. The grand jury completed its work for the session and adjourned on September 17th. About noon on September 20th, during the second week of the session, defendants were returned from Raleigh to Rowan County where, after conferring with their court-appointed counsel, they signed the following waiver at the end of the bill of indictment:

> "The foregoing information has been read and explained to me and I do hereby waive the finding of a bill of indictment by the grand jury upon the advice of my attorney and counsel. I have requested my counsel to sign this waiver, this 20 day of September, 1965."

Thereafter, during the afternoon of the same day, each defendant appeared in court with his counsel and, "after due and diligent inquiry by the court," each reaffirmed his waiver of the indictment and his consent to be tried upon the information signed by the solicitor (G.S. 15-140.1). As to each defendant, the judge made the following entry:

"The defendant having had said charge contained in said information fully explained to him in open Court and upon inquiry of the defendant as to whether Court appointed Counsel had explained the nature and extent of this procedure and meaning of the charges contained in said information, states to the Court, that he answers the Court's inquiry in the affirmative; that he understands; that he has had explained to him by his Counsel; that he assents hereto and that to said Bill of Information he enters a plea of Guilty to breaking and entering with intent to commit a felony, freely and voluntarily, without fear or compulsion; promise of reward or coercion in the part of anyone; that he signs said information freely and voluntarily, agreeing to trial on Bill of Information rather than Bill of Indictment.

"JUDGMENT: It is the judgment of the Court that the defendant . . . be confined to State's Prison, Raleigh, North Carolina for a term of ten (10) years, to do work as provided by law."

On the same day, defendants were returned to the State's Prison in Raleigh. Subsequently, each gave notice of appeal, and their present counsel were appointed to represent them here, where the two cases were consolidated for argument.

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

Kesler and Seay for Junior Rex Hodge, defendant appellant.

Graham M. Carlton for Bobby Junior White, defendant appellant.

PER CURIAM. Defendants do not contend that the attorneys who represented them in the Superior Court were incompetent; neither do they contend that they were unduly influenced or misinformed when they waived the finding of a bill by the grand jury and entered their pleas of guilty to the charge contained in the information. On the contrary, upon the oral argument, counsel expressly repudiated any such contention; nor have defendants asserted their innocence of the charge. In requiring that their sentences be appealed to this Court, defendants are merely taking advantage of the unlimited right of appeal which this State permits. *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800. Court-appointed counsel, ingrained with the profession's traditional loyalty to a client, have done their best to make bricks without straw. They argue (1) that counsel had insufficient time to prepare defendants'

defense and (2) that defendants, while waiving the *finding* of a bill of indictment, did not waive its *return*.

The four hours during which Messrs. Eudy and Burke had access to their court-appointed clients most probably would not have been sufficient time in which to prepare a contested case for trial. *Prima facie*, however, it was sufficient time for defendants to decide whether they should enter a plea or contest the charges. They themselves had had two and a half months to consider the matter. The record is devoid of any suggestion that defendants needed more time either to prepare a defense or to present evidence in mitigation of punishment. They did not ask for a continuance, nor do they now contend that one would have profited them. Counsel for a defendant "caught in the act" or against whom the State has an "air-tight case" has no duty to advise him against entering a plea of guilty merely to delay the day of judgment. Frequently such advice would be a great disservice to the defendant, for trial judges are often inclined to reward the truth, which they consider the best evidence of repentance. Furthermore, time spent in jail awaiting trial will not be credited on the sentence imposed and need not be considered by the judge in fixing his punishment. *State v. Weaver*, 264 N.C. 681, 142 S.E. 2d 633.

The statute which authorizes trial upon an information in lieu of indictment (G.S. 15-140.1) provides that a "defendant may waive the finding and return into court of a bill of indictment when represented by counsel and when both the defendant and his counsel sign a written waiver of indictment." The statement, which each defendant and his counsel signed, recited, "I do hereby waive the finding of a bill of indictment. . . ." Because the statement was not, "I do hereby waive the finding *and return* . . .," defendants now contend that the court was without jurisdiction to proceed to judgment against them. The State concedes that "it is the action of the (grand) jury in publicly returning the bill into court as true, and the recording or filing it among the records, that makes it effectual." *State v. Cox*, 28 N.C. 440, 446. As a practical matter, there is no necessity of publicizing to an accused a finding contained in an information and in a waiver of indictment to which he has just affixed his signature. The equivalent of a "return," however, was actually had when the judge, in open court, interrogated each defendant as to his understanding of, and assent to, the information and waiver he had signed. We hold that the waiver of the finding of a bill of indictment also includes the waiver of the return.

Each defendant having entered a plea of guilty to a valid information charging the felony of nonburglarious breaking, this appeal brings up for review only the question whether the facts charged constitute an offense punishable under the laws and consti-

tution. *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591. Defendants' pleas established a violation of G.S. 14-54, the punishment of which may be a maximum of 10 years. It is noted that a violation of G.S. 14-89.1 (one of the charges contained in the warrants) subjects an offender to a sentence of from 10 years to life imprisonment.

All defendants' assignments of error are overruled, and the judgment below is

Affirmed.

MOORE, J., not sitting.

CARSON R. BAREFOOT, ADMINISTRATOR OF LLOYD RAY BAREFOOT, DECEASED, v. FELTON HOLMES.

(Filed 4 May, 1966.)

Automobiles § 41p—

Evidence that defendant was seen driving the vehicle in question shortly before the vehicle left the highway because of reckless driving and excessive speed, and that shortly after the wreck defendant was aided out of the driver's seat, *held* sufficient to be submitted to the jury on the issue of the identity of defendant as the driver at the time of the accident.

MOORE, J., not sitting.

APPEAL by plaintiff from *Hubbard, J.,* August 31 Civil Session 1964 of JOHNSTON was not perfected. *Certiorari* allowed 14 December 1965.

This is a civil action to recover for the wrongful death of plaintiff's intestate.

Plaintiff alleges in his complaint that on 10 March 1961, about 7 P.M., his intestate was riding as a guest passenger on the back seat of a 1950 Oldsmobile sedan, owned by James Charles Beasley and driven by defendant Felton Holmes on Highway 242 approximately six miles east of Benson, North Carolina.

The only occupants of the car at the time complained of were the plaintiff's intestate, Lloyd Ray Barefoot, James Charles Beasley and the defendant Felton Holmes.

The plaintiff alleges that the defendant operated the Oldsmobile at a high, dangerous and unlawful rate of speed, in a careless and negligent manner, and caused said vehicle to leave the highway, travel approximately 375 feet off the paved portion of the highway on the north side of the road, jump a ditch and collide with great

force against a tree 12 feet from the shoulder of the highway; that the death of his intestate was proximately caused by the negligence of defendant in driving the automobile at an excessive and unlawful rate of speed and in a reckless and careless manner.

The defendant in his answer denied that he was driving the automobile at the time alleged.

Shelton Barefoot, who was not related to Lloyd Ray Barefoot, testified: "I saw Lloyd Ray Barefoot, Felton Holmes and J. C. Beasley, at almost dark, dusk dark, on March 10, 1961 * * * I saw them around 7 or 7:30 P.M. on that day. I was living with my father at that time and heard a noise; I came out of the house and was standing in the yard. My father lives on Highway 242 about 4 or 5 miles south of Benson. * * * The noise of skidding tires is what attracted my attention to the car. * * * The car was approximately a quarter of a mile from me then. * * * It went off the road, then it went back across the road and hit a tree. * * * I would say the car slid approximately 300 or 400 feet up the road from where it hit the tree. * * * I went to the car. When I got there, J. C. Beasley, Felton Holmes and Lloyd Ray Barefoot were there. J. C. Beasley was in the right front * * *. He was next to the right door. Felton Holmes was next to him. The first time I saw Felton * * * he was not unconscious but he was still in the car, and I opened the left front door. Felton got out almost on his own with maybe just a hand from me. At that time I did not know Lloyd Ray Barefoot was in the car. * * * Felton said something about it, and we looked in the back seat and he was in the back seat. * * * Lloyd Ray's head was right at the point of the car where it contacted the tree. He was sitting penned up into that damaged area of the car. * * * Beasley was not conscious when I got there."

D. Gardner Johnson testified that he was traveling on Highway 242 and met and passed Felton Holmes driving the Oldsmobile only 400 or 500 yards from where the wreck occurred. "I was traveling in the opposite direction from the direction he was traveling. Felton Holmes was driving the Oldsmobile car at the time I met him." This witness further testified the wreck occurred a short while before dark on March 10, 1961.

At the close of the plaintiff's evidence the court below sustained the defendants' motion for judgment as of nonsuit. Plaintiff appeals, assigning error.

Joseph H. Levinson for plaintiff appellant.

Teague, Johnson and Patterson, Robert M. Clay and Bob W. Bowers for defendants, appellees.

PER CURIAM. The appellant assigns as error the ruling of the court below in sustaining the defendants' motion for judgment as of nonsuit.

In our opinion, when the plaintiff's evidence is considered in the light most favorable to plaintiff, as it must be on a motion for judgment as of nonsuit, it is sufficient to take the case to the jury, and we so hold. *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492; *Thomas v. Morgan,* 262 N.C. 292, 136 S.E. 2d 700; *Randall v. Rogers,* 262 N.C. 544, 138 S.E. 2d 248. See also *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33.

In accord with the policy of this Court, since there must be a new trial we will not discuss or attempt to analyze the evidence. The judgment of the court below is

Reversed.

MOORE, J., not sitting.

STATE v. GRADY MATTHEWS.

(Filed 4 May, 1966.)

1. Receiving Stolen Goods § 5— Evidence held for jury on charge of receiving stolen goods with knowledge they had been stolen.

The State's evidence tending to show that defendant suggested to confederates that if they stole guns from a certain store he could sell the guns for them, that his confederates stole the guns and brought them to defendant's house and put them in the back of a car outside defendant's house, that the next day they put the guns in the car of one of the confederates and defendant drove the confederate's car around to various people he knew, selling all of the guns but one, *is held* sufficient to carry the case to the jury on the charge of receiving stolen property with knowledge at the time that it had been stolen, defendant's evidence in contradiction not being considered on motion for nonsuit.

2. Receiving Stolen Goods § 6—

The judge's charge in this prosecution for receiving stolen goods with knowledge that they had been stolen *is held* without prejudicial error.

3. Criminal Law § 107—

Exception to the charge on the ground that the court failed to apply the law to the evidence in the case *held* untenable. G.S. 1-180.

4. Receiving Stolen Goods § 2—

The indictment in this prosecution for receiving stolen goods with knowledge at the time that they had been stolen *held* sufficient and valid.

MOORE, J., not sitting.

STATE *v.* MATTHEWS.

APPEAL by defendant from *Brock, S.J.,* January 1966 Criminal Session of RANDOLPH.

Criminal prosecution on the following bill of indictment:

> "THE JURORS FOR THE STATE, UPON THEIR OATH, DO PRESENT: That Grady Matthews late of the County of Randolph on the 12th day of December A.D. 1965, with force and arms, at and in the County aforesaid, nine (9) shotguns and three (3) rifles of the total value of SIX HUNDRED TWO AND NO/100 ($602.00) DOLLARS of the goods, chattels and money of one Reece Hodgin, before then feloniously stolen, taken and carried away, feloniously did receive and have the said Grady Matthews then and there well knowing said goods, chattels and moneys to have been feloniously stolen, taken and carried away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The defendant through his counsel, Hal Hammer Walker and Deane F. Bell, entered a plea of not guilty. Verdict: Guilty as charged.

From a judgment that defendant be imprisoned for a term of not less than three nor more than five years, defendant appealed to the Supreme Court.

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

Walker, Anderson, Bell & Ogburn by Deane F. Bell for defendant appellant.

PER CURIAM. The State and defendant offered evidence. Defendant assigns as error the denial by the court of his motion for judgment of compulsory nonsuit made at the close of the State's evidence, and the denial by the court of a similar motion made by him at the close of all the evidence.

The State offered evidence as follows: About 11 p.m. on 12 December 1965 Dannie Gales, Bradford Butler, a 14-year-old boy, and defendant were in the Wagon Wheel Restaurant. Gales and defendant had a drink together. Defendant told Gales and Butler that if they would go to Reece Hodgin's store in the town of Ramseur, go into the store and get the guns for him, he would sell them the next day. The agreement was "it would be a 50-50 deal." Gales and Butler got 25% apiece. A short while thereafter, Gales and Butler drove to Ramseur, parked the car behind the Shell station, went to Reece Hodgin's store, broke the lock on the back door, and went in the store. They took from the gun rack thirteen guns of the value of

$600, went back to the Shell station, and put these guns in the automobile. They then drove back to Asheboro. When they arrived in Asheboro they went to defendant's home about 3 a.m. They woke him up. Defendant looked at the guns, and told them to put them in the back of a car outside, come back the following day, and he would sell the guns for them. They put the guns in the back of an old Plymouth car there, and left. The following day Gales and Butler went back to defendant's home. They got the guns out of the old Plymouth car and put them in Gales's car. Defendant drove Gales's car around to various people he knew, and they sold all of these guns except one to these people for various amounts. When any of the purchasers paid defendant for the guns, defendant put the money in his pocket. Defendant gave Gales a small amount of the money, and Gales gave Butler some of the money. Gales was to see defendant later to get some more of the money, but he did not go back to see him. Of the guns they stole, defendant kept a double barrel Spanish made shotgun.

Twelve of the guns were afterwards returned to Reece Hodgin by the sheriff's department of Randolph County. Hodgin identified these guns as guns stolen from his store the night of 12 December or 13 December 1965. The guns belonged to Hodgin, and had a value of approximately $600.

Defendant's evidence in summary is as follows: He was not in the Wagon Wheel Restaurant on the night of 12 December 1965. On that night he was in Albemarle. He never told Gales and Butler to break in Reece Hodgin's store. About 3:30 a.m. on 13 December 1965 Clinton McQueen, who runs a cafe for him, Dannie Gales, and Bradford Butler came to his house. He was in bed asleep. McQueen knocked on the side door, awakened him, and told him to come to the front door, that he had something for him. He went to the front door, and all three of them came in the house. McQueen said to him, "Butch [Gales] has got some guns, and he wants to see you, Grady." He told them to bring the guns in. They brought the guns in and Gales told him that he wanted $150 for the guns. He told them he did not have $150. Gales asked him if he would take the guns down to Wimpy Ward's, and he told them he would between 8 and 9 o'clock the next morning. Gales asked him if he could leave the guns at his house. He replied no, but he had an old car out there and McQueen had an old car out there, and that if they wanted to they could leave the guns in one of the cars. The next day Gales and Butler came back. Gales told him to take the keys and drive Gales's car. Gales and Butler got the guns and put them in Gales's car. He drove off and the first stop they made was at Ray Jarrell's house. He told Jarrell that Gales and Butler had some guns they wanted to

sell, and that they wanted $150 for the guns. Jarrell looked at them and said, "I'd buy all of the guns, but I'm scared they are stolen, they might be stolen." Gales replied, "No, they are not stolen." Jarrell bought a rifle. He paid $8 for it. They then went around to Charles Moody's house, and he said that Wimpy Ward had gone to Florida. Gales sold Moody a 30-30 rifle for $30. Butler handed the rifle out of the back seat and received the money. His brother bought one of these guns, and Jesse Rufus Marshall also bought one of these guns. When he left the car, some of the guns were still in the car. He did not know the guns had been stolen, because Gales told him that he and Butler had gotten them from a friend in Reidsville. He did not receive any of the guns, and did not receive any money from the sale of the guns.

Considering the evidence in the light most favorable to the State, it was amply sufficient to carry the State's case to the jury, and to support the verdict, and defendant's motions for judgment of compulsory nonsuit were properly overruled by the trial judge. *S. v. Brady*, 237 N.C. 675, 75 S.E. 2d 791.

Defendant assigns as error that the judge charged the jury: "Now, the offense charged here has at least four distinct elements that the State must satisfy you beyond a reasonable doubt about." The court then instructed the jury as to the essential elements of the crime of receiving stolen goods substantially as stated in *S. v. Brady, supra,* quoting from 1 Wharton's Criminal Evidence, 10th Ed., § 325b, p. 643, with the exception that Wharton states there are three elements, and the second element is ". . . (b) that the accused, knowing them to be stolen, received or aided in concealing the goods," and the trial judge charged: ". . . second, that the defendant received the goods that were stolen; third, that at the time of receiving the goods the defendant knew that they had been stolen." This assignment of error is overruled upon authority of the *Brady* case.

Defendant assigns as error that the trial judge committed prejudicial error in failing to apply the law to the evidence in the case, G.S. 1-180. This assignment of error is overruled. An examination of the charge shows that the trial judge in his charge substantially complied with the requirements of G.S. 1-180. In addition, the trial judge clearly charged the jury in substance that if it found beyond a reasonable doubt from the evidence that defendant was guilty of receiving stolen property, knowing it to have been stolen, as he had defined the offense for it, and found beyond a reasonable doubt that the guns were of a value of $600, then it would return a verdict of guilty as charged, but if under those circumstances it found the guns were of a value of $200 or less, then it would return a verdict of

guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200 or less, a misdemeanor. This conforms to the decision in *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. The verdict is "Guilty as charged."

Defendant assigns as error the court's denying his motion in arrest of judgment on the ground the indictment is defective. The trial judge properly denied the motion in arrest of judgment, for the simple reason the indictment is not defective. *S. v. Brady, supra* (the indictment is set forth verbatim in the case on appeal which is in the office of the clerk of this Court); *S. v. Best,* 232 N.C. 575, 61 S.E. 2d 612 (the indictment is set forth verbatim in the case on appeal which is in the office of the clerk of this Court); Bishop's Practical Directions and Forms, Ch. LXXIII.

In the trial below we find

No error.

MOORE, J., not sitting.

IN THE MATTER OF THE CUSTODY OF TYLER DEAN MACON.

(Filed 4 May, 1966.)

Habeas Corpus § 3; Divorce and Alimony § 22—

In a *habeas corpus* proceeding instituted by the father to determine the right to custody of his minor son, the order of the court removing the proceeding on motion to a county in which the mother, subsequent to the service of the writ but before the hearing, had instituted an action for alimony without divorce and for the custody of the child, will not be disturbed.

MOORE, J., not sitting.

APPEAL by Leonard D. Macon, petitioner, from *Gambill, J.,* November 29, 1965 Session, RANDOLPH Superior Court.

On October 19, 1965, the petitioner obtained a writ of *habeas corpus* requiring that Tyler Dean Macon, age 2, be brought before the court for its adjudication of the right to his custody. The petitioner resides in Randolph County. The mother, Carol Dianne Robbins Macon, who has custody, resides in Guilford County. The parents are living in a state of separation. Subsequent to the service of the writ before the hearing, the mother instituted an action in the Superior Court of Guilford County for alimony without di-

vorce and for the custody of the child. Notice was served on the father to appear before the Superior Court of Guilford County on December 13, 1965, for hearing on a motion for a *pendente* order. On December 1, 1965, in Randolph Superior Court, Judge Gambill, upon motion of the mother and in his discretion, removed the *habeas corpus* proceeding to Guilford County. This is the reason assigned for the removal order: "Upon the ground that the convenience of witnesses and the ends of justice would be promoted." The petitioner, Leonard D. Macon, appealed.

Ottway Burton for plaintiff appellant.
W. Marcus Short for defendant appellee.

PER CURIAM. The respondent, mother, has instituted an action in the Superior Court of Guilford County for alimony without divorce and for the custody of the child as prescribed by G.S. 50-16. The Guilford Superior Court appears to have acquired jurisdiction of the child as well as of both its parents unless the *habeas corpus* writ previously issued by the Superior Court of Randolph County has prevented the Superior Court of Guilford County from acquiring jurisdiction of the child and the right to determine its custody. Prior to the 1953 amendment to G.S. 50-16, custody could not be determined in an action for alimony without divorce.

The amendments to G.S. 50-16 entered in 1953 and 1955 have been discussed in many decisions of this Court. *Murphy v. Murphy,* 261 N.C. 95, 134 S.E. 2d 148; *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857; *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879. Some doubts have arisen whether under the facts of this case the custody of the child should be determined under the *habeas corpus* writ or in the mother's alimony and custody action. However, in this particular case, Judge Gambill's order of transfer will enable the court to hear the two proceedings together. The welfare of the child, the rights and liabilities of its parents are the same whether the inquiries are made under the writ or as a concomitant part of the alimony and custody hearing. With this background we conclude Judge Gambill's order should be

Affirmed.

MOORE, J., not sitting.

BRUCE EDWARD BUTLER v. EARL WOOD.

(Filed 4 May, 1966.)

1. Negligence § 25—

Evidence bearing on the issue of contributory negligence must be considered in the light most favorable to defendant in determining the sufficiency of the evidence to require the submission of that issue to the jury.

2. Automobiles § 49— Evidence held for jury on question of contributory negligence of passenger in grabbing steering wheel in emergency.

Defendant's evidence was to the effect that while he was traveling some 50 miles per hour he passed a stop sign and then realized that the highway upon which he was traveling came to a dead end at its intersection with another highway, that defendant was attempting to make a left turn into the intersecting highway and that while the car was sliding plaintiff passenger grabbed the wheel, causing the car to continue in a straight line and hit an embankment and telephone pole. *Held:* Whether plaintiff grabbed the wheel and, if so, whether plaintiff's act under the circumstances constituted negligence and was a proximate cause of the collision was properly submitted to the jury on the issue of contributory negligence.

MOORE, J., not sitting.

APPEAL by plaintiff from *Carr, J.*, October 1965 Regular Civil Session of HARNETT.

Plaintiff was injured on Sunday, October 13, 1963, shortly after 3:30 a.m., as a result of a one-car collision. Plaintiff owned the car and was riding on the right front seat. Defendant was the operator.

Uncontroverted testimony tends to show: The collision occurred in Harnett County, some three miles north of Dunn, in the area where rural unpaved road #1715 dead ends at rural paved road #1722, forming a "T" intersection, #1722 being the top of the "T" and #1715 extending south therefrom. Each road was approximately 32 feet wide. A stop sign south of said "T" intersection faced northbound traffic on #1715. The car, proceeding north on #1715, passed the stop sign, entered the intersection area, struck and bounced off an embankment five or six feet high on the north side of #1722, then hit a telephone pole.

The pleadings raised issues as to negligence, contributory negligence and damages. Both plaintiff and defendant offered evidence. The jury answered both negligence and contributory negligence issues, "Yes," and did not reach the issue of damages. In accordance with said verdict, the court entered judgment that plaintiff recover nothing from defendant. Plaintiff excepted and appealed.

D. K. Stewart and Bryan & Bryan for plaintiff appellant.
Pittman, Staton & Betts for defendant appellee.

PER CURIAM. The sole question is whether the court erred in submitting the contributory negligence issue.

In passing upon the sufficiency of the evidence to require submission of the contributory negligence issue, defendant is entitled to have the evidence bearing on that issue considered in the light most favorable to him. 3 Strong, N. C. Index, Negligence § 25, and cases cited.

Defendant's evidence, in brief summary, tends to show: At or about the time he passed the stop sign, defendant became aware that #1715 came to a dead end at its intersection with #1722. He was then going 50-55 miles per hour. Being on the right side of #1715, there was more turning room to defendant's left. Defendant "automatically jerked to the left" and applied his brakes. While defendant was attempting to make a left turn and the car was "sliding," plaintiff looked up, said "Look out," and grabbed the steering wheel. Thereupon, the car went straight across #1722 and hit the embankment and telephone pole.

We are constrained to hold, in accordance with the ruling below, that whether plaintiff grabbed the steering wheel and thereby interfered with the operation and course of the car, and, if so, whether plaintiff's said conduct under the circumstances constituted negligence and was a proximate cause of the collision, were for jury determination. With reference to the contributory negligence issue, defendant's allegations and evidence, and the court's instructions, relate to actual interference by plaintiff in the operation and course of the car.

No error.

MOORE, J., not sitting.

J. H. CALLICUTT v. DOUGLAS SMITH.

(Filed 4 May, 1966.)

1. Trial § 11—

While counsel is allowed wide latitude in the argument to the jury, the refusal to permit counsel to present a chart with computations to substantiate the argument as to the injured person's life expectancy and the *quantum* of damages, which chart amounted to an exhibit not introduced in evidence, is not error.

2. Damages § 15—

The court's instruction on the issue of damages held in conformity with the rule laid down in *Ledford v. Lumber Co.*, 183 N.C. 614, and not subject to exception.

3. Trial § 52—

A motion to set aside the verdict for inadequacy of award is addressed to the sound discretion of the trial court, and the denial of the motion will not be disturbed in the absence of a showing of abuse.

MOORE, J., not sitting.

APPEAL by defendant from *Bone, E.J.*, January 1966 Session, RANDOLPH Superior Court.

J. H. Callicutt brought suit against the defendant Douglas Smith to recover some $600.00 for damages done to his truck in a collision occurring May 11, 1964. He made the usual allegations of negligence, saying, in effect, that the defendant's car ran into his truck while the latter was making a left turn from Fayetteville Street to Walker Avenue in the City of Asheboro. The defendant denied negligence and set up a cross action against the plaintiff in which he sought to recover $26,180.00 for personal injuries and property damage. The jury answered the issues of negligence against the plaintiff and in favor of the defendant and awarded Smith $400.00 for damages to his car and $1,000 for personal injuries.

The defendant moved to set aside the verdict for inadequacy and upon denial of the motion, appealed, assigning errors.

John Randolph Ingram Attorney for defendant appellant.

Jordan, Wright, Henson and Nichols by G. Marlin Evans Attorneys for plaintiff appellee.

PER CURIAM. At the beginning of the defendant's argument in the Superior Court, his attorney attempted to present to the jury a large chart setting forth the defendant's life expectancy and a number of computations to support a verdict far in excess of the amount

sued for. Upon objection by the plaintiff, it was excluded and the defendant complains that this was error. While counsel is allowed wide latitude in argument to the jury, and to use figures and calculations in support of his position, he, in effect, was attempting to use this chart as an exhibit which had never been introduced in evidence. The exception is untenable.

The defendant excepts to the court's instruction on damages, but upon examining it, it is found to be an almost verbatim statement of the rule of damages as taken from *Ledford v. Lumber Co.*, 183 N.C. 614, 112 S.E. 421 (1922). It has been used as an accurate statement by the judges of the Superior Court for many years and has been approved by this Court in numerous cases. These exceptions are without merit.

While it is true that the defendant's evidence showed serious and painful injuries, and substantial hospital and medical expense as a result, the amount awarded by the jury indicates that it had difficulty in arriving at a verdict in favor of the defendant. This was reflected by the length of time taken for its deliberations, as well as the amount awarded. This phase of the matter was presented to the trial judge upon the insistence of the defendant that the amount was so small that it went against the greater weight of the evidence. We have frequently held that this kind of motion is within the sound discretion of the trial judge, *Dixon v. Young*, 255 N.C. 578, 122 S.E. 2d 202, and it was held in *Brown v. Griffin*, 263 N.C. 61, 138 S.E. 2d 823 that "(t)he judge had the discretionary power to set the verdict aside; but he was not compelled to act." Abuse of discretion is not shown and after fully considering all of the defendant's exceptions, we find that in the trial there was

No error.

MOORE, J., not sitting.

ANSON BANK & TRUST COMPANY v. COLE HENRY.

(Filed 4 May, 1966.)

1. Appeal and Error § 19—

In the absence of any assignment of error the judgment will be sustained unless error appears on the face of the record proper or unless the issues are insufficient to support the judgment entered. Rule of Practice in the Supreme Court No. 19(3).

2. Appeal and Error § 34—

Where the evidence is set out in the record entirely in question and answer form, the appeal will be dismissed in the absence of error appearing on the face of the record proper. Rule of Practice in the Supreme Court No. 19(4).

MOORE, J., not sitting.

APPEAL by defendant from *Gwyn, J.*, November 1965 Civil Session of ANSON.

Plaintiff brought this action to recover upon two promissory notes (Exhibits 1 and 2), which, it alleges, defendant executed and delivered to it for value received. Defendant's answer is only a general denial of the allegations of the complaint. Upon the trial defendant admitted that, on June 7, 1955, for value received, he had executed and delivered to plaintiff a note (Exhibit 2), in the sum of $3,050.00, due and payable on September 7, 1955, and that it had not been paid. He also conceded that plaintiff's Exhibit 1, a note in the amount of $1,195.00, dated May 24, 1954, and due July 9, 1954, bore his signature. Interest on this note had been paid to August 9, 1955, and the principal had been reduced to $1,150.00.

In accordance with the court's peremptory instructions, the jury found that defendant was indebted to plaintiff on its Exhibit 1 in the amount of $1,150.00, with interest at 6% from August 9, 1955, and, on Exhibit 2, in the amount of $3,050.00, with interest from September 7, 1955. From judgment entered on the verdict, defendant appeals.

Taylor, McLendon & Jones for plaintiff appellee.
Theron L. Caudle for defendant appellant.

PER CURIAM. Defendant's case on appeal contains no assignments of error as required by Rule 19(3), Rules of Practice in the Supreme Court. Therefore, unless error appears on the face of the record proper, or the issues are insufficient to support the judgment entered, the judgment will be sustained. *Bank v. Bryant,* 257 N.C. 42, 125 S.E. 2d 291. The issues establish defendant's indebtedness to plaintiff and are, therefore, clearly sufficient to support the judgment.

Defendant's evidence in the case on appeal is set out entirely in questions and answers instead of in narrative form as required by Rule 19(4), Rules of Practice in the Supreme Court. When this rule is ignored, the Court considers only errors presented by the

record proper. *Amusement Co. v. Tarkington,* 251 N.C. 461, 111 S.E. 2d 538. In this case no such errors appear.

The appeal is

Dismissed.

MOORE, J., not sitting.

STATE v. STEVE REVIS.

(Filed 4 May, 1966.)

Escape § 1—

Where the indictment for escape nowhere refers to a previous conviction of defendant for escape, it will not support a sentence for the felony.

MOORE, J., not sitting.

APPEAL by defendant from *Stevens, J.,* January 1966 Session, MONTGOMERY Superior Court.

Defendant was tried under a bill of indictment charging that:

"* * * (O)n the 18th day of October, 1965, with force and arms, and in the County aforesaid (Montgomery), while he * * * was then and there lawfully confined in the North Carolina State Prison System in the lawfully *(sic)* custody of the Superintendent of State Prison Unit #042, Troy, North Carolina, and while then and there serving a sentence for the crime of * * * Larcency *(sic)* * * * Escape which is a Misdemeanor under the laws of the State of North Carolina, imposed at the August 4, 1965 Term General County Court, and September 23, 1965 term Recorders Court, Henderson and Montgomery Counties, then and there unlawfully, willfully, and feloniously did attempt to escape and escaped from the said State Prison Unit #042, Troy, North Carolina against the form of the Statute in such case made and provided, and against the peace and dignity of the State."

The defendant entered a plea of guilty to it and it was treated by the court as a felony for a second offense of escape. He was sentenced to serve twelve months upon the felonious charge which was to begin "at the expiration of the sentence for escape, which he is now serving for escape * * *."

From the judgment pronounced, the defendant appealed.

S. H. McCall, Jr., Attorney for the appellant.

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

PER CURIAM. An examination of the bill of indictment discloses that it does not properly charge a felonious escape because it nowhere refers to "previous conviction of escape from the State Prison System" which is one of the elements necessary under G.S. 148-45. However, it will support a charge of an escape, a misdemeanor. The Attorney General is well advised in conceding as much. The cause will be remanded to the Superior Court of Montgomery County for proper judgment upon a plea of guilty of escape, a misdemeanor. The defendant is entitled to credit for any time he may have served upon the invalid judgment.

Error and remanded.

MOORE, J., not sitting.

STATE v. RAY GIBSON SIMS, SR.

(Filed 4 May, 1966.)

APPEAL by defendant from *McLaughlin, J.*, January Session 1966 of CABARRUS.

The bill of indictment charged that the defendant, on 19 May 1965, did feloniously steal $237.13 of the lawful money of the United States which belonged to the Tar Heel Oil Company, a corporation.

The State's evidence tends to show that the defendant and a companion were in the filling station of the Tar Heel Oil Company in the afternoon of May 19, 1965, and that the money box was found missing shortly after they left. That same afternoon about 6 P.M. the money box of the Tar Heel Oil Company was found near the defendant's parked Pontiac automobile which had been driven out on Rankin Road and left on a little dead-end road about 50 yards off the Rankin Road in the western edge of Kannapolis, in a wooded area. The box still contained $111 and the defendant when arrested had on his person $73.27, and his companion, who died before trial, had on his person $61.21.

The jury returned a verdict of guilty of the larceny of property

of the value of under $200. From the judgment imposed the defendant appeals, assigning errors.

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

B. W. Blackwelder for the defendant.

PER CURIAM. The defendant's assignments of error have been examined, and in our opinion they present no prejudicial error. In the trial below we find

No error.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, PLAINTIFF, V. CAROLINA TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT.

(Filed 11 May, 1966.)

1. Utilities Commission § 9—

The Supreme Court may affirm the judgment of the Superior Court reversing a decision of the Utilities Commission and remanding the cause to the Commission if the judgment of the Superior Court is correct on any one of the grounds enumerated by the statute and specifically set forth in the notice of appeal from the Commission, and it is not necessary that the Supreme Court concur in the ruling by the Superior Court upon every ground set forth in the order. G.S. 62-94(b)(c).

2. Same; Utilities Commission § 1—

G.S. 62-79(a) and G.S. 62-60 must be construed together, and where one member of the Utilities Commission writes the decision of the Commission refusing an application for a certificate of public convenience and necessity, and two other members of the Commission concur therein on the ground that the Commission had no jurisdiction to determine the application, the decision is a decision and order of the Commission, and, the concurring opinions suggesting no other findings of fact, it is error for the Superior Court on appeal to sustain exception to the findings and conclusions on the ground that they were not those of a majority of the Commission.

3. Utilities Commission § 1—

The Utilities Commission has no jurisdiction to entertain an application for a certificate of public convenience and necessity by an applicant which is not a public utility as defined by G.S. 62-3(23), and its issuance of such certificate would be a nullity and could not constitute a basis for a further

order conferring upon the applicant a right which may be granted only to a public utility. G.S. 62-110.

4. Same—

The Utilities Commission has jurisdiction to entertain an application for a certificate of public convenience and necessity to operate a mobile radio service, notwithstanding the proposed service would be limited to a particular territory and the number of customers within such territory which its facilities would be capable of serving is limited, where the applicant would hold himself out as willing to serve all within the territory who apply up to the capacity of his facilities, and therefore offers a service to the "public" for the transmission of messages and communications as a public utility within the purview of G.S. 62-3(23).

5. Utilities Commission § 9—

Findings by the Commission that an applicant for a certificate of public convenience and necessity is fit and able to provide the proposed service and that the proposed service would be of convenience to the public are conclusive when supported by competent, material and substantial evidence in view of the entire record.

6. Utilities Commission § 1—

The requirement that the Utilities Commission apply the rules of evidence applicable in civil actions insofar as practicable, G.S. 62-60, G.S. 62-65(a), does not preclude the Commission from making findings based upon facts arising between the conclusion of the hearing and the entry of order when such facts are shown by exhibits otherwise competent, provided the adverse party has adequate notice that such exhibits have been filed, and while the adverse party is entitled to demand thereupon that the hearing be reopened in order to permit it to controvert such additional evidence, its failure to do so constitutes a waiver of this right.

7. Utilities Commission § 7—

A finding that a proposed service would be a convenience to the public is not sufficient for the issuance of a certificate of public convenience and necessity without a further finding that there is a public need for the proposed service in the area.

8. Same— Application for duplicating service should be denied if utility already serving area is ready, able and willing to provide the service.

Where a public utility has a certificate of convenience and necessity for communications in the area by telephone or telegraph or any other means of transmission, and is ready, able and willing to provide such area a mobile radio service, and it is obvious that the demand for such service in the area is not extensive, the Utilities Commission should deny an application for a certificate of public convenience and necessity to an applicant who proposes to render substantially the same mobile radio service in the area, and the fact that the applicant proposes to offer a telephone answering service as an auxiliary to its mobile radio service is not a sufficient difference to justify the issuance of the certificate when it appears that the applicant proposes to use an independent telephone answering service which would be available to any subscriber of the utility already having the franchise.

9. Same—

While public policy in this regard does not absolutely prohibit competition between public utilities rendering the same service, and while there is no express provision prohibiting the issuance of a certificate of public convenience and necessity to an applicant engaged in the communications field in an area already served by another utility ready, able and willing to provide such service, there is inherent in the requirement for a showing of public convenience and necessity that once a certificate is granted another certificate will not be issued to a competitor in the absence of a showing that the utility already having the franchise is not rendering, and cannot or will not render, the specific service in question.

10. Same—

The burden is upon an applicant to show that there is a public convenience and need for its proposed service. G.S. 62-75.

11. Same—

Statutes authorizing the Utilities Commission to require a public utility to interconnect its facilities with those of a competitor must be strictly construed.

12. Same—

The statute authorizing the Utilities Commission to require a connection between the lines of two telephone companies when they serve localities which cannot be reached by the lines of one of them alone, cannot be construed to authorize the Utilities Commission to compel a telephone company to interconnect its system of line telephones with the system of a mobile radio service serving the identical area which the telephone company, itself, serves or desires to serve. G.S. 62-44.

MOORE, J., not sitting.

APPEALS by the North Carolina Utilities Commission and Mobile Radiotelephone Corporation from *Hubbard, J.*, 13 September 1965 Civil Session of LENOIR.

Mobile Radiotelephone Corporation, hereinafter called the Applicant, applied to the Utilities Commission, hereinafter called the Commission: (1) for the issuance to it of a certificate of public convenience and necessity permitting the operation by it of a mobile radio service and (2) for the issuance of an order requiring Carolina Telephone & Telegraph Company, hereinafter called Carolina, to interconnect its land-line telephone system with such mobile radio system of the Applicant.

The Commission entered an order granting the requested certificate of public convenience and necessity and directing Carolina to make such interconnection. From this order Carolina, having intervened as a protestant before the Commission, appealed to the superior court, setting forth 23 exceptions to the procedure, findings of fact, conclusions of law and the order of the Commission.

The superior court sustained all of the exceptions by Carolina, other than Nos. 12, 13, 23 and part of No. 9, and entered its judgment reversing the order of the Commission and remanding the matter to the Commission, with directions to deny the application. From this judgment both the Commission and the Applicant have appealed, assigning as error each of the several rulings of the court sustaining exceptions by Carolina to the order of the Commission, the ruling of the court that the order of the Commission should be reversed and the entry of its judgment so providing.

Evidence offered by the Applicant before the Commission, including exhibits, may be summarized as follows:

The Applicant is a North Carolina corporation, David E. Hardison, hereinafter called Hardison, being its only stockholder. Its articles of incorporation were filed in the office of the Secretary of State 9 April 1964. On 5 January 1965, after the conclusion of the hearing before the Commission but prior to the entry of its order, the Applicant filed in the office of the Secretary of State an amendment to its charter. This amendment states that the purposes for which the Applicant is organized include the purpose "to engage in the business of operating a common carrier communications service providing mobile radio service with interconnection with existing telephone service * * *."

The Federal Communications Commission, hereinafter called FCC, issued to Hardison its permit authorizing him, individually, to construct "a radio transmitting station." This is not a license to operate. However, the issuance of an operating license generally follows the completion of construction. After the conclusion of the hearing before the Commission, but before the entry of its order, the construction permit was assigned by Hardison to the Applicant with the consent of the FCC.

Hardison has had substantial experience as a broadcast radio engineer and in the installation and maintenance of two-way mobile communications systems. The record discloses no corporate activity of the Applicant. It appears to have no assets other than a small amount of paid in capital less accrued expenses for organization and legal services. The record contains no financial statement of the Applicant, but contains a "balance sheet" for Hardison purporting to show that Hardison, as of 30 June 1963, had a net worth of $20,690.82, including an equity of $9,900 in a residence owned by him and his wife as tenants by the entirety. Hardison testified that the corporation has an agreement with the General Electric Company that the latter will finance the acquisition of all equipment necessary for the proposed operation provided Hardison underwrites the obligation. The estimated cost of such equipment is $3,600.

Without an interconnection with the Carolina system the Applicant's proposed service would provide, by radio, a means of communication between the Applicant's central station in Kinston and the Applicant's subscribers in their respective automobiles, so long as those vehicles remained within a radius of approximately 50 miles of Kinston. The Applicant's subscriber, in his automobile, could talk to the Applicant's operator in Kinston, who would then, by a separate, ordinary telephone call, transmit the subscriber's message to the person for whom it was ultimately intended. Conversely, one desiring to communicate with the subscriber in his automobile could telephone the message to the Applicant's central station and the Applicant's operator would then call the subscriber's automobile by radio and relay the message. Only one conversation between the Applicant's central station and an automobile could be carried on at the same time, the FCC having limited the Applicant, at least for the present, to one radio channel. The Applicant could also connect two of his subscribers in their respective automobiles so that they could converse directly with each other by radio.

If the Applicant's service is interconnected with the Carolina system, a subscriber in his automobile would be able to call the Applicant's central station by radio and have it connect him with any telephone on the Carolina system or accessible through it, including long distance calls. Similarly, any telephone subscriber could call the Applicant's central station and be connected by it to the automobile of a subscriber for a direct conversation. Even with the interconnection, the person placing the call would first have to call the Applicant's central station and be connected by it with the automobile or land telephone of the person with whom he desired to talk. Thus, even with such interconnection only one subscriber to the Applicant's service could carry on a conversation with a phone on the Carolina system at any time.

An answering service will also be available to the Applicant's subscribers. By this means a call coming to the central station for the subscriber's automobile, which cannot be put through immediately, either because the subscriber is not then in his vehicle or because the Applicant's system is busy with another conversation, can be taken by the answering service. When the subscriber is available the answering service can advise him of the call so that the necessary connection can be made. The Applicant does not propose to operate the answering service itself, but proposes to use a telephone answering service now doing business in Kinston. During the progress of a conversation with a subscriber's automobile, no other subscriber, in his automobile, could reach the answering service or be reached by it, but a land telephone could reach the answering service over an-

other trunk telephone line if the answering service has more than one trunk line telephone connection with the Carolina system. Since only one conversation could be conducted over its radio system at a time, the Applicant would impose a time limit on all conversations.

The applicant proposes to operate what it calls a "semi-private" system. Under such system a conversation between the automobile of a subscriber and another person via the Applicant's central system could be heard in part by any other subscriber. Such other subscriber could hear what one, but only one, party to the conversation was saying.

There is no such service now in operation in the Kinston area. Under the limitations of the FCC construction permit the Applicant could serve a maximum of 45 automobiles. It has determined, by a survey, that there are in the area 33 prospective customers for its proposed service with interconnection. There was no showing of any demand for such service without the proposed interconnection and the Applicant will not attempt to offer service unless it can have such interconnection with Carolina, this being essential to successful operation.

In its protest, Carolina alleges that it holds a certificate of convenience and necessity issued by the Commission for "conveying or transmitting messages or communications by telephone or telegraph, *or any other means of transmission,* where such service is offered to the public for compensation" within the Kinston area and has rendered telephone service therein for many years. [Emphasis added.] (Carolina's franchise was not offered in evidence but the truth of this allegation does not appear to be contested.) It also alleges that it is ready, willing and able to provide adequate mobile telephone service in such area. It denies the authority of the Commission to order the proposed interconnection of its system with that of the Applicant. It further denies that public convenience and necessity require the granting of the certificate sought by the Applicant. Carolina offered evidence tending to show:

Carolina is the only company authorized to render telephone service within the Kinston area. Since 1957 it has provided mobile telephone service at its Rocky Mount and Fayetteville exchanges under rate tariffs filed with the Commission. It does not presently provide this type of service in the Kinston area, but has had such service under consideration since 1963 and has completed all necessary engineering and has ordered the necessary equipment therefor. Carolina has not filed with the Commission any application for a certificate authorizing it to render mobile telephone service in the Kinston area for the reason that it takes the position that it is authorized to do so by its existing certificate, as alleged in its protest.

Carolina has obtained a construction permit from the FCC authorizing the construction by it of a transmitter at Kinston for service to a maximum of 30 mobile units and is ready, willing and able to meet the full demand for mobile telephone service in the area. It has also under consideration the offering of such service at other localities within its telephone service area. If mobile telephone service in the Kinston area is provided by Carolina, rather than by the Applicant, it would be available for use by mobile telephone subscribers based in the areas of Carolina's other telephone exchanges, and also available to such subscribers from other telephone companies. Similarly, its subscribers to such service in the Kinston area would be able to use such service at other localities served by Carolina or other telephone companies. This would not be the case if the mobile service at Kinston were provided by a "miscellaneous, common carrier," such as the Applicant.

Carolina proposes to offer a type of mobile service which would permit direct dialing between a subscriber's automobile and a land telephone. All conversations will be completely private. All mobile telephones will be listed in the telephone directory. There will be no time limit on conversations. Carolina has applied to the FCC for two radio channels at Kinston. At present only one has been allotted to it but it intends to reapply for the second channel as soon as it can demonstrate the need therefor. If and when two or more radio channels are available, the equipment which Carolina proposes to install will result in automatic connection of a call to any idle channel, whether the call is being placed or received by the automobile of the subscriber.

Carolina does not propose, in its operation, to furnish an answering service, but the independent answering service, which the Applicant proposes to use, is available to anyone who wishes to subscribe to it.

Each of the five commissioners filed a written opinion. That of Commissioner Peters sets forth the order which is the subject of this appeal. It also sets forth "findings of fact" and "conclusions" to which the assignments of error relate. Commissioners Worthington and Eller, in separate opinions, stated that they did not regard the service proposed by the Applicant as being such as would constitute the Applicant a public utility subject to regulation by the Commission. Nevertheless, each of them concurred in the issuance of the certificate to the Applicant and in the order directing Carolina to grant interconnection. Chairman Westcott and Commissioner Noah, in separate opinions, dissented on the ground that the granting of the certificate to the Applicant was not justified since Carolina presently holds a franchise in the area and is ready, able

and willing to render a service similar to that proposed by the Applicant.

The findings of fact so contained in the opinion by Commissioner Peters, which are material to this appeal, his numbering being retained, are:

> "5. [T]hat the service which protestant Carolina proposes to offer in the Kinston area is an extension of its regular land-line telephone service to stations or instruments located in mobile vehicles; that, except for the fact that the stations will be located in mobile vehicles, the service will be the same as the regular telephone service offered; * * * that Carolina does not propose to offer a message service or an answer service in connection with its radio or mobile telephone service.
>
> "6. That the mobile radio telephone service which Carolina proposes to offer is not identical with nor the same type of service as is proposed by applicant; that no other communication company holds itself out to provide the same type of service as is proposed by applicant to be rendered in this particular service area.
>
> "7. That the service proposed by applicant will be of convenience to the public.
>
> "8. [T]hat applicant has been advised by Carolina that it cannot be interconnected with Carolina's telephone facilities unless it is granted a Certificate of Public Convenience and Necessity from this Commission and meets certain other conditions; * * *
>
> "9. [T]hat applicant is fit, capable and financially able to construct and operate its facilities to provide and furnish the service for which authority is sought in this application."

Under the heading "CONCLUSIONS" the opinion by Commissioner Peters states:

> "In view of the evidence and the law applicable, the Commission concludes that the service proposed to be rendered, including interconnection with the land-line telephone system, is a communications service within the purview of the definition of the statute and that applicant, in rendering said service, is or will be a public utility and subject to the provisions of the utility regulatory law.
>
> "The Commission is further of the opinion and concludes that public convenience and necessity for the proposed service has been shown; that applicant is financially and otherwise fit and able to furnish such service, and that a Certificate

of Public Convenience and Necessity should be granted to the applicant in this cause to render the service proposed in the application, and that Carolina should be required to interconnect its facilities with those of applicant."

Neither the opinion of Commissioner Worthington nor that of Commissioner Eller discloses disagreement with any finding of fact set forth in the opinion of Commissioner Peters nor with either provision of the order therein contained.

The appeals to this Court are from the judgment of the superior court reversing the order of the Commission. Reference is made in the opinion to the conclusions of the Superior court insofar as necessary to the determination of the questions presented.

Edward B. Hipp for Appellant North Carolina Utilities Commission.

Arendell, Albright, Reynolds & Farmer for Appellant Mobile Radiotelephone Corporation.

Taylor & Brinson for Appellee Carolina Telephone and Telegraph Company.

LAKE, J. The authority of the court to which an appeal is taken from an order of the Utilities Commission is thus stated in G.S. 62-94:

"(b) * * * The Court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

"(1) In violation of constitutional provisions, or

"(2) In excess of statutory authority or jurisdiction of the Commission, or

"(3) Made upon unlawful proceedings, or

"(4) Affected by other errors of law, or

"(5) Unsupported by competent, material and substantial evidence * * *, or

"(6) Arbitrary or capricious."

Upon an appeal to this Court from a judgment of the superior court, reversing a decision of the Commission and remanding the matter for further proceedings, this Court may affirm the judgment of the superior court, if the record discloses one or more of these statutory grounds for such judgment and if such ground therefor is

set forth specifically in the notice of appeal from the Commission to the superior court. G.S. 62-94(c). In order to affirm such judgment of the superior court, it is, therefore, not required that this Court concur in the ruling by the superior court upon every ground for relief set forth in the notice of appeal from the Commission to the superior court.

The superior court was in error in sustaining Carolina's exceptions to the order of the Commission, Nos. 1 through 5. It did so on the ground that "the Findings of Fact, Conclusions and Order entered by the North Carolina Utilities Commission on May 21, 1965, are not the Findings of Fact, Conclusions and Order of the majority of the commission."

G.S. 62-60 provides:

> "The Commission shall render its decisions upon questions of law and of facts in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order of decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this chapter."

There are no exceptions to this statute pertinent to this appeal. A majority of the commissioners concurred in the order set forth in the opinion by Commissioner Peters. It was, therefore, the order of the Commission. Neither of the two concurring opinions nor the two dissenting opinions indicate any disagreement with any of the findings of fact stated in the opinion of Commissioner Peters. The opinion of no other commissioner suggests any other findings of fact. The findings of fact so stated in the opinion of Commissioner Peters are, therefore, concurred in by a majority, if not all of the members of the Commission, and are, therefore, the findings of the Commission.

G.S. 62-79(a) provides that all final orders of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented, and shall include "Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record." When these two sections of the Act are construed together, as they must be, it is apparent that the General Assembly did not intend that an order of the Commission concurred in by the majority of its members, based upon findings of fact concurred in by a majority of its members, may be reversed solely because the members of the concurring majority chose different rules, or supposed rules, of law as support for their decision and order. We do not regard the diver-

sity of the reasons given by the three commissioners who joined in the ultimate decision and order as a sufficient ground for its reversal.

We turn, therefore, to the questions presented by the appeal with reference to the merits.

The superior court sustained Carolina's Exceptions Nos. 15 and 16, among others, to the order of the Commission, saying:

> "APPELLANT'S [Carolina's] EXCEPTION No. 15 is sustained in that there is no competent, material and substantial evidence to support a Finding of Fact which could in turn support the Conclusion 'that a Certificate of Public Convenience and Necessity should be granted to the applicant in this cause to render the service proposed in the Application.'
>
> "APPELLANT'S [Carolina's] EXCEPTION No. 16 is sustained for that there was not competent, material and substantial evidence to sustain a Finding of Fact or Conclusion that the applicant was entitled to a Certificate of Convenience and Necessity, and for that, even had there been such evidence, an order requiring the appellant to interconnect its telephone facilities with those of applicant is in excess of statutory authority of the Commission."

The two concurring commissioners state in their separate opinions that the service proposed by the Applicant is not such as would constitute the Applicant a public utility but, nevertheless, the Applicant should be issued a certificate of public convenience and necessity since, without such a certificate, Carolina cannot be compelled to interconnect its system with that of the Applicant. To grant a certificate of public convenience and necessity to conduct a business which is not a public utility, within the definition of the statute, would be both arbitrary and in excess of the statutory authority of the Commission.

G.S. 62-110 provides:

> "No *public utility* shall hereafter begin the construction or operation of any *public utility* plant or system * * * without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation * * *." [Emphasis added.]

One does not need a certificate of public convenience and necessity in order to engage in a business which is not that of a public utility as defined in G.S. 62-3(23). On the other hand, the issuance of such a certificate by the Commission does not transform an ordinary business into a public utility, so as to entitle its operator to

the rights of a public utility, or so as to impose upon him the duties and limitations of a public utility. Neither the Commission nor this Court has authority to add to the types of business defined by the Legislature as public utilities. It is to be remembered that we are not here determining the limits of the broader term, "business affected with a public interest." That the General Assembly might constitutionally declare a business to be a public utility, and require it to obtain such a certificate in order to operate, does not authorize the Commission to declare it to be so when the statutory definition of "public utility" does not include such business. Thus, if the Applicant's proposed service is not within the definition of "public utility" contained in the statute, the issuance of a certificate of public convenience and necessity by the Commission to the Applicant would be a nullity. It would not supply a basis for a further order conferring upon the Applicant a right which may be granted only to a public utility.

However, the service proposed by the Applicant falls clearly within the definition of "public utility" in G.S. 62-3, which provides:

> "(23) a. 'Public utility' means a person * * *
>
> "6. Conveying or transmitting messages or communications by telephone or telegraph, *or any other means of transmission,* where such service is offered to the public for compensation." [Emphasis added. The italicized words were inserted in the 1963 revision of Chapter 62.]

One offers service to the "public" within the meaning of this statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. For example, the operator of a single vehicle within a single community may be a common carrier. Consequently, the Applicant proposes to render a service within the definition of "public utility" in the statute. The Colorado Commission so ruled in a similar case. *Re Telephone Answering Service, Inc.,* 44 Pur. 3d 425.

This being true, the Applicant may not render its proposed service without obtaining from the Commission a certificate that public convenience and necessity require or will require such operation. G.S. 62-110. Consequently, the Commission was authorized to issue to him such certificate if, but only if, the Commission has made findings of fact, supported by competent, material and substantial evidence, which findings, in turn, support the conclusion that public

convenience and necessity "require or will require" the proposed operation by the Applicant.

The Commission has found that the Applicant is "fit, capable and financially able" to provide the proposed service and that the proposed service "will be of convenience to the public." These findings are supported by competent, material and substantial evidence in view of the entire record. They are, therefore, binding upon the reviewing court. *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890.

The Commission is required by G.S. 62-65(a), in cases such as the present, to apply the rules of evidence applicable in civil actions in the superior court "insofar as practicable." G.S. 62-60 provides that the Commission shall render its decision "in the same manner as a court of record."

The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court. *Utilities Commission v. Coach Co.*, 260 N.C. 43, 132 S.E. 2d 249; *Utilities Commission v. Champion Papers, Inc., supra.* In the present case, the Commission permitted the Applicant to file certain exhibits after the conclusion of the hearing. Unquestionably, Carolina thereupon had the right, unless waived, to demand that the hearing be reopened, in order to permit it to cross-examine witnesses for the Applicant with reference to data shown upon such "late" exhibits, or to offer evidence of its own in rebuttal. However, Carolina did not and does not seek a reopening of the hearing for this purpose. Its exceptions, in its notice of appeal from the Commission to the superior court, to the admission and consideration of these exhibits are upon the ground that the "late" exhibits are not only late but show events which did not occur until after the conclusion of the hearing. These exhibits are relied upon by the Applicant and the Commission to show the Applicant's ability to render the proposed service. They include an amendment to the Applicant's articles of incorporation and the assignment to it by Hardison of the construction permit issued to him by the FCC. There is no indication that Carolina contests the correctness of the data or the occurrence of the events shown thereon. The statutes prescribing the procedure for hearings before the Commission do not forbid it to make a finding, as to the Applicant's capacity and ability to serve, upon the basis of facts arising between the conclusion of the hearing and the entry of the order when those facts are shown by "late" exhibits, otherwise competent, and when the adverse party has had adequate notice that such exhibits have been filed with the Commission for inclusion in the record.

Carolina's Exceptions Nos. 6 and 7 to the order of the Commission, contained in its notice of appeal from the Commission to the superior court, which were sustained by the superior court, do not, therefore, justify the reversal of the Commission's order.

However, the finding by the Commission that the rendering of the proposed service by the Applicant would be a convenience to the public, even if supported by competent and substantial evidence, is not adequate basis for an order granting the Applicant a certificate of public convenience and necessity. To entitle the Applicant to such a certificate it is, of course, not necessary for him to show, and the Commission to find, that the proposed service is necessary in the sense of being indispensable. *Utilities Commission v. Coach Co., supra; Utilities Commission v. R. R.*, 254 N.C. 73, 118 S.E. 2d 21. Nevertheless, a mere showing of convenience is not sufficient. There must be an element of public need for the proposed service by the Applicant in the area.

Carolina, in its duly verified protest, alleges that it is the holder of a certificate of convenience and necessity for the geographic area in question, authorizing it to engage in the business of "conveying or transmitting messages or communications by telephone or telegraph, *or any other means of transmission,* where such is offered to the public for compensation." [Emphasis added.] A certificate so worded would appear sufficient to permit Carolina to render the proposed service in the Kinston area. There is no suggestion in any finding of the Commission that Carolina is not ready, able and willing to provide a mobile telephone service in the Kinston area, and there is no evidence in the record which would support such a finding. On the contrary, the record shows that Carolina is ready, able and willing to do so. There is no suggestion that the right to supply this service in the area be taken from Carolina by an amendment to its certificate. We are, therefore, not required to determine whether such an order would be within the statutory authority of the Commission. There is no suggestion in the record that the public needs or would benefit from having two companies rendering this service in this area. It is obvious from the record that at present the total demand for such service in the Kinston area is not extensive. It may well be doubted that it is sufficient to permit both Carolina and the Applicant to operate such services successfully.

The Commission found that Carolina proposes a service in the area which is "not identical with nor the same type of service as is proposed by applicant." This finding is, in turn, based upon the finding "that Carolina does not propose to offer a message service or an answer service in connection with its radio or mobile telephone

service." The record, however, shows that the answering service which will be available to the Applicant's subscribers, if the Applicant is permitted to operate, is not to be owned and operated by the Applicant but is an independent telephone answering service in the city of Kinston and that it is available to any subscriber to Carolina's service at Kinston. Consequently, the record does not contain evidence to support a finding that there is a substantial difference in nature between the service proposed by the Applicant and that proposed by Carolina. The two services need not be identical in every respect in order to give the utility already serving the area the prior right.

G.S. 62-262(f) expressly provides as to motor carriers of passengers that no certificate shall be granted to an applicant proposing to serve a route already served by a previously authorized motor carrier unless and until the Commission shall find from the evidence that the service rendered by such previously authorized carrier is inadequate, and the certificate holder has been given reasonable time to remedy the inadequacy. See *Utilities Commission v. Coach Co., supra; Utilities Commission v. Coach Co.,* 233 N.C. 119, 63 S.E. 2d 113.

There is no such express provision as to utilities engaged in the communications field. Nevertheless, the basis for the requirement of a certificate of public convenience and necessity, as a prerequisite to the right to serve, is the adoption, by the General Assembly, of the policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. The requirement of such a certificate is not an absolute prohibition of competition between public utilities rendering the same service. *Utilities Commission v. Coach Co.,* 224 N.C. 390, 30 S.E. 2d 328; *Citizens Valley View Co. v. Illinois Commerce Commission,* 28 Ill. 2d 294, 192 N.E. 2d 392; *Mo., Kan. & Okla. Coach Lines, Inc. v. State,* 183 Okla. 3, 81 P. 2d 664. There is, however, inherent in this requirement the concept that, once a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question.

In *Monson Dray Line, Inc. v. Murphy Motor Freight Lines, Inc.,* 259 Minn. 382, 107 N.W. 2d 850, the court said, "The term 'necessity' as used in the statute contemplates 'a definite public need for a transportation service for which no reasonably adequate public service exists.'" A like statement is found in *Canton, etc. Coach*

Co. v. Public Utilities Commission, 123 Oh. St. 127, 174 N.E. 244. In *McFayden v. Public Utilities Consolidated Corp.,* 50 Idaho 651, 299 P. 671, the court said:

> "If the new service offered has no advantage over the old from the public viewpoint, other than mere competition under similar basic costs, then the convenience and necessity for it, under the public utility law, would be wanting, and the utility in the field would be entitled to protection against duplication and unwarranted competition."

In *Kosciusko County re Membership Corp. v. Public Service Commission,* 225 Ind. 666, 77 N.E. 2d 572, the court said:

> "There was no allegation in the petition nor was there any evidence or finding which would remotely indicate that the appellant REMC is not ready, willing and able to adequately serve all customers in this territory at a reasonable rate when the extension of its service is requested; in fact all the evidence was the other way. This was a necessary item of proof in order to warrant the granting by the Commission of this petition."

One of the leading cases upon the question is *Chicago and West Towns Rys. v. Illinois Commerce Commission,* 383 Ill. 20, 48 N.E. 2d 320. There, after reviewing its earlier decisions, the Supreme Court of Illinois said:

> "In our opinion the foregoing cases conclusively establish the right of appellants to have an opportunity as a regulated monopoly to render whatever service convenience and necessity may require, and it is only when it has been demonstrated that it is unable either from financial or other reasons to properly serve the public that a competing carrier will be allowed to invade the field."

Other decisions of the Illinois Court to the same effect are: *Citizens Valley View Co. v. Illinois Commerce Commission, supra; Chicago Rys. Co. v. Illinois Commerce Commission,* 336 Ill. 51, 167 N.E. 840. *Bartonville Bus Line v. Eagle Motor Coach Line,* 326 Ill. 200, 157 N.E. 175; *Illinois Power & Light Corp. v. Illinois Commerce Commission,* 320 Ill. 427, 151 N.E. 236. Decisions of other jurisdictions taking the same view of the matter include: *Re Trico Electric Cooperative, Inc.,* 92 Ariz. 373, 377 P. 2d 309; *Consolidated Coach Corp. v. Ky. River Coach Co.,* 249 Ky. 65, 60 S.W. 2d 127; *State v. Public Service Commission,* 327 Mo. 249, 37 S.W. 2d 576; *Capital Electric Power Asso. v. Mississippi Power & Light Co.,* 240 Miss.

139, 125 So. 2d 739; *N. Y. Central R. Co. v. Public Utilities Commission,* 123 Oh. St. 370, 175 N.E. 596; *Yelton & McLaughlin v. Dept. of Public Works,* 136 Wash. 445, 240 P. 679.

The burden of proof is upon the Applicant to show there is a public convenience and necessity for its proposed service. G.S. 62-75; *Utilities Commission v. Coach Co.,* 261 N.C. 384, 134 S.E. 2d 689. That showing has not been made by the Applicant in the record before us. The superior court, therefore, properly sustained Carolina's Exception No. 15 set forth in the notice of appeal from the Commission to the superior court.

Even if the present record were sufficient to support the order granting the Applicant a certificate of public convenience and necessity "to act as a common carrier of communications providing mobile radio service," the Commission had no statutory authority to require Carolina to interconnect the Applicant's radio communications system with Carolina's land telephone system. G.S. 62-44 provides:

> "The Commission may, * * * require any two or more *telephone or telegraph utilities* to establish and maintain through lines within the State between two or more localities, *which cannot be communicated with or reached by the lines of either utility alone,* where the lines or wires of such utilities form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points." [Emphasis added.]

If permitted to render the service which it proposes to render within its own system, the Applicant would not be a "telephone or telegraph utility," though it would be a public utility conveying or transmitting messages by "other means of transmission," namely, radio.

In a somewhat similar case, *Evansville & H. Traction Co. v. Henderson Bridge Co.,* 134 F. 973 (W. D., Ky.), Evans, D.J., said:

> "It may be remarked in this connection that what is demanded by complainant by its bill is closely akin to the exercise of the right of eminent domain, namely, the right to have the property of another subjected to complainant's use; * * *
>
> "One water company or one telephone company or one telegraph company or one street railway company or one railroad company, while bound appropriately to serve the general public, cannot, *unless under express statutory enactment* and by due process of law thereunder, be compelled to give its prop-

erty to the uses and benefits of a rival, except by some form of condemnation." [Emphasis added.]

With reference to a Missouri statute requiring telephone companies to accept and transmit messages for other telephone companies, the court said in *Home Tel. Co. v. Sarcoxie Light & Tel. Co.*, 236 Mo. 114, 139 S.W. 108:

> "This section does not require physical connection between telephone lines. It does require such company to receive all messages from other telephone or telegraph lines and transmit them, as it likewise requires it to receive all messages from individuals. This does not mean that such corporation must yield to a physical connection with its lines by a competitive company, and permit the use thereof in that way. In such case and under this statute, the telephone corporation or the telegraph corporation has no greater right than the individual. If the individual goes to the office of the telephone company and tenders payment for a message, the company must accomodate him. So, too, if a telegraph company or other telephone company goes, in the capacity of an individual or corporate entity, and demands a similar service, it must be rendered. But this does not mean that the telephone company must put up a switchboard for all such individuals or corporations desiring to do business with the telephone company."

In *Clay County Co-op Tel. Asso. v. Southwestern Bell Tel. Co.*, 107 Kan. 169, 190 P. 747, 11 A.L.R. 1193, the court said:

> "Any one who desires a telephone of this company is entitled to have one; and each company is entitled to a telephone of the other, should it so desire. That service satisfies the public duty of each company. Patrons of the United Company have no right, as individuals or in the name of the public interest, to demand that the United Company furnish them with means of communication with patrons of the Co-operative group who do not patronize the United Company. Patrons of the Co-operative Company are in the same situation. *Without a statute, facilities for communications between the two groups of patrons cannot be compelled.*" [Emphasis added.]

In *Western Buse Tel. Co. v. Northwestern Bell Tel. Co.*, 188 Minn. 524, 248 N.W. 220, the court said:

> "At common law public utilities were and are required to furnish equal facilities to the public. But physical connection between telephone companies cannot be compelled at common

law. *State ex rel. Fletcher v. N.W. Bell Telephone Co.,* 214 Iowa 1100, 240 N.W. 252. *The right to do so rests entirely in statutory law.*" [Emphasis added.]

To the same effect, see *Home Tel. Co. v. People's T. & T. Co.,* 125 Tenn. 270, 141 S.W. 845, the decision of the United States Court of Appeals for the Eighth Circuit in *Oklahoma etc. Tel. Co. v. Southwestern Bell Tel. Co.,* 45 F. 2d 995, 76 A.L.R. 944, applying the law of Arkansas, and Annot., 76 A.L.R. 953.

The Supreme Court of Missouri, construing a statute permitting the Public Service Commission of that state to require a physical connection between telephone companies "maintaining telephone communication for hire," held the Commission was without authority to require a telephone company to connect its lines with those of a mutual telephone company. *State v. Public Service Commission,* 272 Mo. 627, 199 S.W. 962.

The Supreme Court of Indiana said in *General Tel. Co. v. Public Service Commission,* 238 Ind. 646, 150 N.E. 2d 891:

> "When the power of the Public Service Commission comes in question it must be recognized it is a statutory board which 'derives its power and authority solely from the statute, and unless a grant of power and authority can be found in the statute it must be concluded that there is none.' "

The power to require the proprietor of a business to interconnect its facilities with those of a competitor is a drastic power. Statutes conferring it should not be extended beyond their plain meaning. G.S. 62-44 authorizes the Commission to require a connection of the lines of two telephone companies, but only when they serve localities which cannot be communicated with by the lines of one of them alone. This statute may not reasonably be extended by construction to authorize the Commission to compel a telephone company to interconnect its system with the system of a radio company serving the identical area which the telephone company, itself, serves or desires to serve.

The Applicant testified that his proposed radio communication system, between his base radio station and the automobiles of his subscribers, cannot operate successfully of itself and he does not propose to embark upon a service so limited. The order of the Commission requires Carolina to interconnect its system with a competitor in order to enable that competitor to take from Carolina patronage it desires and is permitted to serve under its own certificate. There is no provision in Chapter 62 of the General Statutes which requires, or authorizes the Commission to require, a utility,

with large investments in its own plant and facilities, to permit interconnection with such plant and facilities by a competitor in order to increase the competitor's opportunity to take away its customers or prospective customers. The order requiring interconnection was beyond the statutory authority of the Commission, and the superior court properly sustained Carolina's Exception No. 16 to the order of the Commission.

For these reasons, the judgment of the superior court reversing the order of the Commission and remanding the cause to the Commission with directions to enter an order denying the application of the Applicant must be affirmed. It is not necessary for us to discuss specifically other assignments of error by the Commission and the Applicant in their appeals to this Court. We have carefully considered each of them and find nothing therein which would justify reversal or modification of the judgment of the superior court.

Affirmed.

MOORE, J., not sitting.

FIRST NATIONAL BANK OF NEVADA, EXECUTOR UNDER THE WILL OF PEARL K. WELLS; PLANTERS NATIONAL BANK & TRUST COMPANY AND LILLIAN KENT DICKENS, ANCILLARY ADMINISTRATORS OF THE ESTATE OF PEARL K. WELLS, v. REDMOND S. WELLS.

(Filed 11 May, 1966.)

1. Appeal and Error § 60—

Decision on appeal that testatrix had exercised a valid power of appointment by will is conclusive on the parties, and none of them may contend in a subsequent action that no power of appointment existed in the testatrix.

2. Wills § 70—

26 U.S.C.A. 2207 is merely an enabling act to aid executors and administrators in protecting probate estates passing through their hands, and the statute does not violate the Tenth Amendment to the Federal Constitution, and liability of beneficiaries for federal estate taxes is to be determined by state law.

3. Same; Courts § 20—

Where the will of a nonresident disposes of property situate in this State, the apportionment of the federal estate taxes among the beneficiaries is to be determined by the law of testator's domicile, and liability of the resident beneficiary for his proportionate share of the tax in accordance with its laws may be enforced under 26 U.S.C.A. § 2207, not-

withstanding that a decree of the court of the domicile with respect to apportionment would not be binding on the resident beneficiary when the foreign court has obtained no jurisdiction over him.

4. Wills § 70—

Where property situate in this State is devised by a nonresident testatrix in the execution of the general power of disposition, and such property is included in her net estate in computing the federal estate tax, and the will contains no express direction regarding the burden with respect to the payment of such tax, the devisee is chargeable with his pro rata share of the federal estate taxes. This result follows under the laws of the State of Nevada of which testatrix was a resident and in which the greater part of the estate is located, and would follow under our doctrine of equitable contribution for tax liability.

5. Same—

Where a nonresident executor has paid the federal estate taxes on the entire net estate and has sent his annual account and report to a resident beneficiary, such resident beneficiary is liable for interest on his pro rata part of the federal estate taxes and interest from the dates the executor pays the tax and interest, and not only from the date the executor made formal demand on the beneficiary for payment.

MOORE, J., not sitting.

APPEAL by defendant from *Copeland, Special Judge,* January 10 non-jury Session 1966 of WAKE.

This action was instituted by First National Bank of Nevada, Executor of the will of Pearl K. Wells, Planters National Bank & Trust Company and Lillian Kent Dickens, Ancillary Administrators of the estate of Pearl K. Wells, to recover from the defendant, a citizen of Durham County, North Carolina, the pro rata part of the federal estate taxes attributable to property received by him by virtue of the exercise of a power of appointment by Pearl K. Wells. Two companion suits were brought by the same plaintiffs against William M. Wells, Jr. and Alice Elizabeth Wells Romanek. In each of those suits the allegations of the complaints and the answers were identical to those in this case. The three cases were consolidated for trial and identical judgments were entered. For convenience, only one case was appealed and a stipulation was entered to the effect that the decision of the Supreme Court in the *Redmond S. Wells* case would control the other two cases.

By instrument dated 3 February 1956 William M. Wells, husband of Pearl K. Wells, created a trust for the benefit of his wife. Planters National Bank & Trust Company of Rocky Mount, North Carolina, was named Trustee in said instrument.

The answer of the defendant, Redmond S. Wells, who is an in-

competent by reason of a congenital disease, was duly verified by Josey M. Wells, his general guardian.

William M. Wells died on 6 September 1961. He left a last will and testament dated 6 February 1956. In Item 4 of the will the testator devised to the Planters National Bank & Trust Company of Rocky Mount, North Carolina, as Trustee under the trust above referred to, sufficient property which, when added to any other property devised or bequeathed to his wife and qualifying for the marital deduction, would equal one-half of his adjusted gross estate. He directed that the five farms in North Carolina, described in paragraph 8 of the complaint, be included in the Pearl K. Wells trust.

Item 7 of the instrument creating the Pearl K. Wells trust by William M. Wells provided that the Pearl K. Wells trust would terminate upon the death of Pearl K. Wells and the *corpus* of the trust would be equally divided between the defendant, Redmond S. Wells, and his brother, William M. Wells, Jr., and his sister, Alice Elizabeth Wells Romanek, who were children of William M. Wells by a previous marriage.

Item 9 of the above instrument contained the following provision:

> "(9) But notwithstanding all the foregoing limitations over after the death of my wife, nevertheless, my said wife, Pearl K. Wells, shall alone and at all events throughout her lifetime have the power to dispose of the entire *corpus* of this trust, free of the trust, by her will, but only by making specific reference to this power, as she may see fit, with the same effect as if she were the owner of said *corpus* free of the trust. This provision shall override all the limitations after the original life estate to my wife."

Pearl K. Wells died on 28 June 1962. She left a last will and testament dated 5 May 1961 in which she exercised the power of appointment created by her husband and devised the North Carolina real estate involved herein to the three children of her husband by a previous marriage, share and share alike.

The court below found as a fact that the gross estate of Pearl K. Wells involved herein amounted to $547,467.96, including the appointed property, less exemptions, leaving a taxable estate of $487,467.96, on which federal estate taxes in the amount of $129,-791.03 were determined to be due on or about 28 September 1963. The tax was paid in installments together with accrued interest, as follows:

Oct. 10, 1963	$ 43,006.00
Jan. 3, 1964	48,364.47
Feb. 10, 1964	15,995.85
March 3, 1964	6,000.00
Aug. 19, 1964	18,426.73
Total	$131,793.05

The court below further found as a fact that the value of the property devised to the defendant pursuant to the exercise of the power of appointment by Pearl K. Wells as shown on the federal estate tax return, is $91,208.33, and that the value of the property devised to defendant is 16.66% of the taxable estate of Pearl K. Wells as shown on said tax return.

The conclusions of law of the court below pertinent to decision herein are as follows:

"3. That section 2207 of the Internal Revenue Code (26 U.S.C.A. 2207) is applicable to the facts of this case and is valid and constitutional and does not violate the Tenth Amendment of the Constitution of the United States. Under said section the plaintiffs are entitled to recover from the defendant 16.66% of the Federal estate tax which they have paid on the Estate of Pearl K. Wells and any interest on said tax which they have paid, together with interest at the rate of 6% from the dates of payment; that is, the plaintiffs are entitled to recover 16.66% of each payment shown in Finding of Fact 11 above, together with interest thereon from the date of such payment.

"4. In the event that the Court is wrong in Conclusion of Law 3 immediately above, then the Court is of the opinion that North Carolina Law would be applicable to the question of whether the defendant should be required to bear a pro rata part of the Federal estate tax. The Court is of the opinion that under the North Carolina Law the defendant should bear his pro rata part of the Federal estate tax attributable to the value of the property received by him on account of the exercise of the power of appointment by Pearl K. Wells, and that such apportionment of the Federal estate tax is fair, just and equitable. Under North Carolina Law the plaintiffs are entitled to recover from the defendant 16.66% of the Federal estate tax which they have paid on the Estate of Pearl K. Wells and any interest on said tax which they have paid, together with interest at the rate of 6% from the dates of payment; that is, the plaintiffs are entitled to recover 16.66% of each payment shown in Finding of Fact 11 above, together with interest thereon from the date of such payment.

"And it appearing to the Court that the plaintiffs have abandoned the theory that they are entitled to recover of the defendant a pro rata part of the Federal estate tax by virtue of the binding and conclusive effect of the Orders issued by the Second Judicial Court of the State of Nevada, for that said Court lacked jurisdiction of the defendant.

"And it further appearing to the Court that under the Finding of Fact above the Nevada 'Federal Estate Tax Apportionment Law' does not apply.

"And it further appearing to the Court that under the Findings of Fact above the plaintiffs are entitled to recover on the theories of the case set forth under Conclusions of Law 3 and 4 above."

The court entered judgment in favor of plaintiffs and against the defendant for 16.66% of the respective payments made by the executor of the estate of Pearl K. Wells as set out hereinabove, with interest at 6% from the date the respective payments were made. The defendant appeals, assigning error.

Joyner & Howison, W. T. Joyner, Jr., Battle, Winslow, Merrell, Scott & Wiley for plaintiffs, appellees.

Poyner, Geraghty, Hartsfield & Townsend and Arch E. Lynch, Jr., for defendant appellant.

DENNY, E.J. The determinative question posed on this appeal would seem to be simply this: Is the devise of real property under a general power of appointment which is included in the gross estate for federal estate tax purposes liable under the law for payment of a pro rata part of the federal estate tax where the will of the devisor contains no express direction regarding the ultimate burden with respect to the payment of such tax?

As we interpret the evidence, the stipulations and findings of fact by the court below, it is uncontradicted by any competent evidence that the estate of Pearl K. Wells had a gross value of $547,467.96 for federal estate tax purposes and that the tax determined to be due, based on the federal estate tax return, was $129,791.03. And, further, that Pearl K. Wells, pursuant to the power of appointment created as hereinabove set out, devised to the defendant, Redmond S. Wells, an undivided interest in real property in North Carolina in fee simple, having a value of $91,208.33, which property was included at such value in the gross estate of Pearl K. Wells for federal estate tax purposes. That this devise represents 16.66% of the value of the gross estate of Pearl K. Wells.

The defendant contends that stipulation No. 3 should be construed as an agreement of counsel that Pearl K. Wells did not have "a general power of appointment" over the North Carolina property involved in this proceeding. As a matter of fact, the stipulation merely identified the estate tax return and stated "the estate tax has been paid on the basis of said return."

Counsel for defendant contends that certain answers to questions in Schedule H of the return tend to show that no power of appointment exists. Even so, an examination of this schedule tends to show both the existence and non-existence of such power. However, the question of the existence and validity of such power is no longer an open question. This Court, in the case of *Wells v. Trust Co.*, 265 N.C. 98, 143 S.E. 2d 217, settled this question. Sharp, J., speaking for the Court said:

> "Did the interest of R. S. Wells in the *corpus* of the Pearl K. Wells Trust pass to him in fee, freed of the trust, as appointee under the will of Pearl K. Wells? Or did it pass, under the terms of the *inter vivos* trust, to defendant Bank as trustee for R. S. Wells for life and at his death to his heirs (excluding any adopted child) in fee? The answer is that R. S. Wells owns his share in fee, freed of the trust, as appointee. By the terms of the instrument creating the Pearl K. Wells Trust, the income beneficiary was given a general power of appointment to dispose of the corpus of the trust by her will just as if she herself owned the *corpus* free of the trust. She could have appointed to her own estate."

The plaintiffs contend they are entitled to recover of the defendant on three separate and alternate grounds, as follows:

1. That under the Federal statute, 26 U.S.C.A. 2207, the plaintiffs have the right to collect from the defendant the pro rata part of the federal estate tax.

2. In the event it should be held that the Federal statute is unconstitutional or for any reason not applicable, then the plaintiffs contend they are entitled to recover from the defendant under the North Carolina law.

3. That if the lower court erred in concluding that under North Carolina law the defendant is required to pay his pro rata part of the federal estate tax, that such error was harmless because the Nevada law is applicable to this case, and that under the apportionment law of Nevada the plaintiffs are entitled to recover of the defendant his pro rata part of the federal estate tax.

The court below ruled with the plaintiffs on their contentions Nos. 1 and 2, but denied their contention as to No. 3.

Now with respect to contention No. 1. Section 2207 of the Internal Revenue Code (26 U.S.C.A. 2207) provides in part as follows:

> "Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under Section 2041, the Executor shall be entitled to recover from the person receiving such property by reason of the exercise, non-exercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the taxable estate and the amount of the exemption allowed in computing the taxable estate. * * * If there is more than one such person, the Executor shall be entitled to recover from such persons in the same ratio. * * *"

It is the position of the defendant that the states have the exclusive right to determine how decedents' estates under their jurisdiction shall be distributed, and that Section 2207 of the Internal Revenue Code infringes this right.

It seems to be the general rule as to probate estates that Congress has left it to the respective states to determine who shall pay the federal estate tax levies.

In the case of *Riggs v. Del Drago,* 317 U.S. 95, 87 L. Ed. 106, the question posed for determination was, "* * * whether Section 124 of the New York Decedent Estate Law, which provides in effect that, except as otherwise directed by the decedent's will, the burden of any federal death taxes paid by the executor or administrator shall be spread proportionately among the distributees or beneficiaries of the estate, is unconstitutional because in conflict with the federal estate tax law."

The New York Court of Appeals held the New York act unconstitutional. (See 287 N.Y. 61, 38 N.E. 2d 131.) The Supreme Court of the United States said:

> "In the act of 1916 Congress turned from the previous century's inheritance tax upon receipt of property by survivors * * * to an estate tax upon the transmission of a statutory 'net estate' by a decedent. That act directed payment by the executor in the first instance, section 207, but provided also for payment in the event that he failed to pay, section 208. It did not undertake in any manner to specify who should bear the burden of the tax. Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, and that Congress intended that state law should deter-

mine the ultimate thrust of the tax," citing a statement of Congressman Kitchin, Chairman of the House Ways and Means Committee, as follows:

"We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution." 53 Cong. Rec. App. p. 1942.

The Court further said:

"* * * while the federal statute normally contemplates payment of the tax before the estate is distributed, § 822(b) of the Code, 26 U.S.C.A. § 822(b), provision is made for collection of the tax if distribution should precede payment, § 826(a). If any distributee is thus called upon to pay the tax, § 826(b) provides that such person 'shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate.' By that section Congress intended to protect a distributee against bearing a greater burden of the tax than he would have sustained had the tax been carved out of the estate prior to distribution; any doubt that this is the proper construction is removed by the concluding clause of the section specifically stating that it is 'the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.' Section 826(b) does not command that the tax is a non-transferable charge on the residuary estate; to read the phrase 'the tax shall be paid out of the estate' as meaning 'the tax shall be paid out of the *residuary* estate' is to distort the plain language of the section and to create an obvious fallacy. For in some estates there may be no residue or else one too small to satisfy the tax; resort must then be had to state law to determine whether personalty or realty, or general, demonstrative or special legacies abate first. In short, § 826(b), especially when cast in the background of Congressional intent discussed before, simply provides that, if the tax must be collected after distribution, the final impact of the tax shall be the same as though

it had first been taken out of the estate before distribution, thus leaving to state law the determination of where that final impact shall be.

"Respondents also rely on § 826(c) (now 26 U.S.C.A. § 2206), authorizing the executor to collect the proportionate share of the tax from the beneficiary of life insurance includable in the gross estate by reason of § 811(g), and § 826(d). 26 U.S.C.A. 1940 Ed. §§ 811(g), 826(d) (now 26 U.S.C.A. § 2207), authorizing similar action against a person receiving property subject to a power which is taxable under § 811(f), as forbidding further apportionment by force of state law against other distributees. But these sections deal with property which does not pass through the executor's hands and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor.

"Since § 124 of the New York Decedent Estate Law is not in conflict with the federal estate tax statute, it does not contravene the supremacy clause of the Constitution."

The Court held the New York apportionment act constitutional and reversed the New York Court of Appeals.

The case of *Fernandez v. Wiener*, 326 U.S. 340, 90 L. Ed. 116, involved the constitutionality of a 1942 amendment to the federal estate tax law which provided that the entire value of property (rather than one-half) owned by husband and wife in a community property state would be taxable on the death of either. The constitutionality of the law was challenged on various grounds, one of which was stated by the Court as follows: "And finally the tax is said to invade the powers reserved to the states by the Tenth Amendment, to determine property relationships within their borders."

The Court held that the 1942 law was constitutional. On the question of whether it violated the Tenth Amendment, the Court said:

"The Tenth Amendment does not operate as a limitation upon the powers, expressed or implied, delegated to the national government. * * * The amendment has clearly placed no restriction upon the power, delegated to the national government to lay an excise tax *qua* tax. Undoubtedly every tax which lays its burden on some and not others may have an incidental regulatory effect. But since that is an inseparable concomitant

of the power to tax, the incidental regulatory effect of the tax is embraced within the power to lay it."

We think it is significant that § 2207, relating to power of appointment property, has been in effect since 1942, and 26 U.S.C.A. § 2206, relating to life insurance, has been in effect since 1918 and, having been applied numerous times in the state and federal courts, no case has been cited, and we have found none, in which the question has heretofore been raised as to whether these sections are in contravention of the Tenth Amendment of the Constitution of the United States. We cite the following cases where one or the other of these sections has been applied: *In re Duell's Will,* 227 N.Y.S. 2d 469, 34 Misc. 2d 589; *Union Bank & Trust Co. v. Bassett,* 253 S.W. 2d 632; *Jeromer v. United States,* 155 F. Supp. 851; *Union Trust Co. v. Watson,* 76 R.I. 223, 68 A. 2d 916.

In our opinion the above sections are merely enabling acts to aid executors and administrators to protect probate estates passing through the hands of such executors or administrators, and are not in violation of the Tenth Amendment of the Constitution of the United States. Neither do they infringe upon matters relating to the descent and distribution of decedents' estates or the probate and administration of such estates. Therefore we concur in the decision reached below with respect to contention No. 1, which is in accord with conclusion of law No. 3 hereinabove set out.

In our opinion the court below committed error in holding that the Nevada Apportionment Act was not applicable in this action.

The state of Nevada has a law entitled "Federal Estate Tax Apportionment Law." It was enacted in 1957 and is contained in sections 150.290 through 150.390 of the Nevada Revised Statutes. Insofar as applicable to this case, the method of proration is set forth in Section 150.330(1) as follows:

> "The proration shall be made by the Court having jurisdiction in probate of any property in the estate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interest and benefits received by all such persons interested in the estate."

In *In re Gato's Estate,* 97 N.Y.S. 2d 171, 276 App. Div. 651, Gato, a citizen and resident of Florida, established two living trusts in New York. He named Guaranty Trust Company of New York as trustee of one of the trusts and another New York bank as trustee of the other. Gato was to receive the income from both trusts for his life, and after his death his five children were to receive the in-

come for their lives, with remainders over to their issue. Gato died intestate on 8 March 1948. The *corpus* of these *inter vivos* revocable trusts created by decedent were included in the gross estate in the tax return for federal estate tax purposes. This appeal involved the trust in which Guaranty Trust Company of New York was trustee.

The Appellate Division of the Supreme Court of New York held: "The Florida court could not exercise jurisdiction over the trustee (in New York) in the absence of consent, and therefore the New York Supreme Court is the appropriate forum. Nor is it disputed that the New York court will apply the domiciliary law of the decedent in a proceeding wherein instructions are sought concerning apportionment of estate taxes. In the present proceeding the domiciliary law is the law of the State of Florida." This decision was affirmed by the New York Court of Appeals, 301 N.Y. 653, 93 N.E. 2d 924.

In the case of *Central Hanover Bank & Trust Co. v. Peabody,* 190 Misc. 66, 68 N.Y.S. 2d 656, it was held that an *inter vivos* trust created by a testator who died as a resident of Connecticut, the trust property being located in New York and the trustee being a resident of New York, the trust must bear its pro rata share of the federal estate taxes in accordance with the proration formula in the Connecticut statute on apportionment of the federal estate tax.

Likewise, in the case of *Re Chase National Bank,* 59 N.Y.S. 2d 848, the testator created a trust in New York during his lifetime. He died a resident of Maryland. The court held the Maryland statute on apportionment controlled and it was applied by the New York court.

In the case of *Re Adams Estate,* 37 N.Y.S. 2d 587, a decedent died a resident of New York. It was held the New York apportionment law was applicable against the devisee of real property situate in New Hampshire.

In *Isaacson v. Boston Safe Deposit & Trust Co.,* 325 Mass. 469, 91 N.E. 2d 334, 16 A.L.R. 2d 1277, the testator created a trust in Massachusetts while he was a citizen of Massachusetts. He later moved to Maine and died while a resident of that state. The Massachusetts court refused to apply the domiciliary rule followed by New Jersey and New York. The court said: "The Federal government could have provided for apportionment of the tax, and did so in certain particulars not reaching the question in this case. U.S.C. (1946 Ed.) Title 26, § 826(b), (c) and (d), 26 U.S.C.A. § 826 (b, c, d)."

The case of *First National Bank of Miami v. First Trust Co. of*

St. Paul, 242 Minn. 226, 64 N.W. 2d 524, involved the estate of a testatrix who resided in Florida at the time of her death. The Minnesota court followed the above Massachusetts decision and declined to apply Florida's apportionment law. However, the court apparently was influenced by the fact that it determined it was not the intent of the testatrix for the tax to be apportioned.

In *Doetsch v. Doetsch,* 312 F. 2d 323 (U.S.C.A. 7th Cir.) the decedent was a resident of Arizona. There was included in his estate for federal estate tax purposes a trust whose assets were in Illinois. The plaintiff sought to require the beneficiaries of the Illinois trust to contribute the pro rata part of the federal estate tax. The first question presented to the court was whether the law of Arizona or the law of Illinois was applicable to the question of the proration of the federal estate tax. Since the suit was brought in the state of Illinois, the conflict of laws question was held to be determinable by Illinois law under the doctrine of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L. Ed. 1188. After an exhaustive review of the authorities the court held that the law of the domicile of the decedent was controlling; that is, specifically, the court held that the Illinois court would, if presented with the question, decide that the law of Arizona was applicable. In its opinion the court said:

> "In our opinion the better rule, and the one which the courts of Illinois would follow, is that adopted in New York and New Jersey. When questions of apportionment of estate taxes arise in courts of a state of the *situs* of a trust whose assets are includible in decedent's gross estate for tax purposes, the law of the *situs* refers to the law of decedent's domicile to resolve the questions.
>
> "The rule brings about the desirable result of uniform treatment of all those who benefit from the property included in decedent's gross estate for tax purposes, for regardless of the *situs* of the property there is a single point of reference — decedent's domicile."

For other decisions in accord with the New York rule, see Anno.: Estate Tax — Allocation — Law Governing, 16 A.L.R. 2d 1282; *In re Gallagher's Will,* 57 N.M. 112, 255 P. 2d 317, 37 A.L.R. 2d 149; *Trust Co. of Morris County v. Nichols,* 62 N.J. Super 495, 163 A. 2d 205.

We concur in the view of the court below that the Nevada decree with respect to apportionment was not binding on this defendant, since that court had no jurisdiction over him. However, when these plaintiffs came into North Carolina and instituted this action, in our

opinion they are entitled to the relief they seek under 26 U.S.C.A. § 2207, as well as under the apportionment statute in effect in Nevada, and we so hold.

In view of the foregoing conclusion, we deem it unnecessary to consider whether or not the tax involved is apportionable under the decisions of this jurisdiction. Even so, this Court has heretofore recognized and applied the doctrine of equitable contribution with respect to gift taxes. *Nebel v. Nebel,* 223 N.C. 676, 28 S.E. 2d 207. This doctrine was cited with approval in *Cornwell v. Huffman,* 258 N.C. 363, 128 S.E. 2d 798.

The defendant contends that if interest is allowed at all, it should be allowed only from 30 January 1965, the date this defendant received a letter from the executor of decedent's estate making formal demand for payment of a pro rata part of the federal estate tax. On the other hand, the plaintiffs contend, and according to the facts found, a copy of the first annual account and report rendered by the executor was sent to defendant by certified mail on 24 October 1963. It was further found that said first account and report constituted notice to defendant of the claim of the executor that the defendant owed to the estate the pro rata part of the federal estate tax attributable to the value of the property which he received by virtue of the exercise of the power of appointment by Pearl K. Wells. There was no exception to the foregoing findings of fact.

In the absence of any evidence tending to show that the executor was not diligent in converting assets of the estate into cash for the payment of the federal estate tax, we hold that this defendant is liable under the doctrine of equitable contribution for his pro rata part of the interest as decreed in the judgment entered below.

The assignments of error directed to the matters discussed in this opinion, as well as the remainder of the assignments of error not discussed, present no prejudicial error which in our opinion would justify the relief sought by the defendant, and they are overruled.

Except as modified herein, the judgment of the court below will be affirmed.

Modified and affirmed.

MOORE, J., not sitting.

NATIONWIDE MUTUAL INSURANCE COMPANY v. JOHN ROBERT BYNUM.

(Filed 11 May, 1966.)

1. Torts § 4—

The right of one joint tort-feasor to compel contribution from another is purely statutory. G.S. 1-240.

2. Same—

G.S. 1-240 gives joint tort-feasors and joint judgment debtors the right to contribution, but this statutory right relates to contribution and does not include subrogation.

3. Same—

A passenger in a car recovered judgment in a suit against the insurer of the driver for injuries received in a collision. Insurer paid the judgment and sued the driver of the other car upon allegations that such other driver was guilty of concurring negligence causing the collision. *Held:* Plaintiff insurer's rights arise by contract of subrogation under its policy and not upon the right of contribution by a joint tort-feasor who has paid the judgment, and insurer may not maintain an action against the driver of the other car under G.S. 1-240.

4. Constitutional Law § 10—

Whether a statute should be amended to enlarge its scope relates to a legislative and not a judicial function.

MOORE, J., not sitting.

APPEAL by plaintiff from *Copeland, S.J.*, March 7, 1966 Non-Jury Civil Session, WAKE Superior Court.

The plaintiff instituted this civil action to recover the sum of $678.00, "The same being one-half of the amount paid by the plaintiff in discharge of the judgment against plaintiff's insureds . . ." The action grew out of this factual background: John Robert Bynum, the defendant, and Reuben F. Bland live directly across the street from each other. Their private driveways into the street likewise are directly opposite. At 2:30 p.m. on February 21, 1965, John Robert Bynum attempted to back his Chevrolet into the street from his driveway. At the same time Billie C. Bland, agent of Reuben F. Bland, likewise attempted to back the latter's Ford from the driveway into the street. The rear ends of the vehicles collided near the center of the street. Neither driver knew of the presence or intended movement of the other. Edna M. Bynum, wife of John Robert Bynum, was a passenger in her husband's Chevrolet. She suffered injury as a result of the collision.

Edna M. Bynum brought suit against Billie Clyde Bland, driver, and Reuben F. Bland, owner of the Ford, and obtained a judgment for $1,200.00 for her injuries.

The plaintiff, Nationwide Mutual Insurance Company, as required by its policy of insurance on the Ford, paid to Mrs. Bynum the judgment, interest, and costs, amounting to $1,356.00. Nationwide brings this action against John Robert Bynum for the recovery of one-half of the amount paid Mrs. Bynum in satisfaction of her judgment.

As a basis for the recovery against Bynum, the plaintiff, Nationwide, alleged:

> "12. The injuries and damages complained of by Edna M. Bynum in the aforesaid civil action were not only caused by the negligence of the plaintiff's insureds, who were named as defendants therein, but were also proximately caused by the negligence of the defendant in this action, John Robert Bynum, who, in causing the collision between the Bland automobile and his automobile was negligent in these particulars: ((a) failure to keep a proper lookout; (b) failure to keep the Chevrolet under proper control; (c) failure to stop in time to avoid a collision.)
>
> "13. The negligence of John Robert Bynum as aforesaid joined and concurred with that of Billie Clyde Bland and Reuben Fernando Bland, and their joint and concurrent negligence thus became the proximate cause of the injuries and damages sustained by Edna M. Bynum and constituted them joint tort-feasors."

The defendant filed the following demurrer:

> "That the Complaint does not state facts sufficient to constitute a cause of action against defendant in that: It affirmatively appears from the Complaint that plaintiff is an insurance carrier who has paid a joint tort-feasor's obligations to the injured party and now seeks to force contribution from another alleged tort-feasor; that it affirmatively appears from the Complaint that plaintiff is not a tort-feasor or a joint tort-feasor within the provisions of N. C. G.S. 1-240 and cannot as a matter of law maintain said action."

The court sustained the demurrer and dismissed the action. The plaintiff excepted and appealed.

Dupree, Weaver, Horton, Cockman & Alvis by F. T. Depree, Jr., Jerry S. Alvis for plaintiff appellant.

Teague, Johnson & Patterson by Robert M. Clay for defendant appellee.

HIGGINS, J. The plaintiff-appellant in its brief correctly states the question of law involved in this appeal:

"Can an automobile insurer of one joint tort-feasor after discharging in full a judgment obtained by an injured party against its insured maintain in its own name an action for contribution under G.S. 1-240 against a second joint tort-feasor whose negligence proximately caused and contributed to the injury for which the judgment was obtained where the second tort-feasor was not made a party to the original suit?"

Under the rules of the common law the right of one joint tort-feasor to compel contribution from another did not exist. The common law rule in this State was changed by the enactment of Chapter 194, Public Laws, Session of 1919, and was further changed by Chapter 68, Public Laws of 1929. These enactments are now codified as G.S. 1-240.

In substance the section provides that where two or more persons are liable for their joint tort and judgment has been rendered against some, but not all, those who pay may enforce contribution against the others who are jointly liable. "The right permitted to be enforced under this section is one of contribution and not one of subrogation." *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 86 S.E. 2d 780; *Squires v. Sorahan*, 252 N.C. 589, 114 S.E. 2d 277; *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673; *Tarkington v. Printing Co.*, 230 N.C. 354, 53 S.E. 2d 269. Joint tort-feasors and joint judgment debtors are given the right to contribution. The plaintiff is neither.

The original action was brought by Mrs. Bynum against the plaintiff's insured. The present defendant, John Robert Bynum, was not a party to his wife's action. He was, of course, not adjudged a joint tort-feasor. No judgment whatever has been entered against him. In the two cases cited by the plaintiff in support of its position, *Pittman v. Snedeker*, 264 N.C. 55, 140 S.E. 2d 740, and *Safeco v. Insurance Co.*, 264 N.C. 749, 142 S.E. 2d 694, the insureds were adjudged to be joint tort-feasors and judgments were rendered against them. Hence they are within the specific provisions of G.S. 1-240. Nationwide was neither a judgment debtor nor a joint tort-feasor. The plaintiff's rights as insurer arise by contract of subrogation under its policy and not as a result of its joint liability as a tort-feasor who has paid the judgment and is entitled to force contribution under G.S. 1-240.

A rather impressive argument may be advanced in support of the proposition that the statute should be amended to include subrogation in the same category as contribution. Our decisions have been uniform in holding that subrogation is not included within the frame-

work of G.S. 1-240. If and when the lawmaking body wishes to amend the statute, a few words will suffice. This Court must forego the opportunity to amend here. The judgment sustaining the demurrer is

Affirmed.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. HENRY SPENCER COVINGTON, III, AND JOHN DAVID CUMMINGS.

(Filed 11 May, 1966.)

1. Criminal Law § 136—

Where the court finds upon competent evidence that defendant had wilfully violated the conditions upon which sentence in a criminal prosecution had been suspended, the court's order activating this suspended sentence must be affirmed.

2. Criminal Law § 159—

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

3. Automobiles § 85; Criminal Law § 16—

The unlawful taking of an automobile in violation of G.S. 20-105 is a misdemeanor, and in those instances in which inferior courts are given exclusive original jurisdiction of misdemeanors in a county named in the proviso to G.S. 7-64, the Superior Court is without original jurisdiction of the offense, and when the prosecution for the offense originates by indictment in the Superior Court its judgment is a nullity.

4. Criminal Law § 139—

Where the record proper discloses that defendant was tried for a misdemeanor upon indictment originating in the Superior Court in an instance in which an inferior court has exclusive original jurisdiction, the fatal lack of jurisdiction appears on the face of the record, and the Supreme Court will take notice thereof *ex mero motu* and arrest the judgment.

5. Criminal Law § 121—

The legal effect of arrest of judgment for a fatal defect of jurisdiction is to vacate the verdict and judgment, but defendants can thereafter be tried in a court having jurisdiction over the offense.

MOORE, J., not sitting.

STATE *v.* COVINGTON.

APPEAL by defendants from *Shaw, J.*, 24 January 1966 Mixed Session of GUILFORD—Greensboro Division.

Criminal prosecution of Covington on two indictments. The first indictment charges him with larceny from the person of John Henry Oldham of personal property of Oldham of the value of $124. The second indictment contains three counts: The first count charges him with the larceny of an automobile of the value of $1,300, the property of John Henry Oldham; the second count charges him with receiving the said automobile knowing it to have been stolen; and the third count charges him with the unlawful taking of the said automobile, a violation of G.S. 20-105, and a misdemeanor. Criminal prosecution of Covington also on a warrant charging him with simple assault on John Henry Oldham, he, the defendant, being a male person over 18 years of age, heard *de novo* on appeal from a conviction and judgment against him in the municipal-county court, criminal division, Greensboro, Guilford County.

Criminal prosecution of defendant Cummings on two indictments charging him with the identical offenses charged against defendant Covington.

Each defendant was an indigent and was represented by court appointed counsel. All of these cases were consolidated for trial. Each defendant entered a plea of not guilty to all the charges against him.

At the close of the State's evidence, each defendant moved for a judgment of compulsory nonsuit. The court denied such motion by each defendant, except that it is stated, "the Court will submit to the jury the charge of Temporary Larceny of Automobile, said offense having been alleged in the Bill of Indictment."

Verdict as to defendant Covington: Not guilty of larceny from the person; guilty of an assault; "Guilty of Temporary Larceny of Automobile as defined in G.S. 20-105:" Verdict as to Cummings: Not guilty of larceny from the person; "Guilty of Temporary Larceny of Automobile as defined in G.S. 20-105."

It appears from the record that on 6 December 1963 defendant Covington, in the domestic relations court in Greensboro, entered a plea of guilty to the crime of contributing to the delinquency of a minor (at another place in the record it states he was found guilty of this offense), and was sentenced to imprisonment for a term of two years. This term of imprisonment was suspended, and defendant was placed on probation for a period of five years on certain specified conditions. At a hearing in the domestic relations court on 19 November 1965 the presiding judge found that defendant had wilfully violated the conditions of probation in nine instances, revoked probation, and activated the two-year sentence of imprisonment.

Defendant appealed to the Superior Court. Upon the coming in of the verdict against defendant Covington, Judge Shaw heard *de novo* the appeal of defendant Covington from the activation of the road sentence, made detailed findings of fact to the effect that defendant Covington had wilfully violated the conditions of probation, approved the order of the judge of the domestic relations court, revoked probation, and activated the two-year sentence.

From a judgment on the assault charge that defendant Covington be imprisoned for a term of 30 days, said sentence to run concurrently with the two-year sentence of imprisonment given him for contributing to the delinquency of a minor which has been activated, and from a judgment that defendant Covington be imprisoned for a term of 12 months for the unlawful taking of an automobile, a violation of G.S. 20-105, said sentence to run concurrently with the two-year sentence of imprisonment given him for contributing to the delinquency of a minor which has been activated, defendant Covington appeals. From a judgment of imprisonment for 8 months for the unlawful taking of an automobile as defined in G.S. 20-105, defendant Cummings appeals.

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

Benjamin D. Haines for defendant appellants.

PARKER, C.J. Defendants, who are indigents, were allowed to appeal *in forma pauperis,* and are represented here by court appointed counsel.

Defendant Covington excepted to Judge Shaw's entering a judgment revoking probation and activating the sentence of imprisonment imposed upon him for contributing to the delinquency of a minor. Judge Shaw at the hearing before him found as facts from competent evidence presented to him that defendant Covington had willfully violated the conditions of probation upon which a term of imprisonment was imposed upon him for contributing to the delinquency of a minor, and properly revoked probation and activated the sentence of imprisonment.

Each defendant assigns as error the denial of his motion for judgment of nonsuit. However, this assignment of error by each defendant is not brought forward and discussed in their joint brief. Therefore, it is deemed to be abandoned by each defendant. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810; *S. v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

We have carefully examined the assignments of error in respect to the admission of evidence over the objections and exceptions of

defendants and their assignments of error to the charge. Prejudicial error is not shown.

The revocation of the order of probation and activation of the sentence of imprisonment against Covington is affirmed. In the trial of Covington on the assault charge we find no error.

The record before us shows the charge in the indictment against each defendant of the unlawful taking of an automobile in violation of G.S. 20-105 originated in the Superior Court of Guilford County.

The municipal-county court, criminal division, Greensboro, Guilford County, is a court of limited jurisdiction and has "original, exclusive and final jurisdiction of all violations of the ordinances of the city of Greensboro and of all criminal offenses below the grade of felony, as defined by law . . .," committed within Guilford County, "except the Townships of High Point, Jamestown and Deep River." 1955 Sessions Laws, Ch. 971, sec. 3(a), (b), (1). The Legislature, in the exercise of its discretion, has denied to the superior court sitting in the counties named in the proviso to G.S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Guilford County is named in the proviso to G.S. 7-64. Because of the limitation so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the unlawful taking of an automobile, a violation of G.S. 20-105, which is a misdemeanor. If the defendants are to be prosecuted for a violation of G.S. 20-105, it must originate in the municipal-county court, criminal division, Greensboro, Guilford County. *S. v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846, and authorities cited, appeal dismissed 364 U.S. 177, 4 L. Ed. 2d 1650, petition for rehearing denied 364 U.S. 856, 5 L. Ed. 2d 80. This case is reported in the United States Supreme Court Reports as *Wolfe v. North Carolina;* because of the death of Phillip Cooke, his appeal was dismissed as abated. 359 U.S. 951, 3 L. Ed. 2d 759. Any jurisdiction the Superior Court of Guilford County obtains in this case for a violation of G.S. 20-105 must be derivative. *S. v. White,* 246 N.C. 587, 99 S.E. 2d 772. The conviction of defendants of a violation of G.S. 20-105 in this case was by a court without jurisdiction to hear and determine the guilt or innocence of defendants on that charge and was therefore a nullity, and the sentence imposed on each defendant on such conviction is void. However, defendants can be tried thereafter when properly charged in a court having jurisdiction over a violation of G.S. 20-105. *S. v. Cooke, supra.* This fatal lack of jurisdiction appears on the face of the record proper. It is not referred to in the briefs of the Attorney General or of the defendants. The Supreme Court, *ex mero motu,* arrests the judgment of 12 months

imprisonment imposed upon defendant Covington upon his conviction of a violation of G.S. 20-105, and arrests the judgment of 8 months imprisonment imposed on defendant Cummings upon his conviction of a violation of the same statute. The legal effect of arrest of judgment is to vacate the verdict and judgment below in respect to the charge of a violation of G.S. 20-105. *S. v. Williams,* 253 N.C. 337, 117 S.E. 2d 444; *S. v. Biller,* 252 N.C. 783, 114 S.E. 2d 659.

The result is this: As to defendant Covington, revocation of probation and activation of sentence of imprisonment affirmed; trial and judgment on assault case, no error. As to defendants Covington and Cummings, judgment arrested as to each defendant of imprisonment imposed upon conviction of a violation of G.S. 20-105.

MOORE, J., not sitting.

JUDY FAYE GRIFFIN v. WILLIE D. WARD.

(Filed 11 May, 1966.)

1. Automobiles § 9—

The requirement of G.S. 20-154 that the driver of a vehicle should not stop without first seeing that he can do so in safety and must give a signal of his intention when the operators of other cars might be affected does not apply to a stop made necessary by the exigencies of traffic, as when a driver, with his windows up because of rain, is following a line of cars meeting oncoming traffic and is forced to stop because of the stopping of prior traffic.

2. Negligence § 11—

Contributory negligence bars recovery if it contributes to the injuries as a proximate cause.

3. Automobiles § 9—

A driver of a vehicle in a line of traffic is charged with notice that the operator of each car is affected by the one in front of it, and he must maintain such distance, keep such a lookout, and operate at such speed under the prevailing conditions so that he can control his car under ordinarily foreseeable developments.

4. Automobiles § 42d—

Evidence tending to show that plaintiff's vehicle was the fifth vehicle in a line of cars in a rain, that the cars were meeting oncoming traffic precluding a left turn, that the lead car stopped, awaiting opportunity to turn left, that defendant, driving the fourth car, brought his vehicle safely

to a stop, and that plaintiff's vehicle struck the rear of defendant's vehicle, *held* to disclose contributory negligence as a matter of law.

MOORE, J., not sitting.

APPEAL by defendant from *Bone, J.*, September 1965 Session, BRUNSWICK Superior Court.

The plaintiff alleged that she was seriously injured as a result of a collision between her 1963 Falcon automobile and a 1962 Chevrolet driven by the defendant on the afternoon of June 16, 1963. The defendant denied negligence, pleading contributory negligence and set up a counterclaim.

Plaintiff's evidence tended to show that hers was the fifth in a line of cars going north on U. S. Highway No. 17 south of Wilmington, and that defendant's car was immediately ahead of her; that it had been raining and the highway was wet; that both she and the defendant were driving at about thirty to thirty-five miles per hour and she had been following his car for some twelve miles. While she was some four car lengths behind the defendant, he, without signal, brought his car to a stop and her car ran into the rear end of the Chevrolet, causing injury to her. She testified that she saw no brake lights on the defendant's car and that he gave no hand signal of his intention to stop.

The defendant's evidence tended to show that the procession was moving at a rate of forty to forty-five miles per hour; that he was following the car in front of him by some seventy-five to one hundred feet and that they were meeting oncoming cars; that the cars in front of him stopped to allow the lead car to make a left turn; that he had brought his car to a gradual stop some twelve feet in back of the car in front of him and his foot was still on the brake pedal when the plaintiff's car struck his from the rear, knocking it into the rear of the car in front of him. He had been sitting there for a second or so when he was hit. His brake lights were working the day before and he believed they still were at the time of the collision. His wife testified that their child was sleeping on the rear seat of the car and that when it slowed down, she looked back and saw the plaintiff's car at that time; that the plaintiff appeared to be engaged in conversation with a passenger in the front seat of her car and was turning her head to talk, and was not keeping a constant lookout; that the plaintiff made no attempt to stop or slow her car down prior to the impact; that the defendant slowed down so gradually the baby was not thrown off the rear seat.

At the close of the plaintiff's evidence and again at the close of all the evidence, the defendant moved for judgment as of nonsuit, both upon the grounds of lack of actionable negligence on the part

of the defendant, and of contributory negligence on the part of the plaintiff. The motions were denied and the jury awarded substantial damages to the plaintiff. The defendant appealed, assigning error.

Sullivan and Horne by Kirby Sullivan and Thomas E. Horne Attorneys for plaintiff appellee.

Stevens, Burgwin, McGhee & Ryals by Ellis L. Aycock; Herring, Walton, Parker & Powell by Ray Walton Attorneys for defendant appellant.

PLESS, J. G.S. 20-154, which provides that the driver of a motor vehicle shall not stop without first seeing that he can do so in safety and that he must give a signal of his intention where the operation of other cars might be affected, is not applicable where the driver has no choice. Here the defendant was confronted with a situation which demanded that he stop because the line of cars in front of him had done so and he could not turn left because of oncoming traffic. It had been raining and the windows of his car were up so he could give no hand signal, so that his negligence, if any, is based upon the statement of the plaintiff that she saw no brake lights burning on the rear of his car. Even so, it may be doubted that this was the proximate cause of the collision. If the plaintiff can survive the motions for nonsuit upon the questionable contention that the defendant was actionably negligent, we have no serious problem in holding that upon the plaintiff's evidence, and upon all the evidence, the plaintiff could not survive the issue of contributory negligence.

In *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804, this Court said:

> "The mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely", citing *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 333, where this Court laid down the following rule:
>
> "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."

The following excerpts from *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355, are applicable here:

> "The driver of an automobile is not required to anticipate negligence on the part of others and his failure to do so does not

> constitute an act of negligence * * * but he is under the duty to keep a reasonably careful lookout. * * * 'The requirements of a 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.' "

"The plaintiff's negligence, to defeat a recovery in an action like the present, need not be the sole proximate cause of the injury. It is enough if it contribute to the injury as a proximate cause, or one of them." *Moore v. Boone,* 231 N.C. 494, 57 S.E. 2d 783.

There is little, if any, conflict in the evidence for the plaintiff and for the defendant, but we have summarized both to give the full picture. The statement of Chief Justice Stacy in *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137 is applicable here:

> "It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them. The plaintiff thus proves himself out of court. It need not appear that his negligence was the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendant. It is enough if it contribute to the injury. The very term 'contributory negligence' *ex vi termini* implies that it need not be the sole cause of the injury. The plaintiff may not recover, in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the injury."

Here the plaintiff and defendant had been behind a line of cars for a substantial distance. Under these conditions a driver, in the exercise of reasonable care, is charged with notice that the operation of each car is affected by the one in front of it. He must maintain such distance, keep such a lookout and operate at such speed, under these conditions, that he can control his car under ordinarily foreseeable developments. The defendant did so and was able to stop when it became necessary. No less responsibility was cast upon the plaintiff.

Being of the opinion that the cited authorities are controlling here, we hold that the motion to nonsuit the plaintiff's cause of action should have been allowed.

Reversed.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. RICHARD CUMMINGS.

(Filed 11 May, 1966.)

1. Criminal Law § 41—

Circumstantial evidence, which is evidence of facts from which other matters may be fairly and sensibly deduced, is competent and is highly satisfactory in matters of gravest moment.

2. Automobiles § 72—

Circumstantial evidence tending to show that defendant's vehicle was the one involved in a collision with another car, that a trail of water was followed from the collision to defendant's car which was stalled with its radiator damaged and the motor hot, that defendant was then intoxicated and admitted that he had been driving, is sufficient to be submitted to the jury on the question of whether defendant was also intoxicated at the time of the collision.

3. Criminal Law § 55—

The results of a Breathalyzer test are properly admitted in evidence upon a showing that the defendant voluntarily submitted to the test and that the test was made in compliance with G.S. 20-139.1.

MOORE, J., not sitting.

APPEAL by the defendant from *Mintz, J.*, February 7, 1966, Criminal Session, Superior Court of GUILFORD County, High Point Division.

The defendant was charged in High Point Municipal Court in a warrant with the offense of driving a motor vehicle upon the public highway under the influence of intoxicants, in violation of G.S. 20-138. Upon his conviction, he appealed to the Superior Court of Guilford County where, upon a new trial, the jury returned a verdict of guilty. Judgment was pronounced and the defendant appealed.

The State's evidence tended to show that Officer L. E. Miller of the High Point Police Department received a radio call and within three to five minutes thereafter arrived at the intersection of English and Whittier Streets. There he saw an automobile on the right-hand side of the road, headed East on English, which had been damaged on its left-front side. A woman, who was injured, was sitting in the car and the officer, after talking with the driver of it, followed a trail of water which commenced at the damaged car to Ward Street, where he came upon an old model black Ford sitting in the street. The car belonged to the defendant and was badly damaged on its left front, the radiator ruptured, and the motor was still hot. It was not running and would not run. The defendant admitted to Miller that he was driving the vehicle and had been in a wreck; that someone had struck him in the rear. There was no damage to

the rear of the car, all of it being on the left front about the radiator. The black Ford had some blue or bluish color paint on it which resembled the bluish color of the other car.

The officer testified that he saw the defendant walk, detected an odor of alcohol on his breath, and that he was, in his opinion, under the influence of alcohol and was intoxicated. Thereupon, the defendant was taken to the Police Station where, some five or ten minutes later, he was given the Breathalyzer test by Captain Joseph D. Wade. Before being permitted to testify, Officer Wade was questioned preliminarily and his answers tended to show that the tests were made in compliance with G.S. 20-139.1 and the regulations of the State Board of Health as set forth in that statute. He is a graduate of the State Board of Health School on Breathalyzer work and is duly certified as an operator by the Board. He testified in effect that he administered the test to the defendant after the latter had volunteered to take it. This was about twenty minutes after the defendant was arrested. He was given a copy of the results which showed .14 of 1.00 of blood alcohol content.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit which was overruled and the defendant rested and renewed his motion, which was again denied. Upon a verdict of guilty and judgment thereon, the defendant appealed.

T. W. Bruton, Attorney General and Bernard A. Harrell, Assistant Attorney General, for the State.

Morgan, Byerly, Post & Keziah by W. B. Byerly, Jr., Attorneys for defendant appellant.

PLESS, J. The State's evidence impressively shows that the defendant operated a motor vehicle upon the streets of the City of High Point *and* that he was intoxicated. The defendant complains that it doesn't directly show that he drove *while* he was intoxicated. His position is well taken unless the evidence will reasonably and logically sustain such a finding. Here, the State relies upon circumstantial evidence, which, as has been said is "merely direct evidence indirectly applied." It is evidence of facts from which other facts may be fairly and sensibly deduced. It has long been the law in our state that circumstantial evidence may be used, and is highly satisfactory in matters of gravest moment, *S. v. Lowther*, 265 N.C. 315, 144 S.E. 2d 64, and at least twenty earlier cases, cited there.

From the evidence there can be little doubt that the defendant's car collided with the one on English Street. Although the defendant said he had been hit from the rear he admitted a collision. His radiator was leaking and the officer had followed a trail of water

from the scene of collision to the point where he found the defendant and his car. It was hot, stopped, and wouldn't run. And with a bluish paint on it that resembled the bluish paint of the other car. A jury could very reasonably believe that on the busy streets of High Point the trail of water would have been eradicated by other cars in a few minutes; that a car isn't still hot when it has been stopped for an appreciable time; and further, that a driver who admits he had had two beers (as defendant admitted) and has a collision isn't likely to hurry off for more intoxicants to make his condition more noticeable and his breath more "odoriferous." The jury was fully justified in finding that the defendant, when seen by the officer, and later tested by the Breathalyzer, was, if anything, less intoxicated than at the time of the collision.

The defendant's objections to the results of the Breathalyzer Test are not sustained and in the remainder of the trial, we find

No error.

MOORE, J., not sitting.

SECURITY FIRE & INDEMNITY COMPANY AND E. B. STONE FINANCE COMPANY, INC., v. WALTER J. BARNHARDT.

(Filed 11 May, 1966.)

Insurance § 53— Insurer's right of subrogation must be based on payment made to insured or to insured's assignee.

Allegations that the owner of a damaged car released his interest in the car to a finance company, that the finance company paid the deductible portion of the policy of collision insurance, and that the owner's insurer then paid the finance company the remainder of the damages, *held* insufficient to show a right in the finance company and the insurer to sue the alleged tort-feasor under the doctrine of subrogation, since the right of the insurer to subrogation must be based upon a payment by it to insured, and the finance company was not an insurer under the policy and there was no allegation of any loss payable clause to it, or allegation that the insured's claim had been assigned to either the finance company or the insurer.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Walker, Special J.*, November Session 1965 CABARRUS Superior Court.

The plaintiffs alleged that on the 14th day of May, 1962 a 1956 Chevrolet automobile of one Orville H. Kiser was damaged when

three cows, owned by the defendant Barnhardt, suddenly appeared in the path of the car on the highway and that a collision resulted. They further allege that the defendant was negligent in permitting the cows to be loose from the pasture and that the car was damaged to the extent of $385.79. The complaint also alleged that on this occasion the car was insured by Security Fire & Indemnity Company (Security) against loss from damage by collision or upset, and that it thereby became liable to Kiser; that Kiser released his interest in the Chevrolet automobile to the plaintiff, E. B. Stone Finance Company, Inc. (Finance), that Finance paid the deductible portion under the policy and that Security then paid Finance $335.79 for damages to the automobile. Security and Finance alleged that under the above circumstances the defendant, Barnhardt, became indebted to them in the amount of $385.79 and sued to recover that amount, plus attorney's fees. The plaintiffs did not attach a copy of the insurance policy and gave no quotations from it except those shown above.

The defendant demurred to the complaint upon the grounds; (1) that any cause of action accrued to Kiser who was not a party; (2) the alleged interest of Finance arises from a release which is illegal; (3) alleged interest of Security arises from payment to Finance which gave no right of subrogation or cause of action against the defendant. The court sustained the demurrer and the plaintiffs appealed.

Hartsell, Hartsell & Mills by J. Maxton Elliott Attorneys for the appellants.

Williams, Willeford & Boger by John Hugh Williams Attorneys for defendant appellee.

PLESS, J. The right of the plaintiffs to sue Barnhardt is based upon their allegation that Kiser "released his interest" in the automobile to the plaintiff Finance; that it paid the deductible portion (but did not name the payee) "whereupon Security paid Finance $335.79 for damages to the said 1956 Chevrolet automobile." For the insurer to become subrogated to any right of action which the insured may have against the third party, the payment must be to the insured under the policy. Finance was not an insured under the policy and the complaint does not allege any loss payable clause to it. Further, we assume, as a matter of mathematics, that Finance paid somebody $50.00 and that the insurance company paid the remainder of the alleged loss $335.79. There is no allegation that Kiser's claim was assigned to either of the plaintiffs.

The law applicable to a case of this type may be summarized as follows:

(1) A single and indivisible cause of action arises against the tort-feasor for the total amount of the loss. *Insurance Co. v. Motor Lines,* 225 N.C. 588, 35 S.E. 2d 879.

(2) The insurance company can become subrogated to the rights of the insured against the tort-feasor only when it pays the *insured,* not some third party. *Insurance Co. v. Railroad,* 193 N.C. 404, 137 S.E. 309.

(3) The insurance company becomes a necessary party plaintiff and must sue in its own name to enforce its right of subrogation where it has paid the *insured* the loss in full. *Insurance Co. v. Lumber Co.,* 186 N.C. 269, 119 S.E. 362.

(4) The insured is a necessary party plaintiff where the insurance company has paid only a portion of the loss. *Powell v. Water Co.,* 171 N.C. 290, 88 S.E. 426.

The above statements are summarized in a different fashion and more fully by Ervin, J., in *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

The action of the lower court in sustaining the demurrer is Affirmed.

MOORE, J., not sitting.

STATE v. BENJAMIN FRANKLIN LUCAS.

(Filed 11 May, 1966.)

1. Rape § 17—

In a prosecution for assault on a female under the age of consent, it is not required that defendant intend to force sexual relations notwithstanding any resistance the child might make and there is no requirement of force, an intent on the part of defendant to commit rape being sufficient.

2. Rape § 18—

Evidence tending to show that defendant, a 48 year old male, took off his pants so as to expose his private parts and got on top of a female child five years of age, and that her vagina was considerably bruised, *is held* sufficient to sustain a conviction of assault on a female with intent to commit rape.

MOORE, J., not sitting.

STATE *v.* LUCAS.

APPEAL from *Clark, J.,* January 1966 Criminal Term of HOKE.

The defendant was charged in a bill of indictment with the rape of Wendi Carrol Parrish, a female child five years of age on August 30, 1965, but was not tried on the capital charge. He was convicted of an assault on a female with intent to commit rape, and from prison sentence imposed, appealed to this Court.

The State's evidence tended to show that the defendant, a 48-year old married man, took little Wendi Parrish, in his car to some woods near her home; that he made her lie down on the front seat of the car, took off his trousers and exposed the lower parts of his body; that Wendi was scared and crying and that he lay down on top of her and stuck his "finger" in her between her legs; that he persisted in spite of her request that he stop; and that after he did stop he gave her a dollar and she walked home. Before permitting the child to testify to the above, Judge Clark had examined her and found her to be a competent witness.

She told her mother and grandmother of the incident that night and was taken to see Dr. Roscoe McMillan the following day, who testified that "her vagina was considerably bruised, swollen and bleeding and that the depth of the bruising was as far up as he could go, approximately two inches." About five days later the Doctor found that she was infected from the injury to her vagina and was running a temperature which required that he treat her with antibiotics until November. He gave it as his opinion that the injury was caused by penetration of at least two and one-half inches, or as far up as her vagina extended, but gave no opinion as to what type of object was used for the penetration.

The defendant offered evidence tending to show an alibi but the State refuted it with impressive testimony by witnesses who testified that he was not on the job at the time in question and that he was seen by at least two adults in the vicinity of Wendi's home about the time in question.

The defendant assigns as error the failure of the court to grant his motion for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence.

Harrison and Diehl by Philip A. Diehl Attorneys for the defendant appellant.

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

PER CURIAM. Upon a charge of assault with intent to commit rape of a female person above the age of twelve years, the State is required to show that the defendant actually committed an assault

with intent to force the female to have sexual relations with him, notwithstanding any resistance she might make; however, since a child under the age of twelve years cannot give her consent, the requirement of force is not necessary to constitute the offense. The vast majority of the states subscribe to the doctrine that an assault upon a female under the age of consent with intent to have intercourse, constitutes the crime of assault with intent to commit rape. This is well stated in 75 C.J.S., Rape, § 28, p. 493 as follows:

> "Where one touches or handles or takes hold of the person of a female under the age of consent with the present intent of having sexual intercourse with her then and there, he commits the offense of assault with intent to rape; and, when nothing but actual intercourse remains to follow acts done with intent to have intercourse with a girl under the age of consent, the crime is committed. Neither penetration nor an attempt thereof is necessary to constitute the crime of assault with intent to rape a female under the age of consent."

In 44 Am. Jur., Rape, § 23, p. 916 it is said:

> "Where a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection is an assault with intent to commit rape, the consent of the child being wholly immaterial; since the consent of such an infant is void as to the principal crime, it is equally so in respect to the incipient advances of the offender."

A full annotation on the subject may be found in 81 A.L.R., p. 599.

We do not have to leave North Carolina for citations in support of the above position for as early as 1880, when the age of consent was ten years, our Court said in *State v. Dancy,* 83 N.C. 608:

> The elements of "(f)orce and want of consent must be satisfactorily shown in the case of carnal knowledge of a female of the age of ten or more, but they are conclusively presumed in the case of such knowledge of a female child under that age, and no proof will be received to repel such presumption."

It had previously said that in order to convict the defendant, "the sufferer being under ten years of age, it was sufficient to show that he attempted to do the act; to carnally know and abuse the child, who was incapable of consenting." . . . The charge "is supported by proof of an assault with intent to unlawfully and carnally know and abuse a female child under the age of ten years." *S. v. Johnston,* 76 N.C. 209.

The well-reasoned and thorough opinion by Parker, J. (now C.J.), in *S. v. Carter,* 265 N.C. 626, 144 S.E. 2d 826 is analagous. There the indictment did not charge that the victim was just a nine-year old child, so the element of force and resistance had to be considered, almost as though she were past the age of consent. Here, the bill of indictment describes the little prosecutrix as "a female child under the age of twelve (12) years, towit: five (5) years of age" and, of course, she cannot consent. The law resists for her. But the *Carter* case says that the mere submission of a child, in the power of a strong man, can by no means be taken to be such consent as to leave him unanswerable for his reprehensible conduct.

The defendant contends that the evidence only discloses a possible intent to assault the child with his finger but a little five year old girl would not likely know the various components of a man's anatomy and it could reasonably be found that he did not use his "finger" as referred to by the child, but assaulted her with his private parts. His more serious intent is shown by the evidence that he took off his pants so as to expose his private parts and that he got on top of her in the front seat of the car.

The defendant has shown no substantial error and the verdict is amply sustained by the evidence.

No error.

MOORE, J., not sitting.

ESSIE SELLERS v. JOHNIE W. VEREEN T/A VEREEN'S RED & WHITE FOOD STORE.

(Filed 11 May, 1966.)

1. Negligence § 37b—

A proprietor is not under duty to warn an invitee of risks which are obvious.

2. Same—

A proprietor owes an invitee the legal duty to maintain the aisles and passageways of its place of business in such condition as a reasonably careful and prudent person would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety.

3. Negligence § 37f—

Evidence tending to show that plaintiff customer, in attempting to sit in a light lawn chair in the aisle of defendant's store, placed her hands

on the arms of the chair and was pressing down on the arms preparatory to sitting in the chair when it slipped from under her, causing personal injury, *held* insufficient to be submitted to the jury on the issue of negligence.

MOORE, J., not sitting.

APPEAL by plaintiff from *Mallard, J.*, December 1965 Session of BRUNSWICK.

Plaintiff instituted this civil action to recover damages for personal injuries she sustained May 20, 1961, about 2:00 p.m., when she, a customer in defendant's food store, fell while attempting to sit down in a chair.

Plaintiff alleged and defendant admitted: The concrete floor of the store was covered with smooth tile. The chair was "an aluminum lawn-type chair which did not have any 'legs' as such but which was supported by half-circle aluminum hollow tubes extending from underneath the arm rests on either side of said chair down to the floor and back under said chair."

Plaintiff alleged in gist that defendant negligently placed or permitted the chair in the customer area of his store, without giving warning of its inherent dangers and without securing it to the floor, and that defendant knew, or by the exercise of reasonable care should have known, that the chair would cause, or be likely to cause, injury to plaintiff or other customers of the store.

Plaintiff and her doctor were the only witnesses.

Plaintiff's testimony is summarized, except when quoted, as follows:

She saw the chair when she and her husband entered the store. Later, while her husband was "at the meat counter," she came back to the chair. While lawn-type chairs were on display across the front outside the building, "(t)here was just one chair sitting there in the aisle . . ." Plaintiff testified: "There was nothing around the chair. It was sitting at the end of this counter, kind of off at the end of the counter. It was by itself." The chair was from eight to twelve feet from "the check-out place" where defendant as cashier was checking out customers.

The chair "was made out of plastic material, the type people use for lawn or porch chairs." The metal was "a light material." She "did not notice anything unusual about the chair other than it looked like one of those lawn-type chairs." She "didn't see anything wrong with the floor when (she) looked at it." It was "just a tile floor with plastic squares." She "did not have any trouble walking on the floor and if it was slick (she) never noticed it."

As to what occurred when she attempted to sit down in the chair, plaintiff testified: "I walked up to the chair and then backed up to it. I put my hands on the arm rests and the chair popped out from under me and I hit the floor." Again: "I walked up to the chair and turned around to it and put my hands on the arms of the chair . . . I did not touch the chair with anything but my hands. As I was assuming a sitting position I pressed down on the arms of the chair. I was just pressing straight down like you would and it just popped right out from under me. There was no other part of my body touching the chair at that time other than my hands."

At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Herring, Walton, Parker & Powell for plaintiff appellant.
Frink & Prevatte for defendant appellee.

PER CURIAM. There is no evidence (or allegation) that the chair was defective or that the lighting was insufficient. Nor is there evidence the floor in the vicinity of this chair or elsewhere was in an unsafe condition.

There is no evidence of hidden defects or dangers. All the evidence tends to show it was obvious the chair was a light, lawn-type chair, and that plaintiff was fully aware of this fact. A failure to warn of risks of which a person has knowledge is without significance. *Petty v. Print Works,* 243 N.C. 292, 304, 90 S.E. 2d 717. "Defendant owed plaintiff, as invitee, the legal duty to maintain the aisles and passageways of its place of business in such condition as a reasonably careful and prudent proprietor would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety." *Harrison v. Williams,* 260 N.C. 392, 395, 132 S.E. 2d 869, and cases cited.

In our opinion, the evidence, when considered in the light most favorable to plaintiff, was insufficient to warrant submission of an issue to the jury as to the alleged actionable negligence of defendant. Accordingly, the judgment of involuntary nonsuit is affirmed.

Affirmed.

MOORE, J., not sitting.

MARCELLA LONG v. DANIEL THOMPSON.

(Filed 11 May, 1966.)

1. Damages § 5—

Where the complaint alleges that, as a result of the collision, plaintiff suffered personal injuries requiring hospitalization and treatment by a physician for a long period of time, it is not error for the court to admit evidence that as a result of her injuries plaintiff lost certain time from her employment and, consequently, lost certain wages she otherwise would have earned.

2. Negligence § 28—

An instruction to the effect that defendant contended that plaintiff was contributorily negligent in certain respects "or some of them" and that defendant contended that such negligence solely and proximately caused the collision and not any negligence on defendant's part, *held* not to require a finding of contributory negligence conjunctively on each aspect asserted by defendant, and not subject to exception on this ground.

3. 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.

MOORE, J., not sitting.

APPEAL by defendant from *McKinnon, J.*, January 1966 Civil Session of COLUMBUS.

This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff as a result of a collision between her automobile and the pickup truck owned and driven by the defendant on 6 February 1963 upon U. S. Highway No. 701 bypass near the southern limits of the city of Whiteville.

The complaint alleges in substance that the plaintiff, driving her automobile, was following the defendant, driving his pickup truck, in a northward direction on the bypass; the defendant gave a signal for a right turn and pulled the truck entirely off the pavement onto the right shoulder, decreasing its speed; as the plaintiff approached the defendant's vehicle, the defendant suddenly and without signal of his intention to do so drove his truck back upon the pavement, directly into the path of the plaintiff's automobile, without keeping a proper lookout for oncoming traffic and without ascertaining that such movement could be made in safety; these acts and omissions of the defendant caused a collision between the two vehicles whereby the plaintiff sustained personal injuries, the negligence of the defendant being the proximate cause of such injuries.

The answer of the defendant denies negligence by him and, as a

further answer and defense, alleges that the plaintiff by her own negligence contributed to her injuries.

The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and found that she was entitled to recover of the defendant $3,700. From judgment in accordance with the verdict, the defendant appeals.

Only two assignments of error are brought forward in the defendant's brief. These are:

(1) The court erred in admitting, over objection, evidence by the plaintiff tending to show that as a result of her injuries in the collision she lost certain time from her employment and, consequently, lost certain wages she otherwise would have earned;

(2) In stating the contentions of the defendant concerning the first issue, the court instructed the jury that the defendant contends that he was not negligent but the accident was solely the result of the negligence of the plaintiff, the court then set forth the contentions of the defendant as to the various respects in which the defendant contended the plaintiff was negligent and then said, "He contends that she was negligent in those respects or some of them, and that negligence solely and proximately caused the collision, and not any negligence on his part."

The allegations of the complaint with reference to the injuries sustained by the plaintiff are that the collision threw "the plaintiff about in said automobile wherein she was injured and damaged, receiving contusions, sprains and other personal injuries, causing her to experience great pain and suffering which resulted in her being hospitalized and being treated by a physician for a long period of time; that the plaintiff still suffers from said injuries and, upon information and belief, she alleges that her injuries, to some extent, are and will be permanent. * * * That by reason of said negligence of said defendant and on account of the injuries sustained as aforesaid, the plaintiff has been damaged by the defendant in the sum of Ten Thousand and No/100 ($10,000.00) Dollars."

Williamson & Walton for defendant appellant.

Sankey W. Robinson and J. Wilton Hunt for plaintiff appellee.

PER CURIAM. It was not error, in view of the allegations of the complaint, to permit the plaintiff to testify as to the number of days lost from her employment and the wages lost as a result thereof. *Sparks v. Holland,* 209 N.C. 705, 184 S.E. 552; *Kizer v. Bowman,* 256 N.C. 565, 124 S.E. 2d 543; 22 Am. Jur. 2d, Damages, § 282.

The court instructed the jury, "The defendant has alleged that

the plaintiff was negligent in several respects." Each of these allegations was then reviewed and the jury properly instructed concerning each. For example, the court instructed the jury, "The plaintiff, as the operator of a motor vehicle, equally with the defendant, was under a duty of keeping a reasonably careful lookout in the direction of her travel, and if she failed to look or if she failed to see upon looking what a reasonably prudent person would have seen, then she would be guilty of negligence in that respect." There was a similar instruction with reference to the allegation of following too closely, and a proper instruction with reference to the alleged failure of the plaintiff to sound her horn. The court then stated, "The defendant contends, on this first issue, that he was not negligent, but rather that it was solely the negligence of the plaintiff which caused the collision." The defendant's contentions as to what he did and as to what the plaintiff did were then reviewed and the court said, "He contends that she was negligent in those respects or some of them, and that negligence solely and proximately caused the collision, and not any negligence on his part."

The defendant assigns as error the last quoted statement on the ground that it conveyed to the jury the idea that the plaintiff had to be negligent in two or more respects before they could find against her. We do not think the jury could possibly have so construed the charge. There is no merit in this exception.

Other assignments of error set forth in the record are not brought forward in the brief and are, therefore, deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court of North Carolina. We have, nevertheless, examined each of them and find no merit therein.

No error.

MOORE, J., not sitting.

STATE v. JAMES ROBERT PIKE.

(Filed 11 May, 1966.)

Criminal Law § 108—

The court, in setting forth the contentions, stated, without basis in the evidence, that a State's witness had testified that he had met defendant in a prison camp. *Held:* Defendant could not have effectively controverted the misstatement without going upon the stand and, in view of the facts

of this case, the statement, even in the absence of request for correction, must be held sufficiently prejudicial to require a new trial.

MOORE, J., not sitting.

APPEAL by defendant from *McLaughlin, J.*, October, 1965 Criminal Session, GUILFORD Superior Court, Greensboro Division.

The defendant was arrested in High Point on August 18, 1965, and charged in a Municipal-County warrant with the larceny of specific articles of personal property of James Kelly of the value of $310.00. The defendant, not being represented by counsel, was bound over to the Superior Court. Upon a showing of indigency, the present counsel of record was appointed to represent the defendant. Both the defendant and his counsel waived indictment and consented that the defendant be tried on information which conformed to the charge in the warrant.

At the first trial on September 22, 1965, the jury was unable to agree on a verdict. The court ordered a mistrial. At the second trial the jury returned a verdict of guilty. From a sentence of 4 to 7 years in the State's prison, the defendant appealed, assigning errors.

T. W. Bruton, Attorney General, George A. Goodwyn, Assistant Attorney General for the State.

Robert A. Merritt for defendant appellant.

PER CURIAM. At the trial the defendant did not testify as a witness. He did not offer evidence. The State's evidence disclosed that the owner of the stolen articles lived in a Greensboro apartment; that the defendant had lived with him for eight days prior to the time the owner missed the articles, some of which were recovered from a "loan and jewelry company" where they had been pledged for a loan. The owner of the shop at first was equivocal about the identity of the defendant as the one who pawned the stolen articles. In summing up the State's evidence, however, the court charged the jury: "The State's evidence tends to show by Mr. Kelly that on 7 August 1965, that he met the defendant in Graham, in a prison camp in Graham." The record fails to disclose any such evidence from Mr. Kelly or any other witness. The court's statement was the subject of Assignment of Error No. 5, based on Exception No. 5. The Attorney General's brief says of the challenged statement: "This may or may not be prejudicial."

True, the defendant did not request the court to correct the statement with reference to the testimony of the prosecuting witness and the defendant having met at a prison camp. Any objection on the

part of counsel, short of a denial by the defendant which would have required him to testify as a witness, would have been of doubtful value in view of the court's unjustified statement. The court committed error, probably prejudicial, by this statement. In view of the equivocal nature of the evidence and the failure of the jury to agree on a former trial, we deem the court's error in placing him in a prison camp as sufficiently prejudicial to require that he be given, and he is awarded, a

New trial.

MOORE, J., not sitting.

GEORGE ROOSEVELT McGEE, PLAINTIFF, v. WILLIS LLOYD COX, DEFENDANT.

(Filed 11 May, 1966.)

Automobiles § 41r—

Evidence that the owner had knowledge of the defective condition of the right door latch, that he had warned several passengers not to lean against the door, that he failed to warn plaintiff passenger, and that the door came open on a left turn and plaintiff, who was leaning on the door a little, fell out to his injury, *held* sufficient to be submitted to the jury on the issue of negligence.

MOORE, J., not sitting.

APPEAL by plaintiff from *McConnell, J.*, January 3, 1966 Civil Session of GUILFORD, High Point Division.

Action for personal injuries.

Plaintiff's evidence, viewed in the light most favorable to him, tends to show these facts: On October 22, 1963, plaintiff was one of two passengers in the front seat of defendant's 1956 Chevrolet automobile, which he was operating at 30-35 MPH on South Main Street in the City of High Point. Plaintiff was seated next to the right door and might have been leaning against it "a little bit, but not much." On a slight curve, the door came open; plaintiff fell out and was injured. Defendant had purchased the car earlier in 1963. He had had the brakes relined, but had done no other work on the car prior to the accident. Gene Frye, the man who relined the brakes, examined the door latch at that time. He found the teeth of the cog-wheel in the latch to be worn. Frye told defendant that "the latch

was wore out," and that if he would get a new door latch he would put it on for him. Defendant never mentioned the latch to Frye again. In August 1963, defendant had warned several persons not to lean against that door, that it would come open. He had not, however, warned plaintiff. The door had never before come open when plaintiff was in the car, and he had no knowledge that the latch was defective.

The foregoing facts are supported by the necessary allegations in the complaint. Defendant offered evidence in contradiction of that offered by plaintiff. At the close of all the evidence, defendant's motion for judgment of nonsuit was allowed, and plaintiff appealed.

Schoch, Schoch and Schoch by Arch K. Schoch, Jr., for plaintiff appellant.

Jordan, Wright, Henson & Nichols by Karl N. Hill, Jr., for defendant appellee.

PER CURIAM. The rule of law applicable to plaintiff's allegations and evidence is stated as follows:

> "Where the owner or operator of a motor vehicle has knowledge of the defective condition of the vehicle which would make riding in it hazardous or unsafe for a guest, and believes or has reason to believe that the guest would not discover the danger, he has an obligation to warn the guest of such danger and risk and to exercise reasonable care in the operation and control of the vehicle in view of its known defective condition. For instance, where he knew, or in the exercise of reasonable care should have known, that such equipment was in a defective condition, and the guest had no knowledge, actual or constructive thereof, the owner or operator of a motor vehicle is liable for injuries sustained by a guest by reason of . . . a defect in . . . a door. . . ." 8 Am. Jur. 2d, Automobiles and Highway Traffic § 500 (1963).

See Annot., Automobile Guest — Falling Through Door, 9 A.L.R. 2d 1337, 1347 (1950).

Plaintiff's evidence was sufficient to take his case to the jury, whose province it was to resolve the conflicts in all the evidence. The judgment of nonsuit is

Reversed.

MOORE, J., not sitting.

STATE v. HENRY BERRY CASON.

(Filed 11 May, 1966.)

Indictment and Warrant § 1—

The waiver of preliminary hearing by a defendant without benefit of counsel cannot amount to a deprivation of defendant's constitutional rights when no plea is entered upon such preliminary hearing.

MOORE, J., not sitting.

APPEAL by defendant from *McLaughlin, J.*, October 18, 1965 Criminal Session of GUILFORD (Greensboro Division).

The defendant was tried upon a bill of indictment charging that he did unlawfully, wilfully and feloniously commit the abominable and detestable crime against nature with one ....., a female of the age of ten years.

The jury returned a verdict of guilty as charged in the bill of indictment.

From the judgment imposed the defendant appeals, assigning error.

Attorney General Bruton and Staff Attorney Vanore for the State.

Wallace C. Harrelson for defendant.

PER CURIAM. The State's evidence was ample to carry the case to the jury and to support the verdict returned by the jury.

The defendant waived preliminary hearing on 16 August 1965 in the Municipal County Court of Guilford County. He now contends that his constitutional right was violated when he was permitted to waive the preliminary hearing without the benefit of counsel. The defendant was furnished with court-appointed counsel to represent him at his trial in the Superior Court.

Since the hearing was waived and no plea was entered, in our opinion the case of *White v. Maryland,* 373 U.S. 59, 10 L. Ed. 2d 193, and similar cases relied on by the defendant are not applicable to the factual situation in this case. In *White v. Maryland, supra,* a preliminary hearing was held and the defendant entered a plea of guilty, and such plea was admitted in evidence at the trial of the case.

In our opinion the defendant's assignments of error present no prejudicial error that would justify disturbing the result of the trial below. We find

No error.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA EX REL NORTH CAROLINA UTILITIES COMMISSION, AMERICAN TOBACCO COMPANY, WM. MUIRHEAD CONSTRUCTION COMPANY, INC., CITY OF WILMINGTON, NORTH CAROLINA DEPARTMENT OF AGRICULTURE, F. S. ROYSTER GUANO COMPANY, SMITH-DOUGLASS COMPANY, INC., ROBERTSON CHEMICAL CORPORATION, VIRGINIA-CAROLINA CHEMICAL CORPORATION, WILMINGTON FERTILIZER-COMPANY, HEIDE WAREHOUSE COMPANY, CAROLINA NITROGEN COMPANY v. THE SOUTHERN RAILWAY COMPANY, ATLANTIC & EAST CAROLINA RAILWAY COMPANY, CAROLINA & NORTHWESTERN RAILWAY COMPANY, PIEDMONT & NORTHERN RAILWAY COMPANY, CAMP LEJEUNE RAILROAD COMPANY, STATE UNIVERSITY RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, ALEXANDER RAILROAD COMPANY AND THE CLINCHFIELD RAILROAD COMPANY.

(Filed 25 May, 1966.)

1. Utilities Commission § 6—

The burden is upon the carriers asking for increase in rates to prove justification for the increase and that the proposed rate is just and reasonable. G.S. 62-75.

2. Utilities Commission § 9—

An order of the Utilities Commission is *prima facie* correct.

3. Utilities Commission § 1—

The General Assembly has delegated to the Utilities Commission its authority to fix or approve rates of public service corporations, and the fixing of such rates is a function of the Utilities Commission and not the courts.

4. Utilities Commission § 9—

The courts may review an order of the Utilities Commission only to the extent of determining whether the Commission acted reasonably and legally within the exercise of its delegated authority, whether the Commission's findings are supported by evidence, whether the proceedings before the Commission met the requirements of due process, and whether the Commission has acted arbitrarily, unreasonably, or its order was confiscatory.

5. Same—

The findings of the Utilities Commission are conclusive when supported by competent evidence, notwithstanding the evidence might support a contrary finding.

6. Utilities Commission § 6— Order denying increase in rates will not be disturbed when petitioning carriers fail to show proposed increase was just and reasonable.

Petitioning carriers requested uniform increase in their charges for designated types of switching services at all points in the State. The

existing rates were not uniform at all switching points, and the carrier's evidence disclosed that their cost analysis of such operations was based on averages for the country as a whole without regard to the varying factors at each switching point, and the carrier's expert testified that it would be impossible to determine what part of the costs were attributable to the various switching points in North Carolina. *Held:* The carriers failed to prove that the proposed increase was just and reasonable, and order of the Utilities Commission denying the increase will not be disturbed.

MOORE, J., not sitting.

LAKE, J., did not participate in the consideration nor the decision of this case.

BEFORE *Riddle, S.J.*, (without jury) November 29, 1965 Civil Term, WAKE Superior Court. Defendants appealed.

On June 2, 1964, the twenty-nine railroads doing business in North Carolina filed a proposed tariff to increase charges for certain designated types of switching services at all points in the State. Under the authority of G.S. 62-134, the North Carolina Utilities Commission on July 20, 1964 suspended the proposed increase and set the matter for investigation and hearing. The railroads proposed increases as follows:

(1) $7.50 per car for intra-terminal movements of freight cars from one point in the terminal to another.
(2) $7.50 per car on inter-terminal switching, which involves movement from one terminal in a city to another in the same city.
(3) $7.50 per car on non-absorbed reciprocal switches for cars where an industry is located on a railroad which does not participate in line-haul movements and does not share in the revenue from the line-haul movement. A line-haul movement is one where the shipment moves from one city to another over the tracks of one or more carriers.
(4) $3.00 per car on intra-plant switching, which is the switching of a car from one point within the confines of an industry to another point within the confines of the same industry where the car does not leave the property of the industry.

Upon the filing of the proposed increases, protests and interventions were filed as follows:

(1) The City of Wilmington objected to the increase on intra-terminal and inter-terminal switching of fertilizer at Wilmington.

(2) The American Tobacco Company objected to the increase on intra-terminal and inter-terminal switching of tobacco and tobacco products at Durham and Reidsville.

(3) The following group of companies objected to the increase on switching charges as it related to switching of fertilizer at Wilmington: F. S. Royster Guano Company, Smith-Douglass Company, Robertson Chemical Corporation, Virginia-Carolina Chemical Corporation, Wilmington Fertilizer Company, and Heide Warehouse Company.

(4) The North Carolina Department of Agriculture objected to the increase on switching charges for fertilizer and fertilizer materials.

(5) The Wm. Muirhead Construction Company, Inc., objected to the increase on switching charges for crushed stone and aggregates in Durham, North Carolina.

The matter came up for hearing before the Utilities Commission in February, 1965 with the result that the Commission, by order dated August 31, 1965, held that the proposed increases in switching charges were unjust, unreasonable and discriminatory, and ordered the tariff withdrawn and cancelled.

The principal witnesses for the railroads were Mr. Neil S. Simpson, Senior Cost Analyst of Southern Railway and Mr. W. A. Robertson, General Statistician for Seaboard Railroad. They supervised tests, compiled the results and testified at length in behalf of their employers. Their evidence, with some additions from other witnesses, showed the results of costs studied in six cities. They said Durham, Wilson and Reidsville were selected because protests had been filed from shippers in those cities. Charlotte was selected because it is the largest city in North Carolina and has extensive switching operations. Plymouth was selected to represent a small community with relatively little switching operations. Wilson was selected as a medium-sized community. The result of the studies made in these cities, shown on Exhibit 17, and the railroads' evidence tended to show the cost and revenue for twenty-three separate switching operations in the six North Carolina cities, and costs exceeded revenue under present charges in all of them. It showed also that of the twenty-three switching operations in intra-terminal switching, only Reidsville's revenue exceeded cost under the proposed increased charges. It further showed that the increase would result in approximately $178,910 annually to all of the railroads doing business in the State. The Roads contended that switching costs are divided into two separate and distinct categories. One is the cost associated with operation of the switch engine — the wages

of the crew, the fuel, maintenance and repairs of the engine, and similar expenses. The other is the cost associated with the ownership of the car involved in the switching operation, such as depreciation, maintenance and repairs of that car.

The Roads claim that the method used by them was in accordance with procedures approved by the Interstate Commerce Commission.

Using riders on switch engines of the four major railroads of the state, to wit; Southern Railroad, The Atlantic Coast Line, the Seaboard Airline Railway and Norfolk Southern, detailed studies were conducted. Upon the basis of these studies the statisticians for the railroads compiled and offered in evidence an exhibit purporting to show the number of "switch engine minutes" consumed in switching one car in each type of switching movement at each city so studied. The railroads then presented the witness Simpson's computation of the cost of service per "switch engine minute" used per car in each type of switching movement at each city studied. The result so obtained was asserted by him to be the cost to the railroad of moving one car in that type of switching movement at that city. On the basis of this computation, Mr. Simpson testified that the cost of operating a switch engine for one minute was 96.267 cents or $57.76 per hour. In arriving at these figures the railroads combined the system-wide operating costs of the Southern, Seaboard, Coast Line and Norfolk-Southern and then allocated the combined costs to the switch engine operations, resulting in their computation of a uniform cost of a "switch engine minute" at all terminals and in all switching services. They also used some statistics applicable to railroads generally throughout the United States but claim that since the fuel, wages and the number of operators are the same everywhere, there will be no material difference in the cost of operating a switch engine in North Carolina and in other states.

Upon the basis of the computations so made by him, Mr. Simpson testified that the average cost per car switched in all states in which these railroads do business exceeds the average revenue per car, which would be derived from the switching, assuming the increase sought in this case to be in effect; that for the latest period of time covered by their tests, October, 1964, the cost of switching a car in intra-terminal service is approximately double the revenue received; that the cost of switching a car in the inter-terminal service is more than double the revenue. They say in their brief that the cost of operating a switch engine for one minute is the same or substantially the same in North Carolina as it is elsewhere; that even with the proposed increases the railroads would conduct their

switch operations at a loss at all the points tested, except in Reidsville; that they are all operating at a loss without the increase.

The case on appeal consists of two volumes of almost six hundred pages and it is manifestly impossible to refer to all of the details of the evidence. However, the preceding constitutes a fair analysis and summary of the evidence tending to support the position of the railroads.

The protestants offered evidence in opposition of that of the railroads and upon cross-examination of the witnesses for the latter, made a number of contentions, some of which are herein set out. They attacked the validity of the methods used and the results so computed by this study, both as to the number of "switch engine minutes" used in each such service and as to the cost per "switch engine minute."

Based largely upon evidence elicited from the carriers' witnesses they say that Mr. Simpson's cost figures are not supported by facts but are founded in substantial part upon arbitrary charges based upon agreements for car rentals among the railroads; that many of the costs claimed are for depreciation, repairs and maintenance of the cars used but that the railroads offer no figures to substantiate such costs; that they use $10.97 for car ownership cost by the Coast Line at Wilmington, the total cost being $33.32. The figures for Seaboard at Wilmington are $11.33 for car ownership cost while the total is $31.25. They point out that the car ownership costs approximate one-third of the total cost for switching operations but call attention to the evidence showing that a large number of the Seaboard cars are owned by it and have been fully depreciated and written off; that they are not usable otherwise and are never cleaned or washed. They further contend that the evidence shows that one car out of seven received by Smith-Douglass and Royster in Wilmington was a private tank car for which car ownership was not properly chargeable. They further contend that if the percentage of privately owned cars was any less at other plants, the railroads would have presented evidence accordingly.

The protestants called attention to the fact that the railroad's evidence of costs was based upon only six switching yards; whereas, there are fifty-one in the state; that only four of the twenty-nine railroads in the state were involved in the test and that the rates now charged are not uniform, neither are the costs. They called attention to the difference in intra-terminal switching rates as follows: Wilmington $20.14, Greensboro $7.12, Winston-Salem $11.88, Concord $11.98, Asheville $14.62, Charlotte $15.35. They then compared these rates with the cost claimed by the railroads: Plymouth $32.95, Durham $43.24 and Wilmington $33.32; calling attention to the fact

that the cost in Charlotte is higher than in Wilmington but that the rate in Wilmington is higher than the one in Charlotte. The defendants also elicited evidence tending to show that practically all of the figures offered by the railroads deal with average costs of the four different railroads in the six cities tested; that nowhere do they purport to be accurate with respect to any particular railroad at any particular place, primarily because a substantial part of the charges alleged are based upon agreements among the railroads and are not applicable to this case. They further challenge the allocation to yard switching on a system-wide basis which included charges for maintenance of wharves, docks, drawbridge operation, and other operations which would apply to only some of the railroads but not to any substantial number of the twenty-nine railroads in the State, nor to all the fifty-one switching yards. They further contend that the evidence of Mr. Simpson was originally to the effect that it would be impossible to develop the intra-state engine hours in any state; that he did not know how much is attributable to North Carolina Inter and Intra-state; that the carriers later claim they could make such showings now; from which the protestants make the argument that the evidence as offered by the railroads is not reliable and should not be used by the Commission. Other features of the evidence will be considered in the opinion.

From the refusal of the Commission to approve the proposed increased charges, the railroads appealed to the Superior Court which upheld the ruling of the Commission and the defendants appealed to the Supreme Court.

Joyner & Howison by W. T. Joyner, Jr.; Maupin, Taylor & Ellis by Frank W. Bullock, Jr.; Simms & Simms by R. N. Simms, Jr., for defendant appellants; of Counsel: Mr. Henry J. Karison, Southern Railway System; Mr. Charles B. Evans, Atlantic Coast Line Railroad Co.; Mr. James L. Howe, III, Seaboard Air Line Railroad Co.

Thomas Wade Bruton, Attorney General, George A. Goodwin, Assistant Attorney General, for North Carolina Department of Agriculture, appellee; Edward B. Hipp, Attorney for North Carolina Utilities Commission; Cicero P. Yow, Attorney for City of Wilmington, by Edward B. Hipp, plaintiff appellees.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant, Attorneys for Protestant, The American Tobacco Company.

Boyce, Lake & Burns by F. Kent Burns, Attorneys for F. S. Royster Guano Company, Smith-Douglass Company, Inc., W. R. Grace & Co., V-C Chemical Company, Carolina Nitrogen Company, and Heide Warehouse Company — appellees.

Albert W. Kennon, Attorney for Protestant Appellee, Wm. Muirhead Construction Company, Inc.

PLESS, J. In determining this appeal the railroads are confronted with the statutes and decisions of the Court, which provide that the burden of proving the justification for increased rates is on them. They are required, too, to show that the proposed rate is just and reasonable. "G.S. 62-75. BURDEN OF PROOF. —In all proceedings instituted by the Commission for the purpose of investigating any rate, service, classification, rule, regulation or practice, the burden of proof shall be upon the public utility whose rate, service, classification, rule, regulation or practice is under investigation to show that the same is just and reasonable. In all other proceedings the burden of proof shall be upon the complainant." They must also overcome the presumption that the order of the Commission is *prima facie* correct, G.S. 62-94(e) provides the scope of review on appeal, in part, as follows:

> "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 . . ."

Stated another way, the shippers and customers of the railroads have no burden of proving anything; the previous rates are presumed to be fair and reasonable — so are the orders of the Commission.

This Court is not expected to determine freight rates, that is the function of the Commission. The right to fix or approve the rates to be charged by public service corporations for the services rendered the public rests in the Legislature. The General Assembly may act directly or delegate its authority to a Legislative Agency or Commission for that purpose. " 'It is the prerogative of that agency to decide that question. It is an agency composed of men of special knowledge, observation, and experience in their field, and it has at hand a staff trained for this type of work. And the law imposes on it, not us, the duty to fix rates.' " *Utilities Com. v. State* and *Utilities Com. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133.

In 73 C.J.S., Public Utilities, § 32, p. 1056 it is said that: A Utilities Commission "is an expert, technical body which devotes its time and talents to the administration of some of our largest and most complex businesses."

"That a specially trained body of experts in charge of public utility matters is necessary and should be expected and permitted to dispose of such questions in the exercise of their best judgment

unless their action is arbitrary or unreasonable is the basis of the principle of commission control as expressed in the case of *State Public Utilities Commission v. Springfield Gas & Electric Co.*, 291 Ill. 209, 125 N.E. 891, P. U. R. 1920C, 640: 'The law is settled in this state that the matter of rate regulation is essentially one of legislative control. The fixing of rates is not a judicial function, and the right to review the conclusion of the Legislature or administrative body, acting under authority delegated by the Legislature, is limited to determining whether or not the Legislature or the administrative body acted within the scope of its authority, or the order is without substantial foundation in the evidence, or a constitutional right of the utility has been infringed upon by fixing rates which are confiscatory or insufficient to pay the cost of operating expenses and give the utility a reasonable return on the present value of its property. *Chicago, Milwaukee & St. Paul Railway Co. v. Public Utilities Com.*, 268 Ill. 49, 108 N.E. 729, [P. U. R. 1915D, 133]; *Public Utilities Com. v. Chicago & West Towns Railway Co.*, 275 Ill. 555, 114 N.E. 325, Ann. Cas. 1917C, 50, [P. U. R. 1917B, 1046]. The Public Utilities Act gives the courts power to determine whether or not evidence has been properly received or rejected, and whether there is sufficient evidence in the record to support the finding of the commission. If the order does not contravene any constitutional limitation and is within the constitutional and statutory authority of the commission and has a substantial basis in the evidence, it cannot be set aside by the courts. The court is without authority to set aside such an order unless it is against the manifest weight of the evidence. * * * It is clear from the salary fixed for the commissioners and the great power vested in the commission by the Public Utilities Act that the Legislature intended to create an office of dignity and great responsibility. It is, therefore, not to be expected that through fear of popular disfavor the commission will coyly toy with the situation. It sits to administer justice to individual and corporation, the weak, the strong, the poor, the wealthy, indifferently, fearing none and fawning on none. The notion that commissions of this kind should be closely restricted by the courts, and that justice in our day can only be had in courts, is not conducive to the best results. There is no reason why the members of the Public Utilities Commission of this state should not develop and establish a system of rules and precedents as wise and beneficial, within their sphere of action, as those established by the early common-law judges. All doubts as to the propriety of means or methods used in the exercise of a power clearly conferred should be resolved in favor of the action of the commissioners in the interest of the administration of the law. There should be ascribed to

them the strength due to the judgment of a tribunal appointed by law and informed by experience. * * * The necessity of public regulation of rates arises out of the monopoly of the public service company. The unregulated price of the service ceases, except so far as some substitute for the particular service may be found, to be determined by competition, and the individual consumer is unable to contract on equal terms. Fixing rates by public authority may secure to each individual the advantage of collective bargaining by or in behalf of the whole body of consumers, and result in such rate as might properly be supposed to result from free competition if free competition were possible. A just and reasonable rate, therefore, is necessarily a question of sound business judgment rather than one of legal formula, and must often be tentative, since exact results cannot be foretold.' " Pond, Public Utilities, 3rd Ed., § 904, p. 936.

On review, this Court is limited in scope to the questions involved. As stated in 73 C.J.S., Public Utilities, § 64, j.(1), p. 1157:

> "The powers to be exercised by a court on appeal from an order of a public utility or similar commission are restricted to those conferred by constitution or statute. The reasonableness and lawfulness of an order are subject to review on appeal; and the order may be set aside if it is unlawful or unreasonable or both unlawful and unreasonable.
>
> "* * * (T)he only issue before the reviewing court is whether the commission has acted reasonably and legally or has exceeded or abused its powers, and the review is limited to the questions whether the commission acted within the scope of its authority, whether the order is supported by evidence, and whether any constitutional right of a party is infringed thereby, these questions being included in the issue of the reasonableness and lawfulness of the order."

As stated in Pond, Public Utilities, vol. 2, 4th Ed., Sec. 548, p. 984:

> "The court * * * is restricted to the question of determining whether any particular rate already fixed is reasonable or otherwise and can not itself fix such rate because this power inheres entirely in the legislative department of the state."

In *re* the legislative character of fixing rates, the following from 73 C.J.S., Sec. 41, a, p. 1081, is applicable:

> "Although, in establishing rates for public utilities, a public utility commission does not exercise the full power of the legislature in that regard, the action of a public utility commission

in regulating rates is legislative in character, and is subject to the same tests and commands the same regard as a legislative enactment."

With respect to the presumption of validity of rates established by the Utilities Commission, the general rule is stated in 43 Am. Jur. Sec. 186, p. 695:

"In general, a rate fixed by an authorized rate-making body for a public utility is presumed to be valid and reasonable. Accordingly, the courts will not enjoin or interfere with the collection of rates established under legislative sanction unless they are plainly and palpably unreasonable, confiscatory, or excessive, and clearly proved to be such, or unless there was fraud or arbitrariness in fixing such rates."

In effect, this Court occupies the same relative position to the Utilities Commission that it does to the Workmen's Compensation Commission. That is, if the order of the Commission is supported by any reasonable construction of the evidence it is not to be disturbed because a different interpretation could have been placed upon it. We feel that upon a consideration of the evidence before it, the Commission was well justified in failing to find that the proposed increased rates were fair and reasonable.

It has been accepted by all parties that this is not a general rate case. The parties apparently agree that it is one in which the railroads seek a uniform increase on switching charges. While the increase sought appears to be uniform with all of the railroads at all switching points, there the uniformity ceases. Neither the switching charges nor the costs are uniform throughout the State and, as stated previously, the rates extend from $11.98 to $20.14 while the costs claimed by the railroads fluctuate from $32.95 to $43.24, so that only an average cost or an average rate can be presented. The evidence of the railroads shows that an identical increase at every switching point has to be arbitrary and discriminatory. It would put into effect increases in charges for a number of unrelated services at unrelated localities by unrelated railroads. We cannot accept evidence of costs in a seaport town such as Wilmington with its docks, wharves and drawbridges as valid in a hilly or mountain section, such as Asheville or even Winston-Salem. The six appellees, whose operations are in Wilmington, have no interest or concern with costs or rates in Charlotte or Durham.

The carriers contend that they can fairly use National figures as to operations, wages, fuel, maintenance, repairs, depreciation and other business expenses which are the same everywhere. If that be

true, we can see no reason why they can make a profit with the proposed increases at Reidsville but will continue to lose varying and wide-spread amounts at other terminals. While they seek a flat rate increase for switching services at all cities, Mr. Simpson testified that due to the more expensive equipment in use in Charlotte, the switching is more expensive there than at Wilmington.

The Commission was well justified in failing to accept the contentions of the railroads. At one point in their evidence their witness said, "It would be impossible to develop the intrastate engine hours in any state. I do not know how much is attributable to North Carolina all total, interstate and intrastate. I do not know how much is attributable to switch operation in North Carolina. * * * It is a physical impossible *(sic)* element to develop the separate costs of North Carolina." However, in their briefs, the railroads say that after the Commission's order, they made a study to determine if it were possible to allocate switching costs to North Carolina by reasonably sound and acceptable methods and had determined that this was possible. In view of this statement, it is apparent that the evidence in the record could not be entirely accurate. Taking this situation into consideration and in view of the disparity in costs, as well as revenue, in the six cities tested, we can see no more reason for a uniform increase throughout the State than for the substantial difference in the present charges. The railroads chose the yards to be tested and presumably picked the six they expected to support most favorably their claims. Even from this "chosen few" one will show a profit. We can only surmise that tests at the forty-five other yards would have yielded less favorable results.

The railroads are at liberty to make further application for increased charges which do not have to be uniform but could very properly be based upon actual costs and charges under the prevailing conditions.

The Court has considered all of the exceptions brought forth by the fourteen railroads appealing the order of the Utilities Commission and the judgment signed by Judge Riddle. We are of the opinion that they should not be sustained.

Affirmed.

MOORE, J., not sitting.

LAKE, J., did not participate in the consideration nor the decision of this case.

NORMAN LITTLE v. ALVIN O. STEVENS.

(Filed 25 May, 1966.)

1. Courts § 20; Limitation of Actions § 10—

The effect of the 1955 amendment to G.S. 1-21 is to bar all actions by nonresidents on a transitory cause of action arising in another state when such action is barred in the state in which it arose at the time of institution of action here, since the language of the amendment and the history of the statute disclose the legislative intent that the amendment should constitute a limitation and should not be restricted to the mere tolling of the statute by reason of nonresidence.

2. Statutes § 6—

A proviso of a statute must be constructed to effect the legislative intent and will not be restricted by construction to the subject matter of the main statute when the legislative intent is apparent that it should be given general effect as an independent act.

3. Statutes § 5—

A construction which will result in undesirable consequences will be rejected when the act is susceptible of another construction which will avoid such undesirable consequences, since it will be assumed that the Legislature intended the latter construction.

4. Appeal and Error § 49—

A finding of fact by the court relating to a matter not supported by allegation in the pleading is feckless.

5. Limitation of Actions § 16—

When the date the cause of action accrued appears in the complaint and the statute of limitations barring the action is pleaded, defendant's plea in bar must be allowed when plaintiff fails to allege by reply any facts which would avoid the plea in bar by bringing the action within a particular exception or saving provision of the statute.

MOORE, J., not sitting.

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

APPEAL by plaintiff from *Nimocks, E.J.,* March 1965 Civil Session of CUMBERLAND, docketed in the Supreme Court as Case No. 696 and argued at the Fall Term 1965.

Plaintiff, a resident of the State of Tennessee, instituted this action in Cumberland County on November 21, 1963, to recover $45,000.00 for personal injuries and $400.00 for property damage, allegedly sustained in an automobile collision which, he avers, was caused by defendant's negligence. The collision occurred on April 18, 1962, in the parking lot of a shopping center in Shelby County, Tennessee. Answering the complaint, defendant denied his alleged residence in North Carolina. He also denied that he was negligent,

asserted plaintiff's contributory negligence, and pled in bar of plaintiff's action the provisions of G.S. 1-21 and the Tennessee statute of limitations (Tenn. Code. Ann. Ch. 28 § 304), which provides that actions for injuries to the person "shall be commenced within one (1) year after cause of action accrued." Plaintiff filed no reply.

The judge presiding at the September 1964 Session entered an order that defendant's plea in bar be heard prior to any trial upon the merits. Thereafter, the parties waived a jury trial as to the plea in bar, and Judge Nimocks heard the matter. In addition to the facts already recited, he made the following findings to which no exceptions were taken: Plaintiff, a resident of Tennessee at the time of the accident in suit, brought a prior action, identical with this one, against defendant in the Circuit Court of Shelby County, Tennessee, in March 1963. Upon defendant's "Plea in Abatement" (the nature of which is not disclosed), the cause was dismissed on June 28, 1963. In July 1962, prior to institution of that action, defendant had departed the State of Tennessee. Thereafter, defendant was physically present in the State of North Carolina until and beyond November 21, 1963, the date this action was instituted — one year, seven months, and three days after the cause of action accrued in Tennessee. The residence of defendant was not found.

Judge Nimocks, being of the opinion that plaintiff's action for personal injuries was barred by the Tennessee statute of limitations, dismissed it but retained the cause for property damages. From the judgment entered, plaintiff appeals.

McGeachy, Pope & Whitfield for plaintiff appellant.
Quillin, Russ, Worth & McLeod for defendant appellee.

SHARP, J. In Tennessee, actions for injuries to the person must be commenced within one year after the cause of action accrues; for injuries to personal property, within three years. Tenn. Code Ann. Ch. 28, §§ 304, 305. Since, on November 21, 1963, plaintiff's suit for property damage was not barred in either Tennessee or North Carolina, he is clearly entitled to maintain that action here. His right to maintain the action for personal injuries, however, depends upon whether the limitations of North Carolina or Tennessee are applicable. If the former, the action is timely; if the latter, it may be barred. To answer this question, we must ascertain the Legislature's intention when, by Sess. L. 1955, ch. 544, it amended G.S. 1-21. This statute, with the 1955 amendment italicized, is as follows:

"Defendant out of State; when action begun or judgment enforced. — If, when the cause of action accrues or judgment is

rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment. *Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.*"

The Legislature added the above proviso to the statute after this Court's decision in *Bank v. Appleyard,* 238 N.C. 145, 77 S.E. 2d 783. The facts in *Appleyard* were these:

On December 6, 1947, the defendant, then a resident of Texas, executed and delivered to the plaintiff, a Texas bank, an unsealed promissory note, payable on February 4, 1948. The defendant continued to reside in Texas until December 1951, when he moved to North Carolina. On January 29, 1952 — seven days prior to the expiration of the Texas four-year prescription on unsealed notes, but after the three-year period allowed by North Carolina — the plaintiff brought suit here on the note. This Court held, in accordance with the well-settled rule, that North Carolina's three-year limitation, not Texas' four-year prescription, was applicable, since procedural rights are governed by the *lex fori. Accord, Sayer v. Henderson,* 225 N.C. 642, 35 S.E. 2d 875; *Smith v. Gordon,* 204 N.C. 695, 169 S.E. 634; 53 C.J.S., Limitations of Actions § 27 (1948). See Note, 4 Duke B. J. 71 (1954). The majority of the Court concluded, however, that the plaintiff's claim was not barred, because our three-year limitation had been tolled by G.S. 1-21. This section was interpreted to mean that, where a cause of action accrued against a person who was then without the State, our limitations did not begin to run until that person came into the State (if he had never before resided here), or returned here if he had been temporarily absent. The effect of the case was to toll our limitations in behalf of a nonresident plaintiff as against a defendant until the latter came into North Carolina. Thus, under *Appleyard,* no matter how stale a plaintiff's claim — no matter that it had been barred ten, twenty, or thirty years in the state of its origin — the defendant's entry into this State immediately revived it, and limitations

began to run here only from the date of the resurrection. The majority and concurring opinions recognized that the primary purpose of G.S. 1-21 was to toll the statute in favor of resident plaintiffs when defendants (resident or nonresident) were beyond the reach of our courts, and that the decision discriminated unduly in favor of nonresident plaintiffs. By calling attention to the statutes of other states — particularly that of New York — this Court clearly suggested that the Legislature consider enacting a statute which would prevent a nonresident from prosecuting here a claim barred in the state where it arose. The majority opinion concluded with this observation:

> "It will also be noted that many jurisdictions, while adhering to the majority view, have adopted legislation which may prevent recovery on a cause of action arising out of the state of the forum, if such action, at the time of its institution, was barred in the jurisdiction in which it arose. Whether we should take similar action is a matter for the Legislature. Be that as it may, the cause of action involved herein was not barred in the jurisdiction in which it arose at the time the present action was instituted." *Id.* at 152, 77 S.E. 2d at 789.

In *Appleyard,* it was pointed out that the majority of decisions in other jurisdictions had applied the tolling statute of the forum to causes arising out of the State. In some states this rule prompted legislation designed solely to limit the application of the tolling statute; in others, it resulted in the enactment of borrowing statutes of general application.

> "These statutes were necessitated by the rule that the period is interrupted by absence of the defendant from the forum whether the cause of action arose in the forum or in a foreign jurisdiction against a nonresident defendant. In the absence of a borrowing statute, this rule would permit actions which have long since been barred by the *lex loci* and by the statutes of the state where the defendant resided and which would have been barred by the forum had the defendant resided there since the cause of the action arose. Borrowing statutes provide only a shorter time limit than the local period, which is still applicable to bar an action not barred by the borrowed foreign limitation." Developments in the Law, Statutes of Limitations, 63 Harv. L. Rev., 1177, 1262-63 (1950).

Although their terms vary greatly, "probably all jurisdictions" have now enacted statutes "which provide in effect . . . that a

cause of action arising in another jurisdiction or affecting a non-resident defendant and elsewhere barred shall be barred in the domestic courts." 34 Am. Jur., Limitation of Actions § 51(6) (Supp. 1965). The purpose and effect of statutes such as the New York Act quoted in *Appleyard* is stated in 2 Carmody, New York Practice § 488 (2d Ed. 1930):

> "The purpose of this provision is to prevent a non-resident claimant from coming into this State and prosecuting a claim, whether against a resident or a non-resident, under the New York statute of limitations, where the claim would be outlawed under the statute prevailing in the state where the cause of action arose. *The effect is not to substitute the foreign statute of limitations for our own, but to impose it as an additional limitation.* Thus, an action arising in a foreign state in favor of a non-resident, must be brought within the time limited by the New York statute of limitations; and it cannot be brought after the time limited by the laws of the state in which the cause of action arose. *The only effect of the statutory provision, if it is applicable at all, is to shorten the period of limitation.*
>
> "A resident plaintiff is made an exception in this statute, and is thus favored in not being subject to a shortening of the period of limitation where the cause of action arose without the State." (Italics ours.) *Accord, Kahn v. Commercial Union of America,* 227 App. Div. 82, 237 N.Y.S. 94; *Kirsch v. Lubin,* 131 Misc. 700, 228 N.Y.S. 94, *Affirmed,* 248 N.Y. 645, 162 N.E. 559; *Dodge v. Holbrook,* 107 Misc. 257, 176 N.Y.S. 562; *Dalrymple v. Schwartz,* 177 App. Div. 650, 164 N.Y.S. 496; *Isenberg v. Ranier,* 145 App. Div. 256, 130 N.Y.S. 27.

The foregoing statement by Carmody is expressive of the general rule as to the effect of these statutes. "With the exception of Kentucky decisions, the rule is followed with little question that a statute admitting the bar of the law of any other state or country does not so adopt the foreign law as to lengthen the limitation period otherwise prescribed at the forum." Annot., Foreign Bar — Local Statute Admitting, 75 A.L.R. 203, 231 (1931); *Accord,* Annots., 149 A.L.R. 1224, 1237 (1944); 67 A.L.R. 2d 216, 218 (1959). See also 53 C.J.S., Limitations of Actions § 31 (1948).

Prior to the 1955 amendment adding the proviso to G.S. 1-21, plaintiff's right to maintain this action for personal injuries in North Carolina would, under the *Appleyard* decision, have been unquestioned. Since this Court would have applied our own three-year statute, which had not run, the Tennessee one-year limitation would

have been legally irrelevant. The question then becomes: What is the effect of the 1955 amendment upon the law of *Appleyard?* If it is merely a limitation upon the tolling provisions of G.S. 1-21, the proviso never comes into play unless the North Carolina limitation has expired and it is necessary to toll the statute to revive the claim. If this be the proper interpretation, the proviso has no application to this case. If, however, the proviso is interpreted literally, it bars the maintenance here of *all* foreign claims by nonresidents which are barred in the state in which they arose.

The only reported case which has construed the proviso is *Snyder v. Wylie,* 239 F. Supp. 999 (W.D.N.C.). In *Snyder,* the plaintiff, at all times a resident of Ohio, brought an action on October 9, 1964, in the U. S. District Court for the Western District of North Carolina against the defendant, at all times a resident of North Carolina, for personal injuries sustained in Virginia on October 13, 1961. In bar of the plaintiff's right to recover, the defendant pled Virginia's two-year statute of limitations. The question there, as in the instant case, was whether G.S. 1-21, as amended, applied generally so as to bar litigation here of out-of-state causes of action barred in the jurisdiction where they arose, or whether it merely limited the operation of the tolling statute which would otherwise be applicable. The plaintiff contended that the amendment was merely a limitation upon tolling; that it had no application because (1) the defendant was never out of North Carolina, and (2) the action having been brought within the North Carolina period, tolling was unnecessary. The plaintiff argued that, unless a claim is barred in North Carolina *and* by *lex loci,* a plaintiff may sue here. The defendant contended that the proviso not only restricted the application of the tolling provisions, but that it applied generally to prevent the enforcement in North Carolina of all foreign causes of action which were stale in the state of origin.

The opinion of the District Court says clearly that, except for its legislative history and its enactment in the form of a proviso to the tolling statute, the amendment, in the Court's opinion, would have operated generally to bar actions here when they are barred in the state of origin. "In substance," it said, the amendment "is a 'borrowing' statute" such as now exists in "probably all jurisdictions." *Id.* at 1001. The Court, however, persuaded by the form and its interpretation of the history of the amendment, adopted plaintiff's contentions. It held the amendment to be a limitation on the tolling statute and denied defendant's motion to dismiss plaintiff's action.

The closely reasoned opinion in *Snyder* employs such a lucid "convolution of theory" that admiration for its artistry tempts its adoption. Nevertheless, our conclusion — likewise drawn from the legislative history of the proviso — is that the Legislature intended it to be a limited borrowing statute, operating to bar the prosecution in this State of all claims barred either in the state of their origin, or in this State.

It was at its next session following the decision in *Appleyard* that the Legislature enacted the proviso in question, upon the recommendation of the Judicial Council of the State of North Carolina, which had prepared the bill. The Council's report (page 21) explained that the amendment

> ". . . would clarify the law in this area [*Appleyard*] and bring North Carolina in line with several other states which have enacted legislation to the effect that where the cause of action has arisen out of the state, an action cannot be maintained in this state if it is barred by the laws of the state where it arose, unless the action originally accrued in favor of a resident of this state. This will prevent the bringing of stale claims into our courts and at the same time give North Carolina residents the benefit of our own statute."

It is apparent from the above that the Judicial Council had in mind a borrowing statute and not merely a limitation on tolling. The amendment was designed (1) to clarify the law, and (2) to bar stale out-of-state claims. To treat the proviso merely as a limitation would accomplish neither of these purposes. For example, when the prescription period of a foreign state is shorter than that of North Carolina, such an interpretation would resurrect a stale claim; but it would not extend our period so as to save an action where the foreign limitation is longer than North Carolina's and the defendant had never left the state. If, however, the proviso be treated as a limited borrowing statute, *no* action barred in the state of origin may be litigated here.

Construing § 9-1-18 of the Rhode Island General Laws (1956), a statute similar to G.S. 1-21 as amended, the Court of Appeals for the First Circuit, in *DePietro v. Tarter*, 302 F. 2d 611 (1st Cir.), arrived at a different conclusion from that reached by the District Court in *Snyder*. The Rhode Island statute reads:

> "If any person against whom there is or shall be cause for action, hereinbefore enumerated, in favor of a resident of the state, shall at the time such cause accrue be without the limits thereof, or, being within the state at the time such cause ac-

> crues, shall go out of the state before said action shall be barred by the provisions of this chapter, and shall not have or leave property or estate therein that can be attached by process of law, then the person entitled to such action may commence the same, within the time before limited, after such person shall return into the state in such manner that an action may, with reasonable diligence, be commenced against him by the person entitled to the same; *provided, however,* that no action shall be brought by any person upon a cause of action accruing without this state which was barred by limitation or otherwise in the state, territory or country in which such cause of action arose while he resided therein." (Italics ours.)

In *DePietro,* the court, in a *per curiam* opinion, held that the proviso had general application and, in this connection, said:

> "We construe Rhode Island General Laws (1956) § 9-1-18, the last clause, as applying generally, as do similar statutes in many other states, to all causes of action arising in another state and there barred." 302 F. 2d at 612.

In arriving at its construction of the proviso, the court rejected the plaintiff's contention that "the meaning to be given to all parts of a statute is to be restricted by what is provided in the first sentence, even though to do so would do violence to the normal meaning of later language." Rejected also was the plaintiff's contention that when the Legislature amends a statute after the discovery of a defect, any amendment is to be construed, if possible, as applying only to that particular defect. The court said,

> "(A) statute often has more than a single, limited purpose . . . *(T)he discovery of a defect may well be cause for legislative review of the statute for other defects.* . . . Whatever may be the normal situation with respect to amendments, broad remedying language should not be narrowly interpreted where the change was for the purpose of clarification." *Ibid.* (Italics ours.)

A statute in the form of a proviso must be construed to effect the intention of the Legislature; and, where the language of the statute is clearly of general application, a proviso may be given the effect of an independent law. 82 C.J.S., Statutes § 381, p. 888 (1953); 50 Am. Jur., Statutes §§ 435-440 (1940). This principle was clearly recognized in *Propst v. R. R.,* 139 N.C. 397, 399, 51 S.E. 920, 921, where this Court said:

"The general office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it, and usually it is not permitted to enlarge the meaning of the enactment to which it is appended, so as itself to operate as a substantive enactment. It relates generally to what immediately precedes it and is confined by construction to the subject matter of the section of which it is a part. *These rules are, however, not absolute and, after all, if the context requires it, the proviso may be construed as extending to, and qualifying other sections or even as being tantamount to an independent provision, the main object being to enforce the will of the Legislature, as it is manifested by the entire enactment. . . . The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso, the intention expressed being paramount to form.*" (Italics ours.) *Accord, Bank v. M'F'G Co.*, 96 N.C. 298, 3 S.E. 363.

When we give to the language of the proviso its ordinary meaning, we conclude we have a limited borrowing statute which bars all stale foreign claims. Had the amendment been intended merely as a limitation on tolling, we think the Legislature would simply have said, "Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, the provisions of this section shall not apply." Instead, it said that "no action may be maintained in the courts of this State for the enforcement" of an action barred in the jurisdiction where it arose, "except where the cause originally accrued in favor of a resident of this State."

If an act is susceptible to more than one construction, the consequences of each are a potent factor in its interpretation, and undesirable consequences will be avoided if possible. 50 Am. Jur., Statutes § 368 (1940). Considering the ever-increasing number of domestic actions, we think it would be undesirable to burden our dockets with foreign causes barred by the *lex loci*. We believe that the Legislature acted to decrease the burden.

Since we hold that our statute borrows the one-year period prescribed by Tennessee, defendant's plea based thereon imposed upon plaintiff the burden of showing that he could have maintained his action in Tennessee on November 21, 1963, the date on which this suit was instituted. *Parsons v. Gunter*, 266 N.C. 731, 147 S.E. 2d 162; *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548; *Speas v. Ford*, 253 N.C. 770, 117 S.E. 2d 784; *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E. 2d 8. In his brief, plaintiff argues that he

could have done so because (1) the Tennessee one-year limitation statute was tolled by defendant's departure from that state in July 1962 (Tenn. Code Ann. Ch. 28 § 112), and (2) the action was "saved" by Tenn. Code Ann. Ch. 28 § 106 which, like our G.S. 1-25, provides for the recommencement of a new action within one year after a dismissal of a timely action upon any ground other than decision upon the merits. Defendant argues that the cases of *Arrowood v. McMinn County,* 173 Tenn. 562, 121 S.W. 2d 566, and *Oliver v. Altsheler,* 198 Tenn. 155, 278 S.W. 2d 675, answer both of these contentions against plaintiff.

It may be that these cases do not support the propositions for which defendant cites them, and that plaintiff could have successfully avoided the bar of the statute. However, we are not called upon to decide the matter because plaintiff has not, *in any pleading,* set out facts which would repel defendant's plea in bar.

In *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125, it appeared affirmatively that the action for an alleged assault, occurring on April 12, 1952, was instituted on August 24, 1953. The answer interposed the plea of the one-year statute of limitations, G.S. 1-54(3). Thus, nothing else appearing, the action was barred. The plaintiff filed a reply, but alleged no facts which would repel the plea of the statute. Bobbitt, J., speaking for the Court, raised this *quaere:* "When the complaint discloses that plaintiff's action is barred by a statute of limitations pleaded by defendant, *and the plaintiff replies thereto* without alleging facts sufficient to repel defendant's plea, should such action be dismissed as a matter of law?" *Id.* at 416, 88 S.E. 2d at 131. The question was not answered because the case was to be remanded, and the plaintiff, if so advised, could move for leave to plead such facts, if any there were, as would repel the bar of the statute.

Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387, was an action to reform an instrument for mutual mistake. Although the date of execution of the instrument appeared in the complaint, there was no allegation as to the date on which the plaintiff discovered the mistake. The defendant pled the statute of limitations; the plaintiff filed no reply. The trial judge held that, upon the face of the pleadings, the action was barred. Upon appeal, his judgment was reversed. The Court said,

> "The limitation prescribed is not three years from the mistake, but from its discovery. . . . As the date of the discovery of the mistake does not appear in the complaint, the plaintiff should have been allowed to prove, if he could, that it was

within three years before this action was begun." *Id.* at 459, 18 S.E. at 387.

The opinion pointed out, however, that "when the date of the accruing of the cause of action appears in the complaint and the statute of limitations is pleaded, the court can, of course, pass judgment, *unless matter in avoidance is pleaded. . . .*"*Ibid.* (Italics ours.) *Accord, Speas v. Ford, supra.*

This statement is in accord with the general rule stated in 54 C.J.S., Limitations of Actions §§ 376-77 (1948), as follows:

> "(W)here a party against whom limitations have been pleaded attempts to bring himself within a particular saving or exception, he must state with distinctness and particularity all such facts as are essential to bring him within such exception. . . . In pleading nonresidence or absence from the state, as a general rule it is necessary to bring the case clearly within the exception in the statute by appropriate allegations of fact. . . . Where the dismissal of a former action, or a nonsuit or the reversal or arrest of a judgment therein, is relied on to show that a subsequent action is within the exception of the statute which extends the time for suing in such cases, plaintiff must plead specially in this respect. . . ."

See the rationale of this procedure given by Dean Dickson Phillips in his 1964 Supplement to 1 McIntosh, N. C. Practice and Procedure § 373.

After defendant's plea of the one-year Tennessee prescription, which, *prima facie,* barred his action, plaintiff filed no reply. Nor had he theretofore alleged any facts which would have avoided the plea in bar. Whatever may be the legal effect of the Judge's findings, plaintiff may not avail himself of them for they are unsupported by allegations. Presumably they were based upon evidence, although none appears in the record. But however that may be, "proof without allegation is as unavailing as allegation without proof." *Talley v. Granite Quarries Co.,* 174 N.C. 445, 447, 93 S.E. 995, 996-97.

The Tennessee one-year statute of limitations, being shorter than our three-year prescription, imposed an additional limitation upon plaintiff's right to maintain his action in North Carolina. It appearing on the face of the complaint that the cause of action accrued more than one year from the date on which plaintiff instituted this action, defendant's plea in bar was *prima facie* good. For plaintiff to have avoided the bar of the statutory limitation, he was required to plead by reply facts which would have brought him within a savings

provision or exception to the statute. This he did not do. The judgment must be

Affirmed.

MOORE, J., not sitting.

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

JAMES WILLIAM YOUNG v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 25 May, 1966.)

1. Judgments §§ 6, 20, 25—

While the clerk may modify a consent judgment to correct a mutual mistake or mistake by the court in entering the judgment so as to make the record speak the truth, the clerk may not alter the judgment on the ground that it was erroneous, since the remedy to correct an erroneous judgment is by appeal.

2. Trial § 57—

Where the parties waive jury trial and consent that the court find the facts, the parties transfer to the court the function of weighing the evidence, and the court's findings are conclusive if supported by competent evidence.

3. Judgments §§ 6, 20, 25; Insurance § 65—

Consent judgment was entered settling all matters in controversy arising out of a collision. Thereafter, upon unverified motion and without evidence by affidavit or otherwise that the consent judgment failed to express the true intent of the parties, the judgment was modified as "erroneous," without notice to plaintiff's insurer, by inserting a statement that the judgment was without prejudice to defendant's alleged counterclaim. *Held:* Defendant, after recovery of judgment on his counterclaim, may not maintain an action against plaintiff's liability insurer.

MOORE, J., not sitting.

APPEAL by plaintiff from *Bailey, J.*, February, 1966 Civil Session, JOHNSTON Superior Court.

On April 28, 1965, the plaintiff, James William Young, instituted this civil action against the defendant, State Farm Mutual Automobile Insurance Company, to recover the sum of $25,000.00 which the defendant, by its liability policy, is alleged to be obligated to

pay to the plaintiff on behalf of its insured, Melvin E. Moore, in satisfaction of a judgment entered in the Superior Court of Johnston County at its February, 1964 Civil Session.

The defendant, State Farm Mutual, filed a plea in bar, alleging in substance: On April 28, 1961, the defendant's insured, Melvin E. Moore, driving the insured vehicle, (Cadillac) collided with a Ford pickup truck, owned and being driven by the plaintiff, James William Young. Mrs. Melvin E. Moore, a passenger in her husband's Cadillac, was killed and Moore was injured. The plaintiff, James William Young, also was injured. Moore, individually and as administrator of his wife's estate, instituted civil actions against Young for damages on account of the injuries and wrongful death resulting from the collision. Young filed an answer, denying negligence and setting up against Moore a counterclaim for damages he sustained in the collision.

Young was indicted and convicted of the crime of involuntary manslaughter in causing the death of Mrs. Moore.

Other specific allegations of the plea in bar are here quoted:

"7. That the defendant is informed and believes, and therefore alleges, that James William Young, through his personal attorney, requested Young's liability insurance carrier to settle the claims of Melvin Moore, individually and as administrator.

"8. That on September 6, 1962, Melvin E. Moore, acting through his personal attorneys and without the knowledge of the attorneys for his liability insurance carrier, agreed to a settlement of his claim against James William Young, executed a full release of James William Young, accepted a substantial sum of money from Young's liability insurance carrier and consented to a judgment which was entered on September 6, 1962, in the Superior Court of Johnston County and which reads as follows:

"JUDGMENT. THIS CAUSE came on to be heard before the undersigned Clerk Superior Court, Johnston County, at which time it was made to appear to the Court from statement of counsel for plaintiff and counsel for the defendant that all matters and things in controversy in this action have been compromised, agreed and settled, and that the plaintiff has elected to take a voluntary nonsuit of his claim; it is, therefore, ORDERED:

"That this action be, and the same is hereby dismissed as of nonsuit. * * *

"14. That thereafter, on September 18, 1963, James William

Young, acting through his personal attorney, filed a motion in the Superior Court of Johnston County reading as follows:

"'MOTION: That on September 6, 1962, a Consent Judgment was entered into by and between the plaintiff, Melvin E. Moore, and his attorney, Joseph H. Levinson, and the defendant's insurance company carrier's attorney, J. C. Moore, purporting to settle all matters and things in controversy between the plaintiff and defendant.

"That said Judgment was inadvertently, or erroneously, entered, in that: It should have read, "Without prejudice to the defendant's counterclaim."'

"15. That the attorneys for Melvin Moore's liability insurance carrier had no notice of or knowledge of such motion until after a consent order had been entered thereon.

"16. That in connection with said motion, James William Young, through his personal attorney, prepared an order for the signature of the Clerk to change the judgment in accordance with the motion and presented the same to the personal attorneys for the plaintiff Moore and requested Melvin E. Moore to consent to said order.

"17. That Melvin E. Moore, through his personal attorneys, consented to the order on September 23, 1963, and the following order was entered by the Clerk on that day:

"'ORDER. This cause coming on to be heard and it appearing to the Court, and the Court finding as a fact that said judgment is erroneous and that he is entitled to have said error corrected to read, "without prejudice to the defendant's counterclaim"'

"'IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said Judgment be, and the same is hereby corrected to read, "Without prejudice to the defendant's counterclaim."'"

The motion was filed and allowed 12 days after the entry of the original judgment. The motion was not verified and was not supported by affidavit or other evidence. The motion recited the following: "The judgment was inadvertently or erroneously entered in that it should have read, 'Without prejudice to the defendant's counterclaim.'" The clerk found (apparently from the motion itself) "That said judgment is erroneous."

Thereafter, the defendant Young (plaintiff herein) tried his counterclaim against Moore and obtained a judgment for $25,000.00. In the present action he, as plaintiff, seeks to collect the judgment from the present defendant, Moore's liability insurance carrier. At the trial the parties stipulated that Judge Bailey should try the

case without a jury and from the records and stipulations render judgment.

After finding the facts, of which the foregoing is a summary, Judge Bailey concluded that both Moore and Young, by the consent judgment, settled the controversy. By adding, "Without prejudice to the defendant's counterclaim," thereafter, both waived the protection and benefits of the policy of insurance issued by the defendant, State Farm Mutual Automobile Insurance Company, and, "That James William Young is estopped from maintaining this action. . . . That it would be against public policy for the plaintiff to recover of the defendant in this action." Judge Bailey entered judgment sustaining the plea in bar and denying the right of the plaintiff to maintain this action. The plaintiff excepted and appealed.

Canaday & Canaday by Harry E. Canaday, J. R. Barefoot for plaintiff appellant.

Smith, Leach, Anderson & Dorsett for defendant appellee.

HIGGINS, J. The sole assignment of error involves the validity of the judgment. The plaintiff assails it on two grounds: "(a) It is against the weight of the evidence; and (b) it is contrary to the law and the conclusions of law arising from the facts thereon."

By waiving a jury trial and by consenting for the court to find the facts, the parties transferred to the Judge the function of weighing the evidence. Hence the findings are conclusive if supported by competent evidence. The record consists of the pleadings, documents, and stipulations. Most of these this Court has seen before. *Moore v. Young,* 260 N.C. 654, 133 S.E. 2d 510; *Moore v. Young,* 263 N.C. 483, 139 S.E. 2d 704. These records furnish ample support for Judge Bailey's findings of fact.

The records disclose that Moore brought this action against Young for damages resulting from their motor vehicle collision. Young answered, denying negligence and setting up a counterclaim alleging Moore's negligence. By judgment, the parties "compromised, agreed and settled" all matters and things in controversy. Young's insurance carrier paid Moore a substantial sum of money and obtained from Moore full release of Young's liability. Twelve days later Young, by motion, and with Moore's consent, moved to amend the judgment, reciting: "That said judgment was inadvertently or erroneously entered in that it should have read: 'Without prejudice to the defendant's counterclaim.' " The motion was not verified. Evidence was not offered by affidavit or otherwise that by mutual mistake of the parties or by mistake of the court the record did not

speak the truth. The clerk found the judgment "is erroneous." Young and Moore, and Young's insurance carrier are stuck with this finding or conclusion which serves as the only basis for the addition to the judgment. The addition attempting to restore the defendant's counterclaim is inconsistent with that part of the judgment which recites that all matters and things in controversy were compromised and settled.

Ordinarily, erroneous judgments may be corrected only by appeal. *Hill v. Development Co.*, 251 N.C. 52, 110 S.E. 2d 470. *"An erroneous judgment is one rendered contrary to law. . . . (I)t must remain and have effect until by appeal to a Court of Errors it shall be reversed or modified." Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460; Strong's N. C. Index, "Judgments," Vol. 3, § 20.

We doubt if court records, especially judgments, may be treated with such informality as the record in this case discloses. However, Moore and Young caused the change in the judgment to be made. Their respective rights and duties *inter se* are not before us. Having compromised and settled their adverse claims against each other upon the basis of Young's insurer having paid off Moore's claim, this conduct absolved Moore's insurer from liability. Thereafter, by changing the judgment, the parties did not restore this defendant's liability which had terminated by the settlement. The defendant's liability having terminated, the parties could not restore it, enabling Young to collect from Moore's insurer. The law does not look with favor on liability created by manipulation. Notice that such would be this Court's view is given in the closing sentence of the opinion in *Moore v. Young,* 263 N.C. 483: "Needless to say, no question arises, on this appeal, as to the liability of plaintiff's insurance carrier upon the judgment rendered."

If Young was guilty of actionable negligence and Moore free from it, Moore should recover. If Moore was guilty and Young was not, Young should recover. If both were guilty, neither should recover. Young was found guilty of culpable negligence in the criminal case. Thereafter his insurer paid Moore in full. This compromise settlement operated not only as a merger of all interests, but as a bar to all rights. *Beauchamp v. Clark,* 250 N.C. 132, 108 S.E. 2d 535; *Jenkins v. Fields,* 240 N.C. 776, 83 S.E. 2d 908; *Snyder v. Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805.

The trial court's judgment that Young cannot now maintain this action against State Farm Mutual Automobile Insurance Com-

pany is a proper conclusion from the facts found. The judgment of the Superior Court is

Affirmed.

MOORE, J., not sitting.

LARRY EUGENE SINK, BY HIS NEXT FRIEND, EDWIN T. PULLEN, III, v. WILLIAM MOORE, JAMES D. FELTON AND WIFE, KATIE H. FELTON

AND

LOUISE A. HALL v. WILLIAM MOORE, JAMES D. FELTON AND WIFE, KATIE H. FELTON.

(Filed 25 May, 1966.)

1. Animals § 3—

In the absence of municipal ordinance, the owner of a dog is not required to keep him under restraint unless the animal is vicious or a menace to the public health, G.S. 106-381, and testimony that a dog on several occasions fought with other dogs in the neighborhood and that he frequently dashed into the street to bark at and pursue vehicles, is not evidence of a vicious propensity within the meaning of the statute, nor is it sufficient to invoke the common law rule imposing liability upon the owner for injuries inflicted by a dangerous, vicious, mischievous, or ferocious animal when the owner knows or should know of the animal's vicious propensity.

2. Same—

The exclusion of testimony that the dog in question had a bad reputation as an ill-tempered dog is not error when it appears that the testimony was based entirely upon the witness's observations of the dog and not on the dog's reputation in the community.

3. Automobiles § 41m—

Evidence tending to show that a dog had the habit of chasing vehicles upon the street abutting the owner's property, without sufficient evidence to show that the dog had a vicious propensity known to the owner, and that the dog ran after a boy on a bicycle, barking, but not growling or snapping, *is held* insufficient to support an issue of negligence of the owner in causing an accident occurring when the boy, thus distracted by the dog, ran into the side of an automobile at an intersecting street.

4. Same— Evidence held insufficient on issue of negligence of motorist in colliding with bicycle ridden across intersection into side of car.

The evidence tended to show that a motorist was driving some 25 miles per hour and within the speed limitation, that as he approached a street making a "T" intersection to his left he saw a 14 year old boy riding a bicycle with a dog three or four feet behind the bicycle, without anything to put him on notice that the dog was chasing the bicycle or that the boy was afraid of the dog, that when he observed the boy pedalling rapidly, he

drove his automobile entirely off the pavement onto the shoulder on his right, and that the boy rode past a stop sign and straight through the intersection and ran into the side of the automobile when all four of its wheels were off the pavement. *Held:* The evidence is insufficient to be submitted to the jury on the issue of the motorist's negligence, since the motorist is not charged with the duty of anticipating that the boy would continue straight across the intersection without turning.

5. Same—

The evidence tended to show that a boy on a bicycle, approaching along a street making a "T" intersection to a motorist's left, rode across the intersection and into the side of the motorist's car after it had turned to the right and had its four wheels on the right shoulder. *Held:* The failure of the motorist to sound his horn in the emergency cannot constitute a proximate cause of the accident when the boy would not have had time to alter his course even if a horn had been sounded.

6. Automobiles § 19; Negligence § 14—

A person without fault in creating an emergency may not be held to the wisest choice of conduct, but only for his failure to take those measures which a reasonably prudent man, faced with like emergency, would have taken.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Lupton, J.*, 11 October 1965 Session of FORSYTH.

These are two actions, consolidated for trial, which arise out of a collision on 26 June 1962 at the intersection of Hannaford Road and Vest Mill Road, outside the city of Winston-Salem, between a bicycle ridden by Larry Eugene Sink and an automobile driven by William Moore. The plaintiff Louise A. Hall is the mother of the plaintiff Larry Eugene Sink. Larry was 14 years of age at the time of the collision. His father is deceased. Larry sues on account of serious personal injuries alleged to have been sustained by him as a result of the collision. His mother sues for medical, hospital and nursing expenses incurred by her as a result of Larry's injuries and for loss of his services.

The allegations of the two complaints are the same as to how the collision occurred. In summary they are:

Larry was riding his bicycle in an easterly direction on Hannaford Road, approaching its intersection with Vest Mill Road. A dog owned by Mr. and Mrs. Felton suddenly ran out from their front yard and began to chase Larry, barking, growling and snapping at him. Mr. Felton was then in his front yard. While Larry was distracted, in fear of the dog, his bicycle collided with the automobile of William Moore. The Feltons were negligent in that, although they knew the dog was in the habit of chasing children on bicycles

and other vehicles, they neglected to confine the dog to their premises or to restrain him after seeing him chasing Larry. Moore was negligent in that he drove his automobile at a speed in excess of 35 miles per hour in this residential district, failed to decrease his speed in approaching and crossing the intersection, failed to keep a proper lookout, failed to yield the right of way to Larry, failed to sound his horn when he saw, or should have seen, that Larry was confused by the dog's chasing him, and failed to bring his automobile to a stop so as to avoid colliding with the boy. Moore had the last clear chance to avoid the collision. The negligence of the Feltons concurred with that of Moore as a proximate cause of the collision.

In their respective answers the defendants deny they were negligent and allege contributory negligence by Larry in that he operated his bicycle into the intersection without keeping a lookout and in violation of a duly erected stop sign.

At the conclusion of the evidence offered by the plaintiffs, each defendant moved for a judgment of nonsuit and each such motion was allowed. From such judgment the plaintiffs appeal, assigning as error the allowance of the said motion and the ruling of the court sustaining the objections of the defendants to proposed testimony of the witness W. D. Stancil, who lives in the vicinity, to the effect that the "general character and reputation of the dog in this community as of June 26, 1962" was bad, he being known "as an ill-tempered dog."

The evidence offered by the plaintiffs, in addition to that relating to the nature and extent of Larry's injuries and the amount of medical, hospital, drug and nursing expenses incurred, may be summarized as follows:

The collision occurred in a residential area at approximately 6:50 p.m., 26 June 1962, at which hour it was daylight. Hannaford Road and Vest Mill Road intersect in a "T," Vest Mill Road being the top of the "T." Hannaford Road is 26 feet wide. There is erected upon it a stop sign 23 feet from the intersection. Looking south from the stop sign, one can see 500 to 700 feet down Vest Mill Road. Between this sign and the corner there was an ornamental brick wall and some shrubs, all about two feet high.

Following the collision the Moore automobile was in the ditch on the east or far side of Vest Mill Road. There was a hole in the left side of the windshield. The rear of the automobile was a few feet past the north line of Hannaford Road, extended. Moore had been driving north on Vest Mill Road. Tire tracks leading to both rear wheels were visible upon the grass shoulder, the right track running upon the shoulder for 91 feet and the left track for 47 feet. The right and left tracks ran upon the shoulder for approximately

68 feet and four feet, respectively, before reaching the south line of Hannaford Road, extended. The shoulder was four or five feet wide and was thickly grown with honeysuckle and grass. To the right of the shoulder was a drop-off and a wooded area.

Moore was driving 30 to 35 miles an hour. His two small children were with him. He veered to the right in an effort to miss the bicycle, which did not stop but came straight across the intersection and struck the left door of the automobile near the windshield. Larry fell back upon the pavement, blood being found slightly south and east of the center of the intersection.

The Felton's little dog, Corky, came from their yard as Larry passed on his bicycle and chased the bicycle at its rear wheel on its right (south) side. He was just barking. There was no evidence to support the allegation in the complaint that he was growling and snapping at Larry. Larry looked back at the dog and kicked at him. It appeared that Larry was intending to turn to the right at the intersection. He increased his speed when the dog started to chase him. He did not stop or change his speed as he went past the stop sign and into and across the intersection to the point of collision. A witness, approximately 125 feet from the point of the collision, did not hear a horn blow or an automobile skid.

Corky "is just a little mutt," approximately a foot high. Prior to this occasion he had been observed to chase trucks, motorcycles or other vehicles moving with a loud noise along the street, running and barking behind the vehicle. Customarily, he was not penned or tied but stayed "pretty close" to the two small Felton boys. He was never known to be vicious among children or to snap at or harm a child.

The witness W. D. Stancil, who lived in the neighborhood, had observed Corky chasing his automobile on a few occasions and barking at it. He had not seen Corky do anything with regard to other vehicles prior to this collision. Had this witness been permitted to answer counsel's question as to the "general character and reputation of the dog in this community," he would have testified that the dog's reputation was bad, that he was known as an ill-tempered dog and that on several occasions he had fought with the Stancil dog and other dogs in the neighborhood.

Mr. and Mrs. Felton stated to Mr. and Mrs. Hall that Corky had chased bicycles and cars before this occurrence. Both families live in this neighborhood. The plaintiffs offered no evidence to support their allegation that Mr. Felton was in his front yard at the time of this occurrence, or that either of the Feltons knew that Corky was chasing Larry and the bicycle.

Moore saw Larry as Larry was just approaching the intersection. The dog was then about three or four feet behind the bicycle

and Moore did not know whether he was chasing the bicycle or not. He did not see the dog thereafter. He left the road to avoid the collision. Larry was pedalling the bicycle fast. After Moore left the road and went onto the shoulder Larry came straight into his car. All four wheels of the automobile were then off the pavement on the right side of the road. Moore did not sound his horn or slow down before reaching the intersection. He did not have time to apply his brakes.

Deal, Hutchins and Minor for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Irving E. Carlyle and Allan R. Gitter for defendant appellee William Moore.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and J. Robert Elster for defendant appellees James D. Felton and wife, Katie H. Felton.

LAKE, J. The scene of this occurrence was in a residential area outside the limits of the city of Winston-Salem. Consequently, no city ordinance requiring dogs to be kept under restraint is involved. G.S. 106-381 provides that "when an animal becomes vicious or a menace to the public health," its owner may not permit the animal to leave the premises on which it is kept unless it is on a leash and in the care of a responsible person.

There is in this record no evidence that the little dog, Corky, was either vicious or a menace to the public health. On the contrary, the evidence is that he had never been known to snap at or bite a child or any other person. He stayed "pretty close" to the two small Felton boys. He was "just a little mutt" about a foot high. There was testimony that, on occasion, he fought with other dogs in the neighborhood, apparently with success. Had the witness Stancil been permitted to testify as to Corky's reputation in the community, he would have said that he saw Corky, on several occasions, fighting with his dog and other neighborhood dogs, and that on these occasions, when Mr. Stancil went out to break up the fight, Corky would tend to stand his ground and growl while the other dogs would spread out. Canine courage in a contest for the championship of the neighborhood, together with determination to remain in possession of the field of battle "whence all but him had fled," is not evidence of a vicious character within the meaning of this statute. There is no evidence that Corky ever indicated an intent to attack Mr. Stancil.

The only other charge of misconduct brought against Corky, prior to the occasion in question, is that he frequently dashed into the street to bark at and pursue motorcycles, automobiles and other

noisy vehicles. Such a habit is not sufficient to justify classifying him as a "vicious" animal. It does not make him "a menace to the public health," though it considerably reduces his own life expectancy. In *State v. Smith,* 156 N.C. 628, 72 S.E. 321, Walker, J., said, "A dog is like a man in one respect, at least — that is, he will do wrong sometimes; but if the wrong is slight or trivial, he does not thereby forfeit his life." Earlier, Gaston, J. said, in *Dodson v. Mock,* 20 N.C. 282:

> "That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the man who had hotly pursued him *flagrant delicto* — that on another occasion he barked at the Doctor's horse, and that he was shrewdly suspected in early life to have worried a sheep — make up a very catalogue of offenses not very numerous nor of a very heinous character. If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightfully extirpated."

Since G.S. 106-381 does not apply and there is no city ordinance involved, the liability, if any, of the defendants Felton must be determined by the rule of the common law applicable to the owner or keeper of a dog. At common law the presence of a dog, not vicious, on a street or highway is not wrongful. 4 Am. Jur. 2d, Animals, § 115. In *Plumidies v. Smith,* 222 N.C. 326, 22 S.E. 2d 713, the plaintiff was a 12 year old boy who, while delivering newspapers, was bitten by the defendant's large Saint Bernard dog. Stacy, C.J., speaking for the Court, said:

> "To recover for injuries inflicted by a domestic animal, in an action like the present, two essential facts must be shown: (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character and habits."

In *Hill v. Moseley,* 220 N.C. 485, 17 S.E. 2d 676, the suit was brought for injuries sustained by a boy attacked by the defendant's vicious bull. Seawell, J., speaking for the Court, said:

> "The evidence of vicious propensity must be unequivocal. But we are not required to explore the psychology of the bull — if he has any — to determine whether his intentions are amiable or malicious. The propensity is vicious if it tends to harm, whether manifested in play or in anger, or in some out-

break of untrained nature which, from want of better understanding, must remain unclassified."

The word "mischievous" as used in this rule of the common law does not connote a mere playful canine trickster. It connotes conduct "producing or tending to produce mischief or harm; injurious; deleterious; hurtful." The Century Dictionary; Webster's New International Dictionary, Second Edition. See *State v. Smith, supra; Spring Co. v. Edgar,* 99 U.S. 645, 653. On the other hand, if the habit of the dog is one which is likely to cause injury, it is immaterial that the dog was playing. Thus, where a large dog jumped up on an old man walking along a highway and knocked him to the ground, the owner, knowing of the dog's disposition to such conduct, was held liable in *Crowley v. Groonell,* 73 Vt. 45, 50 Atl. 546. Similarly, in the days of horse drawn vehicles, there was obvious danger that a dog running about the horse, barking ferociously and snapping and biting at the horse's legs, might cause the horse to run away and injure the occupants of the vehicle. See: *Harris v. Fisher,* 115 N.C. 318, 20 S.E. 461; *Schmid v. Humphrey,* 48 Iowa 652; *Broderick v. Higginson,* 169 Mass. 482, 48 N.E. 269; *Knowles v. Mulder,* 74 Mich. 202, 41 N.W. 896; 4 Am. Jur. 2d, Animals, § 115; Annot., 11 A.L.R. 270.

The test of the liability of the owner of the dog is, therefore, not the motive of the dog but whether the owner should know from the dog's past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result. That is, the liability of the owner depends upon his negligence in failing to confine or restrain the dog. The size, nature and habits of the dog, known to the owner, are all circumstances to be taken into account in determining whether the owner was negligent.

There is no evidence that either Mr. or Mrs. Felton saw the dog run out after Larry's bicycle. There is no evidence that the dog came in contact with the bicycle or with Larry. There is no evidence that he bit or snapped at Larry or at the bicycle, or attempted to do so. There is no evidence that Larry, who lived in the neighborhood, was afraid of this dog. The evidence is that prior to this accident he was a normal boy nearly 15 years of age. It may not reasonably be inferred from the plaintiff's evidence that Larry was frightened or contemplated an attack. The evidence is equally consistent with the view that Larry was playing and enjoying the race. In this respect, the case differs from *Ethridge v. Nicholson,* 80 Ga. App. 693, 57 S.E. 2d 231. There, the plaintiff, a girl whose age does

not appear from the report, alleged in her complaint that she was, while riding her bicycle, attacked by the defendant's "large, vicious German police dog," that the dog was barking and indicating his intention to attack, bite and injure her and she, believing he would do so, gave her sole attention to him and ran into an obstruction in the street. The question arose on a demurrer to the complaint so that these allegations were taken to be true. Furthermore, there was, in that case, an ordinance in effect forbidding owners of dogs to allow them to run at large in the streets. The overruling of the demurrer by the Georgia Court is not authority for the proposition that, upon the facts in the present case, the owners of this small dog should be held liable.

Considering the size of the dog and his established lack of viciousness, we think his propensity for chasing automobiles and other noisy vehicles was not sufficient to cause a reasonable owner to apprehend injury to another unless the dog was confined to a pen or restrained by a leash.

Upon a motion for judgment of nonsuit, the evidence must be taken in the light most favorable to the plaintiff and every reasonable inference of fact favorable to him must be drawn therefrom. *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281. However, when so considered, the evidence in this case is not sufficient to support a finding of a "vicious propensity" on the part of the dog.

There was no error in sustaining the objection to the proposed testimony by the witness Stancil that Corky had a bad reputation "as an ill-tempered dog." In an action of this nature the reputation of the animal is admissible as evidence that the owner knew of its disposition and propensities. *Hill v. Moseley, supra;* Stansbury, North Carolina Evidence, § 109. However, the proper foundation was not laid for the question as to the dog's reputation. The witness was not asked whether he knew that reputation. The record shows that if he had been so asked he would have stated that his testimony was based entirely upon his own observation of the dog's actions and not upon what anyone else said. This witness, as others, could properly testify as to what he had seen the dog do, but this is not evidence of the dog's reputation in the community. It is evidence of the dog's habits, disposition and character. Had the proposed testimony been received in evidence, it would simply have shown that the dog, in this witness' opinion, was ill-tempered because he fought with other dogs in the neighborhood. The witness would have testified that he had never heard of Corky's biting or snapping at any child. "Knowledge that a dog is ferociously disposed toward other

animals is ordinarily not notice that it will attack persons." 4 Am. Jur. 2d, Animals, § 95.

The plaintiff's evidence also fails to show negligence by the defendant Moore in the operation of his automobile.

Moore was driving 35 miles per hour, which was not in excess of the maximum speed limit. He was approaching a "T" intersection, proceeding along the top of the "T." The intersection was protected by a stop sign on the other street. He had his two children, two and three years of age, respectively, in the car with him. To bring his automobile to a sudden stop would seriously jeopardize their safety. He saw a 14 year old boy riding a bicycle and a dog three or four feet behind the bicycle. There is nothing to suggest that Moore should have known the dog was chasing the bicycle or that the boy was afraid of it. The scene confronting Moore was consistent with that of a normal 14 year old boy followed by his own dog. At that point there is nothing to indicate that Moore should have anticipated that the boy on the bicycle would continue straight across the "T" intersection without turning one way or the other into Vest Mill Road. When he observed the boy pedalling rapidly, Moore pulled his automobile entirely off the pavement onto the shoulder and the collision occurred when all four wheels of the Moore vehicle were off the pavement. The shoulder was approximately the width of the car. Had the bicycle not struck the car, it would certainly have gone across the shoulder, over the drop-off and into the wooded area beyond Vest Mill Road. We can only conjecture as to what injuries Larry would have sustained in that event.

Had Larry turned to the left or to the right on Vest Mill Road, he would not have struck the Moore vehicle. Moore's failure to blow his horn after it became apparent that Larry would not turn in either direction could not have been a proximate cause of the collision for there was then not sufficient time for Larry to alter his course and avoid the collision.

Moore was acting in an emergency not created by his own conduct. In such a situation he is not required to exercise precautions which calm, detached hindsight suggests might have been taken. He may not be held liable for failure to take those measures unless it can be said that a reasonable man faced with a like emergency would have done so. *Forgy v. Schwartz,* 262 N.C. 185, 136 S.E. 2d 668. As in the *Forgy* case, "The evidence fails to show that an ordinary prudent person would have reacted more quickly or used better judgment under the same circumstances."

Since the evidence of the plaintiffs fails to show actionable negligence by any of the defendants, we do not reach the question of

whether their evidence leads to the sole conclusion that the plaintiff Larry Sink, by his own negligence, contributed to his injuries. He has been grievously injured and the evidence indicates that these injuries are permanent in nature. However, the evidence does not disclose any basis for imposing upon any defendant liability for those injuries or for the resulting loss to his mother. Consequently, there was no error in granting the several motions for judgment of nonsuit.

Affirmed.

MOORE, J., not sitting.

STATE v. VINCENT FURIO.

(Filed 25 May, 1966.)

1. Municipal Corporations § 4—

A municipal corporation is a creature of the State and has only those governmental powers granted to it by the Legislature, expressly or by necessary implication. G.S. 160-1.

2. Municipal Corporations § 24—

A municipal corporation has no inherent police powers.

3. Same—

A municipal corporation has no power to extend the application of an ordinance to territory outside its corporate limits in the absence of a grant of such power by the General Assembly.

4. Same—

A municipal ordinance prohibiting the construction and maintenance along any street or highway of any sign, billboard, motion picture screen or other structure upon which is depicted any nude or semi-nude pictures or words which are vulgar, indecent or offensive to the public morals, does not purport to prohibit such act outside of its territorial limits.

5. Municipal Corporations § 34—

In a prosecution of defendant for violation of a municipal ordinance by maintaining a motion picture screen upon which was projected pictures of nude and semi-nude men and women in such manner as to be visible to the general public along a street or highway, a warrant charging that defendant did the proscribed act within the city limits or within one mile thereof or within designated townships, *is held* insufficient to charge a violation of the ordinance, there being no showing that the ordinance was intended to apply beyond the territorial limits of the city, and the commission of the proscribed act outside of the municipal limits not being an offense under the ordinance.

6. Municipal Corporations § 27—

An ordinance proscribing the display of obscene pictures or words in such manner as to be visible to the general public using the streets or highways does not relate to the public safety but to the public morals.

7. Municipal Corporations § 24—

An ordinance proscribing the display of obscene pictures or words in such manner as to be visible to the general public using the streets or highways undertakes to forbid acts not forbidden or permitted by G.S. 14-189, G.S. 14-189.1, and G.S. 14-189.2, and the General Statutes do not preempt the field so as to preclude municipal action in this respect. G.S. 160-200(6)(7).

8. Criminal Law § 1—

A criminal statute or ordinance must be sufficiently definite to apprize a citizen of common intelligence with reasonable precision what acts are forbidden or required, and if it fails to do so it may be void for uncertainty, vagueness or indefiniteness.

9. Municipal Corporations § 24; Indictment and Warrant § 9—

A municipal ordinance making it unlawful for any person, firm, or corporation to construct or maintain along any street or highway, in such manner as to be visible to the general public using such street or highway, any sign, screen or other structure depicting nude or semi-nude pictures of men and women, or words which are vulgar or indecent or offensive to the public morals, *held* void for indefiniteness as to the locations within the purview of the ordinance and as to the acts proscribed, and a warrant charging a violation of the ordinance is properly quashed on motion.

MOORE, J., not sitting.

APPEAL by the State from *McLaughlin, J.*, 27 September 1965 Criminal Session of GUILFORD.

The State appeals from the allowance by the superior court of the defendant's motions to quash two warrants issued by the Clerk of the Municipal Court of High Point purporting to charge the defendant with violation of City Ordinance 15-24.1 of the city of High Point on 18 March 1965 and 16 March 1965 respectively. The defendant was tried and found guilty on each charge in the municipal court and, in each case, was sentenced to confinement in the county jail for a period of 30 days, each sentence being suspended for 12 months on condition that he not violate the said ordinance and that he pay a fine of $25.00 and costs. From each such judgment the defendant appealed to the superior court. In that court, prior to entering a plea, he moved to quash the warrant in each case, which motions were allowed.

It is stipulated that the City Council of High Point in regular session 19 February 1965 adopted the ordinance in question, it

having been originally designated Section 15-39 and later codified as Section 15-24.1, the pertinent portion of which reads as follows:

"Sec. 15-24.1. Obscene Signs, Pictures, etc.

"It shall be unlawful for any person, firm or corporation to construct or maintain along any street or highway, in such a manner as to be visible to the general public using such street or highway, any sign, billboard, motion picture screen or other structure upon which is printed, painted, projected, or displayed any nude, or semi-nude pictures or any pictures or words which are vulgar, indecent or offensive to the public morals."

The pertinent portions of the affidavit upon which the warrant in the first case was issued read as follows:

"S. T. Myers, being duly sworn, deposes and says that Vincent Furio, on or about the 18 day of March, 1965, at and in the County aforesaid and within the City Limits of High Point, or within one mile of said City Limits, or within High Point, Deep River or Jamestown Township, did willfully, wantonly, maliciously and unlawfully Did maintain a motion picture screen upon which was projected, nude & semi-nude pictures of men & women, in such a manner as to be visible to the general public, using U. S. Highway #29-A and Dogwood Drive & Crestwood Circle in High Point, N. C. in vio. of the City Ord. #15-39 of High Point, N. C."

The affidavit upon which the warrant in the second case was issued is identical except as to the date of the alleged offense. Seven grounds for the allowance of the motion to quash are stated therein, these being, in summary:

1. Each warrant violates Article I, Section 17, of the Constitution of North Carolina;

2. Each warrant is in violation of Amendments I and XIV to the Constitution of the United States;

3. The ordinance is void for the reason that the city of High Point had no authority to enact such an ordinance, the General Assembly having preempted this field by the enactment of G.S. 14-189, 14-189.1, 14-189.2 and 14-190;

4. The City Council of High Point had no authority to enact any type of censorship ordinance for the reason that the sheriff of Guilford County is designated by G.S. 14-191 as the sole censor;

5. Neither warrant charges an indictable offense in that each fails to allege that the pictures shown were obscene;

6. The ordinance is unconstitutional for that it sets forth "no reasonable or constitutional basis for the discrimination of the type of picture which may be shown on an outdoor theatre screen"; and

7. The warrants failed to identify the particular pictures which were allegedly shown.

Attorney General Bruton by Staff Attorney Vanore for the State.
Schoch, Schoch and Schoch for defendant appellee.

LAKE, J. It will be noted that in each case the affidavit upon which the warrant was issued, and which is made a part of the warrant by reference, charges the defendant with maintaining a motion picture screen "within the City Limits of High Point, or within one mile of said City Limits, or within High Point, Deep River, or Jamestown Township," in violation of the ordinance of the city of High Point. [Emphasis added.]

An incorporated city or town is an agency created by the State. It has no governmental power or authority except such as has been granted to it by the Legislature, expressly or by necessary implication from the powers expressly conferred. G.S. 160-1; *State v. Byrd,* 259 N.C. 141, 130 S.E. 2d 55; *Cox v. Brown,* 218 N.C. 350, 11 S.E. 2d 152. It has no inherent police powers. *State v. Dannenberg,* 150 N.C. 799, 63 S.E. 946.

While the Legislature may confer upon a municipal corporation the power to enact ordinances having effect in territory contiguous to the corporation, in the absence of the grant of such power a city or town may not, by its ordinance, prohibit acts outside its territorial limits or impose criminal liability therefor. *Smith v. Winston-Salem,* 247 N.C. 349, 100 S.E. 2d 835; *Holmes v. Fayetteville,* 197 N.C. 740, 150 S.E. 624; *State v. Eason,* 114 N.C. 787, 19 S.E. 88. No grant of authority to the city of High Point to project beyond its territorial limits the effect of an ordinance such as that here in question has been brought to our attention. There is in the ordinance nothing to suggest that it was intended by the City Council to apply to acts beyond the city limits. Even if this ordinance be valid within the city, it cannot and does not forbid or make punishable anything done beyond the territorial limits of the city.

The warrant does not charge the defendant, unequivocally, with the doing of the acts therein specified within the city. It charges that he did the act within the city limits, where it is a criminal offense, assuming the ordinance to be valid, *or* that he did the act outside the city, where it is not a criminal offense. This is not a matter of venue or of the jurisdiction of the Municipal Court of

High Point. The place at which the alleged act was committed, if it was done, determines its criminality or lack of criminality, assuming the validity of the ordinance. The warrant, therefore, on its face fails to charge the commission of a crime.

Turning to the ordinance, itself, we cannot agree with the contention of the State that the intent and purpose of the ordinance was to promote safety upon the streets and highways by the elimination of sights which might distract the attention of drivers of automobiles. The obvious intent of the ordinance was to protect the right of the people of the city and visitors thereto, to drive or walk along its streets, alone or with their families and friends, and to permit their children to do so, without having flaunted in their faces language and pictures offensive to the sense of decency of any normal individual. The purpose of the ordinance is commendable but its terminology is not.

On the other hand, we do not hold, as the defendant would have us do, that the ordinance is void for the reason that the General Assembly has preempted this field by the enactment of G.S. 14-189, 14-189.1, 14-189.2 and 14-190, or for the reason that by the enactment of G.S. 14-191 the Sheriff of Guilford County is vested with the sole authority to determine what pictures or words may be displayed within the county. A municipal corporation, being the creature of the State, cannot forbid an act which a statute, state-wide in its application, permits to be done. *Staley v. Winston-Salem*, 258 N.C. 244, 128 S.E. 2d 604. Likewise, where the Legislature has enacted a statute making an act a criminal offense, a city may not adopt an ordinance dealing with the same conduct. *State v. Dannenberg, supra; State v. Langston*, 88 N.C. 692. We do not interpret G.S. 14-189, 14-189.1 and 14-189.2 as granting state-wide permission to publish or display all pictures and writings not therein forbidden, or to construct or maintain a screen or other structure upon which pictures of nude or semi-nude persons are projected. Nor can it be fairly implied from these statutes that the Legislature intended to preempt the entire subject of obscene displays and publications so as to forbid a city to enact an ordinance, otherwise within its authority, which forbids publications or displays neither forbidden nor permitted by these statutes. This ordinance undertakes to forbid acts not forbidden or permitted by these statutes.

G.S. 160-200(6) confers upon the city power "to supervise, regulate, or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to define, prohibit, abate or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and

causes thereof." The same section provides in clause (7) that a city shall have power to enact such ordinances as are "expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions."

It is, however, well settled that a statute, or an ordinance, may be void for the uncertainty, vagueness or indefiniteness of its prohibitions. *State v. Coal Company,* 210 N.C. 742, 188 S.E. 412; *State v. Morrison,* 210 N.C. 117, 185 S.E. 674. In *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768, Parker, J., now C.J., speaking for the Court, and quoting from Wharton's Criminal Law and Procedure, Vol. I, § 18, said:

> "A criminal statute must be definite as to the persons within the scope of the statute and the acts which are penalized. If it is not definite, the due process clause of State Constitutions and of the Fifth and Fourteenth Amendments of the Federal Constitution, whichever is applicable, is violated. If the statute is so vague and uncertain that a reasonable man would be compelled to speculate at his peril whether the statute permits or prohibits the act he contemplates committing, the statute is unconstitutional. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct."

In *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870, Moore, J., speaking for the Court, said:

> "[A]ppellants quote at length from 14 Am. Jur., Criminal Law, sec. 19, pp. 773-4, as follows:
>
> "'* * * A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law.' This is unquestionably a statement of sound principles."

The warrant in this case does not charge the defendant with projecting or causing to be projected, or permitting to be projected any picture. The charge against him is that he "did maintain a motion picture screen upon which was projected, nude and semi-nude pictures of men and women," in such a manner as to be visible to the general public, using certain streets in High Point. As above noted,

it does not allege that the screen, upon which the pictures were projected, was within the city limits.

The ordinance in question presents many problems of construction to the court seeking to apply it and to the person, firm or corporation seeking to determine what he or it may do without violating its provisions. For example: Where must a sign, billboard, motion picture screen or other structure be located in order to be one constructed "along any street or highway"? If the screen, or other structure is visible to persons using the highway, but the picture projected thereon is not, is the construction or maintenance of the screen forbidden by this ordinance? What constitutes maintaining a screen within the meaning of this ordinance? Is the screen or other structure maintained by the lessor or by the lessee thereof or by both of them, within the meaning of this ordinance? Has one who "maintains" a moving picture screen, or other structure, violated this statute if another person, without his knowledge or consent, projects, paints, or displays thereon pictures of nude or semi-nude persons? Does the prohibition against the display of semi-nude pictures apply to pictures not generally regarded as "vulgar, indecent or offensive," such as a billboard advertisement of bathing suits or a moving picture of a swimming meet? Does the ordinance forbid the posting upon a billboard of a New Year's greeting bearing the customary symbol of the new year?

While it is highly improbable that the "nude and semi-nude pictures of men and women," alleged in the warrant to have been projected upon the screen, which is alleged to have been maintained by the defendant, would have been put by any normal person into the category of the innocent and inoffensive, the defendant may not be prosecuted for the violation of an ordinance so vague and indefinite as the one in question.

The warrants were properly quashed.

Affirmed.

MOORE, J., not sitting.

HUBERT MONTAGUE AND HARVEY MONTAGUE, D/B/A MONTAGUE BUILDING COMPANY v. C. T. WOMBLE.

(Filed 25 May, 1966.)

1. Frauds, Statute of § 6a—

An oral contract for the purchase and sale of realty is void in all its parts under the statute of frauds and cannot constitute consideration for a check for part payment given by the purchaser without any notation thereon concerning the agreement.

2. Bills and Notes § 17— Check for initial payment under parol contract to convey is without consideration when no property rights are conveyed.

Plaintiffs instituted this action on a check issued by defendant, which check was dishonored by the bank for insufficient funds. Defendant alleged that the check was given as down payment on a parol contract to purchase realty, that plaintiffs had not conveyed any property to defendant but had sold the realty to another, and plaintiffs' own evidence disclosed that plaintiffs had sold the locus to another, and they did not claim that they suffered any damages as the result of the oral negotiations. *Held:* Plaintiffs' own evidence establishes want of consideration for the check, and the court should have sustained defendant's plea of want of consideration.

MOORE, J., not sitting.

APPEAL by defendant from *Mallard, J.*, January 24, 1966 Civil Session, WAKE Superior Court.

The plaintiffs in this action filed the following complaint:

"I. That the plaintiffs are citizens and residents of the County of Wake, State of North Carolina.

"II. That the defendant is a citizen and resident of the County of Wake, State of North Carolina.

"III. That on or about September 21, 1964, the defendant executed and delivered to the plaintiffs, Hubert Montague and Harvey Montague, d/b/a Montague Building Company, a check in the sum of Five Thousand ($5,000.00) Dollars, said check being in exact words and figures as shown on Exhibit 'A' attached hereto.

"IV. That said check was presented for payment and was returned for insufficient funds.

"WHEREFORE, the plaintiffs demand judgment against the defendant in the sum of Five Thousand ($5,000.00) Dollars, together with interest at the rate of six per cent per annum from September 21, 1964; for the costs of this action to be taxed by the Clerk; and for such other and further relief as to the Court may seem just and proper."

Attached to the complaint as an exhibit was the following:

"Raleigh, N. C. Sept. 21, 1964 No.....
Pay to the Order of
Montague Building Co. $5,000.00
Five Thousand . . . . . Dollars
NORTH CAROLINA NATIONAL BANK
Raleigh, North Carolina C. T. Womble
Down Payment on house
05120025 043097385 0000500000"

The defendant, by amended answer, admitted all the allegations of the complaint and by way of further answer, defense, and plea in bar, alleged:

"1. Defendant denies that he is indebted to plaintiffs in any amount whatsoever. The check referred to in the plaintiffs' Complaint shows on its face that it was purported to be or represent 'down payment on house.' Plaintiffs have not bargained, sold, granted, conveyed, leased or rented any house of any kind to defendant, nor has defendant purchased, leased or rented from plaintiffs any house of any kind, and that no consideration of any kind to support said check has passed between plaintiffs and defendant, and that said check is entirely without consideration of any kind.

"2. Previous to the defendant's having given said check to plaintiffs, the plaintiff Harvey Montague had certain oral conversations with defendant and defendant's wife as to the sale of certain lands, tenements and hereditaments belonging to the plaintiffs and their respective wives under an estate by the entireties; all of said conversations and negotiations were oral and no written agreement, contract, note or memorandum thereof was ever signed or executed by defendant, and that, in fact, defendant and his wife had not actually concluded or reached any agreement with plaintiffs as to the sale and purchase of said property, nor had the plaintiffs reached any agreement with the defendant, nor had they or either of them signed or otherwise executed any written agreement, contract, note, or memorandum thereof to convey said lands to defendant. Since receiving said check from defendant, plaintiffs have never tendered any instrument of conveyance of said property to defendant or his wife, and plaintiffs have in fact conveyed their interest in said property to third parties; . . ."

One of the plaintiffs testified: "We never had any written agreement with the defendant or his wife as to the construction of the

house. It was completely oral. . . . I have never signed the deed. The other signatures on the deed have never been acknowledged by a notary public. I expected to hand the deed to Mr. Womble at the bank, but I expected the money first, the full amount of the purchase price. . . . We sold the house and no longer own it."

At the conclusion of the evidence the defendant moved for nonsuit and excepted to the court's refusal to grant the motion. The defendant tendered the following issues:

"1. Was the check given by defendant to plaintiffs given for a valuable consideration?
"2. If so, was there a failure of said consideration?
"3. In what amount, if any, is defendant indebted to plaintiffs?"

Over defendant's objection, the court tendered this issue:

"1. What amount, if any, is the defendant C. T. Womble indebted to the plaintiffs?"

The court instructed the jury:

"I also instruct you that all the evidence tends to show that the defendant gave to the plaintiffs a check for $5,000.00, which check has not been paid and that it was given to the plaintiffs by the defendant as a down payment for a house and that the plaintiffs were ready and willing to convey the property had the defendant paid the remainder of the purchase price."

The jury answered the issue, "$5,000.00." From judgment for the plaintiffs in accordance with the verdict, the defendant appealed, assigning errors.

Bailey, Dixon & Wooten by Wright T. Dixon, Jr., for plaintiff appellees.

Crisp, Twiggs & Wells by Hugh A. Wells for defendant appellant.

HIGGINS, J. As stated in the complaint, the cause of action rests solely on: (1) the execution and delivery of a check for $5,000.00; and (2) the failure of the check to clear the bank when presented. The complaint does not allege the check was based on any valuable consideration, or in discharge of any debt or obligation the defendant owed the plaintiffs.

The defendant did not challenge the sufficiency of the complaint to state a cause of action in the Superior Court; nor does he do so

here. He does allege, however, (1) the check was without consideration; (2) that he is not justly indebted to the plaintiffs in any amount; (3) that the parties carried on negotiations entirely in parol with respect to the purchase by the defendant of a lot on which a house was under construction. The defendant gave the check as an advance payment during the negotiations which failed to culminate in a binding contract in that no written agreement or memorandum was executed or signed by either of the parties. The defendant never received any consideration whatever for the check. The plaintiffs have never conveyed the property or any property rights whatever to the defendant. In fact, the plaintiffs have sold and conveyed the house and lot to another purchaser. This they admit.

The plaintiffs' evidence in essence established the foregoing. The plaintiffs admit that all negotiations were in parol; that no contract or writing was ever signed by the defendant. They admit they have sold and conveyed the house to another. They do not claim they sold at a loss or that they suffered any damage whatever as a result of their having negotiated orally with the defendant.

In short, the plaintiffs ask the Court to order the check paid without ascertaining whether any part of it is justly due. The plaintiffs' own evidence established the defense that the check was without consideration. It was not a gift. It was not a loan. It was not in payment of any legally binding obligation. It was given in anticipation of what would be a credit on the purchase price of a house, the deal for which was never consummated. The contract and all its parts were void under the statute of frauds. *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723; *Culp v. Love,* 127 N.C. 457, 37 S.E. 476. The plaintiffs' own evidence established the defendant's plea in bar. The court should have sustained the plea. Instead, it rendered judgment for the plaintiffs for the full amount of the check based on a single issue which the jury answered for the plaintiffs under peremptory instructions from the court. The judgment is

Reversed.

MOORE, J., not sitting.

MRS. MAUDE B. HICKS, PLAINTIFF-EMPLOYEE, v. GUILFORD COUNTY, EMPLOYER-DEFENDANT AND BITUMINOUS CASUALTY CORPORATION, DEFENDANT-CARRIER.

(Filed 25 May, 1966.)

1. Master and Servant § 47—

A claimant under the Compensation Act must prove as a jurisdictional basis that the employer-employee relationship existed.

2. Master and Servant § 93—

The findings and conclusion of the Industrial Commission with respect to the existence of the employer-employee relationship are not conclusive but are reviewable by the courts on appeal.

3. Master and Servant § 45—

The rule that the Workmen's Compensation Act must be liberally construed does not apply to the determination of the question of whether the relationship of the claimant to the person from whom compensation is claimed was one to which the Act applied.

4. Same—

The Workmen's Compensation Act provides compensation to an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury is caused by negligence attributable to the employer, but the Act also deprives an employee of certain rights which he had under the common law, and imposes limitations and restrictions as well as benefits.

5. Master and Servant § 47—

A claimant under the Compensation Act must be an employee engaged in an employment under an appointment or contract of hire or apprenticeship, express or implied, and the coverage of the act extends to those whose employment is under the compulsion of legal process, but it is necessary that a claimant be an employee within the definition of the Act as a jurisdictional requirement. G.S. 97-2(2).

6. Master and Servant § 49—

A juror is not an employee of the county, and the Compensation Act does not apply to an injury sustained by a juror in the course of his or her service as such.

MOORE, J., not sitting.

APPEAL by defendants from *Latham, S.J.*, 7 June 1965 Civil Session of GUILFORD.

The plaintiff seeks to recover benefits under the North Carolina Workmen's Compensation Act for injuries sustained by her while serving as a petit juror at a term of the Superior Court of Guilford County. She was duly summoned to serve as a juror and, in response, presented herself at the courthouse when the term of the court began. She was selected as a member of the jury in a case

and, as such, sat and heard the evidence. The jury retired to the jury room and reached its verdict. Before the jury returned to the courtroom to report the verdict to the court, Mrs. Hicks went to the wash room. Upon leaving the wash room she missed a step at the door, fell and sustained the injury from which her disability resulted. She was taken back into the courtroom with the rest of the jury to render the verdict. Thereupon she was discharged from further jury duty and sent to the hospital.

The Hearing Commissioner found that Guilford County is subject to the Workmen's Compensation Act, that Bituminous Casualty Corporation is its compensation insurance carrier and that the plaintiff sustained an injury by accident while serving as a juror for Guilford County. He denied compensation for the reason that the plaintiff was not an employee of the county within the meaning of the Workmen's Compensation Act. On appeal to the Full Commission the order of the Hearing Commissioner was reversed, the plaintiff was found to be an employee of the county within the meaning of the Act, she was found to have sustained an injury by accident arising out of and in the course of her employment, resulting in no permanent disability and in no temporary disability in excess of seven days. Consequently, the Full Commission ordered that the defendant pay medical and hospital expenses but did not award compensation for disability. From this order of the Full Commission, the defendant appealed to the Superior Court. The Court overruled the exceptions of the defendant, thus affirming the order of the Full Commission. The defendant appealed from that judgment to this Court. The sole question is whether a juror, regularly summoned and serving, is an employee of the county within the meaning of the North Carolina Workmen's Compensation Act.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellants.

George W. Gordon for plaintiff appellee.

LAKE, J. A person who seeks to recover benefits under the Workmen's Compensation Act must prove that he is a member of a class embraced in the Act. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645. The Act applies only where the employer-employee relationship exists. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137. The question of whether this relationship existed at the time of the claimant's injury is jurisdictional and, therefore, the finding or conclusion of the Industrial Commission with respect thereto is not conclusive but is reviewable by the court on appeal. *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280. The Industrial

Commission has no jurisdiction to apply the Act to a person not subject to its provisions. *Richards v. Nationwide Homes, supra.* The rule that the provisions of the Act are to be given a liberal construction does not apply to the determination of the question of whether the relationship of the claimant to the person from whom compensation is claimed was one to which the Act applied. *Hayes v. Elon College, supra.*

Johnson, J. said, in *Vause v. Equipment Co.,* 233 N.C. 88, 63 S.E. 2d 173:

> "The philosophy which supports the Workmen's Compensation Act is 'that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products.' [Citations omitted.] However, it must be borne in mind that the Act was never intended to provide the equivalent of general accident or health insurance."

To the same effect, see *Taylor v. Twin City Club,* 260 N.C. 435, 132 S.E. 2d 865.

The Workmen's Compensation Act provides compensation for an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury was caused by negligence attributable to the employer, but the Act also deprives the employee of certain rights which he had at the common law. *Lee v. American Enka Corp.,* 212 N.C. 455, 193 S.E. 809; G.S. 97-9; G.S. 97-10.1. Thus, one who is held to be within the coverage of the Act is subject to its limitations and restrictions as well as being eligible for benefits thereunder.

G.S. 97-2 provides:

> "*Definitions.*—When used in this article, unless the context otherwise requires — * * *
>
> "(2) Employee.—The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, * * * as relating to municipal corporations and political subdivisions of the State, the term 'employee' shall include all officers and employees thereof, except such as are elected by the people * * *"

This definition adds nothing to the common law meaning of the term "employee." *Hayes v. Elon College, supra.* As was said by Stacy, C.J., in *Hollowell v. Department of Conservation and Development,* 206 N.C. 206, 173 S.E. 603, "The sum of the whole matter is, that before the provisions of the Workmen's Compensation Act are called into play, the relation of master and servant, or employer and employee, or some appointment, must exist, and this is the initial fact to be established."

In *Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425, Ervin, J., speaking for the Court, said:

> "The question whether one employed to perform specified work for another is to be regarded as an independent contractor, or as an employee within the operation of the Workmen's Compensation Act is determined by the application of the ordinary common-law tests. * * * The test to be applied in determining whether the relationship of the parties under a contract for the performance of work is that of employer and employee, or that of employer and independent contractor is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it."

It does not necessarily follow that one who is not an independent contractor is an employee within the coverage of the Act. One performing work or rendering services may not fall into either category. Thus, a prisoner, who certainly is not an independent contractor, is not an employee as defined in G.S. 97-2(b), though prisoners are now specifically brought within the Act to a limited extent by another provision of the statute. *Lawson v. Highway Commission,* 248 N.C. 276, 103 S.E. 2d 366.

One may be an employee, within the meaning of the Workmen's Compensation Act, though his employment is involuntary and under the compulsion of legal process. Thus, in *Moore v. State,* 200 N.C. 300, 156 S.E. 2d 806, one deputized by a forest warden to assist him in subduing a forest fire, and injured by an accident in the process of rendering such service, was held entitled to compensation under the Act. Similarly, in *Tomlinson v. Norwood,* 208 N.C. 716, 182 S.E. 659, one deputized by a police officer to assist him in making an arrest was held entitled to compensation under the Act for injuries received in so doing. It will be observed that in each of these situations the person, so called into the public service, was under the

direction and control of the officer, so deputizing him, as to the manner in which his service was to be rendered.

A closer analogy to the case of a juror is that of a witness testifying under subpoena. In *Hollowell v. Department of Conservation and Development, supra,* it was held that a witness is not an employee of the litigant, in whose behalf he testifies, so as to entitle him to compensation, under the Act, for injuries received in an assault upon him by the adverse litigant as the result of his testimony.

Obviously, a juror is not subject to direction and control of county officials as to the manner in which the juror discharges his duties, in the sense that an employee in an industry is subject to direction by his employer. On the contrary, even the trial judge is expressly forbidden to convey to the jury in any manner at any stage of the trial his opinion as to how the jury should determine a question of fact. G.S. 1-180; *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861; *In Re Will of Bartlett,* 235 N.C. 489, 70 S.E. 2d 482.

A juror is not appointed by the county commissioners or by any county official. His name is drawn from the box without regard to the relative qualifications of those whose names are rightly in the box. *State v. Speller,* 229 N.C. 67, 47 S.E. 2d 537. He is then subject to peremptory challenge, as well as to challenge for cause, by either party to litigation. His services, if he is accepted and empaneled to try the issues in an action, are not obtained or defined by a contract of hire between him and the county. There are no negotiations between him and the county, express or implied, for those services. He is not a public officer, an independent contractor or an employee. He is a juror. "He is neither appointed nor elected to his position of duty." *Territory v. Hopt,* 3 Utah 396, 4 P. 250.

This Court has not previously ruled upon this question. See *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308. The excellent briefs of counsel have called to our attention only four decisions by courts of other jurisdictions in which it has been discussed. Our research has revealed no other authority bearing directly upon it. In Ohio it has been held that a juror is within the coverage of the Workmen's Compensation Act of that state. *Industrial Commission v. Rogers,* 122 Oh. St. 134, 171 N.E. 35, 70 A.L.R. 1244. The courts of Colorado and New Mexico have reached the opposite conclusion as to the statutes of those states. *Board of Comr's of Eagle County v. Evans,* 99 Colo. 83, 60 P. 2d 225; *Seward v. County of Bernalillo,* 61 N.M. 52, 294 P. 2d 625. In *Jochen v. County of Saginaw,* 363 Mich. 648, 110 N.W. 2d 780, the claim of a juror for compensation under the Michigan statute was denied. However,

three judges reached that result on the ground that the accident occurred before the claimant was accepted as qualified for service as a juror and so she was not, at the time of her injury, in the service of the county, and refused to determine the status of one accepted and empaneled. Three of the justices were of the opinion that the claim should be denied because "the ordinary incidents pertaining to the relationship of employer and employee are not present" and, consequently, the juror was not an employee within the meaning of the Michigan Act. Two justices dissented.

Since in this jurisdiction a juror is not an employee, the North Carolina Workmen's Compensation Act does not apply to an injury sustained by a juror in the course of his or her service as such. Consequently, the Industrial Commission was without jurisdiction in this matter. The judgment of the superior court is, therefore, reversed, and the award of the Industrial Commission is vacated.

Reversed.

MOORE, J., not sitting.

STATE HIGHWAY COMMISSION v. KATHERINE McDOWELL PHILLIPS, AND HUSBAND, PARKER PHILLIPS, AND JOHN M. McDOWELL.

(Filed 25 May, 1966.)

1. Highways § 11—

A section of an abandoned highway which remains open and in general use as a means of ingress and egress from contiguous property to a State highway is a neighborhood public road, G.S. 136-67, and a stipulation that the landowners' access to a public highway was solely by such abandoned highway is not a stipulation that their property did not abut a public road.

2. Eminent Domain §§ 2, 6—

Where a landowner's access to a public highway over a section of abandoned highway is cut-off by the construction of a limited access highway across a portion of their land, leaving no access from the property to a public highway, the deprivation of access affects the value of the property and the landowner is entitled to introduce evidence of such deprivation of access as an element of damages.

3. Trial § 6—

Where the trial court states as a conclusion of fact a matter not supported by the facts stipulated and states such conclusions as a stipulation of the parties, the parties are not bound thereby.

4. Eminent Domain § 6—

In proceedings to assess compensation for a taking under the power of eminent domain, the parties are entitled to introduce evidence of all elements affecting the value of the property taken without allegation of specific elements of damage, and therefore the landowners, even in the absence of specific allegation, are entitled to introduce evidence of damage to their remaining lands resulting from the diversion of surface waters as a result of the use to which the land taken is put.

MOORE, J., not sitting.

APPEAL by defendants from *Gambill, J.*, 1 November Civil Session 1965 of RANDOLPH.

This is an action instituted pursuant to the provisions of G.S., Ch. 136, Article 9, to appropriate a portion of the property of the defendants for highway purposes.

The defendants were the owners of a 100-acre tract of land lying within 1¼ miles of the corporate limits of Asheboro, N. C., and within ½ mile of a railroad and within ½ mile of an industrial park. The Town of Asheboro is to the south or southeast of this tract of land. The plaintiff has constructed a 4-lane limited access by-pass for state highway 220 around Asheboro, thereby closing defendants' only alleged access road to the tract of land involved.

The defendants sought to show that prior to the taking and construction of this by-pass, the defendants had access to this 100-acre tract of land over a road leading from a public highway to the defendants' tract of land. The court below sustained the objections of the plaintiff to the admission of any evidence tending to show the existence of such a road. The evidence, if it had been admitted, would have tended to show that this access road was a part of an abandoned public road which ran across a portion of defendants' 100-acre tract of land and the lands of an adjoining landowner to the south of the defendants' premises, and that the adjoining landowner, these defendants and others had used this portion of the abandoned road as a way of ingress and egress to and from their respective premises to a State-maintained highway for the past 25 or 30 years.

The plaintiff took only 1.25 acres of defendants' land in the form of a triangle at the southeastern corner of defendants' premises. The eastern end of the triangle is 117.60 feet wide, and the apex of the triangle is 929.09 feet west from the base. The by-pass has been constructed across the alleged access road on the premises taken from these defendants, leaving them without any public or private way from their present tract of land, consisting of 98.75 acres, lying to the north of the non-access highway, to any public road south of the non-access highway.

Likewise, according to the evidence disclosed on the record, since the construction of this by-pass on, along, or near the southern part of defendants' original 100-acre tract of land, these defendants now have no access over any private or neighborhood road which leads to a public road north of this non-access highway.

From a verdict which defendants considered inadequate, they appeal, assigning error.

Attorney General Bruton, Deputy Attorney General Lewis, Trial Attorney Harris, and Staff Attorney Costen for plaintiff.

H. Wade Yates for defendants.

DENNY, E.J. We think it is apparent from the record that the court below excluded the defendants' evidence with respect to the existence of a road at the time of the taking, over which these defendants had access to their premises, because the access road, if any, was not a State-maintained public highway.

After the court had sustained the plaintiff's objection to the defendants' proffered evidence with respect to the existence of a road which was, according to the defendants' proffered evidence, in existence at the time of the taking, the court, among other things, dictated for the record: "* * * (A)s I understand the law and in this case, * * * this property does not abut a public road, that is agreed and stipulated; that prior to the taking there was no public road abutting * * * this property * * *."

We think it was error to exclude defendants' evidence in this respect. It is a matter of common knowledge that hundreds of farms in North Carolina are not served by a public highway. Even so, access to the nearest public highway over a private or neighborhood road serves substantially the same purpose as would a public highway. To completely cut off one's access over a private way or neighborhood road to the nearest public road, without providing other reasonable access to a public road, may diminish the value of the land involved to the same extent as if access was denied to a public highway abutting the premises.

G.S. 136-67 provides in pertinent part as follows: "All those portions of the public road system of the state which * * * have been abandoned by the State Highway Commission, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families * * * are * * * neighborhood public roads." See *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810.

The case of *Snow v. Highway Commission,* 262 N.C. 169, 136 S.E. 2d 678, involved an abandoned area of U.S. Highway 52. The

plaintiff's property abutted on the abandoned portion of the highway. The defendant closed the eastern end of the abandoned portion of the road and denied the plaintiff access to the new 4-lane non-access highway, but provided a modern clover-leaf system of access to the new limited access highway at a point approximately 2,000 feet west of plaintiff's residence. We held the denial of access to the new highway at the eastern end of the abandoned portion of the old highway was not compensable.

Likewise in *Wofford v. Highway Commission,* 263 N.C. 677, 140 S.E. 2d 376, a limited access highway was built across a municipal street which placed the owners of property abutting the street in a cul-de-sac and deprived them of access to one end of the street. Since there was no taking of property and they had reasonable access to the other streets in the city, the property owners in the cul-de-sac were held not to be entitled to compensation.

These cases are factually distinguishable from the instant case, where the only access was closed by the construction of the highway involved and no other access was available or provided.

There is no contention that the plaintiff did not have the right to close the defendants' way of ingress to and egress from the defendants' premises. The only question involved is whether or not such closing does or does not constitute an element of damages that may be considered by the jury in arriving at the value of the property involved before and after the taking.

In *Snow v. Highway Commission, supra,* this Court quoted with approval from the opinion of the Supreme Court of Iowa in *Warren v. Iowa State Highway Commission,* 250 Iowa 473, 93 N.W. 2d 60, as follows:

> " '* * * upon careful analysis of the cases the true rule appears with reasonable certainty. It is that one whose right of access from his property to an abutting highway is cut off or substantially interferred with by the vacation or closing of the road has a special property which entitles him to damages. But if his access is not so terminated or obstructed, if he has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation.' "

In the case of *Kirkman v. Highway Commission,* 257 N.C. 428, 126 S.E. 2d 107, the action was instituted to recover just compensation for the taking of plaintiff's private access to U. S. Highway 421 and for damages caused to the remainder of plaintiff's property by reason of the taking. The plaintiff owned a motel on old U. S. 421

near Kernersville and had previously sold the defendant certain land needed in connection with the construction of new 421, reserving access to the new highway when constructed. Later, defendant took over and closed plaintiff's access to the new highway. The jury assessed damages as a result thereof at $24,000. On appeal to this Court we upheld the verdict, and Sharp, J., speaking for the Court, said:

> "Loss of profits or injury to a growing business conducted on property or connected therewith are not elements of recoverable damages in an award for the taking under the power of eminent domain. *Pemberton v. Greensboro,* 208 N.C. 466, 181 S.E. 258. However, when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that fact is a proper item to be considered in determining whether the taking has diminished the value of the land itself. If it is found to do so, the diminution is a proper item for inclusion in the award. The condemner is not required to pay compensation for a loss of business but only for the diminished value of land which results from the taking. When rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking."

The defendants not only assign as error the refusal of the court below to admit their testimony with respect to the existence of an access road at the time of the taking, but also excepted to and assign as error the statement of the court to the effect that it was stipulated that prior to the taking there was no public road abutting this property. The defendants contend that no such stipulation was ever made. There are numerous stipulations in the record. However, we have been unable to find one in accord with the court's statement dictated for the record and pursuant to which the jury was instructed as follows: "Now, ladies and gentlemen of the jury, you will recall and it was stipulated and agreed that there was no access or was no road or public road on this property at the time this property was taken," to which defendants excepted, and assign as error.

In our opinion the defendants are entitled to a new trial, and it is so ordered.

There are other assignments of error which in our opinion are not without merit. Even so, they may not recur in another hearing and we deem it unnecessary to discuss them.

There is another matter which occurred in connection with the trial below which in our opinion merits our attention. In a pretrial conference in this case the defendants advised the trial judge that

they proposed to offer evidence as to water damages to the property referred to in the complaint and answer by diversion of the natural flow of water. Plaintiff's counsel objected. The court held that such evidence could not be admitted at the trial because such element of damage had not been pleaded in the answer.

Plaintiff's counsel contend here that defendants' counsel did not except to the ruling, and therefore the defendants are not entitled to have this ruling considered. It will be noted that the pretrial order of the court, while dated on 5 November 1965, the date the final judgment was signed, was not filed by the trial judge until 9 November 1965.

The ruling was so palpably erroneous we desire to call attention to certain of our decisions bearing on this identical point.

In the case of *Gallimore v. Highway Commission,* 241 N.C. 350, 85 S.E. 2d 392, the petitioners alleged in separately numbered paragraphs 14 elements or items of damage to their property. All, or substantially all, of these allegations were stricken before trial. Upon appeal to this Court, Bobbitt, J., speaking for the Court, said:

> " 'Any evidence which aids the jury in fixing a fair market value of the land, and its diminution by the burden put upon it, is relevant and should be heard; any evidence which does not measure up to this standard is calculated to confuse the minds of the jury, and should be excluded. This is as far as we can safely go in the present state of the case.' *Abernathy v. R. R., supra* (150 N.C. 97, 69 S.E. 180).
>
> "Since the petitioners, without setting forth in their petition the specific elements they contend caused a dimunition in fair market value, may offer evidence within the rule quoted in the preceding paragraph, they are in no way prejudiced by the ruling of Judge Fountain. Neither G.S. 136-19 nor G.S. 40-12, nor any decision to which our attention has been called, requires such particularization as a prerequisite to the introduction of relevant evidence. The petitioners may offer all competent evidence relevant to the issue to the same extent as if the stricken allegations were now in the petition."

In condemnation proceedings our decisions are to the effect that damages are to be awarded to compensate for loss sustained by the landowner. *Gallimore v. Highway Commission, supra.* "The compensation must be full and complete and include everything which affects the value of the property and in relation to the entire property affected." *Abernathy v. R. R.,* 150 N.C. 97, 69 S.E. 180.

New trial.

MOORE, J., not sitting.

JULIA SCARBOROUGH NICHOLSON, PLAINTIFF, v. JOSEPH LAWRENCE DEAN, DEFENDANT AND JOHN CLAYTON SMITH, EXECUTOR OF THE ESTATE OF HARTWELL VICK SCARBOROUGH, ADDITIONAL DEFENDANT.

(Filed 25 May, 1966.)

1. Automobiles § 46.1— Adjudication that original defendant was not guilty of actionable negligence held to preclude additional defendant's cross-action.

Where, in a passenger's action against the other driver involved in the collision, the personal representative of plaintiff's driver is joined as an additional defendant, and the additional defendant's cross-action for contribution is based upon identical allegations with respect to the original defendant's alleged negligence, and the court instructs the jury that a negative answer to the first issue as to the original defendant's negligence would terminate the case, *held*, a negative finding by the jury on the first issue adjudicates that the intestate of the additional defendant was not injured by the negligence of the original defendant, and the verdict supports judgment that there should be no recovery on the cross-action notwithstanding the absence of an answer to that specific issue.

2. Trial § 42—

A verdict should be liberally construed in the light of the pleadings, evidence and charge of the court, and when, so construed, it supports the judgment, the judgment will not be disturbed.

MOORE, J., not sitting.

APPEAL by additional defendant from *Riddle, J.*, October 18, 1965, Assigned Civil Session of WAKE.

On April 6, 1964, about 3:25 p.m., at the intersection of Glenwood Avenue and St. Mary's Street in Raleigh, there was a collision between a Rambler car operated by Hartwell Vick Scarborough (Scarborough) and a Dodge station wagon operated by Joseph Lawrence Dean (Dean). In approaching the intersection, the Rambler car was proceeding in an easterly direction on St. Mary's Street and the Dodge was proceeding in a southerly direction on Glenwood. Traffic at said intersection was controlled by automatic signal lights erected in accordance with a Raleigh ordinance.

As a result of said collision, plaintiff, a passenger in the Rambler, and Scarborough, the operator thereof, sustained personal injuries. Scarborough died April 17, 1964.

Plaintiff instituted this civil action to recover damages from Dean, original defendant, alleging Dean's negligence proximately caused the collision and plaintiff's injuries. Answering, Dean denied negligence and alleged, if he were adjudged actionably negligent in respect of plaintiff's injuries, Scarborough also was actionably negligent in respect thereof and in such event he was entitled to contribution from Scarborough's estate. On Dean's motion, John Clayton

Smith, Executor of the estate of Scarborough (Smith, Executor), was joined as (additional) defendant in respect of Dean's cross action for contribution as provided in G.S. 1-240.

Smith, Executor, answering Dean's cross complaint for contribution, denied the essential allegations thereof. In addition, he alleged a cause of action against Dean, alleging Dean's actionable negligence was the sole proximate cause of the collision and of Scarborough's injuries and death.

The evidence tending to support the allegations of plaintiff and of Smith, Executor, appears in the record under the heading, "ADDITIONAL DEFENDANT SMITH'S EVIDENCE." It includes plaintiff's personal testimony. Evidence was offered by Dean tending to support his allegations to the effect the collision was not caused by any actionable negligence on his part.

Evidence favorable to plaintiff and to Smith, Executor, tended to show Scarborough had the green light when he entered the intersection and that the Dodge entered the intersection when the red light confronted Dean. Evidence favorable to Dean tended to show Scarborough entered the intersection when confronted by the red light and that the Dodge entered the intersection shortly after the light confronting Dean had changed from green to yellow (caution). The evidence relevant to this main factual controversy was in sharp conflict.

The court submitted the following issues: "1. Was the plaintiff injured by the negligence of the defendant Joseph Lawrence Dean, as alleged in the complaint? 2. What amount of damages, if any, is plaintiff entitled to recover of the defendant Joseph Lawrence Dean? 3. Was the plaintiff injured by the negligence of the deceased Hartwell Vick Scarborough, as alleged in cross action of the defendant Joseph Lawrence Dean? 4. Was the deceased Hartwell Vick Scarborough injured and killed as a result of the negligence of the defendant Joseph Lawrence Dean, as alleged in the counterclaim of John Clayton Smith, Executor? 5. What amount of damages, if any, is the estate of Hartwell Vick Scarborough entitled to recover of the defendant Joseph Lawrence Dean?"

The jury answered the first issue, "No," and did not answer any other issue.

Based on said verdict, the court entered judgment as follows: "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover nothing of defendant Joseph Lawrence Dean and that John Clayton Smith, Executor of the estate of Hartwell Vick Scarborough, have and recover nothing of defendant Joseph Lawrence Dean; that the costs of this action be taxed against plaintiff by the Clerk." Smith, Executor, excepted and appealed.

Crisp, Twiggs & Wells for additional defendant, appellant.
Teague, Johnson & Patterson for original defendant, appellee.

BOBBITT, J. Smith, Executor, is the appellant. Plaintiff did not appeal.

The court instructed the jury: "If you answer the first issue, 'No,' then that ends the lawsuit." Appellant assigns as error the quoted instruction. Appellant also assigns as error (a) the acceptance of the verdict and (b) the portion of the judgment denying his right to recover from Dean. These assignments, relating to the failure of the jury to answer the fourth issue, will be considered together.

Plaintiff, in her action to recover for personal injuries, and appellant, in his action to recover for Scarborough's injuries and death, assert, as the sole basis therefor, injuries resulting from said collision. Dean's answer admitted "plaintiff sustained certain injuries in the collision complained of." Under appellant's allegations, Scarborough's injuries resulted from the identical collision.

Plaintiff, in her complaint, and appellant, in his complaint, alleged the collision was caused by the actionable negligence of Dean. The specifications of the alleged negligence of Dean in the two complaints are identical. The right of plaintiff and of appellant to recover from Dean was determinable by the same factual considerations and legal principles except that plaintiff's right to recover would not be affected by Scarborough's negligence, if any. In view of the identity in pleadings and evidence, the court properly explained to the jury in substance that both plaintiff and appellant were entitled to recover from Dean if the collision was caused solely by the negligence of Dean. This specific instruction was given: "If you answer the first issue, 'Yes,' and the third issue, 'No,' you answer the fourth issue, 'Yes,' and proceed to the damage issue—fifth issue."

The answer, "No," to the first issue necessarily includes a finding *that the collision* was not caused by the negligence of Dean as alleged in the complaint. This finding, considered with the pleadings and evidence, establishes that the collision resulting in Scarborough's injuries and death was not caused by the negligence of Dean as alleged in appellant's complaint against Dean. Since this was the legal effect of the jury's answer, "No," to the first issue, the failure of the court, or of the jury in compliance with a direction from the court, to write in the answer, "No," to the fourth issue was not prejudicial to appellant. The legal effect of the jury's answer, "No," to the first issue is determinative.

"It is well settled that a verdict should be liberally and favorably construed with a view of sustaining it, if possible, and in as-

certaining its meaning resort may be had to the pleadings, the evidence and the charge of the court." *Guy v. Gould,* 202 N.C. 727, 164 S.E. 120; *Widenhouse v. Yow,* 258 N.C. 599, 605, 129 S.E. 2d 306, and cases cited. When the verdict herein is so construed, we are of opinion, and so hold, the answer, "No," to the first issue established that neither plaintiff nor appellant was entitled to recover from Dean. The quoted instruction advised the jury in substance this would be the legal effect of answering the first issue, "No." For the reasons stated, the verdict supports the judgment.

The remaining assignments of error discussed in appellant's brief relate to the charge. These assignments and the (purported) exceptions on which they are based do not comply with statutory requirements as to exceptions (G.S. 1-282; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175) or with Rules 19(3) and 21 (Rules of Practice in the Supreme Court, 254 N.C. 783 *et seq.*). Even so, we have considered these assignments. Suffice to say, none discloses error considered of such prejudicial nature as to warrant a new trial.

No error.

MOORE, J., not sitting.

MARY A. SAYLAND, INCOMPETENT, BY AND THROUGH HER GUARDIAN, L. P. McLENDON, JR., v. MARVIN A. SAYLAND.

(Filed 25 May, 1966.)

1. Divorce and Alimony § 19; Husband and Wife § 11—

Where the court adopts provisions of a deed of separation and decrees that the husband make payments of alimony in accordance therewith, the provisions for alimony are under order of the court, which order may be modified for change of conditions.

2. Divorce and Alimony § 16—

Alimony under G.S. 50-16 is "a reasonable subsistence," which must be measured by the needs of the wife and by the ability of the husband to pay, and the duty to pay alimony may not be avoided merely because it has become burdensome or because the husband has remarried and voluntarily assumed additional obligations, or the fact that the wife has property or means of her own; nevertheless, the earnings and means of the wife are matters to be considered, and the statute does not contemplate that the husband should make payments which tend only to increase the estate of the estranged wife.

3. Divorce and Alimony § 19—

A decree for payment of alimony under G.S. 50-16 may not be modified except for a change of condition. However, any considerable change in the health or financial condition of the parties will warrant an application for modification of the decree, including termination of the award absolutely.

4. Divorce and Alimony § 16—

The amount of alimony to be paid the wife under G.S. 50-16 rests in the sound discretion of the trial court, and its order will not be disturbed in the absence of abuse of discretion.

5. Divorce and Alimony § 19; Appeal and Error § 46—

Where it cannot be ascertained from the record whether the court denied motion for modification of a decree for alimony in the exercise of the court's discretion or whether the court denied the motion because of a misapprehension of the applicable law, the judgment will be vacated and the cause remanded.

MOORE, J., not sitting.

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

APPEAL by defendant, movant, from *Shaw, J.*, March 15, 1965 Mixed Session of GUILFORD, docketed in the Supreme Court as Case No. 683 and argued at the Fall Term 1965.

Motion in the cause by defendant that he be relieved of the obligation imposed by judgment entered in 1954 to pay alimony to plaintiff, Mary A. Sayland.

The facts are not in dispute: Defendant and Mary A. Sayland were married in September 1933. They lived together as husband and wife until June 12, 1951, when they entered into a deed of separation. Defendant conveyed to his wife the house he was buying in Greensboro, together with all its furnishings, gave her one of their two automobiles, and agreed to pay her $40.00 per week for two years. At that time, Mrs. Sayland had $15,000.00 in government bonds which she had acquired by inheritance. On July 3, 1953, she was adjudged to be incompetent. L. P. McLendon, Jr., was appointed her guardian, and she was committed to the State's hospital for the mentally ill at Butner, where she still remains totally incompetent. The prognosis is that she will not improve within the foreseeable future. The cost of her care and maintenance at the hospital is $75.00 a month.

The guardian of Mary A. Sayland instituted this action in her behalf on July 8, 1953, for alimony without divorce. At the February 1954 Term, the parties agreed upon a settlement of all matters in controversy between them. In accordance with their agreement

the presiding judge, by consent, "ordered, adjudged and decreed," *inter alia,* that beginning on February 17, 1954, and on each Wednesday thereafter, defendant should pay to plaintiff's guardian alimony for her in the sum of $57.50 per week, "so long as the said Mary A. Sayland be under legal disability, and so long as she is unable to provide for herself in the manner to which she has been accustomed." In all events, however, these weekly payments were to continue for a minimum period of ten and one-half years. It was also ordered that the proceeding be retained on the docket for "further orders which might become necessary or appropriate for perfecting the relief or enforcement of the remedies adjudged" in the action.

Between the time Mrs. Sayland was declared insane and the entry of the judgment, defendant had continued to make to her guardian the weekly payments of $40.00 specified in the deed of separation. At the time the judgment was entered, defendant was 44 years old, in good health, and earning approximately $8,000.00 a year. For ten and one-half years, he regularly made the weekly payments required by the judgment. Since their separation in June 1951, through August 15, 1965, defendant has paid plaintiff a total of $37,310.00.

As a result of the wise investments made by her guardian, and his careful management of her estate, on June 30, 1964, Mrs. Sayland owned stocks and bonds valued at $33,722.50. In addition, she had tangible personal property worth $1,190.45, and the net worth of her house in Greensboro was $4,750.00. Her total estate had a value of $39,662.95. From July 1, 1963, through June 30, 1964, defendant paid plaintiff $3,000.00 in alimony, twelve payments of $250.00 each. In addition to undisclosed capital gains from the sale of securities, Mrs. Sayland's interest and dividend income for that period was $2,372.02. During that fiscal year, including alimony, she thus had an income of at least $5,372.02; her guardian expended for clothes, taxes, mortgage payments on house, guardian's commissions and bond premiums, medical care, and service charges, the sum of $2,733.20. Her income, therefore, exceeded her expenses by at least $2,638.82.

In February 1954, defendant secured an absolute divorce from Mary A. Sayland. Sometime thereafter he remarried, and, in June 1963, he and his wife adopted an 11-year-old son. Defendant is now 54 years of age. His gross salary is $1,168.00 per month; his take-home pay, $909.00 a month. His annual *gross* income from all sources is about $15,500.00. During 1954, he suffered a heart attack from which he had apparently recovered, but in April 1963, he was

again hospitalized for a "cardiac condition." He required further hospitalization for the same cause in August 1963. His physicians are of the opinion that he will probably have more heart trouble in the future. His net worth is around $15,000.00. He owes $5,000.00 on his home, and he is paying for his automobile. In ten years the company for which he works will require him to retire. Under present conditions, he is unable to save any money for his son's education or any other purpose, and he has only ten years left in which he can hope to accumulate any estate. Because of his physical condition, his life is uninsurable.

On January 11, 1965, defendant filed a motion in the cause requesting that he be relieved from further obligations for the support of Mary A. Sayland. He averred that "she is at Camp Butner and only $75.00 per month is required there for her support and maintenance in that institution, and that her estate, which has accumulated through the years, is amply sufficient to make such payments, and to require the petitioner to continue to make them would be an intolerable burden to him, and unjust to his present family." The motion was heard on March 19, 1965. After considering the facts detailed herein, Judge Shaw entered an order reciting defendant's age, earnings, and health in 1954, his present age, physical condition, earnings, and family status, and concluding as follows:

> "And Whereas when the judgment above referred to was signed by his Honor George F. Fountain on February 16, 1954, the incompetent plaintiff in the above-entitled action was then and is now represented by her Guardian, L. P. McLendon, Jr.; that she was then and is now unable to provide for herself in the manner to which she has been accustomed and was then and is now under legal disability; that said plaintiff, Mary A. Sayland, was then and is now a patient at the John W. Umstead Hospital in Butner, N. C.; that the said plaintiff, Mary A. Sayland, was then and is now totally incompetent for want of understanding to manage her own affiairs; that the prognosis of her case is that the plaintiff, Mary A. Sayland, will not improve within the foreseeable future; that the plaintiff, Mary A. Sayland, is kept and maintained at the John W. Umstead Hospital in Butner, N. C., which is a State Hospital for the mentally ill; and, that the cost of her care and maintenance at said hospital is $75.00 per month.
>
> "Now, THEREFORE, it is the judgment of the court that the motion of the movant be, and the same is hereby denied."

He then ordered that defendant forthwith pay to L. P. McLendon, Jr., guardian of Mary A. Sayland, incompetent, the sum of $57.50

per week for the period from August 17, 1964, to date as required by the 1954 judgment. He further directed that defendant continue payments as decreed by the former judgment. Defendant excepted to the denial of his motion and appealed from the judgment entered.

Robert B. Lloyd, Jr.; Of Counsel: Block, Meyland & Lloyd and John L. Toumaras for plaintiff appellee.

James and Speight by W. W. Speight and W. H. Watson for defendant appellant.

SHARP, J. The 1954 judgment, which defendant seeks to modify, did not merely give judicial sanction to the parties' agreement; the court adopted that agreement as its own determination of defendant's obligation to plaintiff, and ordered him to make the specified payments set out therein. Thus, it was an order of the court which it may modify at any time changed conditions and the ends of justice require. *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882; *Barber v. Barber,* 217 N.C. 422, 8 S.E. 2d 204. A change of circumstances or conditions must be established, however, before an order for permanent alimony may be modified or discontinued. *Rock v. Rock,* 260 N.C. 223, 132 S.E. 2d 342; 2 Lee, North Carolina Family Law § 153 (1963).

The alimony which a husband is required to pay in proceedings instituted under G.S. 50-16 is "a reasonable subsistence," the amount of which the judge determines in the exercise of a sound judicial discretion. His order determining that amount will not be disturbed unless there has been an abuse of discretion. *Hall v. Hall,* 250 N.C. 275, 108 S.E. 2d 487. Reasonable subsistence is measured by the needs of the wife *and* by the ability of the husband to pay. Ordinarily, it is primarily to be determined by the "condition and circumstances" of the husband. *Martin v. Martin,* 263 N.C. 86, 138 S.E. 2d 801; *Coggins v. Coggins,* 260 N.C. 765, 133 S.E. 2d 700. See Note, 39 N.C.L. Rev. 189 (1961). The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443; *Bowling v. Bowling,* 252 N.C. 527, 114 S.E. 2d 228; *Coggins v. Coggins, supra.* Nevertheless, "the earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. G.S. 50-16." *Bowling v. Bowling, supra* at 533, 114 S.E. 2d at 232. The court must consider the estate and earnings of both in arriving at the sum which is just and proper for the husband to pay the wife, either as temporary or permanent alimony; it is a question of fairness and

justice to both. *Bowling v. Bowling, supra;* 2 Lee, *op. cit. supra* § 145; 24 Am. Jur. 2d, Divorce and Separation §§ 620, 631 (1966); 27A C.J.S., Divorce § 233(1) (1959).

Payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. 24 Am. Jur. 2d, Divorce and Separation § 649 (1966); Annot., Alimony as Affected by Remarriage, 30 A.L.R. 79 (1924). However, any considerable change in the health or financial condition of the parties will warrant an application for change or modification of an alimony decree, and "the power to modify includes, in a proper case, power to terminate the award absolutely," 2A Nelson, Divorce and Annulment § 17.01 (2d Ed. 1961). *Accord,* 27A C.J.S., Divorce § 240 (1959). "The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance is an important consideration in determining whether and to what extent the decree should be modified." Annot., Modification of Alimony Decree, 18 A.L.R. 2d 10, 74 (1951); 24 Am. Jur. 2d, Divorce and Separation § 681 (1966). A decrease in the wife's needs is a change in condition which may also be properly considered in passing upon a husband's motion to reduce her allowance. 27A C.J.S., Divorce § 239 (1959). By the same token, an increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony.

We are unable to determine from this record whether the court denied defendant's motion in the exercise of his discretion, or because of a mistaken view of the law. The excerpt from his order quoted in our statement of facts suggests that he may have deemed the court without authority to modify the 1954 judgment as long as Mrs. Sayland remained incompetent. As heretofore pointed out, the court has plenary authority to modify the judgment whenever changed circumstances make such action equitable. But whatever the basis of his ruling, the sum which he ordered defendant to continue paying is not, as a matter of law, reasonable subsistence under the circumstances of this case.

The actual cost of Mrs. Sayland's maintenance in the State's hospital is presently $75.00 a month. Defendant's alimony payments are $230.00 every four weeks — slightly more than three times the cost of her actual *subsistence.* Even including the cost of Mrs. Sayland's guardianship, at the present time, this sum exceeds "reasonable subsistence." *Subsistence,* according to Webster's New International Dictionary (2d Ed. 1934), is "that which furnishes support to animal life; means of support; provisions, or that which procures

provisions; livelihood." The Legislature did not contemplate that "reasonable subsistence" should include contributions by a husband which tend only to increase an estate for his estranged wife to pass onto her next of kin. Furthermore, it would seem that, in ordering defendant to pay plaintiff $57.50 per week, the judge entirely ignored the income from Mrs. Sayland's own estate, which G.S. 50-16 requires the court to take into consideration.

The judgment appealed from is vacated, and this cause is remanded for another hearing upon defendant's motion in light of the legal principles herein enunciated.

Error and remanded.

MOORE, J., not sitting.

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

FLOSSIE G. ASHE v. ACME BUILDERS, INC.

(Filed 25 May, 1966.)

1. Negligence § 24a—

In passing upon the sufficiency of the evidence to be submitted to the jury on the issue of negligence, only that evidence supported by allegation need be considered.

2. Same— Evidence held insufficient for jury on issue of negligence on theory of liability alleged in the complaint.

Plaintiff alleged that defendant's employees, pursuant to their contract to renovate a room in plaintiff's house, placed sheetrock slabs against the wall at a slight angle, thereby creating a dangerous condition likely to cause injury to plaintiff, failed to warn plaintiff of the danger, and that plaintiff was injured when the slabs fell against her leg in the progress of the work. The evidence tended to show that the slabs were placed in the room where the work was to be done, that the slabs remained in the same condition some three weeks, and that the slabs fell from vibrations caused when the workmen were moving a heavy cast iron sink while plaintiff was removing pots and pans from a cabinet at the request of a workman. *Held:* Any danger from the falling slabs was as apparent to plaintiff as to the workmen and, the evidence being insufficient to permit a legitimate inference of negligence in stacking the slabs against the wall at a slight angle, nonsuit was properly entered.

3. Negligence § 21—

Negligence is not presumed from the mere fact of injury, and plaintiff must show a failure on the part of defendant to exercise care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligence proximately caused the injury, the sufficiency of the evidence to require its submission of the issue being a question of law.

MOORE, J., not sitting.

APPEAL by plaintiff from *McConnell, J.*, January 3, 1966 Civil Session (High Point Division) GUILFORD Superior Court.

The plaintiff instituted this civil action to recover damages for the personal injury she sustained as a result of the defendant's alleged actionable negligence. The court entered judgment of involuntary nonsuit at the close of all the evidence. The plaintiff excepted to, and appealed from, the judgment.

Schoch, Schoch & Schoch by Arch K. Schoch, Jr., for plaintiff appellant.

Morgan, Byerly, Post & Keziah by W. B. Byerly, Jr., for defendant appellee.

HIGGINS, J. The plaintiff alleged and offered evidence tending to show that she entered into a contract on September 22, 1961, in which the defendant agreed to furnish material and to remodel her kitchen. The work involved the use of sheetrock for the walls and celotex overhead. The sheetrock was in slabs four feet wide by eight feet long and one-half inch thick. On Monday following the date of the contract, the slabs were carried to, and stored in the room to be remodeled. They were stacked lengthwise on the floor, leaning at a slight angle against the wall under one of the windows. "More than four or five pieces were stacked there."

On October 19, 1961, one of the workmen called the plaintiff into the kitchen and requested that she remove some pots and pans from a cabinet which was in their way. This is the plaintiff's evidence relating to the cause of her injury:

> "When I went to move the pots and pans, I picked them up and came around the end of my table to put them on; and just as I got there the man moved the sink again, because it was a heavy sink, it is cast iron, I guess, very heavy; and he picked it up, you know, and tried to push it, or something; and it joshed the floor again. When he did that, the sheetrock fell over against my refrigerator and pushed it over as far as it would go against the

sink, and just the distance to hit me right on my leg, because that is where I was standing. Two pieces of the sheetrock broke when it hit my leg."

In passing on the motion to nonsuit, we need examine only the plaintiff's allegations of negligence in support of which she offered evidence. *Poultry Co. v. Equipment Co.*, 247 N.C. 570, 101 S.E. 2d 458; *Messick v. Turnage*, 240 N.C. 625, 83 S.E. 2d 654. The evidence offered relates only to the allegation the defendant was negligent in that its agents had placed the slabs at an angle against the wall, thereby creating a dangerous condition which was likely to cause an injury to the plaintiff, failed to warn her of the danger to the end that she might take steps to avoid it; that plaintiff was actually injured by the falling slabs on October 19, 1961. (Citing *Chanosky v. City Building Supply*, 152 Conn. 642, 211 A. 2d 141 (1965).)

For more than three weeks these slabs were undisturbed and remained in the same position until a workman moving a heavy cast iron sink caused the floor or walls to vibrate and the slabs to topple over. The slabs struck the refrigerator and then the plaintiff, injuring her.

The Court is confronted with this question: Is the plaintiff's evidence, viewed in the light most favorable to her, sufficient to permit a legitimate inference that the defendant was negligent in stacking the sheetrock slabs against the wall at a slight angle and should have reasonably foreseen that some injury to the plaintiff would proximately result from that negligence? The proper storage place for the materials would appear to be in the room where they were to be used rather than in some other part of the house occupied and in use by the plaintiff. The slabs, if placed lengthwise on the floor, leaning at an angle against the wall, would appear to be less likely to topple over than if they were placed endwise on the floor. To place these slabs flat on the floor would occupy a space of 12 square feet and would handicap those engaged in remodeling the room. Any danger from the falling slabs would have been as apparent to the plaintiff as to the workmen. For three weeks they had been in the same position.

The correct rule of law by which we are to determine the plaintiff's right to have a jury pass on the issues is stated in *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540:

"In order to establish actionable negligence, plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and that such negligence was the proximate cause of the injury — a

cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. . . .

"Negligence is not presumed from the mere fact of injury. The plaintiff is required to offer legal evidence tending to establish beyond a mere speculation or conjecture every essential element of negligence, and upon failure to do so, nonsuit is proper. And in this connection, whether or not there is enough evidence to support a material issue is a question of law."

When measured by the foregoing rule, the plaintiff's evidence in this case is insufficient to survive the motion for nonsuit. The judgment is

Affirmed.

MOORE, J., not sitting.

RAY E. ANGELL, ROBERT B. CORNS, DAVID M. CRENSHAW, AND JAMES L. STOUGH, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF RALEIGH, V. THE CITY OF RALEIGH, A MUNICIPAL CORPORATION; JAMES W. REID, CHARLES W. GADDY, EARL H. HOSTETLER, WILLIAM L. McLAURIN, TRAVIS H. TOMLINSON, JOHN W. WINTERS, AND WILLIAM H. WORTH, MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA; T. WADE BRUTON, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND SOUTHEASTERN CABLEVISION COMPANY.

(Filed 25 May, 1966.)

1. Declaratory Judgment Act § 1—

The Uniform Declaratory Judgment Act does not authorize the adjudication of mere abstract or theoretical questions or require the courts to give advisory opinions when there is no actual existing controversy between the parties affecting their rights, status or other legal relations.

2. Same—

Citizens and taxpayers of a municipality may not maintain a proceeding under the Declaratory Judgment Act to determine the validity of an ordinance authorizing municipal authorities to grant licenses for the installation and operation of a community antenna television system or "cablevision" when no license has been issued by the city under the ordinance and therefore no wrong inflicted or financial loss incurred by plaintiffs.

3. Constitutional Law § 4; Injunctions § 5—

Plaintiffs' allegations *held* insufficient to entitle them to any injunctive

relief in their action attacking the constitutionality of a municipal ordinance.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Peel, J.*, September Non-jury Civil Session 1965 of WAKE.

This is an action instituted on 26 October 1964 under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, in which the plaintiffs, citizens and taxpayers of the City of Raleigh, seek to test the validity of an ordinance adopted by the City of Raleigh, which became effective 5 October 1964.

This is a class action brought by the plaintiffs on behalf of themselves and all other persons having or claiming an interest in the subject matter of the controversy in common with the plaintiffs.

The action was originally instituted against the City of Raleigh and the individual members of the City Council of the City of Raleigh, and T. W. Bruton, the Attorney General of North Carolina. On 2 November 1964 the Southeastern Cablevision Company was made a party-defendant. The City of Raleigh and the Cablevision Company filed separate answers. They filed a joint brief in this Court. The Attorney General filed no formal answer, neither did he file a brief in connection with this appeal.

The first section of the ordinance sought to be tested reads as follows:

"SECTION I. That a person, firm or corporation may install and operate Community Antenna Television System in the City of Raleigh under the conditions set out herein and for that purpose is granted:

(a) The right and the privilege for a period of fifteen (15) years from the effective date of a license issued pursuant to this ordinance to erect structures in the City of Raleigh and to construct, maintain and operate in, over, and along present and future streets, alleys and public places of the City of Raleigh, towers, poles, lines, cables, necessary wiring and other apparatus for the purpose of receiving, amplifying and distributing television, electronic electrical and radio signals, audio and video, to said City and the inhabitants thereof.

(b) To attach or otherwise affix cables or wires to the pole facilities of any public utility company, even though the same may cross the streets, sidewalks, public lands and highways of the City of Raleigh, provided the said Grantee or assigns secures the permission or consent of said aforemen-

tioned public utility company concerned to affix the said cables or wires or other apparatus to their pole facilities."

Section 2 of the ordinance provides that the license granted shall be subject to the following conditions: (These conditions are set forth in some 25 paragraphs.)

Section 3 of the ordinance relates to the manner in which the application for license should be made, and may require of the applicant "as a condition precedent to the granting of the license that cash or its equivalent in the amount of ten thousand dollars ($10,000.00) be deposited with the City guaranteeing the installation of the necessary facilities for the conduct of the business, * * *."

When the matter came on for hearing, a jury trial was waived, and the trial judge concluded as a matter of law that the ordinance was a valid and lawful ordinance of the City of Raleigh and the plaintiffs are not entitled to any injunctive relief as prayed for in their complaint.

Plaintiffs appeal, assigning error.

Johnson, Gamble & Hollowell for plaintiffs, appellants.

Smith, Leach, Anderson & Dorsett and Donald L. Smith for defendants, appellees.

DENNY, E.J. In the case of *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404, Ervin, J., speaking for the Court, said:

"There is much misunderstanding as to the object and scope of this legislation (the Uniform Declaratory Judgment Act). Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. *Tryon v. Power Co.,* 222 N.C. 200, 22 S.E. 2d 450; *Allison v. Sharp,* 209 N.C. 477, 184 S.E. 27; *Poore v. Poore,* 201 N.C. 791, 161 S.E. 532; Anderson on Declaratory Judgments, section 13. This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

* * * * *

"While the Uniform Declaratory Judgment Act thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tri-

bunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Etheridge v. Leary,* 227 N.C. 636, 43 S.E. 2d 847; *Tryon v. Power Co., supra; Wright v. McGee,* 206 N.C. 52, 173 S.E. 31; *Light Co. v. Iseley,* 203 N.C. 811, 167 S.E. 56; *In re Eubanks,* 202 N.C. 357, 162 S.E. 769; 16 Am. Jur., Declaratory Judgments, section 9; 1 C.J.S., Actions, section 18; Anderson on Declaratory Judgments, section 22; Borchard on Declaratory Judgments (2d Ed.), 40-48."

In the case of *Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918, in 1950 the Federal Government by contract leased to plaintiff, a domestic corporation, a certain tract of land lying entirely within Cumberland County. The lease was for a period of 75 years. The lessee obligated itself to construct and maintain on said leased land a housing project of 500 units for Army personnel.

In 1952 Cumberland County notified plaintiff that said property of plaintiff would be assessed for *ad valorem* taxes. The plaintiff, protesting, asserted that said property was not subject to taxation by the county and requested that the question be submitted to the court for decision under the Declaratory Judgment Act. The county agreed, and thereupon the proceeding was instituted.

The question presented for decision was: "Does Cumberland County have the right to levy and collect *ad valorem* taxes on the aforesaid property or any part thereof?"

Barnhill, J., (later C.J.) said:

"Here the facts agreed do not set forth a 'question in difference which might be the subject of a civil action.' The defendant County has made no assessment. Neither has it levied upon this or any other property of plaintiff in an attempt to collect a tax on the property involved. No right of plaintiff has been denied or violated. It has suffered no wrong. It has sustained no loss either real or imaginary. On the facts agreed no justiciable question on which the court, in a civil action, could render a judgment is disclosed.

"Does the County have the right to tax the property of plaintiff which is located on the Fort Bragg Military Reservation? The County asserts this right. Plaintiff denies that it exists. The controversy thus created presents a purely abstract question. Any judgment putting it to rest would be wholly advisory in nature."

The appeal was dismissed.

In *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482, plaintiffs attacked the constitutionality of a zoning statute, applicable to all of Durham County not within the corporate limits of a city or town. Bobbitt, J., speaking for the Court, said:

> "* * * (I)t was not alleged or shown that any plaintiff owns realty constituting farm land either subject to or exempt from the provisions of the ordinance. Indeed, it is not alleged or shown that any plaintiff owns any property of any kind presently restricted by the ordinance. Plaintiffs cannot present an abstract question and obtain an adjudication in the nature of an advisory opinion. *Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918; *Hood, Comr. of Banks v. Realty, Inc.,* 211 N.C. 582, 591, 191 S.E. 410.
>
> * * * * *
>
> "Our conclusion is that the court below was in error in undertaking to rule on the constitutionality of the Act and on the validity of the provisions of the ordinance. Hence, the judgment is vacated and the cause remanded with direction that the action be dismissed, plaintiffs' allegations being insufficient to entitle them to injunctive relief."

In the case of *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413, the proceeding was instituted to have determined the validity of a redevelopment project. The Court said:

> "The validity of a statute, when *directly and necessarily* involved, *Person v. Watts,* 184 N.C. 499, 115 S.E. 336, may be determined in a properly constituted action under G.S. 1-253 *et seq. Calcutt v. McGeachy, supra* (213 N.C. 1, 195 S.E. 49); but this may be done only when some specific provision(s) thereof is challenged by a person who is directly and adversely affected thereby. * * *
>
> Conner, J., reminds us that confusion is caused 'by speaking of an act as unconstitutional in a general sense.' *St. George v. Hardie,* 147 N.C. 88, 97, 60 S.E. 920. The validity or invalidity of a statute, in whole or in part, is to be determined in respect of its adverse impact upon personal or property rights in a specific factual situation. * * *."

Our Uniform Declaratory Judgment Act does not authorize the adjudication of mere abstract or theoretical questions. Neither was this act intended to require the Court to give advisory opinions when no genuine controversy presently exists between the parties. Actions for declaratory judgment will lie for an adjudication of

rights, status, or other legal relation only when there is an actual existing controversy between the parties. *Lide v. Mears, supra.*

In the instant case the City of Raleigh has issued no license pursuant to the provisions of the ordinance alleged to be unconstitutional. Moreover, nothing has been done in connection with said ordinance that has violated any rights of the plaintiffs. The plaintiffs do not allege they have suffered any wrong or financial loss by reason of any action taken by the City of Raleigh in connection with the adoption of the ordinance in question.

We hold that since no genuine justiciable controversy now exists between the parties hereto, the judgment below must be vacated and the cause remanded with direction that the action be dismissed. Furthermore, plaintiffs' allegations are insufficient to entitle them to any injunctive relief.

Judgment vacated and cause remanded.

MOORE, J., not sitting.

BERNADINE WILES D/B/A CENTERVIEW TAXI v. RALPH P. MULLINAX, JR. AND MULLINAX INSURANCE AGENCY, INC.

(Filed 25 May, 1966.)

1. Insurance § 8—

An insurance agent or broker undertaking to provide coverage against a designated risk is under duty to exercise reasonable care to obtain the insurance or, if he is unable to do so, to give the proposed insured timely notice so that the proposed insured may obtain coverage elsewhere, and failure to perform this duty may render him liable to the proposed insured for loss within the amount of the proposed policy on the grounds of breach of contract or for negligent default in the performance of duty imposed by the contract.

2. Same—

Evidence favorable to plaintiff tending to show that for a period of seven years defendant brokers provided plaintiff with continuous workmen's compensation coverage in accordance with their undertaking, that plaintiff paid the premiums or arranged for their payment when she was billed, that on the renewal date in question defendants made unsuccessful efforts to place the insurance successively with two insurers, but that, when they refused to accept the risk, defendants permitted the coverage to expire without notice to plaintiff, and that as a result plaintiff became liable for a claim within the proposed coverage, *held* sufficient to be submitted to the jury on the question of defendants' liability.

MOORE, J., not sitting.

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

WILES *v.* MULLINAX.

APPEAL by plaintiff from *Walker, S.J.*, February 1965 Civil Session of CABARRUS, docketed in the Supreme Court as Case No. 611 and argued at the Fall Term 1965.

Plaintiff, the operator of Centerview Taxicab Company, brought this action against the individual defendant Mullinax, an insurance broker, and his incorporated agency to recover damages for an alleged negligent breach of duty (1) to provide plaintiff with the workmen's compensation and employer's liability insurance required by the North Carolina Workmen's Compensation Act; and (2) to notify plaintiff of his failure to provide the promised insurance. Plaintiff seeks to recover $8,800.00, which she was required to pay as compensation for the death of an employee, plus $500.00 for attorney's fees, a total of $9,300.00.

Plaintiff's evidence, and that of defendants which is explanatory of it, is sufficient to establish the following facts: Mullinax is an authorized and duly-licensed insurance agent and broker. He is the executive vice-president and treasurer of the corporate defendant, as well as a stockholder in it. For over 25 years, plaintiff has owned and operated a taxi business in Kannapolis. She obtained her first workmen's compensation insurance in 1951, when Mullinax, who wrote all her insurance, came to see her and told her that the law required her to carry such insurance. She instructed him to "write it up." When he left, he told her that he had always looked after her; that he would continue to do so; and that she had nothing to worry about. Thereafter, he provided her with workmen's compensation insurance coverage, either with the Travelers Insurance Company or the Pennsylvania Threshermen & Farmer's Mutual Casualty Insurance Company (P. T. & F. Company) until November 8, 1958. During this period, from time to time, Mullinax reiterated his promise to take care of all of her insurance needs, as well as his assurance that she "had nothing to worry about." Each year defendants renewed her coverage without any specific request from plaintiff, who did not keep up with the renewal dates. Sometimes Mullinax personally delivered the renewal policies to her; sometimes they were mailed. When plaintiff did not have the money to pay the premium at the time it became due, she borrowed it at Concord National Bank upon Mullinax' endorsement.

Defendants also carried liability insurance upon a number of plaintiff's taxicabs. At the bottom of the invoices which defendants sent to her for this insurance was this statement:

> "Thank you, it's a pleasure to work with you. We have renewed the above policy because as you know you have an established account. This entitled you to automatic renewal.

If you have requested changes not shown, they are being made. If you have not received your new policy, one of us will deliver it soon."

From November 8, 1957, to November 8, 1958, plaintiff's workmen's compensation carrier was P. T. & F. Company. In the summer of 1958, defendants ceased to represent this Company. They failed, however, to notify plaintiff that they were no longer agents for that Company or that P. T. & F. Company would not extend her coverage. Effective November 8, 1958, Mullinax bound the Royal Indemnity Company for plaintiff's workmen's compensation coverage, but, between November 8th and 11th, this Company declined the risk. On November 14, 1958, Mullinax bound the Dixie Fire & Casualty Company; on November 18, 1958, it, too, declined the risk. Mullinax, however, did not notify plaintiff either that he had placed the two binders or that the companies had each declined to issue her a policy.

In November 1958, plaintiff had 8-10 employees. On November 29, 1958, one of her taxi drivers, Murray Lee Tucker, was killed in an accident arising out of and in the course of his employment. It was when she notified Mullinax of this occurrence that she learned, for the first time, that she had no workmen's compensation insurance in force.

The widow of the deceased employee filed a claim against plaintiff for compensation benefits. The claim was allowed by the North Carolina Industrial Commission after a hearing in which Mullinax testified, substantially as detailed above, as to his efforts to secure insurance for plaintiff in November 1958. He admitted his failure to notify plaintiff that he had been unable to place her insurance. He also testified that she had told him early in 1958 not to renew any of her policies without her permission, that she was considering "better coverage for her money." Plaintiff denied any such conversation. The Industrial Commission made an award against plaintiff as a non-insurer and ordered her to pay the widow a funeral benefit of $400.00 and compensation in the amount of $24.00 per week for a period of 350 weeks.

At the time of the trial of this case in the Superior Court, plaintiff had paid the funeral benefit and compensation for 321 of the required 350 weeks. In addition, she had paid her attorney $500.00 for his services in connection with this suit. At the close of all the evidence, defendants' motion for nonsuit was allowed, and plaintiff appealed.

Williams, Willeford & Boger for plaintiff appellant.

Hartsell, Hartsell & Mills by Harold H. Smith for defendant appellees.

SHARP, J. This Court has several times stated the rule applicable to plaintiff's allegations and evidence:

> "It is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perfrom the duty he has assumed and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default." *Elam v. Realty Co.*, 182 N.C. 599, 602, 109 S.E. 632, 633.

Accord, Equipment Co. v. Swimmer, 259 N.C. 69, 130 S.E. 2d 6; *Bank v. Bryan*, 240 N.C. 610, 83 S.E. 2d 485; *Meiselman v. Wicker*, 224 N.C. 417, 30 S.E. 2d 317; *Boney, Insurance Comr. v. Insurance Co.*, 213 N.C. 563, 197 S.E. 122. See also 4 Couch, Insurance § 26:460 (2d Ed. 1960); 44 C.J.S., Insurance § 172 (1945); 29 Am. Jur., Insurance § 163 (1960).

If a broker or agent is unable to procure the insurance he has undertaken to provide, he impliedly undertakes — and it is his duty — to give timely notice to his customer, the proposed insured, who may then take the necessary steps to secure the insurance elsewhere or otherwise protect himself. Annot., Insurance Broker or Agent — Liability, 29 A.L.R. 2d 171, 184 (1953); 29 Am. Jur., Insurance § 164 (1960). When, under these circumstances, the broker fails to give such notice, he renders himself liable for the resulting damage which his client suffered from lack of insurance. 44 C.J.S., Insurance § 172 (1945).

Where an insurance broker becomes liable to his customer for failure to provide him with the promised insurance, the latter, at his election, may sue for breach of contract or for negligent default in the performance of a duty imposed by contract. *Equipment Co. v. Swimmer, supra; Bank v. Bryan, supra; Elam v. Realty Co., supra;* 44 C.J.S., Insurance § 172(b) (1945).

Viewing the evidence in the light most favorable to plaintiff, as we are required to do, it appears: (1) In 1951, defendants had agreed to provide plaintiff with continuous workmen's compensation coverage, and, from November 1951 through November 1958, without any further request from her, they had done so; (2) Plaintiff had paid the premium or arranged for its payment only when she was billed; (3) On November 18, 1958, after unsuccessful efforts

to place her insurance with two companies, defendants permitted her coverage to expire without notice to her; and (4) As a result, she became personally liable, 21 days later, to pay the widow of a deceased employee compensation for his death. This was plenary evidence for the jury's consideration on the question of defendants' liability.

Conceding, *arguendo,* that defendants used reasonable diligence to procure coverage for plaintiff, yet they neglected to notify her of their failure to get it for her. If, after a diligent effort to provide the insurance, defendants were unable to do so, all they were required to do in order to avoid liability was to tell plaintiff seasonably that they could not write the policy. *Feldmeyer v. Englehart,* 54 S.D. 81, 222 N.W. 598.

Defendants' asserted defenses are not pertinent to this decision, which relates only to the question of the sufficiency of the evidence to survive the motion for nonsuit.

The judgment of nonsuit is

Reversed.

MOORE, J., not sitting.

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

RONALD W. PENDERGRAFT AND WIFE, MARJORIE ELIZABETH PENDERGRAFT v. WILLIAM T. HARRIS AND PAUL A. MITCHELL, TRADING AND DOING BUSINESS AS HARRIS OIL COMPANY.

(Filed 25 May, 1966.)

1. Courts § 7—

Where the judge of a county civil court allows 90 days for the service of statement of case on appeal to the Superior Court, G.S. 7-378(1), and appellee fails to serve statement of case on appeal within the time allowed, the appeal should be dismissed on motion in the Superior Court, notwithstanding that statement of case on appeal was filed prior to the making of appellants' motion to dismiss.

2. Same—

If G.S. 1-287.1 relates to dismissal of an appeal from a county civil court to the Superior Court, it can apply only to a motion to dismiss addressed to the county civil court.

3. Appeal and Error § 36—

A motion for diminution of the record will not be allowed when nothing contained in the suggested addenda affects the basis of decision.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Johnson, J.*, December 6, 1965, Civil Session of DURHAM Superior Court.

On December 9, 1965, Judge Johnson entered the following order, *viz.:*

"THIS CAUSE coming on to be heard before the undersigned Judge Presiding over the Superior Court of the Fourteenth Judicial District upon motion of the plaintiffs, Appellees, to docket and dismiss the appeal of the defendants, appellants; and,

"IT APPEARING TO THE COURT and the Court finding as a fact that this action was tried in the Durham County Civil Court before the Honorable Oscar G. Barker, Judge Presiding, and a Jury, at the August, 1965 Term of said Court; that the jury answered the issues adjudging the plaintiffs entitled to recover of the defendants the sum of Twelve Hundred Dollars ($1,200.00), and that on the 18th day of August, 1965, a Judgment was entered based upon said issues; and,

"IT FURTHER APPEARING TO THE COURT and the Court finding as a fact that on the 18th day of August, 1965, the defendants gave notice of appeal to the Superior Court in open Court, at which time the Judge Presiding over the Durham County Civil Court, in his discretion, fixed the time within which the Statement of Case on Appeal should be served on the appellees by the appellants at ninety (90) days and allowed forty-five (45) days thereafter for the service of counter statement of Case on Appeal or Exceptions; and,

"IT FURTHER APPEARING TO THE COURT and the Court finding as a fact by stipulation of the parties made in open Court that the time within which the appellants might prepare and serve Statement of Case on Appeal expired at midnight on the 16th day of November, 1965; and,

"IT FURTHER APPEARING TO THE COURT that the appellants did not file or serve their Statement of Case on Appeal in this action until the 17th day of November, 1965, the ninety-first (91st) day following the Notice of Appeal, and that thereafter on the 18th day of November, 1965, the Appellees filed their Motion to docket and dismiss; and,

"IT APPEARING TO THE COURT and the Court finding as a fact that the appellants failed to attach as a part of their statement of

Case on Appeal any assignments of error or grouping of exceptions and that as of the date of the hearing by the undersigned on the Motion of the appellees to docket and dismiss no such assignments of error or grouping of exceptions has been filed by the appellants; and,

"IT FURTHER APPEARING TO THE COURT that the motion of the appellees to docket and dismiss the appeal of the appellants should be denied.

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of the Appellees to docket and dismiss the appeal of the appellants in this action be, and the same is hereby, denied."

Plaintiffs excepted "(t)o the entry of the foregoing Order" and appealed.

Bryant, Lipton, Bryant & Battle for plaintiff appellants.

Weatherspoon & Pulley and Rudolph L. Edwards for defendant appellees.

BOBBITT, J. The Durham County Civil Court was established under the statute now codified as G.S. Chapter 7, Article 35, and has jurisdiction concurrent with the superior court in tort actions wherein the amount demanded does not exceed $1,500.00, exclusive of interest and costs. G.S. 7-372(3). See *Perry v. Owens,* 257 N.C. 98, 101, 125 S.E. 2d 287.

G.S. 7-378, in pertinent part, provides:

"Appeals in actions may be taken from the county civil court within ten days from date of rendition of judgment to the superior court of the county in term time, for errors assigned in matters of law or legal inference, in the same manner as is provided for appeals from the superior court to the Supreme Court, except as follows:

"(1) The appellant shall cause a copy of the statement of case on appeal *to be served on the respondent* within thirty days from the entry of the appeal taken, and the respondent, within fifteen days after such service, shall return the copy with his approval or specific amendments endorsed or attached; *if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved:* Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case. (Our italics.)

"(2) The appellant shall file one typewritten copy of the statement of case on appeal, *as settled,* containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the county civil court to the superior court as the complete record on appeal in said court. (Our italics.)

"(3) The record in the case on appeal to the superior court must be docketed in the superior court *within ten days after the date of settling the case on appeal.* If the appellant shall fail to perfect his appeal within the prescribed time, the appellee may file with the clerk of superior court a certificate of the clerk of court from which the appeal comes showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant and the date of the settling of case on appeal, if any has been settled, with his motion to docket and dismiss said appeal at appellant's cost, which motion shall be allowed at the first regular term or any succeeding regular term of the superior court." (Our italics.)

Judge Johnson's order recites: "IT FURTHER APPEARING TO THE COURT that the appellants did not *file or serve* their Statement of Case on Appeal in this action until the 17th day of November, 1965, the ninety-first (91st) day following the Notice of Appeal . . ." (Our italics.)

G.S. 7-378 provides the following procedure: An appellant is required to serve a copy of his statement of case on appeal *on the appellee* within the prescribed time. The case on appeal is to be filed in the Durham County Civil Court *upon settlement thereof.* Thereupon, "the statement of case on appeal, *as settled,* containing the exceptions and assignments of error," together with the record proper, are to be transmitted by the clerk of the county civil court to the superior court. This record must be docketed in the superior court within ten days "after the date *of settling the case on appeal.*" (Our italics.)

In our view, the crucial question is whether a copy of defendants' statement of case on appeal *was served on plaintiffs* within the prescribed time. The record does not disclose with certainty that such copy was ever served *on plaintiffs.* It does appear that defendants' statement of case on appeal was not served on anybody or in any manner until November 17, 1965, that is, after the expiration of the ninety days allowed for service thereof.

Judge Johnson's order does not indicate the ground of his decision.

Defendants contend the granting or denial of plaintiffs' motion to dismiss was for determination by Judge Johnson in his discretion.

The asserted basis for this contention is that defendants' statement of case on appeal was filed in the Durham County Civil Court on November 17, 1965, prior to the filing (on November 18, 1965) of plaintiffs' motion to dismiss. *McLean v. McDonald,* 175 N.C. 418, 95 S.E. 769, is typical of decisions cited and relied on by defendants. They relate to dismissals of appeals to this Court for failure to docket within the time prescribed by our rules. In this connection, it is sufficient to say: Nothing in the record indicates a case on appeal was settled by agreement or otherwise; and, until *settlement* of a case on appeal, G.S. 7-378 made no provision for the filing in the Durham County Civil Court of defendants' statement of case on appeal or for the transmittal thereof from the Durham County Civil Court to the Durham County Superior Court. Defendants make no contention that error appears on the face of the record proper in the Durham County Civil Court.

G.S. 1-287.1, discussed in both briefs, relates to the dismissal by the superior court of appeals therefrom to the Supreme Court. If applicable under any circumstances to an appeal from the county civil court to the superior court, it could apply only to a motion to dismiss addressed to the county civil court.

In view of the fact that defendants failed to serve statement of case on appeal on plaintiffs within the ninety days allowed therefor, plaintiffs' motion to dismiss defendants' purported appeal from the Durham County Civil Court should have been granted. Hence, the order of the court below is reversed.

Motions made by plaintiffs and by defendants suggesting diminution of the record have been considered and denied. Nothing contained in the suggested addenda to the record affects the basis of decision on this appeal.

Reversed.

MOORE, J., not sitting.

ORVILLE S. HOLLENBECK v. RAMSET FASTENERS, INC., A CORPORATION, (RAMSET DIVISION — OLIN MATHIESON CHEMICAL CORPORATION), AND ACOUSTI ENGINEERING OF CAROLINAS, INC., ALSO KNOWN AS ACOUSTICS, INC.

(Filed 25 May, 1966.)

1. Sales § 5—

A seller is bound by an express warranty when, and only when, it is made to induce a sale and does induce such sale.

2. Same—

A tool used to force a steel bolt into concrete by means of a powder charge is necessarily and inherently dangerous and can be safe only when used with great care and caution, and a salesman's statement that the tool was "safe" is merely an expression of opinion in the "puffing of his wares," and cannot constitute an express warranty.

3. Sales § 16—

Plaintiff contended that the salesman did not warn him of the possibility of a ricochet in using a tool to force a steel bolt into concrete or metal by the use of a powder charge. The evidence disclosed that plaintiff had used a like tool several thousands of times and that he had used the tool in question for a year or so prior to his injury from a ricocheting bolt, and that the shield of the tool carried a printed statement warning of the possibility of a ricochet. *Held:* Plaintiff cannot recover on the theory of negligence of the salesman in failing to give warning.

4. Same; Negligence § 24b—

The doctrine of *res ipsa loquitur* does not apply to an injury sustained by a workman while using a tool to force bolts into concrete or metal by a powder charge placed into the barrel of the tool when it appears that plaintiff had used the tool for a number of years and therefore had knowledge superior to defendant's salesman in regard to the use or condition of the tool.

MOORE, J., not sitting.

PARKER, C.J., concurs in the result.

APPEAL by plaintiff from *Brock, S.J.*, November 15, 1965 Schedule "C" Session of MECKLENBURG.

The plaintiff's action arose out of an accident in which he was using a "powder actuated tool" manufactured by the defendant Ramset and sold by the defendant Acoustics to the plaintiff's employer, Electrical Contracting and Engineering Company. It was used to fasten construction materials to steel or concrete and is barrel shaped with a shield on one end and a triggering mechanism on the other. The stud, or pin, and a powder charge are placed into the barrel and when the tool has been placed in the desired loca-

tion, the pin is forced into the construction material upon activating the charge by pulling the trigger.

The plaintiff had been an electrician for eleven or twelve years and had been using a powder actuated tool similar to the one used at the time of the accident for the previous seven years, having fired it more than four thousand times. He had been using the same tool he was using on the day of the accident for the last year or so and had successfully fired it three times that day before he was injured by the fourth pin. The accident occurred as the plaintiff attempted to use the tool in placing a pin into a twelve inch square "precast concrete column." Upon firing it, he felt a "terrific explosion" and was thrown back as something hit him in the left eye, causing its loss. He testified he had never known a stud to ricochet in all his experience in using this tool.

The manufacturer, Ramset Fasteners, Inc., whose name appears as a defendant, was never served with process and was not a party to this action. The plaintiff offered evidence that in the year 1957 W. H. Henderson, a salesman for Acoustics, told him and other employees of the defendant, "If the gun is used properly and all safety precautions adhered to, it was safe to use and not to be disturbed about it." The instrument itself was introduced in evidence and, printed on the shield of the tool is, "Never operate without setting safety control to minimize possible ricochet. Follow instruction manual." At the time of the statement attributed to Henderson, plaintiff's employer had already bought these instruments and they were in use by the plaintiff and other employees. The injury to the plaintiff did not occur until about three years later and he testified he had been using the tool in question for about a year. It may be deduced that the alleged warranty did not relate to the tool in question and was not relied upon in purchasing it; however, the plaintiff contends that this is an express warranty which was violated when he was injured.

At the close of the plaintiff's evidence, the defendant's motion for nonsuit was allowed; plaintiff excepted and appealed, assigning error.

Carswell and Justice by James F. Justice, Peter L. Reynolds Attorneys for plaintiff appellant.

Boyle, Alexander and Carmichael by R. C. Carmichael, Jr., Attorneys for defendant appellee.

PLESS, J. Since the manufacturer of the powder actuated tool is not a party, the doctrine of implied warranty is not available to the plaintiff. He seeks to recover of the seller upon the alleged breach of an express warranty as summarized in the statement of facts. In

Insurance Co. v. Chevrolet Co., 253 N.C. 243, 116 S.E. 2d 780, Bobbitt, J., speaking for this Court said:

> "'* * * any promise by the seller relating to the goods is *an express warranty* if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.'"

That case cites *Underwood v. Car Co.*, 166 N.C. 458, 82 S.E. 885 which says:

> "An express warranty is defined (as) * * *: 'When the seller makes affirmation with respect to the article to be sold, pending the treaty of sale, upon which it is intended that the buyer shall rely in making the purchase. * * * A warranty consists in representations and statement of and concerning conditions and quality of personal property, the subject of sale, made by the person making the sale to induce and bring it about.'"

Stating it another way: a seller is bound by an express warranty when, and only when, it is made to induce a sale and does induce such sale.

The plaintiff testified that the alleged warranty was made in 1957 but stated on cross examination that, "this particular tool I had used first in 1955 about three and one-half years before the accident." Nowhere does he say that the alleged warranty induced the sale or that he, or his employer, relied upon it.

A salesman is permitted to "puff his wares" and, in saying that a powder actuated tool is safe has merely expressed an opinion. There is no such thing as a safe shotgun or circular saw. Neither can a tool that, with the use of a powder charge, forces a steel bolt into concrete be termed "safe." They are necessarily and inherently dangerous and can be safe only when used with great care and caution.

Even if the plaintiff's evidence justified the finding of an express warranty, he has shown no breach of that warranty except the fact of his injury. His own evidence establishes that he had been using a similar tool for some seven years and had fired it more than four thousand times. The particular tool used on the date of his injury had been used by him "for the last year or so", and on the day of the accident he had successfully used it three times prior to being injured with the fourth pin.

The plaintiff also complains that Henderson did not warn him of the possibility of ricochet. While it is true that Henderson testified as to two cases of ricochet with a similar tool, plaintiff's evidence

does not show that the salesman had this knowledge at the time of the sale. The evidence does affirm, and specifically so, that each of the several thousand times the plaintiff picked up the tool, he was confronted with the printed statement on the shield which warned of a possible ricochet. He could hardly expect more impressive notice than this and exceptions relating thereto are overruled.

Neither can the plaintiff recover upon the theory of *res ipsa loquitur*. In 38 Am. Jur. § 299, p. 995, it is said:

> "The *res ipsa loquitur* doctrine is based in part upon the theory that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it * * *. The inference which the doctrine permits is grounded upon the fact that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured person. If the circumstances do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged, or if the plaintiff himself has equal or superior means of information, the doctrine will not apply."

In view of the use by the plaintiff of this tool or a similar one for some seven years and four thousand "shots", it would be unreasonable to assume that the defendant had knowledge superior to the plaintiff's in regard to the use or condition of the tool.

We have given full consideration to all the arguments and contentions advanced by the plaintiff, but can find no basis upon which to hold the defendant liable.

Plaintiff's assignments of error are, therefore, overruled, and the judgment below granting the defendant's motion for nonsuit at the close of the plaintiff's evidence is

Affirmed.

MOORE, J., not sitting.

PARKER, C.J., concurs in the result.

STATE v. JACKIE E. STALLINGS.

(Filed 25 May, 1966.)

1. Escape § 1—

An indictment charging that defendant escaped from lawful custody while serving a sentence for a felony imposed in the Superior Court of a named county is sufficient without naming the felony for which defendant was imprisoned, and reference in the indictment to the felony is surplusage.

2. Indictment and Warrant § 9—

If an averment in an indictment or warrant is not necessary in charging the offense, it may be treated as surplusage.

3. Escape § 1; Criminal Law § 40—

In a prosecution for escape, certified copies of the record of the Superior Court showing defendant's conviction and sentence, or a commitment issued under the hand and official seal of the clerk of the Superior Court, is admissible for the purpose of showing that defendant was in lawful custody at the time of the alleged escape.

4. Escape § 1; Criminal Law § 76—

It is incompetent for the superintendent of a State Prison to testify that the commitment under which defendant was held was for a felony; even so, upon motion to nonsuit, such testimony must be considered, and when such testimony, together with other evidence, discloses that defendant escaped while serving a sentence imposed by a named Superior Court for a felony, denial of nonsuit is proper.

5. Criminal Law § 168—

In reviewing denial of motion to nonsuit, incompetent evidence admitted at the trial must be considered.

6. Criminal Law § 65.1—

The evidence considered in the light most favorable to the State *is held* to support a finding that the person indicted under the name of "Jackie Emmitt Stallings" is the same person referred to in the commitment as "Jack Stallings."

MOORE, J., not sitting.

APPEAL by defendant from *Cohoon, J.*, January 1966 Session of HALIFAX.

Criminal prosecution on bill of indictment charging that defendant on September 14, 1965, "while . . . confined in the North Carolina State Prison System in the lawful custody of M. L. Stallings, Superintendent of State Prison Camp No. 400 and while then and there serving a sentence for the crime of robbery with force, which is a felony under the laws of the State of North Carolina, imposed at the April Criminal 1959 Term Superior Court, Wake County,

then and there unlawfully, wilfully and feloniously did attempt to escape and escaped from the said State Prison Camp No. 400," etc.

The State offered evidence tending to show that defendant, a prisoner at State Prison Camp No. 400, known as Caledonia Prison, escaped therefrom on September 14, 1965; and that he was found, about midnight on September 14, 1965, stooped behind a parked automobile near a Super Market, beyond the confines of Caledonia Prison.

The jury returned a verdict of "guilty as charged" and judgment, imposing a prison sentence, was pronounced. Defendant excepted and appealed.

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

Dwight L. Cranford for defendant appellant.

BOBBITT, J. Defendant assigns as error the denial of his motion for judgment as of nonsuit. There was ample evidence to support a finding that defendant was an escapee from Caledonia Prison. Discussion is limited to defendant's contention that the evidence fails to support the allegations of the indictment relating to the crime for which defendant was serving a sentence at the time of the alleged escape.

The indictment, as the court explained to the jury, is based on the following portion of G.S. 148-45: "Any prisoner serving a sentence imposed upon conviction of a felony who escapes or attempts to escape from the State prison system shall for the first such offense be guilty of a felony . . ." No question is presented as to the sufficiency of the indictment.

In *S. v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497, the indictment charged that the defendant "did unlawfully, wilfully and feloniously escape and attempt to escape from the State Prison System, said prisoner having been previously convicted of escape," etc. The opinion states: "We do not undertake on this appeal to specify the exact averments prerequisite to a valid warrant or bill of indictment based on G.S. 148-45. Suffice to say, the bill of indictment on which defendant was tried is fatally defective. There is no averment of any kind, even in general terms, that the alleged escape of January 9, 1957, occurred while defendant was serving a sentence imposed upon his conviction of any criminal offense. In order to charge the offense *substantially in the language* of G.S. 148-45, it would be necessary to allege that the escape or attempted escape occurred when defendant was serving a sentence imposed upon conviction of a misde-

meanor or of a felony, irrespective of whether the presently alleged escape or attempted escape is alleged to be a first or a second offense."

The present indictment charges that defendant escaped from lawful custody while "serving a sentence for the crime of robbery with force, which is a felony under the laws of the State of North Carolina, imposed at the April Criminal 1959 Term Superior Court, Wake County," etc. We are of the opinion, and so hold, that an indictment charging a defendant with escape from lawful custody while serving a sentence imposed by judgment pronounced in the superior court of a named county for a felony is sufficient without naming the particular felony for which defendant was imprisoned. The reference to "the crime of robbery with force" is surplusage. "Allegations, without which an indictment or information for escape, or a related offense, is adequate, are deemed to be surplusage." 30A C.J.S., Escape § 25(6). The material averment is that defendant was serving a sentence imposed by judgment pronounced in the Superior Court of Wake County for a felony. Neither allegation nor proof that defendant's imprisonment was for "the crime of robbery with force" was prerequisite to conviction. To establish the alleged crime, it was necessary to prove that defendant escaped when serving a sentence imposed by the Superior Court of Wake County for *a* felony.

To establish defendant's alleged escape was from lawful custody, the State offered evidence that defendant was in the custody of M. L. Stallings, Superintendent of State Prison Camp No. 400, under authority of commitment No. 3468 entitled *"State v. Jack Stallings."* The portion thereof admitted in evidence recites that "the above named defendant" was brought to trial at the April 1959 Criminal Term of the Superior Court of Wake County, that he was convicted and that judgment was pronounced. In lieu of omitted portions, the following appears: "(The type of offense and the punishment is not permitted to be offered and is stricken from the commitment and no part of said information was disclosed or revealed to the jury.)" The record does not indicate why or at whose instance the provisions relating to the type of offense and the punishment were "not permitted to be offered."

"Court records are generally admitted to prove the lawfulness of a prisoner's custody." 19 Am. Jur., Escape, Prison Breaking, and Rescue § 27; 30A C.J.S., Escape § 26(b), p. 902.

Unquestionably, certified copies of the records of the Superior Court of Wake County showing defendant's conviction and sentence were admissible to show defendant was in lawful custody at the time of the alleged escape. *State v. King,* 372 S.W. 2d 857 (Mo., 1963), and cases cited; *State v. McGee,* 398 P. 2d 563 (Kan., 1965).

A commitment issued under the hand and official seal of the Clerk of the Superior Court of Wake County was also admissible for this purpose. Such records were also competent to show whether the offense for which defendant was imprisoned was a felony or a misdemeanor. Here, a crucial portion of the commitment was not in evidence.

The superintendent, on direct examination, identified commitment No. 3468 as the commitment "for Jack Stallings." Thereafter, the record shows: "(Q. And is it a commitment for a felony offense? OBJECTION BY DEFENDANT OVERRULED. DEFENDANT EXCEPTS. A. Yes.) To the foregoing question and answer in brackets the defendant excepted."

While the record discloses no reason why commitment No. 3468 in its entirety was not competent, it was error to permit the superintendent to testify as to the contents thereof or, more precisely, that it was "a commitment for a felony offense." The admission of this testimony, bearing directly upon whether defendant was serving a sentence for a felony, was prejudicial. Even so, it was for consideration in passing upon defendant's motion for judgment as of nonsuit. *S. v. McMilliam,* 243 N.C. 771, 774, 92 S.E. 2d 202.

We have not overlooked the fact that defendant is presently indicted under the name "Jackie Emmitt Stallings" and that commitment No. 3468 is entitled *"State v. Jack Stallings."* However, we are of the opinion that the evidence, when considered in the light most favorable to the State, is sufficient to support a finding that the person indicted is the person referred to in commitment No. 3468 as "Jack Stallings."

For the reasons indicated, we hold the evidence sufficient to withstand defendant's motion for judgment as of nonsuit; but, for error in the admission of incompetent evidence, a new trial is awarded.

New trial.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. WILSON MILLER.

(Filed 25 May, 1966.)

1. Homicide § 9—

Reasonable apprehension of future injury is an essential prerequisite to the right to take life in defense of one's habitation.

2. Homicide § 20— Whether defendant shot in defense of home and whether he used excessive force held jury questions on evidence.

Evidence that a trespasser who was refused entry by the owner of a house stated that he was coming in anyway and was going to "tear the place up," and began to rip the screen from the outer door, that the owner got a pistol and returned to the hall and, without closing the inner wood and glass door, stated, "I told you not to tear my screen out," and fired the fatal shot, *held* to preclude nonsuit, it being for the jury to determine whether the shot was fired for the committed act of tearing the screen or whether the owner shot to prevent an intruder, who he had reason to believe intended to commit a felony or inflict personal injury to him or some other members of his household, from entering the dwelling, and, if so, whether defendant used excessive force under all the circumstances.

3. Homicide § 27—

Where there is evidence that defendant fired the fatal shot in defense of his habitation against a trespasser, a charge on defendant's right to kill in self-defense without an instruction on the law relating to defendant's right to defend his habitation from invasion by an intruder, must be held for prejudicial error.

MOORE, J., not sitting.

APPEAL by defendant from *Bickett, J.*, December 1965 Session of DURHAM.

Defendant was indicted for murder in the first degree. When the case was called for trial, however, the solicitor announced that he would not seek a conviction for that crime, but would ask for a verdict of guilty of murder in the second degree or manslaughter, as the evidence might disclose. The jury found defendant guilty of manslaughter.

Evidence for the State tended to show the following: On May 29, 1965, at about 8:00 p.m., the State's witness, Jasper Conway, finished his work at the cafe where he was employed and started to his room in defendant's home. The deceased, Bruce Browning, who was "half drunk," announced his intention to walk along with him. When they arrived, Conway rang the bell and defendant came to the door. At the entrance were two doors. The inner, a wooden panel door, containing glass panes about 2½ x 3 feet, was open; the outer, a screen door, was closed and hooked. Defendant admitted Conway, who went to his room, but he refused entry to Browning, saying to him, "Bruce, I don't want you in here, you will only make

trouble; I don't want you in my house." Browning told defendant that he was coming in anyway, and that he was going to "tear the place up." Defendant again told him to go away; that he wanted no trouble. Browning then began to rip the screen out of the door. When he started this, defendant went for his pistol. He returned to the hall, and said, "I told you not to tear my screen out." He then fired one shot. The bullet struck deceased in the chest, passed through his heart and both lungs, and caused his death. Browning had theretofore been told to stay away from defendant's house because he "would argue and fuss" every time he came there. On one occasion a policeman had ejected him.

Defendant offered no evidence. From the judgment that he be confined in the State's Prison for 5-7 years, defendant appeals. He assigns as error the refusal of the court to grant his motion for nonsuit and omissions in his Honor's charge.

T. W. Bruton, Attorney General, and George A. Goodwyn, Assistant Attorney General for the State.

Blackwell M. Brogden and Norman E. Williams for defendant appellant.

SHARP, J. Defendant contends that the State's own evidence rebutted the presumption of unlawfulness and malice which arises from an intentional killing with a deadly weapon, and that he is entitled to an acquittal by judgment of nonsuit. We agree with the trial judge, however, that the State's evidence required its submission to the jury. Deceased was unarmed. After he had torn the screen from the outer door, defendant neither shut the panel door, nor gave him any warning of his purpose to shoot if deceased persisted in his efforts to enter the house. Instead, defendant procured his pistol, said to Browning, "I told you not to tear my screen out," and fired the fatal shot. Defendant could not justify or excuse slaying the man at his door for an act already done; reasonable apprehension of future injury is an essential prerequisite to the right to take life in defense of one's habitation. It was for the jury to say whether defendant shot to *punish* deceased for damaging his screen, or to *prevent* an intruder, whom he had reason to believe intended to commit a felony or to inflict personal injury upon him or some other member of his household, from forcibly entering his dwelling. If it were the latter, there was the further question whether defendant used force excessive under all the circumstances. *State v. Baker,* 222 N.C. 428, 23 S.E. 2d 340; *State v. Reynolds,* 212 N.C. 37, 192 S.E. 871.

When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder. Under those circumstances, "the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family. . . . But the jury must be the judge of the reasonableness of defendant's apprehension." *State v. Gray,* 162 N.C. 608, 610-11, 77 S.E. 833, 834, 45 L.R.A. (n.s.) 71, 73. *Accord, State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84; *State v. Bryson,* 200 N.C. 50, 156 S.E. 143. See Annots., Homicide or Assault in Defense of Habitation or Property, 25 A.L.R. 508 (1923); 32 A.L.R. 1541 (1924); 34 A.L.R. 1488 (1925). A householder will not, however, be excused if he employs excessive force in repelling the attack, whether it be upon his person or upon his habitation. *State v. Roddey,* 219 N.C. 532, 14 S.E. 2d 526.

The rules governing the right to defend one's *habitation* against *forcible entry by an intruder* are substantially the same as those governing his right to defend himself. 26 Am. Jur., Homicide § 167 (1940). (Compare the rules governing the right of an owner to kill in defense of his *property. Curlee v. Scales,* 200 N.C. 612, 158 S.E. 89; *State v. Scott,* 142 N.C. 582, 55 S.E. 69, 9 L.R.A. (n.s.) 1148; *State v. Crook,* 133 N.C. 672, 45 S.E. 564; *State v. Taylor,* 82 N.C. 554.)

In his charge to the jury, the judge fully explained the law of self-defense insofar as it related to the right of defendant to defend his person, but defendant assigns as error the court's failure to declare the law relating to his right to defend his habitation from invasion by an intruder. This assignment must be sustained. The Court, in *State v. Spruill,* 225 N.C. 356, 357-58, 34 S.E. 2d 142, 143, spoke to this precise point:

> "Defendant complains, and rightly so, that while the law arising upon the evidence given in the case in so far as it relates to his plea of self-defense was declared and explained in the charge to the jury, as it should have been, the court failed to declare and explain the law arising upon the evidence given in the case as it relates to defendant's legal right to defend his home from attack, and to evict trespassers therefrom.
>
> "The right of a person to defend his home from attack is a

substantive right, as is the right to evict trespassers from his home. . . .

"Hence, when in the trial of a criminal action charging an assault, or other kindred crime, there is evidence from which it may be inferred as in this case that the force used by defendant was in defending his home from attack by another, he is entitled to have evidence considered in the light of applicable principles of law. . . . This is true even though there be no special prayer for instruction to that effect."

The defendant is entitled to have another jury consider his case. New trial.

MOORE, J., not sitting.

THE CHURCH OF GOD IN CHRIST JESUS NEW DEAL, INCORPORATED, AND MRS. C. L. FAISON v. W. H. AMOS, W. E. EDWARDS AND R. B. MUMFORD.

(Filed 25 May, 1966.)

Religious Societies and Corporations § 3—

Where there is serious controversy as to which of two factions of a church congregation is entitled to the use and control of the church property, the Superior Court correctly enjoins the dissipation or expenditure of church funds until the hearing on the merits, but the determination that one of the claimants was the chief officer of the church is not necessary in issuing the injunction, and such provision will be vacated on appeal. The Supreme Court, in the exercise of its supervisory power, may modify the order by directing that the tangible personal property be delivered to the clerk of the Superior Court pending the final hearing.

MOORE, J., not sitting.

APPEAL from *Latham, S.J.*, October 28, 1965 Session, DURHAM Superior Court.

For many years prior to March 27, 1963, Rev. C. L. Faison was the President and Chief Apostle of the Durham Church of The Church of God in Christ Jesus New Deal, Incorporated. On that date he died and shortly afterwards the defendant, W. H. Amos, alleged that he was elected Chief Apostle and was entitled to take over the property and operation of the church. On the 13th day of August, 1964, a Certificate of Incorporation for the "Church of God in Christ Jesus of America" was filed bearing the names of the three

defendants, W. H. Amos, W. E. Edwards, and R. B. Mumford. The three persons named, acting as individuals, and for the new corporation, have taken control of the records, seal and funds of the plaintiff church, and the defendants have held themselves out as the duly elected officials of the plaintiff church.

This action was instituted by the plaintiff church to restrain the above activity on the part of the defendants, and upon a hearing, a demurrer interposed by the defendants was sustained and it was ordered that Mrs. C. L. Faison be made a party. She filed a complaint in which she claimed that the actions of the defendants were without authority of the church and that on the 5th day of December, 1964, at a meeting called by the plaintiff corporation, she was duly elected President and Chief Apostle of the corporation and demanded that the defendants relinquish control and possession of the assets of the plaintiff corporation which they have refused to do.

Her plea for relief was that the defendants be restrained from holding themselves out as officials of the church and that they be required by temporary injunction to deliver all the assets of the church to the plaintiffs and that Mrs. Faison be certified as the duly elected President and Chief Apostle of the church.

In reply, the defendants alleged that Mrs. Faison was the estranged wife of the deceased C. L. Faison, that she had been separated from him since 1947 and had been living in Washington, D. C., where she remained until she became satisfied that her husband was about to die. That she returned to Durham about four days prior to his death and thereafter attempted to proclaim herself his successor, all without authority of the church or the corporation.

Judge Latham, after a hearing, signed a temporary order which, among other things, held that Mrs. Faison was the Chief Apostle of the plaintiff corporation; that the construction of a church building at 814 Fargo Street in Durham was being erected with the use of funds of the plaintiff corporation; that said construction should immediately cease and that no funds of the corporation should be expended for any purpose; that "all records of the corporation, including minutes, seal, deeds, bank books, checkbooks, shall be immediately turned over to Mrs. C. L. Faison, pending the final determination of this action."

Upon the argument of the case in this Court, it was argued by the attorney for the plaintiff and admitted by counsel for the defendant that the defendants have not complied with Judge Latham's order. The defendants have appealed therefrom to this Court.

Bryant, Lipton, Bryant and Battle by Alfred S. Bryant attorneys for defendants.

Haywood, Denny & Miller by George W. Miller, Jr., attorneys for appellees.

PLESS, J. It is apparent that the claims of the opposing parties will have to be determined by a trial in the Superior Court of Durham County. It is also conceivable that further action of the stockholders of the corporation involved, and the members of the church, after appropriate notice to all parties and members, may be required in order to determine the official position of the various claimants to the offices in the church and the control of its property. As to the extent the ecclesiastical laws of the church shall control, we express no opinion at this time.

The finding by Judge Latham that Mrs. Faison is the Chief Apostle of the plaintiff corporation was unnecessary to support the order issued by him and it is, therefore, vacated without prejudice. Acting under our inherent supervisory authority, the order by him is hereby continued in full force and effect until the trial of this action, subject to the modification that the records of the corporation, including minutes, seal, deeds, bank books, checkbooks, and the moneys and bank balances, shall be immediately delivered to the Clerk of the Superior Court of Durham County who shall keep the same in his custody, pending the trial of the case and such order as may be made upon its determination.

Pending the trial, the Judge of the Superior Court is authorized to make appropriate orders in regard to contributions and income which may accrue, and also as to the payment of any necessary charges and debts in order to preserve the property and assets for the benefit of the true owner.

Modified and affirmed.

MOORE, J., not sitting.

STATE v. ERVIN MAYO, JR.

(Filed 25 May, 1966.)

1. Indictments and Warrant § 15—

An indictment may be quashed for want of jurisdiction, irregularity in selection of the grand jury, or for defect in the bill of indictment.

2. Indictment and Warrant § 9—

A defect in the bill of indictment may not be cured by a bill of particulars.

3. Indictment and Warrant § 15; Courts § 9—

The quashal of a bill of indictment charging embezzlement of a specified sum between certain dates does not preclude another Superior Court judge from considering the sufficiency of subsequent indictments setting forth separate acts of embezzlement alleged to have been committed by defendant between the same dates and also a prior date in a total amount in excess of that charged in the first indictment. The law of the case contemplates an irrevocable determination or a final ruling on appeal and is quite different from *res judicata.*

MOORE, J., not sitting.

PARKER, C.J., and BOBBITT, J., concur in result.

APPEAL by the State from *Parker, J.,* September 1965 Criminal Session of BEAUFORT.

At the September 1964 Criminal Session of Beaufort County Superior Court, the Grand Jury returned a bill of indictment charging the defendant with the embezzlement of $1365.25 over a period from 27 January 1964 to 31 March, 1964. Thereafter, the defendant moved for a bill of particulars which was furnished by the Solicitor. Later, he moved the Court that "the indictment be quashed and set aside for the reason that it appeared from the record and from the indictment that no crime had been charged," etc.

At the November 1964 Session, Judge Cowper allowed a motion to quash the bill of indictment. No appeal was taken by the State.

At the September 1965 Criminal Session the Solicitor sent eight bills of indictment against the defendant which more particularly charged the defendant with the offenses set forth in the earlier bill, all of which were returned as true bills by the Grand Jury. The defendant moved to quash the new bills, and the Presiding Judge, the Honorable Joseph W. Parker, allowed the motion, finding as a fact that they "covered precisely the same offense as the indictment returned at the September 1964 Term," and further held that he was "without power to disturb the prior judgment of the Superior Court

quashing the former bill . . . and that no appeal now lies to one Judge of the Superior Court from the ruling of another."

The State appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Millard R. Rich, Jr., for the State.

John A. Wilkinson for the defendant.

PLESS, J. Bills of indictment may be quashed for want of jurisdiction, *S. v. Sloan,* 238 N.C. 547, 78 S.E. 2d 312, irregularity in the selection of the Grand Jury, *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513, and for defects in the bill of indictment, *S. v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81.

A defect in a bill of indictment is not cured by the statute which enables the defendant to call for a bill of particulars . . . the particulars authorized are not a part of the indictment, *S. v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901. As stated in Joyce on Indictments, Sec. 326, p. 364:

> "* * * If the indictment be not demurrable upon its face, it does not become so by the addition of a bill of particulars."

Consequently, it was error to quash the first bill because of "the record *and* the indictment."

We cannot agree that Judge Parker was "without power" to rule on the new bills solely because Judge Cowper had earlier ruled on a similar bill.

An examination of the eight bills considered by Judge Parker discloses that they did not cover precisely the same offenses as the first bill. Two of the later bills refer to dates previous to January 27, 1964, and the total amount of the monies allegedly embezzled in the eight later bills is $1260.20 rather than $1365.25.

We find no North Carolina decision nor, indeed, one from any jurisdiction upon the exact question here presented except in some instances in which a foreign statute is being construed. The defendant in his brief gives no citations to sustain his position.

"The law of the case" contemplates an irrevocable determination or a final ruling on appeal and is quite different from *res judicata.* As stated in 21 C.J.S., Courts, Sec. 195a., p. 331:

> "* * * The law of the case * * * is distinct from *res judicata,* in that the law of the case does not have the finality of the doctrine of *res judicata,* and applies only to the one case, whereas *res judicata* forecloses parties or privies in one case by what has been done in another case, although in its essence

it is nothing more than a special and limited application of the doctrine of *res judicata* or former adjudication, and what is known as the 'law of the case,' that is, the effect and conclusiveness of a former decision in the subsequent proceedings in the same case, has been generally put upon the ground of *res judicata.*"

Since the present bills have not been considered upon their merits, the cause is remanded for that purpose, unaffected by the previous action of the court, and to that end Judge Parker's ruling is hereby

Reversed.

MOORE, J., not sitting.

PARKER, C.J., and BOBBITT, J., concur in result.

STATE v. LUCIOUS STARGAL UPCHURCH.

(Filed 25 May, 1966.)

1. Searches and Seizures § 2—

Where an officer issuing a search warrant testifies that she merely witnessed the signature of the officer signing the affidavit, without requiring the officer to sign the affidavit under oath and without examining him in regard thereto, the record overcomes the presumption that the requirements of the statute have been observed, G.S. 15-27, and evidence obtained by such warrant is erroneously admitted.

2. Criminal Law § 168—

The fact that evidence obtained by an illegal search warrant was admitted in evidence does not warrant the Supreme Court in granting defendant's motion for judgment as of nonsuit, since had the evidence obtained under the search warrant been suppressed, the State might have introduced other evidence tending to support the charge.

MOORE, J., not sitting.

APPEAL by defendant from *Bickett, J.*, 11 November Criminal Session 1965 of DURHAM.

The defendant was tried upon a bill of indictment charging in the first count that he did wilfully, maliciously and unlawfully sell and barter tickets, tokens, certificates and orders for shares in a lottery, to wit: tickets used in connection with a baseball lottery.

The second count charges that the defendant did wilfully, maliciously and unlawfully cause to be sold tickets, tokens, certificates and orders for shares in a lottery, to wit: tickets used in connection with a baseball lottery. The third count charges that the defendant did wilfully, maliciously and unlawfully have in his possession tickets, tokens, certificates and orders used in the operation of a lottery based upon the outcome of baseball games, in violation of G.S. 14-291.1.

The State's evidence consisted of the introduction of certain exhibits found in the grocery store of the defendant located at 316 Morehead Avenue, Durham, N. C., in a search made pursuant to a search warrant purported to have been issued on the 28th day of April 1965, which exhibits Carl C. King, a detective with the Durham police department, testified were baseball lottery tickets. From a verdict of guilty as charged and the judgments imposed on the second and third counts in the bill of indictment, the defendant appeals, assigning error.

Attorney General Bruton, Assistant Attorney General Barham, and Staff Attorney Partin for the State.

Blackwell M. Brogden for defendant.

DENNY, E.J. The defendant's first assignment of error is directed to the failure of the court below to sustain his motion to suppress the State's evidence with respect to the purported lottery tickets on the ground that such evidence was obtained under an illegal search warrant.

The trial judge, in the absence of the jury, heard evidence bearing on the circumstances under which the search warrant was issued. Officer A. L. Hight testified that he signed the affidavit under oath in connection with the procurement of the search warrant. However, Miss Sadie Lee Munford, who issued the search warrant, testified that she was assistant clerk of the recorder's court of Durham County. This witness, according to her testimony, had no recollection whatever in connection with the issuance of the search warrant in question. She did testify, however, that her signature was on the document presented to her, and further testified that usually when the officers come for a search warrant, "(a)ll I can say is they come in and ask if I will witness their signature, and I witness it." This custom on the part of this witness is not a compliance with the requirements of G.S. 15-27. The statute provides that a search warrant shall not be signed or issued by any officer without first requiring the complainant or other person "to sign an affidavit under oath and

examining said person or complainant in regard thereto"; and further that "no facts discovered by reason of the existence of such illegal search warrant shall be competent as evidence in the trial of the action." *State v. White,* 244 N.C. 73, 92 S.E. 2d 404; *State v. McMilliam,* 243 N.C. 771, 92 S.E. 2d 202.

The trial judge held the search warrant was legal and overruled the defendant's motion to suppress the evidence. The defendant excepted to this ruling.

The general rule is that where nothing appears to the contrary, there is a presumption that the requirements of the statute have been preserved. *State v. Gross,* 230 N.C. 734, 55 S.E. 2d 517.

On this record it seems apparent to us that the assistant clerk of the recorder's court of Durham County did not observe the statutory requirements in connection with the issuance of the search warrant involved in this case. Further, it seems evident from her testimony that she does not have the slightest comprehension as to what her legal duties and responsibilities are in connection with the issuance of a search warrant.

In our opinion the court below committed error in overruling the defendant's motion to suppress the evidence obtained under the search warrant involved, and we so hold. Even so, we will not sustain the defendant's motion for judgment as of nonsuit. Had the evidence obtained under the illegal search warrant been suppressed, the State might have introduced other evidence tending to support the charges in the bill of indictment. The defendant is entitled to a new trial, and it is so ordered.

New trial.

MOORE, J., not sitting.

I. A. SCHAFER v. SOUTHERN RAILWAY COMPANY.

(Filed 25 May, 1966.)

Appeal and Error § 60—

Decision on appeal that the evidence justified a peremptory instruction upon an issue relates to the evidence of record upon the appeal and is not controlling upon the subsequent trial if there is a material difference in the evidence.

MOORE, J., not sitting.

ON rehearing.

White, Crumpler, Powell, Pfefferkorn & Green for plaintiff appellant.

W. T. Joyner; Womble, Carlyle, Sandridge & Rice for defendant appellee.

LAKE, J. This cause, filed 14 January 1966, is reported in 266 N.C. 285, 145 S.E. 2d 887. In that opinion it is stated:

> "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 issues in the affirmative if they believed the evidence on this point to be true. No such issue was submitted."

In apt time the defendant filed a petition to rehear. The petition was allowed for the sole purpose of clarification of the foregoing paragraph of the original opinion.

That statement was and is intended to relate solely to the rights of the parties upon the evidence contained in the record before us on this appeal. It is not to be construed as a predetermination of the instructions to be given to the jury in the light of evidence presented at the new trial which is to be had in accordance with the opinion of this Court.

The defendant relies upon a contract, executed by the plaintiff and the defendant on 28 August 1946, in which contract the defendant agreed to operate an industrial track "located wholly on the right of way of the railway" for the purpose of affording to the plaintiff facilities for the shipment of his freight. By the agreement title to the rails, materials and fixtures in the said track are vested in the plaintiff, who agreed to maintain the track. The agreement provides, however, that at the election of the defendant it may "perform the work of maintenance" of the track "for account of" the plaintiff. It may be that, on the new trial of this action, the defendant can present evidence to show that the ditch in question is located on its right of way. If so, the above quoted statement in our opinion will not control the instruction to be given to the jury at that trial upon the issue of trespass. The record before us contains no evidence to show that the ditch was located within the boundaries of the defendant's right of way.

Except as herein modified the opinion and decision heretofore announced are reaffirmed.

MOORE, J., not sitting.

EVERETT RICE v. THE AETNA CASUALTY AND SURETY COMPANY.

(Filed 25 May, 1966.)

1. Insurance § 47.1—

In an action on the uninsured vehicle clause in a collision policy, allegations in the complaint that the vehicle causing the injury was an uninsured vehicle as defined in the policy, and conditional assertion in the reply that if, in fact, such vehicle was insured, the insurance was void because of the insolvency of the insurer, *held* not an admission that the vehicle causing the loss was covered by a liability policy, and therefore motion for judgment on the pleadings in favor of defendant was correctly denied.

2. Same—

In an action on the uninsured vehicle clause in a collision policy, evidence that the vehicle causing the loss was insured in another state, where it was registered and licensed, by an insurer there authorized to write the insurance, and that subsequent to the collision the insurer was placed in receivership because of its insolvency, and that a claim was filed with the insurer's receiver, *held* insufficient to support the court's conclusion that the vehicle causing the injury was an uninsured motor vehicle within the definition of the collision policy.

MOORE, J., not sitting.

APPEAL by defendant from *McLean, J.*, March 1965 Civil Session, as continued, of MADISON.

Plaintiff, a resident of this state, owned a GMC truck. On April 4, 1962, plaintiff purchased from defendant a liability insurance policy covering the operation of his truck. The policy, including a rider affording protection against personal injuries and property damages resulting from the negligent operation of an uninsured motor vehicle, conformed to the requirements of G.S. 20-279.21, in effect when the policy was issued.

Plaintiff, operating his truck, was, on April 30, 1962, in a collision with a Pontiac automobile owned by Charles M. Thornton. The Pontiac was licensed and registered in South Carolina, where Thornton resided.

Plaintiff instituted this action to recover $5,000 for personal injuries and $450 property damage. He alleged his damages resulted from Thornton's negligent operation of the Pontiac, an uninsured motor vehicle.

Defendant, answering, admitted insuring plaintiff on April 4, 1962 to the extent required by G.S. 20-279.21 on the date the insurance was written. It admitted plaintiff was injured by the negligent operation of the Pontiac. It denied the Pontiac was an uninsured motor vehicle, but was in fact insured in South Carolina, where the vehicle was licensed and registered, by Guaranty Insurance Ex-

change (hereinafter Exchange), a Missouri corporation authorized to do business in South Carolina.

Plaintiff, replying to the defenses asserted by defendant, alleged:

"* * * (I)f the said Charles M. Thornton had a policy of motor vehicle insurance on his said Pontiac automobile, said policy was with a bankrupt and insolvent company" and for that reason was not a policy meeting the requirements of G.S. 20-279.21 on April 4, 1962 when the policy was written, nor on April 30, 1962 when the collision occurred.

Defendant moved for judgment on the pleadings. The motion was overruled. Jury trial was waived. The court made findings of fact on which it rendered judgment for plaintiff.

William J. Cocke and A. E. Leake for plaintiff appellee.
Landon Roberts (Meekins & Roberts) for defendant appellant.

PER CURIAM. Defendant's assignments of error present these questions:

1. Did the court err in overruling defendant's motion for judgment on the pleadings?

2. Was there evidence on which the court could conclude that the Pontiac was "an uninsured motor vehicle" as that phrase is defined in the policy issued plaintiff?

The answer to the first question is "No." The complaint specifically alleges that the Pontiac was an uninsured motor vehicle as this phase is defined in plaintiff's policy. The conditional assertion in the reply that if, in fact, Thornton was insured as alleged by defendant the insurance was void because of the insolvency of the insurer, is not an admission that Exchange had issued a policy of liability covering the operation of the Pontiac.

The answer to the second question is also "No." The burden of proof rested on plaintiff to establish his allegation that the Pontiac was an uninsured motor vehicle. *Horn v. Insurance Company,* 265 N.C. 157, 143 S.E. 2d 70; *Hawley v. Insurance Company,* 257 N.C. 381, 126 S.E. 2d 161; *Crisp v. Insurance Company,* 256 N.C. 408, 124 S.E. 2d 149; *Fallins v. Insurance Company,* 247 N.C. 72, 100 S.E. 2d 214; *Strigas v. Insurance Company,* 236 N.C. 734, 73 S.E. 2d 788; *Williams v. Insurance Company,* 212 N.C. 516, 193 S.E. 728; *Jones v. Life & Casualty Company,* 199 N.C. 772, 155 S.E. 870; *King v. Insurance Company,* 197 N.C. 566, 150 S.E. 19; *Levy v. Auto Insurance Company,* 31 Ill. App. 2d 157, 175 N.E. 2d 607; *Hill v. Seaboard Fire & Marine Insurance,* 374 S.W. 2d 606; 12

Couch, Insurance, Sec. 45:628; 7 Am. Jur. 2d, p. 463; 46 C.J.S. pp. 456-7.

Plaintiff's policy reads: "The term 'uninsured automobile' means: (1) with respect to damages for bodily injury and property damage an automobile with respect to the ownership, maintenance or use of which there is, in the amounts specified in the North Carolina Motor Vehicle Safety and Financial Responsibility Act, neither (i) cash or securities on file with the North Carolina Commissioner of Motor Vehicles, nor (ii) bodily injury and property damage liability bond or insurance policy, applicable to the accident with respect to any person or organization legally responsible for the use of such automobile; . . ."

Plaintiff's evidence with respect to the liability insurance covering the ownership or operation of Thornton's Pontiac was limited to: (1) a certificate of the North Carolina Commissioner of Insurance that Exchange had never been authorized to do business in North Carolina and (2) a certificate from the office of the Commissioner of Motor Vehicles that it had no record of the registration of a motor vehicle by Charles M. Thornton, nor did it have a record of proof of financial responsibility by Thornton.

Defendant's evidence was to the effect that the liability of the owner of the Pontiac for negligent operation was insured by Exchange under a policy expiring on April 11, 1962. The policy limited liability for injury to one person to $10,000 and $5,000 for property damage. The policy was extended or renewed by the insured for a period from April 11, 1962 to September 11, 1962. The renewal policy was written by insurer's agent, who was authorized to do business in South Carolina. The agent provided the Motor Vehicle Insurance Commissioner of South Carolina with a certificate to the effect that owner and operator liability for negligent operation was insured. Exchange was in May 1960 licensed to write insurance in South Carolina. Its license was renewed on April 1, 1961 and April 1, 1962. Its license to operate in South Carolina was suspended on August 24, 1962. A receiver was, on September 4, 1962, appointed by the courts of South Carolina for the assets of Exchange. The records of the receivership show Thornton's liability for the operation of the Pontiac was insured as alleged in the answer until May 22, 1962, at which time the insurance was transferred to a Ford automobile. On May 3, 1962 Exchange, at Thornton's request, employed a firm of insurance adjusters doing business in North Carolina to investigate plaintiff's claim. The adjusters reported to Exchange that the collision was caused by Thornton's negligent operation of the insured Pontiac. Plaintiff, in December 1962, filed a claim with the South Carolina receiver of Exchange for damages resulting

from Thornton's negligence. The receiver, in February 1963, acknowledged receipt of plaintiff's claim.

There is not a scintilla of evidence to contradict the allegations of defendant's answer that when plaintiff was injured Thornton's liability for the operation of his Pontiac was insured in South Carolina, where it was registered and licensed, by a company authorized to write the insurance.

The fact that Exchange was, subsequent to the collision causing damage to the plaintiff, placed in receivership because of its insolvency did not render defendant liable on the policy issued plaintiff. Such insolvency did not make the Pontiac an uninsured automobile, *Hardin v. Insurance Company*, 261 N.C. 67, 134 S.E. 2d 142; nor does the fact that Thornton procured insurance in South Carolina, where he lived, and in a company not licensed to write insurance in North Carolina bring plaintiff within the insuring provisions of the policy issued to him by defendant.

Plaintiff has failed to carry the burden of proving his allegation that the Pontiac was an uninsured automobile as that term is defined in the policy issued by defendant. The court erred in overruling defendant's motion for nonsuit.

Reversed.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. THOMAS F. WILLIAMS.

(Filed 25 May, 1966.)

1. Searches and Seizures § 1—

Where the evidence supports the court's findings that defendant freely and voluntarily and without any coercion or duress consented to a search of his house without a warrant, the evidence supports the conclusion that defendant waived the search warrant, rendering competent the evidence obtained by such search, and defendant's contention that he consented to the search because of intimidation resulting from the number of officers descending upon and surrounding his home in the middle of the night, is feckless.

2. Larceny § 10—

Indictments for larceny which do not aver that the property was taken from any storehouse and do not aver that the value of the property taken exceeds $200, charge misdemeanors only, and sentences of not less than

three nor more than five years must be vacated and the cause remanded for proper sentence.

MOORE, J., not sitting.

BEFORE *Johnson, J.*, January 1965 Criminal Session of DURHAM Superior Court. Defendant appeals.

The defendant was charged with breaking and entering six places of business in Durham County and the larceny of various articles of personal property from each, committed over a period of about six weeks in the fall of 1962. The cases were consolidated for trial and the defendant was found guilty of storebreaking and of larceny in each of the six cases. Prison sentences were imposed which will be considered in the opinion.

The defendant was originally tried at the December 1962 Term in Durham Superior Court at which time he was convicted and sentenced to serve seven to ten years in the State's Prison. In January 1965 the defendant was granted new trials because upon the original trial "he was not represented by counsel and did not have an opportunity to prepare adequate defense for the charges against him."

Before pleading to the bills of indictment in January, 1965 the defendant moved to quash them and to suppress the evidence by reason of his contention that "all evidence upon which the indictments was *(sic)* obtained, and all the evidence (they) procured, resulted from a mass raid on this man's home without a search warrant." The court overruled this motion and the trial proceeded. During the trial, the court excused the jury and permitted the defendant to examine the State's witnesses on the question of the "warrantless" search and also heard the defendant's statement about the matter. The court found as a fact "that the search of the residence and surrounding premises of the defendant * * * was in all respects a legal and valid search * * * that it was made by the officers after the defendant had invited them into his home and stated to them that they could search his house and premises; that he consented to said search freely and voluntarily without any coercion or duress, whatever, and that their testimony as to the property found in consequence of said search is admissible in evidence."

There was ample evidence to sustain the facts found by the presiding judge but the defendant brings forward his exceptions with relation to the evidence of the officers.

W. G. Pearson, II, Attorney for defendant appellee.

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

PER CURIAM. The defendant complains that seven officers descended upon his home on the night of November 11, 1962, some of them going to his front door while others went to the back entrance. He testified that the officers did not have a search warrant; that no one said anything to him about one, neither did he ask about one, and even if he had given permission for the search of his premises at that time, it would have been because he was intimidated and frightened by the number of officers descending upon his home in the middle of the night; that this would not constitute a waiver of his right to require a search warrant; therefore, any testimony relating to finding of stolen property under these circumstances was incompetent. We cannot so hold and the exceptions relating thereto are not sustained.

Upon examination of the bills of indictment, it appears that they were drawn upon forms in general use by the solicitors, all of which contain three counts; one for storebreaking, the second for larceny and the third for receiving stolen property.

In the counts charging larceny, the property allegedly stolen is not described as having been taken from any storehouse, etc., and in none of the bills is the value of the property alleged to be more than $200.00. The consequence is that the conviction of the defendant upon these charges of larceny is in all instances a misdemeanor. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297. In the first case, No. 7774, the court imposed a sentence of not less than three nor more than five years on the count charging storebreaking, and the same sentence on the count charging larceny; the latter to begin at the expiration of the sentence for storebreaking. In 7775 the court pronounced judgments on both counts to begin at the expiration of the sentences imposed in 7774 and in cases Nos. 7776, 7777, 7778 and 7779 the sentences pronounced were related to sentences imposed in 7774.

In view of the fact that the larceny counts, as written, are misdemeanors, it is necessary that the causes be remanded for appropriate judgments with the exception of the sentence of not less than three nor more than five years imposed for storebreaking in No. 7774.

It is so ordered.

Remanded.

MOORE, J., not sitting.

STATE v. THELMA BRACY BROOKS.

(Filed 25 May, 1966.)

1. Criminal Law § 162—

Where, in a prosecution for abortion, a witness is permitted to testify that subsequent to the time in question she took a number of girls to defendant to get the same operation, the refusal of the court to grant defendant's demand that the witness name the girls so that defendant could deny that such girls had come to her, cannot be prejudicial when defendant had testified that she did not know prosecutrix and that prosecutrix had never been to defendant's house prior to defendant's arrest, since such denial is sufficient to cover any visit by the prosecutrix prior to defendant's arrest, either alone or with another person.

2. Abortion § 3; Criminal Law § 53—

In a prosecution for abortion, it is competent for a medical expert to testify that the described treatment of a pregnant woman might cause an abortion.

MOORE, J., not sitting.

APPEAL by defendant from *Bickett, J.,* October 1965 Criminal Session of DURHAM.

Criminal prosecution on bill of indictment charging that defendant on October 8, 1964, "unlawfully, willfully and feloniously did administer to a pregnant woman, to wit: one Donna Lee Merritt and did prescribe for such pregnant woman, to wit: Donna Lee Merritt with intent thereby to procure the miscarriage of said woman and did use an instrument or application for the purpose of procuring the miscarriage of said pregnant woman, to wit: Donna Lee Merritt and with intent to do so, in violation of G.S. 14-45," etc.

Evidence was offered by the State and by defendant.

The jury returned a verdict of guilty as charged and judgment, imposing a prison sentence, was pronounced. Defendant excepted and appealed.

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

A. H. Borland and Blackwell M. Brogden for defendant appellant.

PER CURIAM. There was ample evidence to support the verdict. Indeed, defendant does not bring forward her exceptions to the court's denial of her motions for judgment as of nonsuit.

The State's evidence tends to show Miss Merritt, in October 1964, was 18 years old, resided and attended college in Greensboro,

and that the alleged crime was committed by defendant in defendant's residence in Durham.

On direct examination, Miss Merritt testified that between her own experience in October 1964 and the arrest of defendant in June 1965 she had taken five girls to defendant "to get them abortions, too." On cross-examination, defendant's counsel elicited testimony that each of these five girls lived or attended school in Greensboro. Defendant's counsel then asked: "What *(sic)* are they?" The court sustained the State's objection. Defendant excepted to and assigns as error the court's ruling.

Whether testimony relating to Miss Merritt's visits to defendant subsequent to her own experience in October 1964 was competent is not presented. Defendant did not object to or move to strike any part thereof. There is no suggestion defendant desired to issue subpoenas for the five girls referred to in Miss Merritt's testimony. The reason assigned by defendant's counsel was that, unless the names were disclosed, defendant was deprived of an opportunity to testify that "(t)hat girl hasn't been to my house." Actually, defendant testified she did not know Miss Merritt and that Miss Merritt had never been to defendant's house before the date in June 1965 when defendant was arrested. This denial was sufficient to cover any visit by Miss Merritt prior to said date in June 1965 either alone or with another person. In the circumstances, the sustaining of the State's objection to defendant's question, "What *(sic)* are they?" was not prejudicial error.

The State offered evidence tending to show that Miss Merritt's abortion was accomplished by insertion of a catheter tube in her uterus.

Defendant's brief presents this question: "Did the court commit error in allowing the expert witness Dr. June U. Gunter to answer a question as to the cause of abortion without laying the proper hypothetical basis for said question?"

Included in the record of Dr. Gunter's testimony is the following:

"Q. A catheter tube into the uterus of Donna Lee Merritt and that they find beyond a reasonable doubt that that tube was left inserted in there for some number of hours, approximately thirty, do you have an opinion satisfactory to yourself as to whether that could have caused Donna Lee Merritt to abort? Objection — Overruled — Exception. COURT: I believe I will sustain that objection. Q. Can you explain to the Court and the jury the effect of inserting a tube of that sort into the uterus of a pregnant woman? Objection — Overruled — Exception. A. When such a tube is inserted into the uterus of a pregnant woman, the products of conception,

the placenta and the fetus are disturbed. The blood supply is disturbed, the membranes about the developing fetus may be ruptured, and the — MR. BORLAND: Did I understand you to say 'may be'? A. Yes, sir, may be ruptured, and this is very apt to result in an abortion. This is DEFENDANT'S EXCEPTION #7. Motion to Strike; Overruled — Exception. This is DEFENDANT'S EXCEPTION #8."

Defendant's assignment of error based on said exceptions is untenable. The objection to the question as to what caused Miss Merritt to abort was sustained. The admitted testimony of Dr. Gunter related generally to "the effect of inserting a tube of that sort into the uterus of a pregnant woman." The evidence was competent. In *S. v. Shaft,* 166 N.C. 407, 81 S.E. 932, discussed and approved in *S. v. Furley,* 245 N.C. 219, 95 S.E. 2d 448, involving a similar prosecution, the doctor was asked whether aloes had a tendency to produce an abortion and was permitted, over objection, to answer as follows: "Aloes in an excessive dose I should think would have an indirect tendency to produce an abortion." See *S. v. Furley, supra,* p. 221.

While defendant's other assignments of error have been considered, none discloses prejudicial error or merits discussion.

No error.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. OLLIE MELVILLE DAVIS.

(Filed 25 May, 1966.)

Constitutional Law § 32—

It is not required for the validity of a written waiver of counsel that a defendant should have had court-appointed counsel to advise him in regard to making such waiver.

MOORE, J., not sitting.

APPEAL by defendant from *Bickett, J.,* October 1965 Criminal Session, DURHAM Superior Court.

The defendant was indicted in three separate bills of indictment upon charges of forgery and the cases were consolidated for trial. When the cases were called, the defendant was allowed by the presiding judge to sign a "waiver of right to have appointed counsel" and all of the necessary requirements were fulfilled as appears in

the record. Thereupon, the defendant, in his own proper person, entered pleas of guilty in each of the three cases. They were consolidated for judgment and prison sentence pronounced. After serving about five weeks of the sentence, the defendant gave notice of appeal to the Supreme Court and was allowed to appeal *in forma pauperis*. The presiding judge at that time appointed counsel to represent him on his appeal.

His exception No. 1 is "that the court erred in allowing the defendant to waive court-appointed counsel without first appointing counsel and having this counsel personally advise the defendant of his rights and chances." The second exception is "that the court erred in accepting his plea of guilty under these circumstances." The third exception being "that the court pronounced judgment of imprisonment."

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

Anthony M. Brannon of Brannon and Read Attorney for defendant.

PER CURIAM. The record shows that the defendant signed a "waiver of right to have appointed counsel" in which he represented that he had been informed and understood the charges against him, the nature thereof, the statutory punishment therefor, and the right to appointment of counsel and that he did not desire the appointment of counsel and expressly waived the same and desired to appear in all respects in his own behalf. Thereupon, the judge certified that the "defendant has been fully informed in open court of the charges against him and of his right to have counsel appointed by the court to represent him in this case; that he (defendant) has elected in open Court to be tried in this case without the appointment of counsel; and that he has executed the waiver in my (the Court's) presence after its meaning and effect have been fully explained to him."

Prior to the time the defendant went to prison he was satisfied to do without counsel, plead guilty and take no appeal. After five weeks in prison however, he has been informed that under the decrees of the United States Supreme Court he can now take an appeal with no expense to himself; that the County will be required to pay the cost of the record and brief, and that the court will appoint counsel for him to be paid from State funds. No showing of injustice or probable error is required.

"* * * (T)his Court places its own interpretation on the North Carolina Constitution and laws but we must accept the interpreta-

tion the Supreme Court of the United States places on a prisoner's rights under the Due Process Clause. * * * We think our decisions are based on sound legal principles. We modify them only to the extent necessary to comply with the mandates from the Supreme Court of the United States. * * * In matters involving Federal law we recognize the authority of the Supreme Court of the United States to review and reverse our decisions. However, as a State court of last resort, we do not concede that United States Courts inferior to the Supreme Court have that authority." *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344.

Had the court ignored his waiver and appointed counsel anyhow, the defendant would probably now be seeking relief upon the grounds that he was forced to accept unwanted advice and direction and that he should be permitted to have another trial, at which he could direct his own case.

After being fully informed that he was entitled to counsel and with knowledge of the nature of the charge, and of the possible punishment, the defendant waived that right. His complaint now seems to be that he should have been made to accept counsel to advise him whether he should waive the appointment of counsel or that he should have been required over his objection and protest, to accept the services of court-appointed counsel. His position is completely without merit.

No error.

MOORE, J., not sitting.

HOUSING AUTHORITY OF THE CITY OF DURHAM v. JOYCE C. THORPE.

(Filed 25 May, 1966.)

1. Landlord and Tenant § 10—

Where a lease gives either party the right to terminate the lease by written notice 15 days prior to the last day of the term, apt notice by the landlord in accordance with the provisions of the lease terminates the term, and it is not required that the landlord give the tenant any reason for the termination of the lease or that the landlord hold any hearing upon the matter.

2. Ejectment § 1—

Where a tenant holds over after the termination of the term without right, the tenant becomes a trespasser, and the landlord may bring sum-

mary ejectment to oust the tenant and to recover damages for the wrongful retention of the property and for costs of the action. G.S. 42-32.

MOORE, J., not sitting.

APPEAL by defendant from *Bickett, J.,* October 1965 Civil Session of DURHAM.

The plaintiff instituted summary ejectment proceedings before H. L. Townsend, Justice of the Peace, to remove the defendant from Apartment No. 38-G Ridgeway Avenue, McDougald Terrace, in the city of Durham. From a judgment in favor of the plaintiff in the Court of the Justice of the Peace, the defendant appealed to the superior court where the matter was heard *de novo* by the court without a jury. The court made findings of fact, each of which is supported by stipulations or by the evidence in the record. The material facts so found may be summarized as follows:

The plaintiff, a corporation organized and operating under the laws of the State of North Carolina, is the owner of the tract of land known as the McDougald Terrace Housing Project in the City of Durham, which includes Apartment No. 38-G Ridgeway Avenue. On 11 November 1964 the plaintiff and the defendant entered into a lease contract whereby the plaintiff leased to the defendant the said apartment for a term beginning 11 November 1964 and terminating at midnight 30 November 1964. The lease provided that it would be automatically renewed for successive terms of one month each. It further provided that the lease could be terminated by either party by giving to the other written notice of such termination 15 days prior to the last day of the term. There was no provision in the lease requiring the lessor to give to the lessee any reason for its decision to terminate the lease or requiring that any hearing be held by the plaintiff, or by any other person or agency, with respect to such decision.

The defendant occupied the apartment pursuant to the lease. On 12 August 1965 the plaintiff gave, and the defendant received, a written notice that the lease was cancelled effective 31 August 1965 and that at such time the plaintiff would be required to vacate the premises. The plaintiff gave no reason to the defendant for its decision to terminate the lease, advising the defendant that it was not required to do so. The defendant requested a hearing but the plaintiff did not conduct any hearing at which the defendant was present. Whatever may have been the plaintiff's reason for terminating the lease, it was neither that the defendant had engaged in efforts to organize the tenants of McDougald Terrace nor that she was elected president of a group which was organized in McDougald Terrace on 10 August 1965. The defendant refused to vacate the premises.

Upon these findings, the court concluded that the plaintiff terminated the lease as of 31 August 1965; that the occupancy of the premises by the defendant after such date was wrongful and in violation of the plaintiff's right to possession; that there was no duty upon the plaintiff to give to the defendant any reason for its termination of the lease or to hold any hearing upon the matter; and that the plaintiff was entitled to the possession of the premises and the defendant was in wrongful possession thereof.

The court, therefore, gave judgment that the defendant be removed from the premises, that the plaintiff be put in possession thereof and that the plaintiff have and recover from the defendant $58.00 plus a reasonable rent for the premises from and after 1 November 1965 until the same are vacated, together with the costs of the action. From this judgment the defendant appeals.

M. C. Burt, R. Michael Frank, Jack Greenberg, Sheila Rush, Edward V. Sparer of Counsel for defendant appellant.

Daniel K. Edwards for plaintiff appellee.

PER CURIAM. The plaintiff is the owner of the apartment in question. The defendant has no right to occupy it except insofar as such right is conferred upon her by the written lease which she and the plaintiff signed. This lease was terminated in accordance with its express provisions at midnight 31 August 1965. With its termination, all right of the defendant to occupy the plaintiff's property ceased. Since that date the defendant has been and is a trespasser upon the plaintiff's land.

The defendant having gone into possession as tenant of the plaintiff, and having held over without the right to do so after the termination of her tenancy, the plaintiff was entitled to bring summary ejectment proceedings against her to restore the plaintiff to the possession of that which belongs to it. G.S. 42-26; *Murrill v. Palmer,* 164 N.C. 50, 80 S.E. 55. It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease.

Having continued to occupy the property of the plaintiff without right after 31 August 1965, the defendant, by reason of her continuing trespass, is liable to the plaintiff for damages due to her wrongful retention of its property and for the costs of the action.

G.S. 42-32; *McGuinn v. McLain*, 225 N.C. 750, 36 S.E. 2d 377; Lee, North Carolina Law of Landlord and Tenant, § 18.

No error.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. JOHN HENRY JONES.

(Filed 25 May, 1966.)

APPEAL by defendant from *McLean, J.*, January 4, 1966, Regular Schedule A Criminal Session of MECKLENBURG.

Defendant, together with one James Clarence Hallman, was tried upon a bill of indictment charging (1) that on October 28, 1965, with the intent to commit a felony therein, he did break and enter the building of Lucenda Blackmon wherein she conducted a restaurant known as Chick-N-Ribs; and (2) that on the same day he did unlawfully steal and carry away from the premises of Lucenda Blackmon 10 cases of beer valued at $38.00.

The State's evidence tended to show: Jones was the cook at the Chick-N-Ribs; Hallman was the delivery boy. When the restaurant closed at 1:30 a.m., they remained in the parking lot. Shortly after 2:00 a.m., a taxi driver observed Jones and Hallman inside the restaurant. He notified the police who arrived just as the two left in a station wagon. A kitchen window and the door to the storage room, wherein beer and other items for sale were kept, had been broken. Several cases of beer valued at $57.45 were missing. When Jones and Hallman were apprehended in the station wagon approximately one and one-half hours later, Jones had been drinking and Hallman was drunk. No beer, however, was found in the vehicle. Each defendant, testifying in his own behalf, denied that he had broken into the restaurant. Defendant Jones, on cross-examination, admitted previous convictions of robbery, forgery, breaking and entering, resisting arrest, carrying a concealed weapon, and violations of the automobile laws.

The jury acquitted defendants on the second count and convicted them of the felony charged in the first count. From a judgment of imprisonment, defendant Jones appeals.

T. W. Bruton, Attorney General and Millard R. Rich, Jr., Assistant Attorney General for the State.

Francis O. Clarkson, Jr., for defendant appellant.

PER CURIAM. Upon the first count the judge instructed the jury that it might return one of three verdicts: Guilty of felonious breaking and entering, guilty of nonfelonious breaking and entering, or not guilty. He correctly defined the two grades of the offense of breaking and entering as set out in G.S. 14-54, and he fully explained the difference between the felony and the misdemeanor. Early in the charge, his Honor twice referred to nonfelonious breaking and entering as "nonburglarious breaking and entering," and defendant assigns this misnomer as error. Conceding that the judge inadvertently applied the wrong label to a breaking and entering done without intent to steal property from the building, yet he properly applied the law to the evidence in the case. It is inconceivable to us that this technical error could have affected the verdict. In the final judicial mandate, and several times preceding it, the court used the correct terminology, *nonfelonious breaking and entering.* Furthermore, all the evidence tended to show that the breaking and entering in question was done with the intent to commit the crime of larceny, and there was no evidence from which the jury could have found that the lesser crime of nonfelonious breaking and entering had been committed. Thus, in instructing the jury that it could return a verdict of nonfelonious breaking and entering, his Honor committed error in favor of the defendant. *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27.

In the trial, we find

No error.

MOORE, J., not sitting.

STATE v. HENRY AUSTIN BEST.

(Filed 25 May, 1966.)

APPEAL by defendant from *Bickett, J.,* November 1, 1965, Criminal Session of DURHAM Superior Court.

In the Durham County Recorder's Court, defendant pleaded guilty to a warrant charging him with intoxication in a designated

public place in Durham, N. C. "this being his fourth offense of public drunkness *(sic)* within a period of 12 months, the said Henry Austin Best having been convicted on the 10-24-64, 11-24-64, 1-12-65 in Durham County Recorders Court." Judgment, imposing a fine and costs, was pronounced. Defendant appealed.

Upon hearing *de novo* in superior court on said warrant, defendant pleaded guilty; and, upon said plea, the court pronounced judgment imposing a prison sentence of twelve months. Defendant gave notice of appeal. On account of defendant's indigency, the court appointed M. Hugh Thompson, Esq., an attorney at law, to represent defendant in connection with his appeal to this Court.

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

M. Hugh Thompson for defendant appellant.

PER CURIAM. The record on appeal consists of the record proper. Defendant's counsel states he has "been unable to find anything in connection with the record proper which would entitle this defendant to relief by this Court." He states further: "I . . . have talked with the defendant on several occasions in order to determine if there is any new evidence, and I find none."

The judgment pronounced in the superior court is authorized by G.S. 14-335(12).

No error appearing on the face of the record proper, the judgment of the court below is affirmed.

Affirmed.

MOORE, J., not sitting.

STATE v. GEORGE WILLARD ANDREWS.

(Filed 25 May, 1966.)

APPEAL by defendant from *Bickett, J.*, September, 1965 Criminal Session, DURHAM Superior Court.

The defendant was arrested on a warrant issued by and returnable to the Recorder's Court of Durham County, charging that defendant, George Willard Andrews, on July 22, 1965, did unlawfully and feloniously steal one 23-jewel Gruen wristwatch of the value

of $110.00, the property of Clarence E. Maynard. From a verdict of guilty, a prison sentence of two years was imposed, from which defendant appealed to the Superior Court of Durham County.

In the Superior Court the defendant, through his attorney, Michael C. Troy, tendered a plea of *nolo contendere* which the State accepted. The court heard evidence from the State and from the defendant. Clarence E. Maynard testified that he and some of his friends were in a neighbor's home, drinking, when the defendant entered, snatched the Gruen wristwatch from the witness's arm, broke the band, and put the watch in his pocket. The defendant testified that he had been drinking and fighting prior to his arrest and that he did not remember any of the events testified to by the State's witnesses. On cross-examination, he admitted he had been convicted in a number of criminal cases: driving drunk, selling liquor, carrying a concealed weapon; that he did not remember whether he had been convicted in 1964 for assault with a deadly weapon; "that that sort of thing was an unpleasant memory that he didn't like to think about."

The court imposed a sentence of 18-24 months. By order of the court, Michael C. Troy was permitted to withdraw as counsel and Rudolph L. Edwards was appointed to prosecute this appeal.

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

Rudolph L. Edwards for defendant appellant.

PER CURIAM. The defendant was indicted for a misdemeanor: larceny of the property (watch) of the value of $110.00. The State's evidence would have supported a charge of a felony: larceny from the person of the owner of the watch. Defendant here has interposed all available objections to the trial, none of which show any violation of the prisoner's rights.

No error.

MOORE, J., not sitting.

STATE v. EDDIE BRADFORD.

(Filed 25 May, 1966.)

APPEAL by defendant from *Falls, J.*, January Regular Criminal Session 1966 of BUNCOMBE.

This is a criminal action in which the defendant was tried upon a bill of indictment charging him with assault with intent to commit rape. The defendant entered a plea of not guilty. The jury returned a verdict of guilty and judgment was pronounced thereon. The defendant appeals, assigning error.

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

Joseph Sam Schenck for defendant.

PER CURIAM. The defendant assigns as error the refusal of the court below to sustain his motion for judgment as of nonsuit at the close of the State's evidence. The defendant offered no evidence in the trial below. In our opinion the State offered ample evidence to go to the jury on the question of assault with intent to commit rape, and we so hold.

The remaining assignments of error have been examined and they present no prejudicial error.

In the trial below we find

No error.

MOORE, J., not sitting.

MARION DILDAY, BERL B. RESPESS AND ROBERT E. MOORE v. BEAUFORT COUNTY BOARD OF EDUCATION, A BODY CORPORATE, AND THE INDIVIDUAL MEMBERS THEREOF, W. B. VOLIVA, CHAIRMAN; RALPH HODGES, JR., JASPER WARREN, CARMER WALLACE, W. L. GUILFORD; W. F. VEASEY, SECRETARY, AND BEAUFORT COUNTY COMMISSIONERS, CONSISTING OF SAM MOORE, CHAIRMAN; CECIL LILLEY, JAKE VAN GYZEN, ALTON CLAYTON, WALTON BROOME; AND JAY M. HODGES, BEAUFORT COUNTY TREASURER AND AUDITOR.

(Filed 16 June, 1966.)

1. Appeal and Error § 21—

An appeal is in itself an exception to the judgment and raises the question whether the facts support the judgment.

2. Appeal and Error § 19—

An exception which appears for the first time in an assignment of error is ineffectual.

3. Appeal and Error § 50—

On appeal from the dissolution of a temporary restraining order, the Supreme Court may review the findings of fact as well as the conclusions of law, and to that end may find the facts necessary for a determination of whether the lower court erred in dissolving the temporary order.

4. Schools § 4—

While order for the consolidation of schools in a district may not be made until after a public hearing, G.S. 115-76(1), where it appears that the State Board of Education approved the original plans for consolidation prior to the public hearing on the revised plans, and that its Assistant Superintendent stated that no further action by the State Board was necessary, but that thereafter the State Board formally approved the revised plans for consolidation ordered by the county board of education after the public hearing, there is a sufficient compliance with the statute.

5. Schools § 4—

It is the duty of the county board of education to determine, in the first instance, what repairs, remodeling, or enlarging and construction of school houses are required, and the courts may not interfere with its discretionary determination of these questions in the absence of manifest abuse of discretion or a disregard of law, G.S. 115-35, G.S. 115-29; it is the duty of the board of county commissioners to determine what proposals presented to it by resolution of the county board of education are necessary and possible, but having determined this question and having provided funds, the jurisdiction of the county commissioners ends and the authority to execute the plans is in the board of education.

6. Same—

County boards of education with the approval of the county commissioners have authority to transfer or reallocate funds from one project to another within the general purpose of a bond resolution and referendum, but in order to do so the board of education must, by resolution, request such reallocation and apprise the county commissioners of the conditions necessitating the transfer, and the board of county commissioners must make an investigation and record their findings upon their official minutes, and authorize or reject the proposed reallocation; when the county commissioners make only a verbal approval of the reallocation, the expenditure of funds for the revised plans should be enjoined until the statutory requirements are complied with.

7. Taxation § 12—

Where a bond resolution and referendum relating to the consolidation of three high schools attended exclusively by white pupils is approved by the voters prior to the enactment of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000c *et seq.*, the county board of education and board of county commissioners have authority to take funds allocated for the improvement of Negro high schools in the district and add them to the allocation for the consolidated high school so as to constitute the consolidated school one for all of the high school pupils of the district, and thus integrate the high school in conformity with Federal requirements, the reallo-

cation being for a project within the general purpose for which the bonds were authorized.

8. Schools § 4—

A county board of education or a board of county commissioners is without power to provide their constitutents with racially segregated schools; even though the effect of Title VI of the Civil Rights Act of 1964 is merely to deprive a segregated school of Federal aid, Title IV of the Act authorizes the Attorney General, upon complaint, to enforce integration by legal proceedings.

9. Constitutional Law § 1—

The Constitution of the United States takes precedence over the Constitution of North Carolina, and, for all practical purposes, the Federal Constitution means what the Supreme Court of the United States says it means.

10. Schools § 1—

An adequate system of public education is the basis of a viable democratic government.

MOORE, J., not sitting.

LAKE, J., concurring.

APPEAL by plaintiffs from *Mintz, J.*, May 2, 1966 Civil Session of BEAUFORT.

Plaintiffs, as citizens and taxpayers of Beaufort County, brought this action on April 22, 1966, (1) to restrain defendant Beaufort County Board of Education (School Board), from expending any money of Beaufort County for the purpose of constructing a centrally located building to consolidate and house the student bodies of the John A. Wilkinson High School, Bath High School, Pantego High School, Belhaven High School, and Beaufort County High School — all the high schools in District III; and (2) to restrain defendant Beaufort County Commissioners (Commissioners), and defendant Jay M. Hodges, treasurer and auditor of Beaufort County, from providing defendant School Board with any money for the purpose of constructing the said high school. A temporary restraining order was issued on April 22, 1966, by his Honor, Joseph W. Parker, who made it returnable before the judge presiding at the May 1966 Session. At that time, Judge Mintz heard the matter upon the verified complaint and the affidavit of W. F. Veasey, superintendent of Beaufort County Schools and secretary to defendant School Board, which affidavit incorporated the pertinent ordinance and resolutions. No answers have been filed, and the record consists of the affidavits and the court's orders. The briefs and oral

arguments disclose no dispute with reference to the facts. Those pertinent to this controversy are stated chronologically:

In May 1960, defendant School Board and the Board of Education for the Washington City School Administrative Unit jointly requested the Division of School Planning of the State Department of Public Instruction to survey all the schools in Beaufort County and to make long-range recommendations for the improvement of the two school systems. In consequence, a survey committee was commissioned. It made its report on October 22, 1962, and, *inter alia,* recommended that immediate steps be taken to build a consolidated high school on the north side of the Pamlico River, *i.e.,* in District III. On April 14, 1964, defendant School Board and the Washington City Board passed a joint resolution requesting defendant Commissioners to authorize a bond issue in the amount of $1,400,000.00 for school construction, 52.96% to be allotted to the County Administrative Unit and the remaining 47.04% to the Washington City Administrative Unit. These percentages corresponded to the number of students in the two units. Pursuant to the request of the two School Boards, at the meeting of defendant Commissioners, on September 8, 1964, a bond order was introduced authorizing the bond issue requested. At the same meeting defendant Commissioners scheduled a public hearing on the bond issue for September 22, 1964.

On September 11, 1964, defendant School Board adopted a resolution showing the "allocation of funds for school building projects" which it would make if the Beaufort County bond order and the State bond issue (authorized by Pub. L. 1963, ch. 1079), were approved by the voters. The proposed allocations were:

"Central High School on the North side of the River	$ 780,000.00
Aurora High School, dressing and shower rooms for gym	25,000.00
John A. Wilkinson School, physical education building	50,000.00
Bath High School, modernizing lunchroom	20,855.66
Chocowinity Elementary School, two classrooms, principal's office, clinic room, teachers' restroom and an all purpose room to serve as lunchroom and auditorium	56,000.00
Beaufort County High School, four classrooms, gymtorium, vocational shop	105,000.00

Belhaven High School, four classrooms and assembly room	90,000.00
S. W. Snowden High School, four classrooms, lunchroom, vocational shop	70,000.00
Equipment for above listed new buildings	20,000.00
GRAND TOTAL	$1,216,855.66
Source of Funds:	
County schools' share of County bond funds	$ 741,580.00
County schools' share of State bond funds	475,275.66
TOTAL	$1,216,855.66"

At that time, as now, the Pantego High School, the Bath High School, and the Wilkinson High School of Belhaven served white children only; the Beaufort County High School at Pantego and the Belhaven High School served Negro children exclusively. Defendants, in their brief, concede that the preelection publicity indicated that the allocation of $780,000.00 for "Central High School on the north side of the river" was for a consolidated high school which would house only white students from the Pantego, Bath, and Wilkinson high schools.

At the public hearing on September 22, 1964, the allocation of funds made by defendant School Board on September 11th was publicized, explained, and debated. Following the hearing, defendant Commissioners enacted the bond order authorizing the issuance of school bonds in the amount of $1,400,000.00, pursuant to the County Finance Act. The order stated the objects for which the bonds were to be issued as follows:

> "SECTION 1. The Board of Commissioners of the County of Beaufort has ascertained and hereby determines that it is necessary to erect in the Beaufort County Administrative Unit and in the Washington City School Administrative Unit, several new buildings to be used as school houses, school garages, physical education and vocational education buildings, lunchrooms and other school plant facilities, and to reconstruct and enlarge, by the erection of additions, several existing buildings located in such Units and used for such purposes, and to acquire land and furnishings and equipment necessary for such new or reconstructed or enlarged buildings, in order to enable the County of Beaufort as an administrative agency of the public school system of the State of North Carolina, to main-

tain public schools in said school administrative units for the nine months' school term prescribed by law, and that it will be necessary to expend for such purposes not less than $1,400,000 in addition to other moneys which have been made available therefor."

Section 3 of the order allotted $741,580.00 to the Beaufort County School Administrative Unit and $658,420.00 to the Washington City School Administrative Unit. Notice of the bond order and the election to be held on November 3, 1964 (the same day as the referendum on the State bond election), were thereafter duly published. In an effort to secure the voters' approval of the bonds, prior to November 3rd, defendant School Board "distributed to interested citizens" a mimeographed bulletin containing, *inter alia,* the allocation made by it on September 11, 1964. The bulletin also contained questions and answers of interest to the taxpayers, one of which was:

"Q. If the Bath, John A. Wilkinson, and Pantego High Schools are consolidated, will the present school building facilities and equipment in those schools continue to be used?

A. Yes. Each school will remain an elementary school and have grades from one through eight in it. There will be a principal of each school who can devote his entire leadership and professional talent to the improvement of instruction in the elementary grades."

Defendant School Board likewise caused the publication of sample ballots, and urged the electorate to vote YES for both the state and county bond issues. The ballot for the county bond issue was phrased in the same general language of the bond order.

In the referendum, both state and county bond issues were approved by a better than three-to-one majority of the votes cast.

On July 2, 1964, the Federal Civil Rights Act of 1964 became law. Title VI of the Act (78 Stat. 252, 42 U.S.C.A. §§ 2000d through 2000d-4) authorizes and directs each Federal agency empowered to extend financial assistance to any program or activity to issue rules, regulations or orders of general application, to the end that no persons "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," on the ground of race, color, or national origin. Compliance with such rules and regulations "may be effected (1) by the termination of or refusal to grant or to continue assistance under such program . . . or (2) by any other means authorized by law."

On April 20, 1965, defendant School Board, in an official session, adopted a plan for compliance with Title VI of the Act. The plan contained, *inter alia,* the following:

> "DISTRICT III.
>
> A central consolidated high school plant will be constructed in the approximate geographic center of this district . . . and all high school children therein will be assigned to this high school for the 1966-67 school year and each year thereafter. An appropriation has been made for the construction of this high school plant."

This plan departed from the pre-referendum allocation of September 11, 1964, in that, instead of consolidating only the three white high schools, it proposed to consolidate all of the five high schools in District III into one central high school for the children of both races. In an official session on August 24, 1965, the School Board unanimously resolved:

> "That the $105,000.00 allocated for additional construction at the Beaufort County High School and the $90,000.00 allocated to build additional facilities at the Belhaven High School be added to the allocation of the $780,000.00 previously planned for the construction for the central consolidated high school."

The State Board of Education, on November 4, 1965, approved defendant School Board's "School Improvement Program," which included the consolidation of all five high schools in District III.

On January 5, 1966, defendant School Board, in compliance with G.S. 115-76, conducted a public hearing on the proposal to consolidate the five high schools. Present at the hearing as a representative of the State Board of Education was Dr. J. L. Pierce, Director of the Division of School Planning. The next day, the superintendent of the Beaufort County Schools requested the State Board of Education to join the County Board in approving the proposed consolidation. He was informed by the Assistant Superintendent of the State Department of Public Instruction that the State Board, at its meeting on November 4, 1965, had approved the long-range plan for the consolidation of these high schools as proposed by the Beaufort County Board of Education and recommended by the State Review Panel, and that no further action was necessary.

On February 9, 1966, defendant School Board enacted and submitted to defendant Commissioners a resolution requesting their approval of the plan to omit the improvements originally intended for the Beaufort County and Belhaven high schools and to use these

funds to finance an enlarged Central High School with a capacity of 900 pupils instead of 600. With reference to this request, the complaint alleges "that the Board of County Commissioners refused to endorse the revision as requested by the defendant Board of Education and took no action whatever on the request." In his judgment, Judge Mintz found as a fact that defendant Commissioners "in session on March 7, 1966, upon the counsel of Mr. L. H. Ross, informed the Board of Education that the bond order for the County School Bond Funds has sufficient latitude to enable the Board of Education to apply the funds to School building construction according to needs."

On March 8, 1966, defendant School Board unanimously adopted a resolution which recited that the original plan to consolidate only the Bath, Wilkinson, and Pantego high schools had to be abandoned when the School Board was required to make a plan for compliance with Title VI of the Civil Rights Act of 1964; that compliance with the Act required the consolidation of all five high schools in District III, and necessitated the transfer of the funds previously earmarked for Beaufort County High School and Belhaven High School to the Central High School project; that the State Board of Education had approved the building plans for the Central High School; that, at the public hearing on January 5, 1966, "the objections presented were not sufficiently valid to alter or change the plan for the Central High School"; that the office of the Attorney General had advised the School Board that compliance with the Civil Rights Act is necessary to qualify the Beaufort County School Administrative Unit for the receipt of $475,275.66, Beaufort County's share of the State school bond funds; and that defendant Commissioners, upon the advice of the county attorney, had advised the School Board that the bond order gave it sufficient latitude to enable it to apply the funds to school building construction according to needs. Upon these recitals, the School Board resolved to proceed immediately with the "construction of a central high school on the site already purchased in the Yeatesville area for a high school plant of 900 or more students to replace the Bath High School, Beaufort County High School, Belhaven High School, John A. Wilkinson High School, and Pantego High School."

In June 1965, defendant Commissioners borrowed $400,000.00 upon bond anticipation notes, and this sum has been expended for "purposes authorized in the bond issue," including $35,000.00 for a site for the construction of Central High School. Plaintiffs alleged that, in June 1966, defendants plan to borrow $500,000 more on bond anticipation notes and, with the money, to begin the con-

struction of a central high school plant to house children from the five schools of District III.

At the termination of the hearing before him, Judge Mintz found facts which, insofar as they went, are consistent with the above statement. He concluded as a matter of law that the referendum was in all respects regular and valid, and that the construction of the planned Central High School to replace the five schools is proper and valid. He entered judgment dissolving the injunction, and plaintiffs appealed.

John A. Wilkinson for plaintiff appellants.

William P. Mayo for Beaufort County Board of Education, defendant appellee.

L. H. Ross for Beaufort County Commissioners and Jay M. Hodges, Beaufort County Treasurer and Auditor, defendant appellees.

SHARP, J. Plaintiffs' case on appeal contains no exceptions. The appeal, however, is an exception to the judgment, and raises the question whether the facts found support it. *Cratch v. Taylor,* 256 N.C. 462, 124 S.E. 2d 124. Exceptions to the failure of the judge to make certain detailed findings with reference to preelection publicity given the bond referendum by defendant School Board — as well as a statement of the findings allegedly requested — appear for the first time in the first assignment of error. Such an exception, as we have repeatedly pointed out, is worthless. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; 1 Strong, N. C. Index, Appeal and Error § 19 (1957).

Since this case affects the public interest, we advanced it upon our calendar under Rule 13, at the request of the parties. In order that our purpose in doing so be not defeated, we must, in spite of a poor record, consider whether the court below erred in dissolving the preliminary injunction. To that end, we find the facts to be as set out in our preceding statement. "Upon an appeal from an order granting or refusing an interlocutory injunction, the findings of fact, as well as the conclusions of law, are reviewable by this Court." *Deal v. Sanitary District,* 245 N.C. 74, 76-77, 95 S.E. 2d 362, 364. *Accord, Coffee Co. v. Thompson,* 248 N.C. 207, 102 S.E. 2d 783; *Clinard v. Lambeth,* 234 N.C. 410, 67 S.E. 2d 452.

Plaintiffs, as counsel emphasized upon the argument, do not attack the validity of the bonds which defendant Commissioners have heretofore issued, or which they may hereafter issue, pursuant to the bond ordinance approved at the November 3, 1964 election. They do, however, deny the authority of defendants to expend any of the

proceeds from the bonds for the purpose of consolidating the Beaufort County and Belhaven high schools with the Bath, Pantego, and Wilkinson high schools. Plaintiffs' contentions are these:

(1) There has been no valid order of consolidation. Under G.S. 115-76(1), concurrent action by the County Board of Education and the State Board of Education *after* the required public hearing is essential in order to consolidate any two high schools with an average daily attendance of 60 or more pupils. The State Board approved the consolidation of the five schools in question on November 4, 1965 — two months *in advance* of the public hearing on January 5, 1966. After the public hearing, an order of consolidation made by the County Board alone was ineffectual.

(2) Defendant Boards are without authority to divert to Central High School funds allotted to the Beaufort County and Belhaven high schools prior to the bond referendum.

(3) Even if defendant Boards are legally empowered to transfer the funds in question from one educational purpose to another, unilateral action by defendant School Board cannot effect the transfer, since such a reallocation requires certain specific findings and the approval by defendant Commissioners. These findings have not been made nor has approval been given in the manner required by law.

Plaintiffs' first contention, originally valid, is now moot. It appears from a stipulation signed by counsel for all parties and filed with this Court on June 13, 1966, that at its meeting on May 6, 1966, the State Board of Education formally approved the consolidation of the five high schools in District III into one central high school by the following resolution:

> "The Superintendent of Beaufort County Board of Education having communicated with the Secretary of the State Board of Education relative to the questions raised regarding the action of the State Board of Education upon the proposed long-range building plans of Beaufort County, and it appearing to the Board that a public hearing has heretofore been held by the Beaufort County Board of Education, at which the State Board of Education was represented as required by G.S. 115-76; and it further appearing to the Board that the Beaufort County Board of Education has approved the plans for consolidation of the proposed schools in Beaufort County, and the State Board of Education upon considering the same finds that the proposed long-range building plan will promote and enhance educational advantages in the proposed area to be consolidated: Thereupon, the State Board of Education con-

curs with the Beaufort County Board of Education and approves the plans for the consolidation of high schools at Bath, Beaufort County, Belhaven, J. A. Wilkinson, and Pantego into one consolidated high school as described in the long-range plan submitted to the Board, this action to be effective as of January 6, 1966."

This action by the State Board related back to January 6, 1966, and constitutes a sufficient compliance with G.S. 115-76(1). *Burney v. Comrs.*, 184 N.C. 274, 114 S.E. 298.

Plaintiffs' second and third contentions require a consideration of the relative duties of county commissioners and county boards of education with reference to the public schools.

The authority and duty to operate county schools is vested in the county board of education, which is required to provide adequate school buildings, suitably equipped. G.S. 115-35; G.S. 115-29. The board of education determines, in the first instance, what buildings require repairs, remodeling, or enlarging; whether new school houses are needed; and if so, where they shall be located. Such decisions are vested in the sound discretion of the board of education, and its actions with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. *Feezor v. Siceloff*, 232 N.C. 563, 61 S.E. 2d 714; *Board of Education v. Lewis*, 231 N.C. 661, 58 S.E. 2d 725; *Waldrop v. Hodges*, 230 N.C. 370, 53 S.E. 2d 263; *Atkins v. McAden*, 229 N.C. 752, 51 S.E. 2d 484.

Each year the board of education surveys the needs of its school system with reference to buildings and equipment. By resolution it presents these needs, together with their costs, to the commissioners, who are "given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped. . . ." G.S. 115-129. It is the board of commissioners, therefore, which is charged with the duty of determining what expenditures shall be made for the erection, repairs, and equipment of school buildings in the county. *Johnson v. Marrow*, 228 N.C. 58, 44 S.E. 2d 468. However, as pointed out in *Atkins v. McAden, supra*, the commissioners' control over the expenditure of funds for the erection, repair, and equipment of school buildings does not interfere with the exclusive control of the schools which is vested in the county board of education or in the trustees of administrative units. Having determined what expenditures are necessary and possible, and having provided the funds, the jurisdiction of the commissioners ends. The

authority to execute the plans is in the board of education. *Parker v. Anson County,* 237 N.C. 78, 74 S.E. 2d 338.

This dual responsibility obviously requires the utmost cooperation between the two boards and the full assumption of responsibility by each, if the educational needs of the children of the county are to be met.

G.S. 153-107 provides, *inter alia,* that "the proceeds of the sale of bonds and bond anticipation notes . . . shall be used only for the purposes specified in the order authorizing said bonds, and for the payment of the principal and interest of such notes issued in anticipation of the sale of bonds. . . ." In construing this section, this Court has said:

> "But G.S. 153-107, in our opinion, does not place a limitation upon the legal right to transfer or allocate funds from one project to another within the general purpose for which bonds were issued. The inhibition contained in the statute is to prevent funds obtained for one general purpose being transferred and used for another general purpose. For example, the statute prohibits the use of funds derived from the sale of bonds to erect, repair and equip school buildings, from being used to erect or repair a courthouse, or a county home, or similar project." *Atkins v. McAden, supra* at 756, 51 S.E. 2d at 487.

To effectuate such a transfer of funds from one project to another, however, certain facts must appear, and certain preliminary steps must be taken.

1. The board of education must, by resolution, request the reallocation of funds and apprise the county commissioners of the conditions which bring about the needs for the transfer.

2. The commissioners must then investigate the facts upon which the School Board's request is made.

3. After making their investigation, the commissioners must, by resolution, record their findings upon their official minutes and authorize or reject the proposed reallocation of funds.

If the commissioners find (1) that, since the bonds were authorized, conditions have so changed that the funds are no longer necessary for the original purpose, or that the proposed new project will eliminate the necessity for the originally-contemplated expenditure and better serve the educational interests of the district involved, or that the law will not permit the original purpose to be accomplished in the manner intended, and (2) that the total proposed expenditure for the changed purpose is not excessive, but is necessary in order to maintain the constitutional school term, the

commissioners may then legally reallocate the funds in accordance with the request from the board of education. Without such affirmative findings, however, the commissioners have no authority to transfer funds previously allocated to another purpose. And, without authority from the commissioners, the county board of education itself has no power to reallocate the funds. *Parker v. Anson County, supra; Mauldin v. McAden,* 234 N.C. 501, 67 S.E. 2d 647; *Gore v. Columbus County,* 232 N.C. 636, 61 S.E. 2d 890; *Feezor v. Siceloff, supra; Waldrop v. Hodges, supra; Atkins v. McAden, supra.*

Here, defendant School Board has strictly followed the appropriate procedures in requesting the reallocation of the funds in question. However, when it requested defendant Commissioners' approval of the transfer to Central High School of funds which had been allotted to the Beaufort County and Belhaven high schools, the Commissioners — without taking any official action and without making any entry whatever upon their minutes — orally advised the Board of Education (through the county attorney) that "the bond order for the county school bond funds has sufficient latitude to enable the Board of Education to apply the funds to school building construction according to needs."

The transfer which the School Board has requested involves no change in the purpose for which the school bonds were issued, *i.e.*, "to enable the County of Beaufort as an administrative agency of the public school system of North Carolina to maintain public schools in said administrative unit for the nine months' school term prescribed by law." It does, however, involve a change in the method of accomplishing that purpose. *Feezor v. Siceloff, supra. Prima facie,* the requested transfer would be entirely legal under ordinary circumstances, for it would seem that if the high school children from the Beaufort County and the Belhaven high schools are transferred to Central High School, the necessity for the expenditures originally proposed for these two schools will be totally eliminated, or reduced to such an extent that the expenditure originally contemplated could not be justified. Defendant Boards, however, are not faced with ordinary circumstances. Even if some of the needs at the Beaufort County and Belhaven schools should still remain after the transfer of their high school students to a centrally-located, consolidated high school, so also would the illegality of the original plan to make Central High School a segregated school for white children.

If the Commissioners approve the School Board's request for a transfer of funds, plaintiffs do not suggest that the voters of Beaufort County will have been dealt with unfairly in that tax funds

are being misspent or diverted *from educational purposes.* They do assert, however, that the people voted bonds for Central High School believing that it would be a consolidated school for white children only. Defendants do not contest this assertion, and we assume its truth. But notwithstanding that belief, it is not within the power of the Board of Education or the Board of Commissioners of Beaufort County to provide their constituents with racially segregated schools. The provision of Section 2, Article 9 of the Constitution of North Carolina which provided that "the children of the white race and the children of the colored race shall be taught in separate public schools" was invalidated on May 17, 1954, when the Supreme Court of the United States handed down its decision in *Brown v. Board of Education of Topeka,* 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A.L.R. 2d 1180. The Constitution of the United States takes precedence over the Constitution of North Carolina, and, for all practical purposes, the Federal Constitution means what the Supreme Court of the United States says it means. It boots little that the members of the Board of County Commissioners, the Board of Education, and the majority of their constituents share the conviction that the *Brown* case did violence to the Constitution as it was understood by its authors and by those who ratified it. The *Brown* case is binding upon us. *Constantian v. Anson County,* 244 N.C. 221, 93 S.E. 2d 163. Furthermore, Title VI of the Civil Rights Act of 1964 provides that the Federal department or agency which is empowered to extend Federal financial assistance to any program is *directed* to effectuate the provisions of the Act "by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." Translated, this simply means that if Beaufort County is to secure any Federal aid to education, it must comply with Federal law.

Title VI of the Civil Rights Act refers only to federally-assisted programs and, where no Federal grants are in contemplation, need not be considered. A refusal to accept Federal aid, however, will not solve the basic problem in this case. Title IV of the Civil Rights Act of 1964 (78 Stat. 246, 42 U.S.C.A. §§ 2000c through 2000c-9), entitled "Public Education," authorizes the Attorney General of the United States, upon a written complaint by any parent or group of parents that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, "to initiate and maintain appropriate legal proceedings for relief" in a district court of the United

States, to the end "that the institution of an action will materially further the orderly achievement of desegregation in public education."

Obviously, plaintiffs instituted this action in the unwarranted and ill-advised hope that they could create a racially segregated school in Central High School. It is a dream which anyone familiar with the Federal decisions should know cannot be realized. If Central High School is constructed as a facility to house the children from the three schools which presently serve only white children, its physical plant will, of course, remain unchanged. Its complexion, however, will not.

Under the decisions of the Supreme Court of the United States and the Acts of the Congress, the Board of Education of Beaufort County can no longer legally impose segregation of the races in any school. Therefore, the real question to be resolved by the County Board of Education, the Board of County Commissioners, and the State Board of Education is whether it is in the best interest of the children who live in District III to have a *single* integrated high school or *three* integrated high schools. The question whether the schools of Beaufort County will be integrated in the future is no longer open. At the time of the bond election, defendant Boards apparently did not believe that the situation which now confronts them could possibly materialize. Having assumed the responsibilities of their respective offices, board members are required by their oaths to face realities now and, having done so, to take the steps which, in their best judgment, will serve the highest good of all the school children, for whom they are trustees. It behooves defendants to see to it that the citizens understand the exigencies which confront not only defendant Boards but every member of the body politic. Democracy is based upon the premise that the citizenry, if educated and enlightened, will do what is required of it to preserve government by law. The preservation of our form of government, therefore, depends upon an adequate system of public education.

Since defendant Board of County Commissioners has not acted upon defendant School Board's request that it approve a reallocation of the funds in question, the latter has no authority, acting alone, to make the reallocation. Until defendant Commissioners approve the request, defendant School Board may not proceed. The order of Judge Mintz is reversed and the injunction is reinstated.

Reversed and remanded.

MOORE, J., not sitting.

LAKE, J. Concurring. I concur in the result reached by the majority opinion. I also agree that the reasons there advanced are sufficient to support the reinstatement of the injunction for the present. However, I would reach that result on a ground much more fundamental and more enduring than the absence, as of the present, of a resolution by the Board of County Commissioners. Because of this, and my inability to concur in some of the statements in the majority opinion, I shall state my own view of the matter.

The question is not whether the schools as originally proposed shall be constructed or whether, if constructed, they can be operated as the defendants contemplated when they submitted the bond issue to the voters. The question is whether the proceeds of a bond issue, submitted to and approved by the voters on the basis of a definite, specific proposal for the construction or improvement of certain named public schools, may lawfully be spent by the defendants for the construction of an entirely different school. In my opinion the answer should be "No" and it would make no difference if the Board of County Commissioners had already adopted and recorded a resolution approving the change in purpose.

The appellants in their argument make it clear that they do not question the good faith of the defendants in submitting the original, specific proposal to the people of the county as the statement of the purposes for which the proceeds of the bonds would be used. But for actions of the federal government, in which the defendants had no voice, the proceeds of the bonds would have been used as stated by the defendants in their pre-election campaign releases, which were designed to persuade the people to vote for approval of the bond issue. Those actions have forced the defendants into a dilemma which they did not anticipate when they submitted their proposal to the voters of the county.

For the purposes of the present discussion, I assume that it is now impossible, legally and practically, for the defendants to operate the originally contemplated schools in the originally contemplated manner, tested and proved to be wise and beneficial by over sixty-five years of experience in this State. It may also be true that the school construction and operation now proposed as a substitute for the original plan, by which the voters were persuaded to approve the bond issue, is wiser and will be better for the people of Beaufort County than the original proposal would have been under today's conditions. That is not the question for us to decide. Nor, in my opinion, is that a question for these defendants to decide, at least so far as the expenditure of the proceeds of these bonds is concerned.

That is a question which should be submitted to the people of Beaufort County, whose children are to be educated and whose homes and farms and business properties are to be taxed in order to pay the bonds. It may well be that, given an opportunity, they will approve the use of bond proceeds to build the schools now proposed by the defendants, but fair play demands that they be given the opportunity to say "No."

In *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 266, Barnhill, J., later C.J., spoke for this Court with reference to a school bond issue, approved by the voters on the basis of a proposal to use such proceeds to build new schools, the plan thereafter being changed so as to divert the proceeds to the enlargement of existing schools. He said:

> "The law is founded on the principle of fair play, and fair play demands that defendants keep faith with the electors of the district and use the proceeds for the purpose for which the bonds were authorized — the erection and equipment of new buildings and the purchase of sites therefor * * * Use for any other purpose (*i.e.,* enlarging existing schools) would constitute an unauthorized diversion against which plaintiff is entitled to injunctive relief."

See also, *Lewis v. Beaufort County,* 249 N.C. 628, 107 S.E. 2d 77.

I have no thought of charging any defendant in this action with bad faith or with having, at any time, any purpose other than to provide for the children of Beaufort County the best public school system possible under the oppressive and, in my opinion, unconstitutional interference of the federal government by which they are presently hampered and restricted. The fact remains, as shown in the record before us, that, in order to persuade the people of Beaufort County to vote for the bond issue, they caused representations to be made to the people that the proceeds of the bond issue would be used to build and improve certain schools, the itemized list of the proposed constructions and improvements being published and circulated as a campaign document prior to the election. Now, after the election, they propose to spend the money to build different schools. To do so, however worthy the motive, is to break faith with the people and to make a mockery of the law requiring the bond issue to be submitted to the vote of the people.

To be sure, the proceeds of these bonds will, under the present proposal, be used for school construction and not for roads, hospitals or courthouses. Nevertheless, the presently proposed use is utterly different from that which the voters approved. To be sure,

the ballots on which they recorded their votes did not carry the proposal in itemized form, but the defendants, acting in the utmost good faith, publicized the itemized, original proposal and asked the people to vote for the bonds so that it could be put into effect. Whether that campaign document carried the election for the bond issue no one can presently say with certainty, but there is a way to find out. The matter should be resubmitted to a vote of the people before the proceeds of these bonds are spent and, if the people disapprove the change in plan, the proceeds of such bonds as have been issued should be held for their retirement.

A truly liberal construction of provisions of the Constitution and of statutes dealing with the pledging of the public credit and the expenditure of the public funds is not one which, for fear that the people may not approve the expenditure, denies them the right to vote upon the question and places the power to determine the matter in the hands of a board or commission, however wise and honorable. The truly liberal construction of these provisions of the law is that which enlarges the power of the people to determine their own destiny by deciding what obligations they will assume and for what purpose.

I cannot agree with the statement in the majority opinion that the Constitution of the United States means whatever five out of nine members of the Supreme Court of the United States may see fit, from time to time, to say that it means. This, in my opinion, is a far more significant matter than the use to be made of the proceeds of these bonds. The statement is as inaccurate as it would be to say that the Constitution of North Carolina means whatever four of us may see fit to say it means. The decision of a majority of this Court, applying the provisions of the Constitution of North Carolina, as we understand them, to a matter before us, is the final adjudication of the rights of the parties in that particular lawsuit and is a precedent which the judges of the other courts of this State must follow in deciding subsequent cases of like nature, until it is overruled by us or by our successors or by the people, themselves, through the amending process. Nevertheless, we have no authority to change the true meaning of the Constitution of North Carolina by our fiat. The Supreme Court of the United States has no greater authority in its field. In my judgment, the distinction is a vitally important one which must be kept before ourselves and before the people of America if our country is to avoid the smothering of freedom beneath the robes of a judicial despotism.

The Constitution of the United States, itself, in explicit, clear

language declares what is the supreme law of the land. It states in Article VI, Section 2:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

That provision I am bound by my oath as a member of this Court to support and defend. It requires me to recognize the difference between "the law of the land" and judicial lawlessness regardless of the court in whose decrees it may be found. The Constitution does not declare a decision of the United States Supreme Court to be the supreme law of the land. On the contrary, it declares that such decision is not the "law of the land" if it is in conflict with the Constitution, itself.

I agree, of course, that this Court and all other courts, both state and federal, must now decide cases brought before us or them as if the decision of the United States Supreme Court in *Brown v. Board of Education,* 347 U.S. 483, 74 S. Ct. 686, were a correct interpretation of the Fourteenth Amendment to the United States Constitution, but I cannot concur in the statement that it is so, or in the thought that the Constitution which I have sworn to support and defend actually means no more than five judges see fit to say that it means; that its true meaning varies from opinion day to opinion day. This, in effect, means that there can be no distortion, no misconstruction, no violation of the Constitution of this State by this Court or of the Constitution of the United States by the Supreme Court of the United States; that a court of last resort can do no wrong. That I believe to be a dangerous fallacy.

This error in the majority opinion is not removed by inserting the phrase "for all practical purposes." There is a practical value in recognizing the difference between what the Constitution of our country really means and what a majority of the Supreme Court of the United States says it means. There is always practical value in recognizing the difference between right and wrong even though one is without power to prevent the wrong. The first step in curing a disease is to recognize the difference between sickness and health. But, if indeed we be only "a voice crying in the wilderness" I believe it our duty to exert that effort to "make straight the path."

JAMES LEWIS, PLAINTIFF, v. CALVIN BARNHILL AND CONSTRUCTION EQUIPMENT RENTAL COMPANY, DEFENDANTS, FOARD CONSTRUCTION COMPANY, ADDITIONAL DEFENDANT.

(Filed 16 June, 1966.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence is to be considered in the light most favorable to him, resolving all conflicts in his favor and giving him the benefit of all reasonable inferences deducible therefrom, and defendant's evidence is to be considered only insofar as it is favorable to plaintiff.

2. Negligence § 26—

Nonsuit on the ground of contributory negligence may be allowed only when plaintiff's own evidence establishes this defense so clearly that no other conclusion can reasonably be drawn therefrom.

3. Negligence §§ 24a, 26—

Evidence tending to show that a crane operator, in hoisting joists progressively toward one corner of the building site over which was suspended an electric power line of which he had an unobstructed view, permitted one end of the steel joist to come in contact with the power line while plaintiff workman, with his back to the power line, was concentrating upon placing his end of the joist at the proper place along the center girder of the building, *held* sufficient to be submitted to the jury on the issue of the crane operator's negligence and not to disclose contributory negligence as a matter of law on the part of plaintiff.

4. Negligence § 11—

One engaged in work requiring his concentration upon a particular area, thus preventing him from maintaining a lookout, may not be held contributorily negligent as a matter of law in assuming that another worker performing another aspect of the same job will perform his own assignment in a reasonably careful manner so as not to increase the danger.

5. Trial § 26—

Nonsuit for variance may not be granted on the ground that one of plaintiff's witnesses testified to a material circumstance at variance with plaintiff's allegations when plaintiff's own testimony is consonant with the allegations, since conflicts in plaintiff's evidence must be resolved in his favor.

6. Same—

Allegation that plaintiff was standing on a ladder placed so that his back was to the source of danger, with testimony that the ladder was facing in the opposite direction, cannot justify nonsuit for variance when plaintiff's testimony tends to show that in the performance of his work, requiring concentration upon a particular area, his back was to the source of the danger. Variance as to which direction the ladder was facing is not material under the evidence. G.S. 1-168.

7. Master and Servant § 8— Evidence held to support finding that lessor of crane was an independent contractor.

Where the evidence tends to show a builder leased a crane with operator solely for the purpose of lifting steel beams and joists into place in the construction of a building, the operator being paid solely by the lessor who had sole right to recall the operator and substitute another, and it appears that it was intended both by the lessor and the builder that the mechanical operation of the crane would be handled by the operator pursuant to his own judgment, *held* the evidence is sufficient to be submitted to the jury and sustain its determination that the lessor was an independent contractor and that the crane operator was his employee and not an employee of the builder.

8. Master and Servant § 86—

Neither an independent contractor nor an employee of the independent contractor is immune to suit at common law for injury negligently inflicted upon an employee of the main contractor. G.S. 97-9.

9. Trial § 33—

A charge is not subject to the objection that the court failed to explain the law on a particular aspect of the case when the charge, considered contextually and in connection with an immediately prior instruction upon a related aspect, adequately states the evidence to the extent necessary to explain the application of the law upon the aspect in question. G.S. 1-180.

10. Same—

When the court, in its summarization, correctly recites the essential features of the evidence and the contentions of the parties, it is the duty of counsel to call to the court's attention any minor inaccuracies.

11. Negligence §§ 21, 28—

While the burden rests upon plaintiff upon the issue of negligence, there is no presumption that the defendant was negligent or that he was not negligent, and an instruction to this effect is not prejudicial error.

12. Master and Servant § 86—

In the employee's action against a third person tort-feasor there is no prejudice to defendant in striking from the answer the allegation that plaintiff had received compensation payments under the Workmen's Compensation Act when the court reduces the verdict by any amount to which the employer would have been entitled to receive by way of subrogation but for his own negligence. G.S. 97-10.2(e).

13. Same—

The refusal to permit defendants to amend the answer to assert that they were conducting the business of plaintiff's employer is not error when there is allegation and evidence to sustain a finding that one of defendants was an independent contractor and the other defendant an employee of the independent contractor and not an employee of plaintiff's employer.

14. Pleadings § 8; Indemnity § 3—

In an action by an employee against a third person tort-feasor, it is not error for the court to exclude from evidence a contract purporting to

be an agreement of the employer to indemnify defendants against loss in the premises.

15. Principal and Agent § 5—

The authority of a construction superintendent to place an order for rental equipment does not, as a matter of law, carry with it implied authority on the part of the superintendent to enter into an indemnity contract on behalf of his employer.

16. Indemnity § 2—

An agreement to indemnify the lessor of equipment from liability in the operation of the equipment while in the possession or under the control of the lessee cannot cover an injury inflicted while the equipment is in the exclusive control and custody of lessor's employee.

MOORE, J., not sitting.

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

APPEAL by original defendants from *Pless, J.,* 16 August 1965, Schedule A, Civil Session of MECKLENBURG.

The plaintiff, an employee of Foard Construction Company, hereinafter called Foard, was injured while working in the course of his employment in the construction of a building in Charlotte. He has been paid benefits due him from Foard under the North Carolina Workmen's Compensation Act.

Foard was the general contractor upon the construction project. It contracted with Construction Equipment Rental Company, hereinafter called CERCO, whereby CERCO, for a fixed hourly charge paid by Foard, sent to the construction site a crane, an operator thereof and a helper, Barnhill being the operator of the crane, and one Pendergrass, the helper. On arrival, the crane, operated by Barnhill, was used to lift steel joists from the ground and place them in position as supports for the roof of the building. When so placed, one end of each joist rested upon the outside wall of the building and the other rested upon a steel beam running lengthwise along the center line of the building and supported by steel columns. At the time, there was no roof on the building, it being open to the sky.

The plaintiff was stationed by Foard at the interior beam, and another employee of Foard was stationed at the exterior wall of the building, their duties being to take hold of the steel joists as they were brought to them by the crane and to place the end of the joist at the spot previously marked by Foard, these spots not being visible to the operator of the crane. An electric power line ran diagonally across one corner of the building and slightly within the lines of the walls, projected upward, at a height of seven or

eight feet above the top of the wall. This power line carried an electric current at a high voltage. As each joist was set in place the plaintiff and the worker on the outside wall of the building moved their ladders along the center beam and the wall to the location selected for the next joist; that is, moving nearer and nearer to the corner over which the power line ran. After a number of joists had been so set in place, the plaintiff sustained a severe electric shock when placing upon the steel center beam his end of a joist then suspended in air by the crane, the other end of the joist being in contact with the electric power line, of which contact the plaintiff was unaware. As a result, the plaintiff fell to the ground and sustained substantial injuries. He now sues Barnhill and CERCO, alleging that Barnhill was negligent in operating the crane so as to permit the steel joist to come in contact with the power line while it was in contact with the plaintiff, or so as to permit it to come in contact with him, while in contact with the power line. He seeks to recover from CERCO on the theory that it is liable, under the doctrine of *respondeat superior,* as the employer of Barnhill.

Barnhill and CERCO filed a joint answer and brought Foard into the action as an additional defendant. After denying any negligence by themselves, they allege as further defenses: (1) Concurring negligence by Foard, barring Foard's right to subrogation under the Workmen's Compensation Act, in that it failed to cause the current to be turned off from the power line, failed to warn the plaintiff and the original defendant of the danger and failed to provide the plaintiff with a safe place in which to work; (2) Barnhill was, at the time of the accident, the servant and employee of Foard, by reason of which relation the plaintiff is not entitled to recover in this action from Barnhill or CERCO, the Workmen's Compensation Act being pleaded in bar of his action; and (3) contributory negligence by the plaintiff.

Barnhill and CERCO also alleged a cross action in favor of CERCO against Foard on the basis of an alleged agreement by Foard to indemnify CERCO from loss and expense on account of injury to any person by the operation of the rented crane. The cross action was stricken on motion by the plaintiff. Barnhill and CERCO then moved to amend their answer by adding an additional further defense to the effect that the action is barred by the Workmen's Compensation Act since Barnhill and CERCO were, at the time of the injury, engaged in conducting the business of Foard. The motion to amend was denied.

The jury found that the plaintiff was injured by the negligence of Barnhill, that he was not guilty of contributory negligence, that

Barnhill was the employee of CERCO, that he was not the employee of Foard, that the negligence of Foard concurred with that of Barnhill and CERCO in producing the plaintiff's injury and that the plaintiff was entitled to recover $18,000. Thereupon, judgment was entered in favor of the plaintiff for the amount of the verdict, less the amount which Foard would have been entitled to receive by way of subrogation under the Workmen's Compensation Act had it not been so found negligent. From this judgment Barnhill and CERCO appeal, assigning as errors the denial of their motions for judgment of nonsuit, certain rulings upon the admission of evidence, rulings with respect to motions concerning the pleadings and certain portions of the instructions of the court to the jury.

Grier, Parker, Poe & Thompson by Gaston H. Gage for defendant appellants.

Charles T. Myers and Robert L. Scott for plaintiff appellee.

LAKE, J.

THE MOTION FOR JUDGMENT OF NONSUIT

It is elementary that upon a motion for judgment of nonsuit the evidence introduced by the plaintiff is to be interpreted in the light most favorable to him, all conflicts therein are to be resolved in his favor, all reasonable inferences therefrom which are favorable to him are to be drawn, the evidence introduced by the defendant is to be considered only insofar as it is favorable to the plaintiff and the motion for nonsuit may not be allowed on the ground of contributory negligence unless the plaintiff's own evidence establishes such negligence so clearly that no other conclusion can reasonably be drawn therefrom. *McArver v. Gerukos,* 265 N.C. 413, 144 S.E. 2d 277; *Moss v. Tate,* 264 N.C. 544, 142 S.E. 2d 161; *McNamara v. Outlaw,* 262 N.C. 612, 138 S.E. 2d 287; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360; Strong, N. C. Index, Negligence, §§ 24a, 26.

So interpreted, the evidence tends to show, in addition to the uncontroverted facts above stated and in addition to the nature and extent of the plaintiff's injuries, the following:

When the construction of the building reached the stage for setting the joist in place, Foard telephoned CERCO and asked it to send out a crane and operator. For a fixed charge per hour, CERCO sent the crane with Barnhill as its operator and Pendergrass as his helper. Barnhill had worked for CERCO for 17 years as crane operator. The operation of this type of crane is a highly specialized activity. Foard operates no crane itself. Its superintendent on the job was not qualified to operate one. Foard relied on CERCO to

provide a qualified crane operator and did not undertake to determine Barnhill's qualifications.

No one in the Foard organization undertook to tell Barnhill where to place the crane within the walls of the building, at what angle to set its boom or how, mechanically, to put the joists in the places predetermined and marked by Foard. Foard gave Barnhill no instruction as to how to operate the crane. Foard's superintendent, Simpson, merely told Barnhill what steel he wanted lifted by the crane and where he wanted it. After certain other structural steel was put in place by the crane, the moving of the steel joists, one by one, from the ground to the desired positions atop the wall and center beam began.

The cable of the crane was fastened to the center of the joist as it lay on the ground, this being done sometimes by an employee of Foard and sometimes by the helper sent with the crane by CERCO. When it was so fastened, the person fastening it gave by hand a signal to Barnhill that the joist was ready to be lifted. This person also held a rope, called a tagline, fastened to the plaintiff's end of the joist for the purpose of preventing the joist from swinging from side to side as the crane moved it through the air. The tagline could not prevent the far end from rising. Barnhill then operated the crane so as to cause the joist to rise to a height above the center beam of the building and swung it over the center beam to the other side thereof and then lowered it to rest upon the center beam and the outside wall. The plaintiff stood upon a ladder resting against the center beam and another employee of Foard stood upon a ladder resting against the outside wall. The assignment of each was to lay hold upon his end of the joist as it was brought to him by the crane and guide that end to the spot on the center beam or outside wall which had been previously marked by Foard. When it was so placed, the tagline was released and one of them gave by hand a signal to Barnhill that the cable could be slackened to permit its detachment from the joist. No other instructions or signals were given to Barnhill. Barnhill determined by eye and by his own judgment how high to lift the joist in order to swing it over the center beam.

At the time of the injury the plaintiff was standing on his ladder with his back to the far end of the joist. He took hold of his end of the joist then being brought toward him by the crane, and placed it down upon the steel center beam, which was grounded through the supporting steel columns. At that instant the far end of the joist was in contact with the power line and he received a massive electric shock. When Barnhill observed the electric spark he released the

brake on the crane and let the joist down until its contact with the power line was broken.

There was nothing to obstruct Barnhill's view of the plaintiff, of the worker on the outside wall, or of the power line. Foard knew of the presence of the power line and had requested the power company to move it but, on the day in question, had observed that this had not been done. Foard did not warn the plaintiff or Barnhill of the presence of the wire. It could easily be seen. The joist could have been raised, brought around and lowered without striking the wire. This particular joist went too high. At the time of the injury the tagline attached to it was being held by Pendergrass, the helper sent by CERCO. The plaintiff, while engaged in placing his end of the joist on the designated spot, could not see the other end which came in contact with the power line. As the various joists had been so put into position, the end nearest to the plaintiff customarily came in lower than the other end so that the plaintiff placed his end onto its designated position first.

Barnhill was never on Foard's payroll. He was paid by CERCO. His pay began when he left its shop with the crane and his day ended when he returned to CERCO's place of business. The helper took his instructions on the job from Barnhill.

Evidence offered by the defendants tended to show:

CERCO's instructions to Barnhill were simply to report on the job with the crane and helper. Foard was to tell him what work to do there. This entire assignment required only one day. The operator of the crane must have hand signals from someone in order to know when to lift the load and he must be told where to put the thing lifted. The job superintendent told Barnhill when to start and when to stop work. Barnhill had no authority to permit anyone else to operate the crane had Foard instructed him to do so. Barnhill did not see the power line before the joist struck it.

The above evidence is amply sufficient to support the finding by the jury that Barnhill was negligent and its finding that the plaintiff was not guilty of contributory negligence. From it the jury could find that at the time of this occurrence Barnhill's view of the power line, the joist and the plaintiff was unobstructed. The evidence is sufficient to show that had he kept a reasonable lookout, commensurate with the danger which he knew, or should have known, to be present and to be increasing progressively as joist after joist was set in place, he could have prevented the contact between the joist and the power line. The plaintiff's work, on the other hand, required his close attention to the movement of his end of the joist and precision by him in placing it upon the designated spot on the

center beam. Though the plaintiff also knew, or should have known, of the presence of the power line, there is ample evidence to support a finding that, with reasonable care, Barnhill could have brought the joist over the center beam and to the plaintiff and the worker on the outside wall at a lower level and thus have avoided any contact with the power line. One engaged in work which can be done safely, and whose assignment prevents him from maintaining a lookout, may not be held contributorily negligent, as a matter of law, when he proceeds with his duties on the assumption that another worker will perform his own assignment in a reasonably careful manner and thus not increase the danger. *Carrigan v. Dover,* 251 N.C. 97, 110 S.E. 2d 825; *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733; 38 Am. Jur., Negligence, § 192; 65 C.J.S., Negligence, § 118c. The motion for nonsuit could not, therefore, properly have been granted on the ground that Barnhill was not negligent or on the ground that the plaintiff was.

The defendants also contend that their motion should have been allowed because of variance between the plaintiff's allegation and the plaintiff's proof. They contend that whereas the plaintiff alleged in his complaint that he was standing upon a ladder placed so that he was facing away from the wall over which the power line ran, his witness, Foard's superintendent, testified that the ladder was placed so that he faced the power line. It is sufficient to note that the plaintiff, himself, testified that the ladder was placed as specified in the complaint. Thus, when the evidence is taken in the light most favorable to the plaintiff and conflicts are resolved in his favor, there was no variance. In any event, the direction in which the ladder faced was a mere detail. The plaintiff offered abundant evidence to show that as he placed his end of the joist on the center beam he could not see the power line, and his assignment was such that his attention was concentrated upon his end of the joist. Even if the ladder was facing the power line, the variance is not material under the rule of G.S. 1-168. Clearly, it is not such as to constitute a failure of proof so as to support a judgment of nonsuit. See *Bunton v. Radford,* 265 N.C. 336, 144 S.E. 2d 52; *Wilson v. Bright,* 255 N.C. 329, 121 S.E. 2d 601.

The defendants' major contention with reference to the motion for judgment of nonsuit is that, at the time of the injury, Barnhill was not the servant of CERCO but was the servant of Foard. If this be true, CERCO would not be liable on the basis of the doctrine of *respondeat superior* and Barnhill would be absolved from liability by the provisions of the Workmen's Compensation Act. G.S. 97-9.

Unquestionably, an employer may lend or otherwise furnish his employee to another person so as to be relieved from liability for an injury caused by the negligence of the employee in performing work for the other person. *Jackson v. Joyner,* 236 N.C. 259, 72 S.E. 2d 589; *Leonard v. Transfer Co.,* 218 N.C. 667, 12 S.E. 2d 729; *Shapiro v. Winston-Salem,* 212 N.C. 751, 194 S.E. 479. It is equally true that an employer may, for a consideration or otherwise, direct his employee to go upon the premises of another and there perform work, to be designated by such other person, without severing the employment relation between the general employer and the employee.

In *Weaver v. Bennett,* 259 N.C. 16, 129 S.E. 2d 610, the facts were quite similar to those in the present case. A judgment of nonsuit on the ground that the negligent servant was, at the time of the plaintiff's injury, the employee of the borrower was reversed. Bobbitt, J., speaking for the Court, carefully reviewed and analyzed numerous authorities from this and other jurisdictions dealing with liability for the negligence of a loaned servant. The views there expressed control the decision in the present matter. Quoting with approval from *Mature v. Angelo,* 373 Pa. 593, 97 A 2d 59, Bobbitt, J., said:

> " 'The crucial test in determining whether a servant furnished by one person to another becomes the employe of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it* * * *
>
> " 'Where one is engaged in the business of renting out trucks, automobiles, cranes or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, and, unless that presumption is overcome by evidence that the borrowing employer *in fact* assumes control of the employe's *manner of performing the work,* the servant remains in the service of his original employer.' "

Here, Barnhill was sent with the crane by CERCO to do work for a short period of time upon the construction project of which Foard was the general contractor. The crane was an expensive, complicated machine. Its operation required skill and experience. CERCO had frequently so supplied equipment and operators to Foard. Foard operated no cranes of its own. Its job superintendent was not qualified to operate a crane. Clearly, it was intended, both by CERCO and by Foard, that the mechanical operation of the

crane would be handled by Barnhill pursuant to his own judgment and not pursuant to instructions to be given him by Foard. CERCO could have, at any time during the day, recalled Barnhill from this assignment and substituted another operator. Foard had no such authority. Barnhill was paid for his day's work by CERCO. Arriving at the site of the work, he was told only that certain pieces of steel were to be lifted from the ground and carried through the air by the crane so that one end could be placed by an employee of Foard on the center beam and the other end could be placed on the outside wall. How he was to get the joist to that position was left to Barnhill's skill and judgment. The hand signals given to him to show that the cable was fastened and the joist was ready to be lifted, and to show that the joist was in place so that the cable could be slackened and disconnected, were not commands. They merely relayed information which Barnhill could not determine for himself because of his position. The evidence falls far short of showing assumption of control by Foard over Barnhill's operation of the crane so as to make Barnhill, temporarily, the servant of Foard and not the servant of CERCO within the test of *Weaver v. Bennett, supra.*

In *Leggette v. McCotter,* 265 N.C. 617, 144 S.E. 2d 849, we had before us a claim under the Workmen's Compensation Act by reason of the death of the loaned servant by accident on the job to which he was sent by his general employer along with earth moving equipment. We held that the evidence was sufficient to support the finding by the Industrial Commission that, at the time of the accident, the deceased was the employee both of his general employer and of the lessee of the equipment. There are many similarities between the *Leggette* case and the one now before us. There are also material differences. In the *Leggette* case, the evidence was sufficient to show that the lessee had authority to terminate the employee's employment at the construction site, which is not shown on the present record. There, the employee was at the lessee's "disposal." There, the rented equipment and the employee remained on duty at the construction site for months, as contrasted with a single day in the present case. See Restatement of Agency, § 227, comment. In the *Leggette* case, the general employer "occasionally" rented to its building supply customers pieces of machinery together with an operator thereof. In the present case, the rental of such equipment, together with the operator thereof, was the regular business of the lessor, as its name implies. See Restatement of Agency, *supra.* Furthermore, in the *Leggette* case, we were not called upon to decide, and did not decide, that the evidence compelled a find-

ing, as a matter of law, that the operator of the equipment was the servant of both the lessor and the lessee at the time of his injury. We held only that the evidence was sufficient to support such finding of fact by the Industrial Commission and, therefore, its award could not be set aside as an error of law by the superior court. In the present case, to sustain the motion for judgment of nonsuit, it would be necessary for us to hold that, as a matter of law, the evidence compels the finding that the operator was the servant of the lessee only. We hold that the evidence now before us was sufficient to require the submission of this issue to the jury. The jury found that Barnhill was not the employee of the lessee, Foard.

The defendants next contend that the motion for judgment of nonsuit should have been granted because CERCO, itself, was a person "conducting" the business of Foard within the meaning of G.S. 97-9 and, therefore, clothed by that statute with immunity against suit by the plaintiff. Obviously, CERCO was not an employee of Foard but an independent contractor. We have held that the protection of this statute, against suit by an injured employee, extends to officers of the corporate employer, whose acts are such as to render the corporate employer liable therefor. It does not extend to independent contractors performing work pursuant to their contract with the employer of the injured person.

We conclude, therefore, that there was no error in the denial of the motion for judgment of nonsuit.

INSTRUCTIONS TO THE JURY.

The defendants contend that, even though the motion for nonsuit was properly denied, they should be granted a new trial because the instruction with reference to the loaned servant issues did not comply with G.S. 1-180 in that there was a failure to relate the applicable principles of law to the evidence. The third issue submitted to the jury was whether, at the time of the plaintiff's injury, Barnhill was the employee of CERCO. The fourth issue was whether Barnhill was, at that time, the employee of Foard. The judge properly instructed the jury as to the burden of proof upon each issue. In connection with the third issue, he properly stated the principles of law applicable to the loaned servant relationship. Immediately thereafter, he took up the fourth issue and referred the jury to those instructions. Previously, he had reviewed briefly, but sufficiently, the evidence relating to the circumstances under which Barnhill was sent to and worked at the construction site. When the charge is considered as a whole, it cannot be held that the trial court failed, upon these issues, to state the evidence to the extent necessary to explain the application of the law thereto

or that he failed to declare and explain the law arising on the evidence as required by G.S. 1-180. We also find no merit in the contention that the court in its review of the evidence bearing upon these issues expressed an opinion.

In support of several assignments of error, the defendants contend that the court incorrectly stated the evidence and certain contentions of the parties. These assignments are overruled on the authority of *Brown v. Brown,* 264 N.C. 485, 141 S.E. 2d 875, and *Morgan v. Bell Bakeries, Inc.,* 246 N.C. 429, 98 S.E. 2d 464, and the authorities there cited. In the *Brown* case, this Court said:

> "The court is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof. When its recital of the evidence does not correctly reflect the testimony of the witness in any particular respect, it is the duty of counsel to call attention thereto and request a correction. As the trial court's attention was not called thereto, and no exception was entered in apt time, this assignment of error is not now tenable."

The judge stated early in his charge, "You don't start off with a presumption that the defendant is negligent or that he isn't negligent; there just isn't any presumption about it." In this there was no error. This statement was followed by a correct charge with reference to the burden of proof on the issue of negligence. Upon this issue, the trial of a civil action does not commence with the scales tipped in favor of the defendant by an affirmative presumption of due care. The burden of proof rests upon the plaintiff to tip the scales in his favor by evidence of negligence, but no evidence by him is required to bring the scales up to an even balance. Statements in *Sloan v. Light Co.,* 248 N.C. 125, 102 S.E. 2d 822, and *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477, relied upon by the defendants in this connection, when read in context, are not inconsistent with this instruction by the court below. Assignment of error No. 6 is, therefore, overruled.

For the reasons above stated in the discussion of the motion for judgment of nonsuit, there was no material variance between the allegations of the complaint and the plaintiff's evidence concerning his failure to observe the contact between the joist and the power line. Consequently, there was no error in the denial of the defendants' request for an instruction that the first issue be answered "no" if the jury should find by the greater weight of the evidence that the plaintiff was not standing on the ladder with his back to the power line.

Likewise, for the reasons stated in connection with the motion

for judgment of nonsuit, there was no error in the instruction permitting the jury to find Barnhill negligent if he operated the crane so as to permit the joist to come in contact with the power line when he knew, or should have known, that injury was likely to result therefrom.

RULINGS ON MOTIONS TO STRIKE AND AMEND PLEADINGS.

If there was error in striking from the answer of the defendants the allegation that the plaintiff had received compensation payments in accordance with the Workmen's Compensation Act, the defendants were not prejudiced thereby. The court properly reduced the verdict by the amount which Foard would have been entitled to receive by way of subrogation on account of such payments but for the verdict that its negligence concurred with that of the defendants to cause the injury of the plaintiff. This was in accord with the provisions of G.S. 97-10.2(e). This statute provides that the compensation paid under the Act could not properly have been shown to the jury.

There was no error in denying the motion of the defendants to amend the answer so as to assert as a fifth further defense that Barnhill and CERCO were conducting the business of Foard even though Barnhill was not, at the time of the accident, the servant of Foard. As above stated, the immunity to suit granted by G.S. 97-9 does not extend to an independent contractor, supplying equipment or performing work pursuant to a contract with the plaintiff's employer, nor does it extend to the employee of such independent contractor. *Weaver v. Bennett, supra.*

RULINGS ON THE ADMISSIBILITY OF EVIDENCE.

There was no error in sustaining the plaintiff's objection to the introduction in evidence of the document purporting to be a contract between CERCO and Foard by which Foard agreed to indemnify CERCO against loss on account of any injury occasioned by the operation of the rented crane while "in the possession or under the custody and control of the lessee." The purported contract, if valid as between the parties, would not bar the plaintiff's right to recover from these defendants. His action against them should not be cluttered and confused by the simultaneous trial of a claim by one of the defendants against Foard on a contract to which the plaintiff was not a party. See *Gibbs v. Light Co.*, 265 N.C. 459, 468, 144 S.E. 2d 393. Furthermore, there is no evidence in this record that Foard's job superintendent, who signed the alleged contract, was authorized by Foard to do so. The authority of a superintendent on a construction project to place an order for necessary rental

equipment does not, as a matter of law, carry with it the implied authority to enter into an indemnity contract on behalf of his employer. In any event, even if the contract took effect, and would otherwise be admissible as against the plaintiff, it expressly states that the agreement to indemnify applies only to injuries occasioned by the operation of the equipment while it is "in the possession or under the custody and control of the lessee." The record clearly shows that this crane was never in the possession or control of Foard but was in the control and custody of Barnhill, the employee of CERCO, at all times while it was on the construction site.

We have carefully examined the remaining assignments of error relating to the admission and exclusion of evidence and find no error prejudicial to the defendants in any such ruling of the court.

No error.

MOORE, J., not sitting.

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

STATE v. CLARENCE RAY RHINEHART.

(Filed 16 June, 1966.)

1. Criminal Law § 103—

The dismissal by the court of a count in the indictment will be treated as a verdict of not guilty on that count.

2. Criminal Law § 143—

In this jurisdiction, a defendant has the unlimited right of appeal from a conviction in a criminal case, and this right is a substantial right which may not be denied or circumscribed. G.S. 15-180.

3. Criminal Law § 135—

While the trial court has discretionary power to suspend sentence in criminal cases upon reasonable conditions, a condition of suspension that defendant abandoned his appeal entered by him in another prosecution is an unlawful limitation upon his right to appeal and is void, and the judgment of suspension in the second prosecution will be stricken and the cause remanded for resentencing in that prosecution.

4. Criminal Law § 139—

The fact that a defendant is on parole at the time of his application for *certiorari* does not affect his right to review by the Supreme Court, since

conditions of parole are a restraint upon his liberty not shared by the public generally.

5. Criminal Law § 120—

A defendant has a substantial right in a verdict, and while a verdict is not complete until accepted by the court for record, the court does not have an unrestrained discretion in accepting or rejecting a verdict, and must accept a verdict which is complete and sensible.

6. Criminal Law § 117—

The verdict and judgment in a criminal action should be clear and free from ambiguity or uncertainty.

7. Same—

Where prosecutions of two defendants are consolidated for trial, the jury's verdict of guilty, in response to interrogation as to whether the jury found the defendants or either of them guilty or not guilty, is ambiguous in failing to make clear whether the jury found both defendants guilty or only one of them.

8. Same—

A verdict of not guilty as to one charge but guilty in regard thereto of aiding and abetting, is not ambiguous, and is a verdict of not guilty, the words "guilty of aiding and abetting" are not a part of the legal verdict and must be treated as surplusage. In such instance the court must accept the verdict of not guilty and may not require the jury to redeliberate.

9. Criminal Law § 118—

Where the jury returns a verdict of not guilty upon one count but adds the surplusage of guilty of aiding and abetting therein, and a verdict of guilty upon a second count, and the jury is erroneously required to redeliberate in regard to its verdict on the first count, and then returns a verdict of guilty on the first count without any reference to the second count, its action cannot be construed as an acquittal upon the second count, since under such circumstances the rule that a verdict which fails to refer to a count amounts to an acquittal upon such count is not applicable.

10. Criminal Law § 131—

Where the judgment and sentence are set aside and the cause remanded for proper sentence, defendant will be given credit for time served with full credit for any good time he has earned while serving the sentence.

11. Criminal Law § 147—

Where the solicitor does not serve any countercase or exceptions to defendant's statement of case on appeal, defendant's statement becomes the case on appeal. G.S. 1-282.

MOORE, J., not sitting.

DENNY, E.J., and PLESS, J., took no part in the consideration or decision of this case.

STATE *v.* RHINEHART.

ON *certiorari* from *Huskins, J.*, February 1963 Term of HAYWOOD.

At the February 1963 Term of the Superior Court of Haywood County the State had an indictment against defendant Clarence Ray Rhinehart in three counts: The first count charged defendant Rhinehart on 13 December 1962 with feloniously breaking and entering a building occupied by Biltmore Dairy Farms, a corporation, with intent to commit larceny of the personal property therein of the Biltmore Dairy Farms, a corporation; the second count charged defendant Rhinehart on the same date with the larceny of lawful money of the United States of the value of $421, the property of Biltmore Dairy Farms, a corporation; and the third count charged defendant Rhinehart on the same date with feloniously receiving $421 of the lawful money of the United States, the property of Biltmore Dairy Farms, a corporation, knowing at the time that the said money had been feloniously stolen. At the same term of the Superior Court of Haywood County the State had a separate indictment in three counts charging one James West with the identical offenses charged in the indictment against defendant Rhinehart. The indictments against Rhinehart and West were consolidated for trial. Defendants were represented by Charles McDaris and Frank Ferguson. Each defendant entered a plea of not guilty, and a jury was duly selected, sworn and empaneled to try the issues joined between the State and the defendants.

The State's evidence in brief summary tends to show the following facts: On 13 December 1962 Biltmore Dairy Farms, a corporation, owned and operated a dairy bar at Lake Junaluska in Haywood County, where it sold milk shakes and sandwiches. On that night between 8:30 and 8:45 p.m. defendants Rhinehart and West and one James Clark came to the Biltmore Dairy Bar at Lake Junaluska in Rhinehart's automobile, went in, and bought milk shakes, sandwiches, and cigarettes. A few minutes thereafter they left together in Rhinehart's automobile. Shortly after 9 p.m. the employees of the Biltmore Dairy Bar working in the Dairy Bar that night placed the money they had in a safe. The safe was locked. They cut off the lights, locked the doors, and left. The safe is located in the manager's office. When the Dairy Bar was closed and the doors locked, there was in the safe $580.04 in cash money of the United States and a large number of checks, the property of Biltmore Dairy Bar.

James Clark, who was in jail waiting to be sentenced, testified as a witness for the State. This is a brief summary of his testimony, except when quoted: On 13 December 1962 he and defendant Rhinehart were together all day. About 3:30 p.m. on that day he and

Rhinehart in Rhinehart's automobile picked up defendant West. During that afternoon and the early evening of that day the three of them rode around in Rhinehart's automobile in Buncombe, Haywood, and Jackson Counties. About 8:30 p.m. they stopped at the Biltmore Dairy Bar at Lake Junaluska. The three of them went into this Dairy Bar and each got a sandwich and a drink and cigarettes. While they were in the Dairy Bar there was a man in one of the back offices working with a calculating machine or some sort of machine, and they figured they were counting the money. One of them said "how easy it would be to get the money out of there. . . . We discussed how much money there might be in there and how easy it would be to get it." Then all three left the Dairy Bar, got in Rhinehart's automobile, and left. They drove around in the vicinity of the Dairy Bar, Clark driving the Rhinehart automobile. Clark testified as follows: "We had talked over who was going to do what. Rhinehart was to get in the phone booth and me and West was to go in and get the money." In circling around in the vicinity, they saw that the Dairy Bar was closed with the lights out. They returned and parked near the Dairy Bar. Rhinehart went in the telephone booth. He and West went to the back of the Dairy Bar and broke in a back door. They prized or broke through other doors, locked or unlocked, in the Dairy Bar. After searching in a number of offices and drawers and desks and finding nothing, they finally found the safe. They were hunting for money. He found a piece of iron and prized and opened the safe door. He and West took all the contents out of the safe and carried them to the automobile. When they arrived there, Rhinehart asked Clark how much money they got and he told them he had not looked. At that time Rhinehart began driving his automobile and headed towards Asheville. In Asheville they hit Smathers Street, crossed Hyatt Street on to Little Mountain. There they stopped and opened the bags containing the money. There was enough money to give to each one of them $137 apiece. There was about ten dollars in change which they did not divide at this time. They found in the bags about $5,000 in checks.They took these checks and bags containing the money and checks, and burned them.

Each defendant testified in his own behalf. Their testimony and their other evidence in brief summary tends to show the following facts: The defendants and James Clark about 8:30 p.m. on that night stopped at the Biltmore Dairy Bar at Lake Junaluska. Nothing was said there about how easy it would be to get the money belonging to the Dairy Bar, and no plan was made to come back and take it. The three of them did not return later that night to the Dairy Bar. West and Rhinehart were elsewhere that night and

know nothing about any breaking into the Dairy Bar or the stealing of money and checks therefrom.

The court at the beginning of its charge to the jury stated in substance: The defendants West and Rhinehart are charged in indictments which have been consolidated for trial with breaking and entering the Biltmore Dairy Bar in Haywood County on the night of 13 December 1962, and with the larceny of $421 lawful money of the United States from that establishment. They are also charged in the indictments with receiving stolen property, to wit, $421 lawful money of the United States knowing it to have been stolen. There is no evidence in the case to sustain the charge of receiving stolen property knowing it to have been stolen, and those charges are dismissed by the court against these two defendants. The case will be submitted to the jury on the charges of breaking and entering and larceny of money from the Biltmore Dairy Farms on the date mentioned. After the charge, and after deliberating in the jury room, the jury returned into open court and announced that they had agreed upon their verdict. The record shows the following in respect to the verdict:

"Gentlemen of the Jury, have you agreed upon your verdict in the case of *State vs. James West* and *State vs. Clarence Ray Rhinehart?*

"We have.

"Do you find the defendants or either of them guilty or not guilty of Breaking and Entering and Larceny as charged in the respective Bills against them?

"Guilty.

"Is that your verdict as to the defendant Clarence Ray Rhinehart?

"Rhinehart, we found not guilty of entering, but guilty of receiving, aiding and abetting.

"Mr. Foreman, let me ask you with regard to West, did you find the defendant, James West, in case 3595 guilty or not guilty of Breaking and Entering the Biltmore Dairy Farms Dairy Bar on the 13th day of December 1962, and as charged in the first count?

"Guilty.

"Did you find the defendant guilty or not guilty of the larceny of the sum of something over $400.00 in money on that night of the property of Biltmore Dairy Farms?

"That was guilty.

"Is that your verdict as to James West?

"Yes, sir.

"Now, as to the defendant Clarence Ray Rhinehart, did you find him guilty or not guilty of Breaking and Entering the Biltmore Dairy Farms Dairy Bar here in Haywood County on the 13th day of December, 1962, as charged in the first count in the Bill of Indictment?

"Not guilty of Entering, but guilty of Aiding and Abetting.

"Now, — well, gentlemen, the Court charges you that a person aids when being present at the time and place he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an aider and abettor is one who gives aid, comfort or commands, advises, incites or encourages another to commit a crime and the Court further charges you that under the law that all who are present at the place of a crime and are either aiding, abetting or assisting, or advising in its commission or are present for such present..... .....of the actual perpetrator in person are equally guilty and the Court charges you that if the State had satisfied you from the evidence in this case and beyond a reasonable doubt that Clark, West and Rhinehart went to that Dairy Bar together on the night of December 13, 1962, and Rhinehart got in the phone booth and pretended to make a phone call, but was in reality a watchman while West and Clark went in, the Court charges you that if you were satisfied beyond a reasonable doubt that was the truth about it, that then Rhinehart would be equally guilty as a principal and it would be your duty to find him guilty of Breaking and Entering and Larceny, just as the other two, if you found the other two were or not. So the State cannot accept your verdict of not guilty.....as an Aider and Abettor.

"Under the law those are the same thing and so you must return to the Jury Room and resume your deliberations as to Rhinehart and say by your verdict either he is guilty of Breaking and Entering and Larceny; bearing it in mind that if he was there aiding and abetting, the law makes him equally guilty as a principal.

"I don't know whether he is guilty, but you can't return a verdict saying he is guilty and not guilty. The Court cannot accept the verdict in the way you brought it in, so you may return to the jury room and consider the case as to Rhinehart.

"The Jury returns to the Courtroom and the following proceedings were had:

"Gentlemen of the Jury have you agreed upon your verdict as to the defendant Clarence Ray Rhinehart?

"We have.

"Do you find the defendant, Clarence Ray Rhinehart Guilty or not guilty of Breaking and Entering and Larceny of Biltmore Dairy Bar on the 13th of December, 1962, as charged in the first count in the Bill of Indictment?

"Guilty on both counts.

"The second count charges larceny, and what is your verdict in the second count?

"The second count is guilty.

"Is that your verdict so say you all?

"Yes, sir."

The court sentenced defendant Rhinehart to be imprisoned for a term of not less than five nor more than seven years. The court sentenced defendant West to be imprisoned for a term of not less than three nor more than five years. From the sentence imposed, defendant Rhinehart appealed to the Supreme Court. The record before us does not show whether West appealed.

The record before us shows that at the February 1963 Term of Jackson County Superior Court, Huskins, J., presiding, defendant Rhinehart entered a plea of guilty of breaking and entering and larceny, and the State took a nol pros with leave on a count in the indictment charging receiving. Rhinehart was sentenced to imprisonment for a term of not less than four nor more than six years. With the consent of defendant Rhinehart and his counsel, and at his request, the prison sentence as to him was suspended for five years upon certain conditions, one of said conditions being that defendant Rhinehart withdraw his appeal taken with relation to the sentence imposed upon him at the February 1963 term of the Superior Court of Haywood County, and serve that sentence. The record before us shows an application by defendant Rhinehart dated 28 February 1963 and signed by his attorney Frank D. Ferguson, Jr., respectfully requesting permission to withdraw his appeal to the Supreme Court in the Haywood County case and to be permitted to commence serving that sentence.

Thereafter, Rhinehart filed a petition in Haywood County Superior Court for a post conviction hearing to review the constitutionality of his trial at the February 1963 Term of Haywood County Superior Court. This petition was dismissed without a hearing by Patton, J., on 19 July 1963 on the ground that it did not comply with G.S. 15-217 *et seq.* Rhinehart then petitioned this Court for *certiorari.* On 30 October 1963 we remanded the petition for a hearing and appointment of counsel. Patton, J., on 29 November 1963 appointed Walter C. Clark to represent petitioner.

The record before us also shows that at the February Term 1964

of Haywood County Superior Court Pless, J., conducted a hearing in the nature of a *habeas corpus* proceeding and post conviction hearing at the request of James E. West and Clarence Ray Rhinehart. Each was represented by a court appointed attorney. At the hearing before Judge Pless these defendants requested that they be furnished a trial transcript of the evidence and the charge of the court at the hearing before Judge Huskins at the February 1963 Term of Haywood County Superior Court. The judge denied the request because Miss Edna Hayes, the court reporter, had died since the hearing and no one was able to read her stenographic notes. Judge Pless entered an order denying them any relief.

Rhinehart then applied to this Court for *certiorari* to review Judge Pless's order, which we denied on 12 July 1964.

At some date not stated in the record defendant Rhinehart filed a petition for a writ of *habeas corpus* before Judge Craven, United States District Judge for the Western District of the State of North Carolina. Judge Craven on 24 February 1964 entered an order in substance as follows: It appearing to the court from the answer of the State of North Carolina and various documents attached thereto that petitioner Rhinehart has been afforded a completely fair and plenary hearing in the Superior Court of North Carolina under the North Carolina Post Conviction Hearing Act, and that he was represented by court appointed counsel competent to put before the court his contentions with respect to alleged violations of his constitutional rights, it is ordered that his petition be denied and the action dismissed. From this order Rhinehart appealed to the United States Court of Appeals for the Fourth Circuit. That court remanded the matter to the District Court to consider whether Rhinehart should be required to avail himself of any right of review by the State Supreme Court which was still available, and if no State remedies were open, the District Court should review the transcript of the post conviction hearing to determine whether the findings of fact and conclusions of law were supported by the record as a whole. *Rhinehart v. State of North Carolina,* 344 F. 2d 114 (30 March 1965).

On 14 June 1963, Craven, United States District Judge, entered an order in substance as follows: It is the opinion of the court that the suspension of the prison sentence in the Jackson County Superior Court on condition that Rhinehart withdraw his appeal to the Supreme Court of North Carolina from the conviction and sentence at the February 1963 Term of Haywood County Superior Court is constitutionally invalid, and the court concluded that defendant had unlawfully been denied his right of appeal to the Supreme Court of North Carolina from the judgment and sentence

imposed upon him in the Haywood County Superior Court. That the Attorney General of North Carolina consented in open court that he enter an order permitting the petitioner to *nunc pro tunc* file his notice of appeal to the Supreme Court of North Carolina from a judgment and sentence in the Haywood County Superior Court. That nothing contained in the order shall be deemed a mandate by him to the Supreme Court of North Carolina, but is simply an authorization to him to file his appeal as if it had been filed in apt time. Jurisdiction is retained by him for the limited and sole purpose of further considering this matter in the event the Supreme Court of North Carolina should decide that it cannot, or should not, entertain the appeal herein permitted. The court adjudged that the judgment and sentence imposed in Jackson County Superior Court at the February 1963 Term is a violation of his constitutional rights, and that he is relieved of the burdening effect of such suspended sentence and that the judgment of the Jackson County Superior Court is invalid and of no force and effect.

On 9 August 1965 defendant Rhinehart filed in this Court a petition for a writ of *certiorari* to review the validity of his trial at the February 1963 Term of the Superior Court of Haywood County, and in his petition he filed a copy of Judge Craven's order. The Attorney General filed an answer to Rhinehart's petition for writ of *certiorari* on 31 August 1965, in which it states, among other things, that defendant Rhinehart began service of the prison sentence immediately after the trial in the Haywood County Superior Court February 1963 Term, and that after he had served 22 months of this sentence he was subsequently paroled, and that at the present time he is under the conditions of parole issued to him by the State of North Carolina. The reply of the Attorney General also states that he joins in the request that the Supreme Court permit the appeal in order that the petitioner may have his full day in court and his right of review by the Supreme Court. On 19 October 1965 we allowed the petition for a writ of *certiorari* and ordered that his appeal from the judgment imposed at the trial in the Haywood County Superior Court be reviewed by this Court, and that it be heard in its regular order at the Spring Term 1966.

From the record before us it also appears that shortly before or after we granted the *certiorari* that a court reporter was found who was able to read and transcribe the notes of the reporter at the original trial in Haywood County who had died since the trial.

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

Sanford W. Brown for defendant appellant.

PARKER, C.J. The dismissal by the court of the charge in the third count of each indictment against Rhinehart and West of receiving property knowing it to have been stolen will be treated as a verdict of not guilty on that count as to defendants Rhinehart and West. *S. v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411.

In the instant case Rhinehart appealed to the Supreme Court. The week following his trial in the instant case, he appeared in the Superior Court of Jackson County, and entered a plea of guilty of breaking and entering and larceny, and was sentenced to imprisonment for a term of not less than four nor more than six years. With the consent of Rhinehart and his counsel, and at his request, this prison sentence as to him was suspended for five years upon certain conditions, one of said conditions being that Rhinehart withdraw his appeal from the prison sentence imposed upon him in the instant case at the February 1963 Term of Haywood County Superior Court, and serve that sentence. It appears from the record before us that he did withdraw his appeal, and began service of the prison sentence imposed at the February 1963 Term of Haywood County.

The law is well settled in this jurisdiction that the trial court in its discretion may suspend sentences in criminal cases upon reasonable conditions. 1 Strong, N. C. Index, Criminal Law, § 135. In criminal cases the right of appeal by a convicted defendant from a final judgment is unlimited in the courts of North Carolina. This right of appeal is a substantial right. G.S. 15-180; *S. v. Hodge,* 267 N.C. 238, 147 S.E. 2d 881; *S. v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800; *S. v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *S. v. Blades,* 209 N.C. 56, 182 S.E. 714. In *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9, we held that the execution of a sentence in a criminal action may not be suspended on conditions that conflict with the defendant's right of appeal. In *S. v. Patton,* 221 N.C. 117, 19 S.E. 2d 142, the Court held that while the trial judge has discretionary power to change the sentence in a criminal action during the term, where it appears of record that after prayer for judgment was continued, with defendant's consent, upon specified terms, the court, upon learning of defendant's intention to appeal, struck that judgment out and imposed a jail sentence, the cause will be remanded for resentence, since defendant's exercise of his right to appeal, C.S. 4650 (now G.S. 15-180), should not prejudice him in any manner. In its opinion the Court said: "But the defendant's consent to the terms of the judgment did not constitute a waiver of his right of appeal for errors to be assigned." In our opinion, and we so hold, the suspension of the prison sentence in the Superior Court of Jackson County on the condition that Rhinehart withdraw his appeal in the instant case taken at the February 1963 Term of Haywood County

Superior Court is not a reasonable condition, and is void, even though done at his request and with his consent, because his right to appeal in the instant case should not be denied and because it would seem that under the circumstances Rhinehart's request and consent were not entirely free and voluntary.

The Attorney General states in his reply to Rhinehart's petition for a writ of *certiorari,* which we allowed on 19 October 1965, that Rhinehart, after serving 22 months of his sentence imposed at the February 1963 Term of Haywood County Superior Court, was paroled, and at the present time he is under the conditions of parole issued to him by the State of North Carolina. G. S. 148-61.1 provides that under certain circumstances the order of parole of any parolee can be revoked, and if revoked the parolee shall thereafter be returned to the penal institution having custodial jurisdiction over him. The conditions of parole are a restraint on Rhinehart's liberty not shared by the public generally. He is still under the supervision of the parole authorities and subject to be remanded to prison if he fails to perform or violates the conditions of the parole. The fact that Rhinehart is on parole does not under the particular facts of this case, and particularly as we have issued a *certiorari* to review the validity of his trial in the instant case, prevent a review here by us of the validity of his trial at the February 1963 Term of Haywood County Superior Court. *S. v. Mathis,* 109 N.C. 815, 13 S.E. 917, is factually distinguishable. In that case defendant was convicted of the crime of murder and there was a judgment of death against him, from which he appealed to the Supreme Court. Pending the appeal and before it was reached in its order to be heard and determined, the Governor commuted his sentence of death to life imprisonment. The defendant accepted the commutation and began his sentence of imprisonment. When his appeal was called in its order to be heard, the prisoner exhibited before the Court the order of commutation of his sentence signed by the Governor, signified his acceptance of the same, and prayed that the Court permit him to abandon his appeal. The Court permitted him to abandon his appeal, and his appeal was dismissed.

When the jury returned to the courtroom to render its verdict, the record shows the following as to Rhinehart:

> "Gentlemen of the Jury, have you agreed upon your verdict in the case of *State vs. James West* and *State vs. Clarence Ray Rhinehart?*
>
> "We have.
>
> "Do you find the defendants or either of them guilty or not

guilty of Breaking and Entering and Larceny as charged in the respective Bills against them?

"Guilty.

"Is that your verdict as to the defendant Clarence Ray Rhinehart?

"Rhinehart, we found not guilty of entering, but guilty of receiving, aiding and abetting.

* * *

"Now, as to the defendant Clarence Ray Rhinehart, did you find him guilty or not guilty of Breaking and Entering the Biltmore Dairy Farms Dairy Bar here in Haywood County on the 13th day of December, 1962, as charged in the first count in the Bill of Indictment?

"Not guilty of Entering, but guilty of Aiding and Abetting."

Defendant assigns as error that the court committed error in not receiving the verdict as to Rhinehart, "Rhinehart, we found not guilty of entering, but guilty of receiving, aiding and abetting." Defendant contends this was a verdict that Rhinehart was not guilty of a felonious breaking and entry and not guilty of larceny as charged in the indictment. Defendant further assigns as error that the court further erred in then recharging the jury and in receiving a verdict that Rhinehart was guilty of a felonious breaking and entry and guilty of larceny as charged in the indictment.

A verdict is a substantial right. *S. v. Gatlin,* 241 N.C. 175, 84 S.E. 2d 880. But it is not complete until it is accepted by the court for record. *S. v. Gatlin, supra; S. v. Perry,* 225 N.C. 174, 33 S.E. 2d 869.

Verdicts and judgments in criminal actions should be clear and free from ambiguity or uncertainty. The enforcement of the criminal law and the liberty of the citizen demand exactitude. *S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458.

In accepting or rejecting a verdict the trial judge cannot exercise unrestrained discretion. The trial judge should examine a verdict with respect to its form and substance to prevent a doubtful or insufficient verdict from becoming the record of the court, but his power to accept or reject the jury's finding is not absolute. *S. v. Perry, supra; S. v. Bazemore,* 193 N.C. 336, 137 S.E. 172.

The Court said in *S. v. Perry, supra:*

"When, and only when, an incomplete, imperfect, insensible, or repugnant verdict or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and

bring in a proper verdict. *S. v. Arrington,* 7 N.C. 571; *S. v. McKay,* 150 N.C. 813, 63 S.E. 1059; *S. v. Bazemore, supra* [193 N.C. 336, 137 S.E. 172]; *S. v. Noland,* 204 N.C. 329, 168 S.E. 412; *Queen v. DeHart,* 209 N.C. 414, 184 S.E. 7."

This was quoted with approval in *S. v. Matthews,* 231 N.C. 617, 58 S.E. 2d 625.

When the jury returned to the courtroom, it stated it had agreed upon a verdict in the West and Rhinehart cases. It was then asked: "Do you find the defendants or either of them guilty or not guilty of breaking and entering and larceny as charged in the respective bills against them?" The jury replied: "Guilty." This verdict did not have a definite meaning free from ambiguity, for the reason that it is not clear whether the jury found both West and Rhinehart guilty, or only one of them guilty. The jury was then asked: "Is that your verdict as to the defendant Clarence Ray Rhinehart?" The jury replied: "Rhinehart, we found not guilty of entering, but guilty of receiving, aiding and abetting." Then, after the jury was asked as to West, it was asked this question: "Now, as to the defendant Clarence Ray Rhinehart, did you find him guilty or not guilty of breaking and entering the Biltmore Dairy Farms Dairy Bar here in Haywood County on the 13th day of December 1962, as charged in the first count in the Bill of Indictment?" The jury replied: "Not guilty of entering, but guilty of Aiding and Abetting."

Giving the above verdict as to Rhinehart a reasonable construction, it clearly appears that it is free from ambiguity or imperfection, and that the jury in terms and effect found Rhinehart not guilty of breaking and entering as charged in the first count of the indictment against him. The additional words, "but guilty of receiving, aiding and abetting," are not a part of the legal verdict on the first count in the indictment, and do not leave in doubt the verdict of acquittal on the first count in the indictment, and will be treated as mere surplusage. *S. v. Perry, supra.* The verdict of acquittal of Rhinehart on the charge of breaking and entering as charged in the first count of the indictment should have been accepted by the trial court and recorded, and the court committed prejudicial error in not accepting it and directing the jury to retire and reconsider its verdict of acquittal on the first count in the indictment. *S. v. Matthews, supra,* relied upon by the State, is factually distinguishable, for the reason that in that case the court then made inquiry of the jury in the following language: "Do you find the defendants guilty of an assault with a deadly weapon?" To which the foreman of the jury replied: "Yes. Guilty of aiding and abetting."

Giving the verdict as to Rhinehart tendered by the jury before it was instructed by the judge to retire and reconsider its verdict a reasonable construction, it appears that the jury did not tender a verdict in Rhinehart's case as to the offense of larceny charged in the second count of the indictment. However, when it returned to the courtroom after it had reconsidered its verdict as to Rhinehart, it found as its verdict that Rhinehart was guilty of larceny as charged in the second count of the indictment against him, and the court accepted this verdict of guilty for record. It is established law by many of our decisions that where a verdict of guilty specifically refers to some of the counts, but not all, it amounts to an acquittal on the counts not referred to. 1 Strong, N. C. Index, Criminal Law, § 118, p. 798, where many of our cases are cited. That principle of law is not applicable here because the jury acquitted Rhinehart of the first count in the indictment.

Many of the assignments of error in the record do not comply with the rules of this Court. However, we have examined all defendant's assignments of error as to the evidence and as to the charge of the court, and none are deemed sufficiently prejudicial to warrant disturbing the verdict below that Rhinehart is guilty on the second count of the indictment charging larceny. One judgment was entered in the instant case.

The judgment is vacated, and the cause is remanded to the Superior Court of Haywood County to the end that the court below may (1) strike the verdict entered that Rhinehart is guilty as charged in the first count in the indictment, (2) record the one first tendered by the jury that Rhinehart is not guilty as charged in the first count in the indictment, and (3) pronounce judgment on the verdict against Rhinehart that he is guilty of larceny as charged in the second count of the indictment charging him with larceny. In pronouncing judgment on the verdict of guilty of larceny as recorded, the judge will give Rhinehart full credit for all the time he has served on the judgment in this case, with full credit for any good time that he has earned while serving the sentence.

This is a pauper appeal. However, it appears that Rhinehart is represented by a lawyer employed by himself, because there is nothing in the record to indicate that his present counsel of record was assigned by the court to represent him. Defendant's statement of his case on appeal was prepared by his attorney and service of it was accepted by the State solicitor. There is nothing to indicate that the solicitor served any countercase or exceptions to defendant's statement of case on appeal. Therefore, defendant's statement of case on appeal became the case on appeal. G.S. 1-282. Parts of the case on appeal are referred to in the index as appearing on cer-

tain pages of the case on appeal. No such pages are in the case on appeal. In justice to the learned judge who tried this case, there is nothing to indicate that he ever saw the case on appeal.

Error and remanded.

MOORE, J., not sitting.

DENNY, E.J., and PLESS, J., took no part in the consideration or decision of this case.

DR. S. J. POTTS, PLAINTIFF, v. JAMES E. HOWSER, T/A HOWSER BOAT COMPANY, DEFENDANT AND JACK R. HARRIS, ADDITIONAL DEFENDANT.

(Filed 16 June, 1966.)

1. Courts § 6—

Upon appeal to the Superior Court from orders of the clerk relating to motions for judgment by default and inquiry, to strike allegations from a pleading and for the joinder of an additional party defendant, the jurisdiction of the Superior Court is not derivative, and the Superior Court has jurisdiction to determine the motions *de novo*, since the clerk is but a part of the Superior Court.

2. Judgments § 13; Admiralty—

In an action for damages arising out of a boat collision on a lake, defendant's filing of a petition in admiralty seeking a limitation of liability (46 U.S.C.A., Ch. 8, § 183 *et seq.*) is not a motion within the purview of G.S. 1-125, and does not preclude the clerk from entering a judgment by default and inquiry under G.S. 1-212 for failure of defendant to answer or demur within the time limited. In this case the petition in admiralty for limitation of liability and for order restraining further proceedings in the State court was denied, and petitioner's appeal therefrom was not perfected.

3. Judgments § 13—

Motion for extension of time in which to demur or plead is not a motion required by statute to be made prior to the filing of answer within the purview of G.S. 1-125, and upon denying such motion the clerk is authorized to enter judgment by default for failure of defendant to demur or answer within the time limited, G.S. 1-212.

4. Judgments § 15; Parties § 4—

Where defendant, after judgment by default and inquiry has been properly entered against him, files answer requesting the joinder of an additional party defendant for contribution, the order of the clerk joining the additional defendant is properly stricken by the clerk, the joinder of the

additional party defendant being inappropriate after the entry of the default judgment.

5. Judgments § 15; Bill of Discovery § 2—

After judgment by default and inquiry has been properly entered against defendant, who thereafter files answer and requests an adverse examination of plaintiff relating to plaintiff's prior injuries as affecting the issue of damages, the clerk properly strikes his previous order requiring the adverse examination of plaintiff, since, defendant's tardy answer having been stricken, he cannot be held to have filed answer, and therefore does not come within the purview of G.S. 1-568 *et seq.* His right to such examination upon the hearing of the issue of damages upon the inquiry is not presented.

6. Judgments § 15—

Where judgment by default and inquiry is properly entered, the Superior Court has inherent power in the exercise of its discretion to grant upon the inquiry on the amount of damages defendant's application for an order requiring plaintiff to submit to an examination by a medical expert to obtain evidence as to the extent of plaintiff's injuries.

MOORE, J., not sitting.

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

APPEAL by original defendant from *McLaughlin, J.,* 12 April 1965 Session of ALEXANDER. Docketed and argued as Case No. 463 Fall Term 1965, and docketed as Case No. 445 Spring Term 1966.

Civil action to recover $275,000 damages for personal injuries and $422 for damage to a boat.

Plaintiff alleges in brief summary that about 7:15 p.m. on 11 April 1962 he was in his 16-foot mahogany custom-built fishing boat fishing. At the time his boat was stationary on the waters of Oxford Lake, also known as Lake Hickory, in Alexander County. He had lights on the front and rear of his boat, and also a utility light on the boat which was flashing a red light on and off. At the same time James E. Howser, trading as Howser Boat Company, was operating an Owens cabin cruiser boat owned by him on the waters of the same lake. When Howser's cabin cruiser boat was headed directly in the direction of plaintiff's fishing boat, Howser left the helm of his boat and began to work on or adjust the generator of his boat, and by reason of Howser's negligence, which is alleged in the complaint with particularity, Howser's boat collided with plaintiff's boat, proximately causing personal injuries to plaintiff and damage to his boat. Summons and a verified copy of the complaint were duly served on Howser.

On 21 May 1963 Howser filed an "In Admiralty Petition" in the United States District Court for the Western District of North

Carolina and an *ad interim* stipulation with surety seeking a limitation of liability, in accordance with the provisions of 46 U.S.C.A., Ch. 8, § 183 *et seq.*, and requesting the court to issue an injunction restraining the prosecution of all suits and actions and proceedings already begun to recover for damages sustained because of the collision of boats alleged in the complaint. On 23 May 1963 Wilson Warlick, United States District Judge, issued an order stating in substance: It is not agreeable to the court to assume the action and sign an order restraining further prosecutions of any actions that might be instituted by parties in interest, unless and until it is shown to the court that the facts as stated in Howser's petition bring this petition into the realm of admiralty as recognized by the Federal Statutes; the court offers to counsel presenting the petition an order giving notice to anyone interested to appear before the court, within a stated time, to show cause, but refuses to sign an order restraining unknown parties based on the petition, particularly since it appears that a prior action is now pending in the Superior Court of Alexander County about this same controversy. To the court's failure to sign the order requested, petitioner gave notice of appeal to the Federal Court of Appeals. Counsel for defendant Howser states in his brief, "Said appeal was never perfected." On page 3 of the record it is stated: "It is further stipulated that after hearing, his Honor, Wilson Warlick, United States District Judge for the Western District of North Carolina, on February 28, 1964 granted the motion to dismiss the limitation proceedings in the United States District Court instituted by the defendant, for lack of jurisdiction."

On 22 May 1963 defendant Howser filed in the Superior Court of Alexander County a motion that he be allowed not to file answer or other pleadings until 30 days after a final determination of the "In Admiralty Petition" filed by him in the United States District Court for the Western District of North Carolina. On 26 September 1963 the clerk of the Superior Court of Alexander County denied this motion. On 1 October 1963 defendant Howser excepted to the clerk's order denying his motion, and appealed to the Superior Court of Alexander County.

On the same day, 26 September 1963, the clerk of the Superior Court of Alexander County entered an order in substance as follows: It appearing to the court that summons and complaint in the case of *Dr. S. J. Potts v. James E. Howser, t/a Howser Boat Company*, were issued on 12 April 1963, were served upon the defendant by the sheriff of Mecklenburg County on 23 April 1963; and it further appearing to the court that more than 30 days had expired since summons and copy of the complaint were served upon the defendant and that no pleadings as allowed by law have been filed

by the defendant; and it further appearing to the court that motion of the defendant for an extension of time to file answer which goes beyond the jurisdiction and authority of the court has been denied by an order entered in this cause; it is now, therefore, on motion of plaintiff adjudged that judgment by default be entered in said cause, and that said cause be transferred to the civil issue docket to the end that an issue of inquiry be presented to the court and a jury for its determination as to the damages to which plaintiff is entitled.

On 3 October 1963 defendant Howser filed a motion in the Superior Court of Alexander County praying that the judgment by default and inquiry signed by the clerk of the Superior Court of Alexander County on 26 September 1963 be declared null and void. There is nothing in the record to indicate that the clerk passed on this motion.

On 23 October 1963 defendant Howser filed in the Superior Court of Alexander County an answer denying that he was guilty of any negligence in respect to the collision as alleged in the complaint. As a first further answer and defense defendant alleged that if the jury should find that he was negligent in any manner that plaintiff was also negligent in certain particulars alleged in his first further answer, and that this constituted contributory negligence on plaintiff's part and bars any recovery by plaintiff in this action. For a second further answer, defense and cross-action defendant avers that Jack R. Harris was in the boat at the time of the collision, that defendant observed that the water pump of his engine was not working properly, that he asked Harris to operate the boat while defendant adjusted the grease cups in the water pump, and that if the jury should find that he was negligent then Harris was also guilty of negligence in the operation of the boat in the manner specified in his second further answer, defense and cross-action, and that such negligence combined and concurred with his negligence in producing any injury or damage which plaintiff may have sustained, and he asks that Harris be brought in under G.S. 1-240 as an additional party defendant. On 23 October 1963 the clerk of the Superior Court of Alexander County issued an order making Harris a party defendant in the action and ordering that a copy of the summons, the complaint, and the answer of defendant Howser be served upon him, and that Harris be allowed 30 days after such service within which to plead.

On 30 October 1963 plaintiff filed a motion in the case praying that the purported answer filed by defendant Howser on 23 October 1963 be expunged of record, and that the Superior Court of Alexander County at the March 1964 Session conduct an inquiry as to

the amount of damages the plaintiff is entitled to recover of defendant.

On 20 November 1963 Jack R. Harris filed a motion in the Superior Court of Alexander County alleging in substance: That the order of the court on 23 October 1963 making him a party to the action was improperly entered in that there existed at the time a judgment by default in favor of plaintiff and against the original defendant which was regular on its face, and that such judgment bars his joinder in this action for the purpose of contribution. On the same date Harris, without waiving the benefit of his motion to vacate the order making him an additional party defendant, demurred to the cross-action of defendant Howser.

On 19 December 1963 defendant Howser filed an affidavit in the Superior Court of Alexander County stating in substance: That he desires to examine plaintiff in respect to his medical history, to examine certain persons who have known plaintiff for a long period of time, and to inquire as to disability payments received by him from the Government, and he prayed the court to issue an order appointing a commissioner to conduct such examination upon written interrogatories, as provided by G.S. 1-568.17, and make a return to the court. On the same date Howser presented to the court 38 questions which he wished to ask plaintiff. On the same date the clerk of the Superior Court of Alexander County allowed the motion to examine plaintiff.

On 21 December 1963 plaintiff filed a motion in the Superior Court of Alexander County that the court enter an order striking out its order allowing defendant Howser to examine plaintiff upon written interrogatories. On 11 January 1964 the clerk of the Superior Court of Alexander County issued an order striking out his order previously entered allowing defendant Howser to examine plaintiff, and decreeing his former order as of no force and effect whatsoever. To this order Howser excepted and appealed to the Superior Court.

By stipulation on 13 March 1964 by attorneys for plaintiff, for the original defendant Howser, and for defendant Harris, the matter came on for hearing before McLaughlin, J., Resident Judge of the 22nd Judicial District, on the following:

"(1) Appeal by defendant from Order of the Clerk denying the defendant's Motion for an Extension of Time;

"(2) Motion to set aside Judgment by Default and Inquiry;

"(3) Motion of plaintiff to strike purported Answer of defendant;

"(4) Motion to strike Order making Jack Harris an Additional Party;

"(5) Appeal from Order striking Order to require plaintiff to appear and answer certain Interrogatories."

All the parties appeared at the hearing before Judge McLaughlin, and Judge McLaughlin, after hearing the arguments of counsel for plaintiff, Howser, and Harris, entered an order which was dated 12 April 1965, and is in substance as follows: (1) The order of the clerk of the Superior Court of Alexander County dated 26 December 1963 denying plaintiff's motion for an extension of time to file an answer or other pleading to the complaint is adjudged correct and is affirmed (Judge McLaughlin's order states that the order of the clerk was dated 26 December 1963; this is a manifest error because the record shows that the clerk's order was dated 26 September 1963. And further, Judge McLaughlin's order stated that it was plaintiff's motion; this is a manifest error, for the record shows that it was defendant Howser's motion.); (2) with respect to the plaintiff's motion to set aside the judgment by default, it is adjudged that such judgment was properly and duly entered, and the court, in its discretion, declines to set the same aside (Judge McLaughlin's order stated that it was plaintiff's motion; this is a manifest error, for the record shows that it was defendant Howser's motion.); (3) the motion by plaintiff to strike the answer of the original defendant filed after the entry of the judgment by default and inquiry is allowed, and such answer is hereby stricken; (4) the motion of the additional defendant Harris to strike the order making him a party to this action is allowed; and (5) the appeal of the original defendant Howser from the order of the clerk striking the clerk's previous order requiring plaintiff to appear and answer certain interrogatories is affirmed.

From Judge McLaughlin's order, the original defendant Howser appealed to the Supreme Court.

James C. Smathers for original defendant Howser, appellant.

McElwee & Hall by John E. Hall for plaintiff appellee.

Carpenter, Webb & Golding by William B. Webb for additional defendant Harris, appellee.

PARKER, C.J. The original defendant Howser has four assignments of error. He does not assign as error Judge McLaughlin's ruling that the clerk's order dated 26 September 1963 denying his motion for an extension of time to file answer or other responsive pleading to the complaint is adjudged correct, and is affirmed. In

defendant Howser's brief it is stated: "The defendant does not question the right of the Clerk of the Superior Court of Alexander County to sign the order (R. p. 16) denying the motion of the defendant for an extension of time to plead which is the subject of paragraph #1 of Judge McLaughlin's order (R. p. 44)." But he does assign as errors Judge McLaughlin's other four rulings.

The clerk is but a part of the Superior Court and when the motions in the instant case were brought before the judge by stipulation of the parties to be heard, the Superior Court judge's jurisdiction is not derivative, but he has jurisdiction to hear and determine all these motions in controversy in the action. G.S. 1-276; *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365; 1 McIntosh, N. C. Practice and Procedure, 2d Ed., § 164, p. 98.

Defendant Howser assigns as error Judge McLaughlin's second ruling which is in substance as follows: With respect to defendant Howser's motion to set aside the judgment by default, it is adjudged that such judgment was duly and properly entered, and the court, in its discretion, declines to set the same aside. This assignment of error is overruled.

In the instant case summons was issued on 12 April 1963, and served on defendant Howser on 23 April 1963. Defendant Howser had 30 days after the service of summons upon him to appear and demur or answer, or after the final determination of certain motions specified in the statute, or *"after the final determination of any other motion required to be made prior to the filing of the answer,"* (Emphasis ours), or after final judgment in certain other matters specified in the statute which are not relevant here. Instead of demurring or answering in the State court in the instant case, defendant Howser elected to file an "In Admiralty Petition" in the United States District Court seeking a limitation of liability, in accordance with the provisions of 46 U.S.C.A., Ch. 8, § 183 *et seq.,* and requesting the Federal court to issue an injunction restraining all proceedings in the instant case in the Superior Court of Alexander County. Two days following the filing of his "In Admiralty Petition" in the Federal District Court, Judge Warlick, United States District Judge, refused to sign an order restraining any proceedings in the instant case in the State court. Defendant Howser appealed, but states in his brief that he never perfected his appeal. It is stipulated that Judge Warlick on 28 February 1964 dismissed Howser's petition for lack of jurisdiction. Defendant Howser makes no contention in his brief that his "In Admiralty Petition" filed in the United States District Court stayed proceedings in the State court. Defendant Howser's counsel states in his brief: "The writer now understands that if Judge Warlick had signed the order presented to him by

counsel for the defendant, this would have stayed the proceedings in the State court."

Defendant Howser's argument in his brief is as follows:

> "THE DEFENDANT DOES CONTEND that, in accordance with the statute, G.S. 1-125, he should have been allowed thirty (30) days from the signing of said order in which to file answer. The petition in admiralty was valid on its face. If Judge Warlick had signed the order presented to him, it would have stayed the proceeding in the State Court (46 U.S.C.A. 185). An appeal was taken from the order which Judge Warlick did sign, which was never perfected. The plaintiff made no motion in the State Court for a period of several months after the time for appeal in the Federal Court had expired, and, having filed a motion, valid when made, in the State Court, the defendant did not file an answer.
>
> "The defendant relies strictly upon the wording of the statute, G.S. 1-125. No determination of the motion of the defendant had been made until the very date upon which the Judgment by Default and Inquiry was made.
>
> "Of course, there is provision in the statute which provides that the Clerk shall not extend the time for filing answer or demurrer more than once 'nor for a period of time exceeding twenty (20) days except by consent of the parties.' The defendant's motion was not based upon a simple extension of time. It was filed upon the belief of counsel for the defendant that the petition actually stayed the proceeding in the State Court."

In his brief on this assignment of error, defendant Howser cites no case or authority to sustain his argument. This contention is not tenable.

In essence Howser's motion made on 22 May 1963 before the clerk of the Superior Court of Alexander County that he be allowed not to file answer or other pleading until 30 days after the final determination of the "In Admiralty Petition" filed by him in the United States District Court is a motion for an extension of time in which to demur or plead in the instant case.

G.S. 1-125 provides: "The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties." The motion of defendant here was in essence not for the twenty-day extension, but for an indeterminate extension based on the petition in Federal Court. There has been no showing of jurisdiction in the clerk to allow such motion. A motion to strike was held to be within the

category of "other motions" after final determination of which thirty days extension is allowed by C.S. 509, now G.S. 1-125. However, a motion to strike was required by statute to be made before answer or demurrer, or before an extension of time to plead is granted, C.S. 537, now G.S. 1-153. *Heffner v. Insurance Co.*, 214 N.C. 359, 199 S.E. 293. There is no statutory requirement that a motion for extension of time be made before answer.

It seems clear that a motion for an extension of time in which to demur or plead in the instant case is not "any other motion required to be made prior to the filing of the answer" within the intent and language of G.S. 1-125, for the simple reason that there is no statutory requirement that a motion for extension of time to demur or plead shall be made prior to the filing of the answer.

It is true that the clerk of the Superior Court of Alexander County did not deny Howser's request made on 22 May 1963, which was in essence a request for an extension of time in which to demur or plead, until 26 September 1963. However, there is no requirement that the clerk should immediately sign a judgment by default and inquiry for failure by defendant to appear and demur or plead, when the time to demur or plead has expired. See *King v. Rudd*, 226 N.C. 156, 37 S.E. 2d 116. When the judgment by default and inquiry was entered by the clerk on 26 September 1963, the time for defendant Howser to appear and answer or otherwise plead to the complaint had long expired. Howser's answer was filed on 23 October 1963. It was proper for the clerk to enter such judgment, which is regular on its face. G.S. 1-212; *Duplin County v. Ezzell*, 223 N.C. 531, 27 S.E. 2d 448; *Morton v. Insurance Co.*, 255 N.C. 360, 121 S.E. 2d 716; 3 Strong's N. C. Index, Judgments, § 13.

If a motion for extension of time were to be construed to be "any other motion required to be made prior to the filing of the answer," G.S. 1-125 would contradict itself by allowing 30 days extension after the clerk's determination to disallow a petition for 20 days in which to demur or plead.

Defendant Howser assigns as errors the third and fourth rulings by Judge McLaughlin in his order. Judge McLaughlin's third ruling is as follows: "The Motion of the plaintiff to strike the Answer of the original defendant filed after the entry of the Judgment by Default is allowed and such Answer be and the same hereby is stricken." Judge McLaughlin's fourth ruling is as follows: "The Motion of the additional defendant Jack R. Harris to strike the Order making him a party to this action be and the same hereby is allowed." Each of these assignments of error is overruled.

The judgment by default and inquiry in the instant case was entered on 26 September 1963, before defendant Howser filed an

answer on 23 October 1963, and is valid on its face, and defendant Howser is not entitled to have it declared null and void or set aside. Under such circumstances, defendant Howser is not entitled to bring in Harris as a party defendant after default judgment has been entered against him (Howser). *Denny v. Coleman,* 245 N.C. 90, 95 S.E. 2d 352. Consequently, Judge McLaughlin properly allowed the motion of the additional defendant Harris to strike the order making him a party.

Defendant Howser's last assignment of error is to the fifth ruling in Judge McLaughlin's order, which reads as follows: "The Appeal of the original defendant from the Order of the Clerk striking the Clerk's previous Order requiring the plaintiff to appear and answer certain Interrogatories is affirmed." This assignment of error is overruled.

The judgment by default and inquiry here was entered on 26 September 1963. On 3 October 1963 defendant Howser filed a motion in the Superior Court praying that the judgment by default and inquiry be declared null and void. The clerk did not pass on this motion. Defendant Howser on 23 October 1963 filed an answer. Judge McLaughlin held this judgment by default and inquiry was properly entered and in his discretion refused to set it aside. We have held as stated above that Judge McLaughlin's ruling is correct.

On 19 December 1963 defendant Howser filed an affidavit in the Superior Court of Alexander County stating in substance: That he desires to examine plaintiff in respect to his medical history, and to examine certain persons who have known plaintiff for a long period of time, and to inquire as to disability payments received by him from the Government, and he prayed the court to issue an order appointing a commissioner to conduct such examination upon written interrogatories, as provided by G.S. 1-568.17, and make a return to the court. On the same date Howser presented to the court 38 questions which he wished to ask the plaintiff. These interrogatories in substance request answers from plaintiff in respect to the dates and places where he has lived; the colleges he has attended; the states in which he has been licensed to practice dentistry; how many times he has been married, with the names of his former wives and their present addresses, if known; was he ever a member of the armed services and, if so, questions in respect thereto; does he have any disability as a result of any service in the armed forces and, if so, the nature of it; does he receive a monthly payment from the Government and, if so, the details in respect to it, and as to whether he has been examined by doctors in respect to any right he has, if any, to receive payment from the Government and, if so, the names of all such doctors; has he been a patient in a veterans hospital;

the names and addresses of all doctors who have examined him; has he had arthritis prior to April 1962; and other questions in respect to his physical condition, and many other questions of a similar nature. On 19 December 1963 the clerk of the Superior Court of Alexander County allowed the motion to examine plaintiff. On 21 December 1963 plaintiff filed a motion in the Superior Court of Alexander County that the court enter an order striking its order allowing Howser to examine plaintiff upon written interrogatories. On 11 January 1964 the clerk of the Superior Court of Alexander County issued an order striking his order previously entered allowing defendant Howser to examine plaintiff, and decreed his former order as of no force and effect whatsoever. To this later order Howser excepted and appealed to the Superior Court. Defendant Howser in his brief does not contend the clerk could not strike his order requiring plaintiff to appear and answer certain interrogatories. It seems the clerk had such power. G.S. 2-16(9); *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351.

Defendant contends in his brief that "the defendant should be permitted to have the plaintiff examined, upon order of the Court, by competent specialists who should have the benefit, before their examination, of the medical history of the plaintiff. The defendant should not be required to sit supinely by and be slaughtered by the plaintiff in this action."

G.S. 1-568.3 provides that "an examination may be had before trial . . .(2) For the purpose of obtaining evidence to be used at the trial, or at any hearing incident to the trial." An examination for the purpose of obtaining evidence to be used at the trial is a matter of right after both the examining party and the person being examined have filed their pleadings. G.S. 1-568.9(c); *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331. "After both the examining party and the party to be examined have filed their complaint, petition, or answer, an examination is declared to be a matter of right." 2 McIntosh, N. C. Practice and Procedure, 2d Ed., § 2285. It is true that defendant's answer has been stricken, and that plaintiff's cause of action and right to recover at least nominal damages have been established. However, defendant is entitled to a trial on inquiry before a jury on the issue of damages. G.S. 1-212; *Wilson v. Chandler,* 238 N.C. 401, 78 S.E. 2d 155. In the trial of the question of damages, the defaulting defendant has the right to be heard and participate. He may, if he can, reduce the amount of damages to nominal damages. 30A Am. Jur., Judgments, § 219.

In 1951 the Legislature rewrote the sections relating to discovery and examination before trial. G.S. 1-568.1 through G.S. 1-568.27; *Griners' & Shaw, Inc. v. Casualty Co.,* 255 N.C. 380, 121 S.E. 2d

572; McIntosh, *op. cit.* § 2285. Defendant Howser's answer having been stricken, he cannot be held to have filed answer and therefore does not come within the language of the statute, G.S. 1-568.1 *et seq.* However, Superior Court judges have inherent power in their discretion to grant a defendant's application for an order requiring plaintiff to submit to an examination by a specialist or specialists to obtain evidence as to the extent of plaintiff's injury. "The ends of justice, and the particular facts of each case, dictate the manner in which the court shall exercise the power." *Helton v. Stevens Co.*, 254 N.C. 321, 118 S.E. 2d 791. Defendant, if he so desires, can make such an application in the instant case.

Whether the Superior Court judge has power in his discretion to issue an order permitting defendant to examine plaintiff adversely with reference to matters pertinent solely to the issue of damages is not before us at this time.

The judgment of the court below is

Affirmed.

MOORE, J., not sitting.

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

FLORENCE JEAN CLEMMONS v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 16 June, 1966.)

1. Insurance § 60—

In regard to an owner's liability policy providing insurance in addition to that required by the Motor Vehicle Safety and Financial Responsibility Act, as distinguished from an operator's liability policy required by that Act, G.S. 20-279.21, the provisions of the policy in regard to notice of claim or suit by an injured party are valid and enforceable, and the injured party who obtains judgment against the insured can have no greater rights against insurer than those of insured.

2. Same—

Stipulation in a policy providing liability insurance in addition to that required by the Safety and Financial Responsibility Act, that insured should forward to insurer any demand, notice, summons or other process received by him or his representative is not ambiguous and is a reasonable and valid stipulation, and unless insured or his judgment creditor

can show compliance with this requirement, insurer is relieved of liability in the absence of waiver or estoppel.

3. Trial § 22—

Sufficiency of the evidence to overrule nonsuit must be considered in the context of plaintiff's allegations.

4. Insurance § 60— Evidence held insufficient to show waiver by insurer of notice of suit against insured.

Where plaintiff's evidence considered in the light most favorable to her, tends to show at most that insurer's agent was advised by telephone that suit by the plaintiff had been instituted and that insurer's agent made no comment in reply thereto, the evidence is insufficient to be submitted to the jury on the issue of insurer's waiver of provisions of the policy making it a condition precedent to liability that insured should immediately forward any demand, notice, summons or other process received by insured or his representative in regard to the institution of the action against insured by the injured third party, mere knowledge by insurer of the fact that process had been served upon insured not amounting, in itself, to a waiver or estoppel of the policy requirement.

5. Waiver § 2—

Waiver is an intentional surrender of an existing right or privilege on the part of a party having knowledge of such right or privilege.

MOORE, J., not sitting.

APPEAL by defendant from *Mallard, J.,* December 1965 Session of BRUNSWICK.

Plaintiff instituted this civil action October 28, 1964, to recover from Nationwide Mutual Insurance Company (Nationwide) the sum of $5,000.00, together with interest on $7,000.00 from September 25, 1964, and court costs, being a portion of a judgment for $12,000.00 and costs she obtained against Ruby B. King at August 1964 Session of Brunswick Superior Court.

The judgment on which plaintiff bases this action was before this Court in *Clemmons v. King,* 265 N.C. 199, 143 S.E. 2d 83, in connection with appeals relating to Mrs. King's cross action against Myrtle Clemmons Strickland, additional defendant, for contribution. The litigation grew out of a collision that occurred February 6, 1964, between an automobile owned by Eulene Lee and operated, with the permission of said owner, by Mrs. King, and an automobile operated by Mrs. Strickland in which plaintiff was a passenger.

The policies of liability insurance referred to below were in full force at the time of said collision on February 6, 1964.

Dixie Fire & Marine Insurance Company (Dixie) had issued to Mrs. Lee an owner's policy of liability insurance in which the car involved in said collision was designated the insured automobile. It provided coverage of $5,000.00 for bodily injury or death of one

person in one accident. This coverage (as required by G.S. 20-279.21(b)(2)), in addition to protecting the liability of Mrs. Lee, protected the liability of any other person operating the insured automobile with Mrs. Lee's express or implied permission. Dixie admitted its policy covered Mrs. King's liability (established by judgment) resulting from said collision and paid $5,000.00 to plaintiff, which was credited on said judgment.

Nationwide had issued to Mrs. King an owner's policy of liability insurance in which a car owned by Mrs. King, *not* involved in said collision, was designated the insured automobile. It provided coverage of $5,000.00 for bodily injury or death of one person in one accident. Its coverage, in addition to protecting the liability of Mrs. King while operating her own car, the insured automobile, protected liability incurred by her in her operation of a "non-owned" automobile. Under the caption, "Other Insurance," this policy, in pertinent part, provided: ". . . the insurance with respect to a . . . non-owned automobile shall be excess insurance over any other valid and collectible insurance."

Nationwide's policy, under the caption, "3. Notice," in pertinent part, provided: "If claim is made or suit is brought against the Insured, he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative."

Nationwide's policy, under the caption, "6. Action Against Company," in part, provided: "No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy . . ."

The complaint alleged "the said Ruby B. King has fully complied with all of the terms of the said policy . . ."

Answering, Nationwide alleged, in brief summary, (1) that the insurance provided by its policy was "excess insurance," and (2) that Mrs. King failed to forward to it "any demand, notice, summons, or other process received by her or her representative," thereby failing to comply with a condition precedent to Nationwide's liability under its policy.

At trial, pursuant to stipulation, the complaint was amended by adding to paragraph 8 thereof the following: "If the Court should find that the said Ruby B. King failed to comply with that term of the insurance contract allegedly requiring the said Ruby B. King to 'forward to the company every demand, notice or summons received by her or her representative' then the defendant (Nationwide) waived said requirement after actual notice of the institution of Civil Action No. 5443 by failing and refusing to instruct the defendant (Mrs. King, defendant in said prior action) to whom or to

what address said papers should be delivered." The answer was amended so as to deny the allegations of said amendment to complaint.

The court submitted (in accordance with stipulation) and the jury answered the following issues:

"1. Did Ruby B. King comply with the terms of the insurance policy requiring her to notify the defendant of any suit arising under said policy and by forwarding to the company every demand, notice, summons or other process received by her or her representative? ANSWER: *No.*

"2. If not, did Ruby B. King notify the defendant of the institution of Civil Action No. 4543 immediately after receiving notice thereof and thereafter did the defendant waive the terms of said policy regarding the forwarding to the defendant company of every demand, notice, summons or other process received by her or her representative? ANSWER: *Yes.*"

The court, based on said verdict, entered judgment "that the plaintiff have and recover of the defendant the sum of FIVE THOUSAND AND No/100 ($5,000.00) DOLLARS, together with interest on the sum of Seven Thousand and no/100 ($7,000.00) Dollars from September 4, 1964, and for the cost of this action to be taxed by the Clerk."

Defendant excepted and appealed.

Herring, Walton, Parker & Powell for plaintiff appellee.
W. G. Smith for defendant appellant.

BOBBITT, J. The policy issued by Nationwide to Mrs. King contained all provisions of an owner's policy of liability insurance required by G.S. 20-279.21 as proof of the financial responsibility required by G.S. 20-309 *et seq.* The distinction between an owner's policy of liability insurance and an operator's policy of liability insurance, the required provisions of each being set forth in G.S. 20-279.21, is pointed out in *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610, and *Lofquist v. Insurance Co.*, 263 N.C. 615, 140 S.E. 2d 12.

In *Woodruff v. Insurance Co.*, 260 N.C. 723, 133 S.E. 2d 704, the plaintiff had obtained judgment against the party to whom the defendant had issued an owner's assigned risk policy. Defendant based its defense on its policyholder's failure to give it notice of the accident as required by the policy. This Court, in opinion by Denny, C.J., said: "Our Financial Responsibility Act does not require an owner's assigned risk policy to cover any liability except that growing out of the operation of the motor vehicle described in the policy.

Consequently, the coverage in the policy issued by the defendant to Holbrook with respect to the use of other automobiles, was in addition to the coverage required by our Motor Vehicle Safety and Financial Responsibility Act. Therefore, with respect to such coverage, the policy makes the giving of notice a condition precedent to insurer's liability." In this connection, see also *Howell v. Indemnity Co., supra.*

G.S. 20-279.21(g) provides: "Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this article. With respect to a policy which grants such excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section."

Since Nationwide's liability, if any, is based on "coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy," decision herein is governed by *Muncie v. Insurance Co.,* 253 N.C. 74, 116 S.E. 2d 474, rather than by *Swain v. Insurance Co.,* 253 N.C. 120, 116 S.E. 2d 482.

This Court has held binding and enforceable provisions requiring that an insured give notice of an accident, *Muncie v. Insurance Co., supra,* and *Woodruff v. Insurance Co., supra,* and requiring the insured's cooperation in defense of any action against him, *Henderson v. Insurance Co.,* 254 N.C. 329, 118 S.E. 2d 885. Moreover, the cited cases establish that compliance with such policy provisions is a condition precedent to recovery, with the burden of proof on the insured to show compliance, where the policy, as in this case, provides, "No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy," or words of like import. Moreover, with reference to an owner's policy of insurance, unless the action be based on policy provisions required by G.S. 20-279.21, as in *Swain v. Insurance Co., supra,* an injured party who obtains a judgment against the insured has no greater rights against the insurer than those of the insured. *Muncie v. Insurance Co., supra,* and cases cited; *Woodruff v. Insurance Co., supra.*

While no decision of this Court involving a policy provision, "If claim is made or suit is brought against the Insured, he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative," has come to our attention, decisions in other jurisdictions hold this is an unambiguous, reasonable and valid stipulation, and that, unless the insured or his judgment creditor can show compliance by the insured

with this policy requirement, the insurer is relieved of liability. *Potter v. Great American Indemnity Co. of N. Y.*, 55 N.E. 2d 198 (Mass.); *Nevil v. Wahl*, 65 S.W. 2d 123 (Mo.); *Boyle Road & Bridge Co. v. American E. Ins. Co.*, 11 S.E. 2d 438 (S.C.); *Donlon v. American Motorists Ins. Co.*, 147 S.W. 2d 176 (Mo.); *reh. den.*, 149 S.W. 2d 378 (Mo.); *Sims TV, Inc. v. Fireman's Fund Insurance Company*, 131 S.E. 2d 790 (Ga.); *Wilkerson v. Maryland Cas. Co.*, 119 F. Supp. 383 (E.D. Va.), *aff. sub. nom. Maryland Casualty Co. v. Wilkerson*, 210 F. 2d 245 (4 Cir.); *De Vigil v. General Accident Fire & Life Assurance Co.*, 146 F. Supp. 729 (D. Hawaii); Annotation, 18 A.L.R. 2d 443, 450; 7 Am. Jur. 2d, Automobile Insurance § 185; 45 C.J.S., Insurance § 1047.

As stated by Frankum, J., in *Employees Assurance Society v. Bush*, 123 S.E. 2d 908 (Ga.): "In order to hold the insurer liable for damages under the policy, provisions of the policy place upon the insured the duty of complying with two conditions: first, to notify the company of the accident, and second, to forward to the insurer every demand, notice, summons, or process received by him or his representative. The purpose is to inform the insurer of the occurrence of the two events." In *Potter v. Great American Indemnity Co. of N. Y., supra*, Wilkins, J., said: "It is none the less a breach notwithstanding the fact that the company received prompt written notice of the accident under another condition of the policy. These were separate and distinct undertakings by the insured. (Citation). It is not for the plaintiff to assert that the company may not have been prejudiced by failure to receive the summons 'immediately' as stipulated."

"An automobile liability insurer may, by waiver or estoppel, lose its right to defeat a recovery under a liability policy because of the insured's failure to comply with the policy provision as to the forwarding of suit papers." 7 Am. Jur. 2d, Automobile Insurance § 188; 45 C.J.S., Insurance § 1058; Annotation, 18 A.L.R. 2d 443, 487. The subject of waiver will be discussed later with specific reference to the facts in evidence.

Defendant excepted to and assigns as error the denial of its motion at the conclusion of all the evidence for judgment of nonsuit. See G.S. 1-183; *Murray v. Wyatt*, 245 N.C. 123, 128, 95 S.E. 2d 541. Decision with reference thereto requires consideration of the evidence in the light of the foregoing legal principles.

Plaintiff's evidence, apart from the testimony of Ruby B. King, judgment debtor and Nationwide's policyholder, and of Sylvia P. Edwards, consists of the testimony, on adverse examination prior to trial, of Stanley J. Wiemer, H. F. Snevel and William J. Martin;

and of the testimony, on adverse examination at trial, of Robert L. Triplett, James Edward Harrington and E. J. Sealey.

The testimony of Mrs. Edwards, a court reporter, related solely to features of the trial of the prior action, including identification of the attorneys who appeared therein.

The adverse examination of Wiemer, Resident Vice President of Nationwide, was exploratory in nature and resulted in no pertinent discovery. Hence, no further reference will be made to Wiemer's testimony. The testimony elicited on the other adverse examinations is summarized, except when quoted, as set out below.

After notice of the collision of February 6, 1964, investigation thereof was assigned by Nationwide to Sealey, its District Office Manager in Wilmington. On or about February 13, 1964, Sealey assigned the investigation to M. E. Gooch and Associates (Gooch), independent claims adjusters of Wilmington. Triplett, Claims Manager for Gooch, assigned the field investigation to Harrington, an employee of Gooch. Statements were obtained (recorded in Harrington's phraseology and handwriting) from Florence Jean Clemmons, Myrtle Clemmons Strickland, Eulene Lee, Rufus Vonnie King, Ruby Blanton King and Jimmy Lee Maggard.

Triplett's initial report dated February 25, 1964, advised Nationwide that Mrs. Clemmons "had sustained very minor injuries" and, based on Gooch's evaluation of the claim, stated: "Her injuries are such that settlement certainly can be made within the initial or primary coverage and we should not be involved, and therefore we are not suggesting a BI reserve." (Note: "BI" is the abbreviation for Bodily Injury.)

Gooch's said report also advised Nationwide that Mr. Ray Walton was representing Mrs. Clemmons. The report contained the following: "Your insured and her family, which were the occupants of the insured unit at the time, are represented by Attorney Bunn Frink of Southport, North Carolina."

Gooch closed its investigation on February 28, 1964. Thereafter, on March 2, 1964, Triplett sent to Nationwide a hospital bill relating to Mrs. King's injuries, and on March 20, 1964, a medical report relating to Mrs. Strickland's injuries. The Gooch reports were filed with Martin, a claims examiner for Nationwide in Raleigh. Until a suit is instituted, a "claims examiner" or "division claims manager" has supervision of claims.

Snevel was an assistant claims attorney. On the day of the trial of the plaintiff's action against Mrs. King and Mrs. Lee, and a short time prior to the commencement thereof, Mr. Frink advised the Raleigh office of Nationwide of the pending action and of the imminent trial thereof. Prior to receiving information of Mr. Frink's

said message, Snevel had heard nothing of the suit or of the "open claim," the file with reference to the "open claim" being under the supervision of (claims examiner) Martin.

According to Snevel, Nationwide had no regularly retained counsel at Southport. It retained counsel to defend actions against its insureds on a case by case basis. Sometimes it had "hired" Mr. Frink, sometimes Mr. Smith (counsel for Nationwide in the present action) and sometimes other counsel to represent its insureds in Brunswick County.

Evidence admitted over defendant's objection tended to show Mr. Joshua S. James, a Wilmington attorney, and Mr. Frink, a Southport attorney, had represented and defended Mrs. King and Mrs. Lee at August 1964 Session at the trial of plaintiff's said prior action. Questions were asked, and exhibits were offered and later stricken, the general purport of which was to leave the impression that Mr. Frink or Mr. James or both were retained by Nationwide to represent Mrs. King in said action and represented her pursuant to employment by Nationwide. However, no legitimate inference to that effect may be drawn from any facts in evidence. Moreover, there is no allegation that such was the case and no suggestion in the court's charge that plaintiff sought to recover herein on that theory.

The other evidence consisted of the testimony of Mrs. King, a witness for plaintiff, and of the testimony of Braxton L. Prevatte, defendant's agent at Whiteville, North Carolina, from whom Mrs. King purchased the Nationwide policy. Prevatte was the only witness offered by defendant. Both testified that Mrs. King reported the accident to Prevatte a few days after its occurrence on February 6, 1964. In other respects, their testimony was in conflict.

Prevatte testified in substance: He advised Mrs. King, when she called him and reported the accident, that he would notify the Claims Department of Nationwide and they would take care of it. Thereupon, he communicated the information Mrs. King had given him to Nationwide. Prevatte recalled no further conversation with Mrs. King concerning the matter.

Since contradictions and discrepancies must be resolved in favor of plaintiff, we must turn to and accept as true the testimony of Mrs. King. Her testimony, summarized except when quoted, was as follows: Shortly after her original report of the accident, she telephoned Prevatte again. In this conversation, she advised him she had been tried in Recorder's Court for a traffic violation and had been found not guilty. This (second) telephone conversation occurred before Mrs. Clemmons started her suit. She called Prevatte a third time, when she was "sued"—when she "got the paper."

Testimony of Mrs. King with reference to this (third and last) telephone conversation, which bears directly on the crucial question for decision, was as follows: "I called him (Prevatte) on that occasion at his office in Whiteville. Exactly what I told him when I called him was that I had been sued. He did not say anything to me. I just told him that. He didn't say anything. Yes, sir, I told him who I was when he answered the phone. I said this is Mrs. Ruby King, I have been sued by Jean Clemmons, that is right. No, sir, he did not make any comment to me at all. I then hung up. Yes, sir, I knew Mr. Prevatte pretty well. As to whether or not I know of my own knowledge that I was actually talking to Mr. Prevatte, I say it sounded like his voice and I have been to his office several times. I don't remember approximately how long it was after I got the suit papers that I called and talked to someone that sounded like Mr. Prevatte. The best estimate I could give you is it was within a week. I took the suit papers to my lawyer. That was Mr. Bunn Frink." Again: "I never did send the suit papers to my own insurance company, Nationwide. I have the original policy somewhere at the house." Again: "After I gave the suit papers to Mr. Frink, I did not call Mr. Prevatte any more after that. I did not call any person connected with Nationwide Insurance Company after I gave the suit papers to Mr. Frink or tell them I had been sued or had any papers, no, sir."

Nationwide makes no contention it did not receive timely notice of the accident. On the contrary, it admits it received such notice and caused an investigation to be made. It contends such investigation indicated Mrs. King's liability, if any, for Mrs. Clemmons' injuries, was within the coverage provided by Dixie's policy on Mrs. Lee's car. Its asserted ground of defense is that Mrs. King did not comply with the pleaded policy provision.

All the evidence, including the testimony of Mrs. King, tends to show Mrs. King did not "forward to the Company every demand, notice, summons or other process received by (her) or (her) representative," in plaintiff's said prior action. Indeed, her testimony is that she delivered the papers that were served on her in plaintiff's prior action, presumably the summons and complaint, to her own attorney, Mr. Frink. Hence, the court correctly directed the jury to answer the first issue, "No." Nothing else appearing, this negative answer to the first issue defeats plaintiff's asserted right to recover herein.

Decision as to nonsuit depends upon whether plaintiff's allegations and evidence with reference to waiver were sufficient to withstand defendant's motion. Plaintiff alleged the requirement that Mrs. King "forward to the Company every demand, notice, sum-

mons or other process received by (her) or (her) representative" was waived by defendant "by failing and refusing to instruct the defendant (*i.e.*, Mrs. King) to whom or to what address said papers should be delivered." The evidence must be considered in the context of plaintiff's allegations in passing upon whether it was sufficient for submission to the jury. *Faison v. Trucking Co.*, 266 N.C. 383, 146 S.E. 2d 450.

It is noted that plaintiff relies primarily on her (according to her testimony) third telephone conversation with Prevatte. There is no evidence Prevatte refused to answer any inquiry or that he failed to comply with any request or that he gave Mrs. King any misleading directions or instructions. Mrs. King's testimony indicated (somewhat uncertainly) that she knew she was talking to Prevatte because "it sounded like his voice." Her testimony, considered in the light most favorable to plaintiff, is to the effect she advised Prevatte she had been sued and that suit papers had been served on her. Notwithstanding, she insisted that "he (Prevatte) did not make any comment to (her) at all."

In *Hospital v. Stancil*, 263 N.C. 630, 139 S.E. 2d 901, distinctions between estoppel and waiver are pointed out by Sharp, J. Compare *Boyle Road & Bridge Co. v. American E. Ins. Co., supra.* Suffice to say, plaintiff's allegations relate to waiver, not to estoppel.

Ordinarily, waiver is defined as a voluntary and intentional relinquishment of a known right. In *Hospital v. Stancil, supra,* waiver is defined as "the intentional surrender of a known right or privilege, which surrender modifies other existing rights or privileges or varies the terms of a contract." In *Fetner v. Granite Works,* 251 N.C. 296, 302, 111 S.E. 2d 324, Moore, J., in accord with 56 Am. Jur., Waiver § 12, stated: "The essential elements of a waiver are: (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit."

In *Boyle Road & Bridge Co. v. American E. Ins. Co., supra,* with reference to a similar policy provision, Fishburne, J., stated: "(I)n our opinion mere knowledge by the Insurance Company of the fact that process has been served upon the insured does not of itself amount to a waiver or an estoppel. There must exist, in addition to such knowledge, where the papers have not been forwarded to the Insurance Company as provided in the contract, some positive act upon which, in connection with the knowledge, a waiver may be predicated. And this positive act must be known to the insured." In accord: *Nevil v. Wahl, supra; De Vigil v. General Accident Fire & Life Assurance Co., supra.*

Consideration of the evidence in the light most favorable to plaintiff impels the conclusion that Prevatte's *silence,* when advised that Mrs. King had been sued, is insufficient to support a finding that Nationwide thereby knowingly and intentionally waived its rights under the contract provision pleaded by defendant. Defendant's motion for judgment of nonsuit should have been granted. Accordingly, the judgment of the court below is reversed.

Reversed.

MOORE, J., not sitting.

MARY PRIDGEN SHEARIN, ADMINISTRATRIX OF THE ESTATE OF JOHN JACOB PRIDGEN, DECEASED, v. GLOBE INDEMNITY COMPANY.

(Filed 16 June, 1966.)

1. Judgments § 33—

A judgment of involuntary nonsuit on the ground of the insufficiency of the evidence offered at that trial does not bar a subsequent action unless the evidence at the subsequent trial is substantially identical with that offered in the first.

2. Insurance § 63—

Defense by insurer of an action brought by the injured third party against insured does not waive insurer's defense of noncoverage when insurer requires insured to sign an agreement preserving to insured the right to assert the defense of noncoverage.

3. Insurance § 54—

A garage liability policy covers any automobile owned by or in charge of the named insured and used in operations necessary or incidental to insured's business by a person operating the vehicle with the permission of insured.

4. Automobiles § 4—

Prior to 1961, a purchaser of a motor vehicle might acquire title notwithstanding failure of his vendor to deliver vendor's certificate of title, or vendee's failure to apply for a new certificate.

5. Sales § 3—

Whether title passes to the purchaser upon part payment of the purchase price depends upon the agreement between the parties as to whether title should then pass or whether title should not pass until the performance of some condition.

6. Insurance § 54— Evidence held to show that prospective purchaser was not operating vehicle in question with permission of dealer within coverage of garage liability policy.

The evidence tended to show that an automobile dealer delivered the vehicle in question to a prospective purchaser upon a small cash payment with the understanding that the purchaser would pay the balance by a specified time, that the purchaser subsequently made two other small payments, that the dealer's agent then advised the purchaser to pay the balance due by a specified date or surrender the car, that the purchaser did neither, and that the accident in suit occurred two days after the time set by the dealer for the payment of the balance of purchase price or the surrender of the vehicle to the dealer. *Held:* Even conceding evidence sufficient to show title in the dealer at the time the accident occurred, the evidence disclosed that the prospective purchaser was not using the vehicle with the permission of the dealer at the time of the accident within the coverage of the dealer's garage liability policy, and therefore nonsuit was properly entered in an action by the injured third party against insurer after recovery of an unsatisfied judgment against the operator of the vehicle.

MOORE, J., not sitting.

APPEAL by plaintiff from *Bundy, J.*, September-October 1965 Civil Session of WILSON.

Plaintiff instituted this civil action November 21, 1963, to recover from Globe Indemnity Company (Globe) the amount ($16,666.04 with interest and costs) of a judgment she obtained at January 1962 Civil Term of Wilson Superior Court against T. R. Uzzell, Administrator of the estate of Clarence Haywood Speight, deceased.

Plaintiff seeks to recover under a "Garage Liability Policy" issued by Globe to Boyette Auto Exchange, Inc. (Auto Exchange, Inc.) in which Globe agreed "(t)o pay on behalf of the insured all sums (not in excess of $25,000.00) which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the hazards" thereinafter defined, including "(t)he ownership, maintenance or use . . . in connection with the above defined operations (automobile sales agency, repair shop, service station, storage garage or public parking place, and all operations necessary or incidental thereto) . . . of (1) any automobile owned by or in charge of the named insured and used principally in the above defined operations . . ." The policy, which was in full force and effect on May 12, 1958, provides that "the unqualified word 'insured' includes the named insured" and "(2) any person while using an automobile covered by this policy, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

Auto Exchange, Inc., was engaged in the business of buying and selling used cars. Its principal place of business was in Wilson, N. C.

On May 12, 1958, a 1952 Chevrolet, occupied by John Jacob Pridgen (Pridgen), plaintiff's intestate, and Clarence Haywood Speight (Speight), ran off the road and overturned. Pridgen sustained serious injuries and died July 24, 1958, as a result thereof. Speight died May 12, 1958, the date of the wreck.

In the prior action against the estate of Speight, in which plaintiff obtained a judgment for $16,666.04 with interest and costs, the verdict established Speight was operating the car when the wreck occurred and that Pridgen's fatal injuries were proximately caused by Speight's negligence.

Plaintiff, in her complaint herein, alleged that, on May 12, 1958, Auto Exchange, Inc., was the owner of said 1952 Chevrolet; that Speight, a prospective purchaser, was operating it with the permission of Auto Exchange, Inc.; and that Speight's liability for Pridgen's injuries and death was covered by the policy issued by Globe to Auto Exchange, Inc.

Answering, defendant denied plaintiff's said allegations.

Defendant alleged, as a plea in bar, a judgment of involuntary nonsuit entered in a prior action against Auto Exchange, Inc., referred to below.

Plaintiff, by reply, alleged that Globe made a full investigation of the facts surrounding the accident of May 12, 1958, and with full knowledge thereof did not deny coverage but assumed control of and, by its counsel, conducted the defense of the prior action against Auto Exchange, Inc.; and that defendant is estopped thereby from denying coverage.

Pertinent facts concerning prior litigation growing out of said accident of May 12, 1958, are stated below.

On June 26, 1958, Pridgen instituted a civil action against Auto Exchange, Inc., in the Superior Court of Wilson County. Therein, on July 12, 1958, before filing complaint, Pridgen examined adversely T. R. Boyette (Boyette), the president of Auto Exchange, Inc. After Pridgen's death on July 24, 1958, Mary H. Pridgen, the administratrix of Pridgen's estate, was substituted as party plaintiff; and in November 1958 said administratrix filed a complaint in which she alleged Pridgen's injuries and death were caused by the actionable negligence of Speight in the operation of said Chevrolet on May 12, 1958, and that she was entitled to recover damages from Auto Exchange, Inc., on account thereof. Auto Exchange, Inc., answered. Thereafter, the substituted plaintiff, Pridgen's administratrix, examined Boyette adversely on December 1, 1959. Upon the trial of said action at March 1960 Civil Term, the court (Sharp,

J.), at the conclusion of plaintiff's evidence, entered judgment of involuntary nonsuit. Plaintiff gave notice of appeal. However, she did not perfect her appeal. The defense of said action in the name and behalf of Auto Exchange, Inc., was conducted by Globe through its attorneys.

On May 31, 1960, said administratrix of Pridgen's estate instituted the action (referred to above) against the estate of Speight. A judgment of involuntary nonsuit entered therein at September-October 1960 Civil Term of the Superior Court of Wilson County was reversed by this Court in *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755. Subsequently, at January 1962 Civil Term, the plaintiff obtained therein the judgment for $16,666.04 with interest and costs on which she bases the present action. The defense of said action in the name and behalf of the estate of Speight was conducted by Globe through its attorneys.

Globe received notice of and investigated said accident of May 12, 1958. A Non-Waiver Agreement, signed by Auto Exchange, Inc., provided that Globe's investigation "shall not be considered a waiver of any of the conditions of the policy" or as an affirmance or denial of liability thereunder. Thereafter, Globe defended the action against Auto Exchange, Inc.

Globe's defense of the action against the estate of Speight was under the original Non-Waiver Agreement of June 22, 1960, and Non-Waiver Agreement Supplement of April 5, 1961. These agreements were executed by T. R. Uzzell, administrator of the estate of Clarence Haywood Speight, deceased. The original Non-Waiver Agreement provides specifically that Globe reserved all rights to deny coverage as to Speight and that its defense of said action was not a waiver of but was without prejudice to its said rights. The Non-Waiver Agreement Supplement contains similar provisions in relation to the payment by Globe of costs taxed in the Supreme Court against the estate of Speight in connection with said appeal.

Additional factual data will be set forth in the opinion.

At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Vernon F. Daughtridge and Narron, Holdford & Holdford for plaintiff appellant.

Gardner, Connor & Lee for defendant appellee.

BOBBITT, J. Whether the judgment of involuntary nonsuit at March 1960 Civil Term in the action against Auto Exchange, Inc., was entered on account of the insufficiency of the evidence as to

ownership of the car by Auto Exchange, Inc., *or* operation thereof by Speight, *or* actionable negligence of Speight *or* that Speight was the agent of Auto Exchange, Inc., does not appear. Suffice to say, adjudication that the evidence then offered was insufficient, for undisclosed reasons, to warrant submission of that case to the jury, is not a bar to this action.

Nor is there merit in plaintiff's plea that Globe, by defending the action against Auto Exchange, Inc., waived its right to deny coverage as to Speight. Globe's policy covered the liability, if any, of Auto Exchange, Inc., the named insured. Globe defended the action against the estate of Speight under full reservation of its right to deny coverage as to Speight. See *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410.

The garage liability policy issued by Globe to Auto Exchange, Inc., does not list or describe any specific automobile(s). It covers "any automobile owned by or in charge of the named insured" and used principally "for the purpose of an automobile sales agency, repair shop, service station, storage garage or public parking place, and all operations necessary or incidental thereto." A person operating *such an automobile* is covered by the policy if his actual use thereof is with the permission of the named insured. *Godwin v. Casualty Co.*, 256 N.C. 730, 125 S.E. 2d 23; *Luther v. Insurance Co.*, 262 N.C. 716, 138 S.E. 2d 402.

The crucial question is whether the evidence was sufficient to permit a jury to find that the 1952 Chevrolet involved in the accident of May 12, 1958, was then owned by Auto Exchange, Inc., "and used principally in the above defined operations" (automobile sales agency, etc.), and that its actual use by Speight on May 12, 1958, was with the permission of Auto Exchange, Inc.

Plaintiff offered in evidence the adverse examination of C. M. Link, Claims Manager and Adjuster for Globe. The pertinent facts disclosed therein and the exhibits attached thereto are set forth in our preliminary statement.

A witness for plaintiff, Mrs. Florence L. Sutton, testified in substance, except when quoted, as follows: During 1958 she was secretary-treasurer of Dixie Auto Finance Company (Dixie). Early in 1958, Dixie financed for Wortle Brantley (Brantley) a 1952 Chevrolet Brantley had purchased from Auto Exchange, Inc. Brantley's note to Dixie was endorsed by Boyette, individually. The title certificate in Dixie's possession showed the 1952 Chevrolet was registered in the Department of Motor Vehicles in the name of Brantley and that Dixie had a lien thereon executed by Brantley. Brantley was unable to make the payments and requested Dixie "to repossess the car." Brantley did not execute an assignment of his title or "sign

any sort of consent for surrender of the car." Dixie's lien thereon was not foreclosed. Boyette "wholesaled this car" with Dixie. Boyette signed a "wholesale note" to Dixie against this particular car "approximately April of 1958" and paid Dixie the balance on the Brantley note. Mrs. Sutton testified: "The vehicles that were wholesaled by T. R. Boyette were the vehicles of Boyette Auto Exchange, Inc." In April 1958, Boyette, in a telephone conversation, told her "he had made a sale or disposition of that automobile," and asked her to finance the car for Speight. Dixie refused to do so. Boyette paid off the "wholesale note" in June 1958, at which time the title certificate issued to Brantley was delivered to him.

An unsigned accident report dated May ....., 1958, plaintiff's Trial Exhibit No. 11, identified "Boyette Auto Exchange" as the policyholder; and under the heading, "Insured Automobile," the following appears: "Owner's name if not owned by Policyholder: Clarence Haywood Speight."

The foregoing is a summary of plaintiff's admitted evidence. It must be considered in the light of the fact that "(p)rior to 1961 a purchaser of a motor vehicle acquired title notwithstanding the failure of his vendor to deliver vendor's certificate of title or vendee's failure to apply for a new certificate." *Credit Co. v. Norwood,* 257 N.C. 87, 90, 125 S.E. 2d 369, and cases cited.

The admitted evidence tends to show Auto Exchange, Inc., had sold the 1952 Chevrolet to Speight prior to May 12, 1958. Hence, it was not sufficient to withstand defendant's motion for judgment of nonsuit.

Plaintiff offered in evidence the adverse examinations of Boyette taken July 12, 1958, and December 1, 1959, in the prior action against Auto Exchange, Inc. Defendant's objections thereto were sustained. Plaintiff contends the admitted *and* excluded evidence was sufficient to withstand defendant's motion for nonsuit.

The testimony of Boyette on said adverse examinations related to the ownership of the 1952 Chevrolet on May 12, 1958, and to the circumstances with reference to Speight's possession and use thereof. Plaintiff contends this testimony was competent because Auto Exchange, Inc., was defended in said action by Globe, and Globe's attorneys were present and cross-examined Boyette. Defendant contends this testimony was incompetent and properly excluded. Suffice to say, a serious question exists as to the competency of this evidence; and authority bearing directly on the question was not cited in the briefs nor discovered by our research. Under these circumstances, we deem it appropriate to consider whether this testimony, if competent, would suffice to require submission to the jury.

On said adverse examinations, Boyette testified in substance, except when quoted, as follows:

Auto Exchange, Inc., obtained possession of the 1952 Chevrolet from Dixie. It borrowed the money from Dixie "on this car" to pay off Brantley's debt. Dixie continued to hold the (Brantley's) title certificate as collateral.

In April 1958, Boyette saw Speight about buying a car. He had been advised that Speight could buy a car and pay cash. Later, Speight came to the place of business of Auto Exchange, Inc. He advised Boyette he knew the 1952 Chevrolet, and the former owner thereof, and "took the car and tried it out a little bit." Speight said "he would like to have the car." They agreed on a price of $495.00 cash. Speight made a deposit of $40.00 or $45.00. He asked Boyette "if it was all right for him to drive the car," saying "he knew he would have his money in a few days." (Note: This transaction occurred on or about April 18, 1958, and from then until the wreck on May 12, 1958, Speight had the car.)

When Speight came back the following Saturday, he told Boyette "he didn't have the money and expected to get it in a day or two." At that time he made another payment of $20.00 on the car. The following Saturday Speight returned, saw Boyette's brother, and "didn't say anything but just told him he wanted to pay (Boyette) $20.00." When advised of this visit and $20.00 payment, Boyette stated to his brother: "Well, George, we have got to get that thing straight; he has got to pay for the automobile or we have got to bring it in." On the following Wednesday or Thursday, Boyette went to see Speight. Meanwhile, Boyette had learned that Speight's driver's license had been revoked. Boyette saw Speight at his home at Lamm's Crossroads. Boyette testified: "(H)e was fixing to leave in his car." Again: "I talked to him and told him that we had to get it straightened out, that it had to be straightened out, 'You will have to bring the car around or you will have to pay for it,' and he assured me that he could straighten it out the following Saturday." Boyette testified he did not take possession of the 1952 Chevrolet on this occasion because he "didn't have a driver to drive the car." On Saturday, Speight did not bring the car around or pay for it. Boyette and his brother planned to go get it on Monday, May 12, 1958, the day of the wreck.

While there is ample evidence to support a finding that the 1952 Chevrolet was sold by Auto Exchange, Inc., to Speight under an indefinite credit arrangement, the admitted *and* excluded evidence, when taken in the light most favorable to plaintiff, does not compel this conclusion. "The effect of a part payment with respect to the transfer of title depends primarily on the terms of the contract and

the intention of the parties, and also whether, as between the parties, anything still remains to be done with reference to the subject matter of the sale." 77 C.J.S., Sales § 266(b). "Property may be delivered with the understanding that title thereto shall not pass until the performance of some condition, and such understanding or intention is given effect as between the parties." 46 Am. Jur., Sales § 433, p. 603. With reference to cash sales, see *Wilson v. Finance Co.*, 239 N.C. 349, 79 S.E. 2d 908, and decisions and authorities cited.

If Auto Exchange, Inc., was the owner of the 1952 Chevrolet on May 12, 1958, the view most favorable to plaintiff, we are confronted with this question: Was Speight, at the time of the wreck on May 12, 1958, actually using the 1952 Chevrolet with the permission of Auto Exchange, Inc.? If not, the liability of Speight for the operation thereof was not covered by the policy issued by Globe.

Boyette's ultimatum to Speight was that, not later than Saturday, May 10, 1958, Speight was to either pay for the car or deliver it to the place of business of Auto Exchange, Inc. Speight failed to do either.

The burden of showing that the actual use of the car by Speight on May 12, 1958, was with the permission of Auto Exchange, Inc., was on plaintiff. In *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161, the policy definition of "insured" included any person using the described motor vehicle, "provided the *actual use* of the automobile is by the named insured . . . or with the permission" of the named insured. Concluding a full discussion, Moore, J., for this Court, said: "Furthermore, the policy in the instant case uses the term 'actual use' in reference to permission granted. In our opinion this term confines the coverage to situations where the use made of the vehicle at the time of the accident is within the scope of the permission granted."

The conclusion reached is that Boyette's testimony does not show the actual operation of the car by Speight on Monday, May 12, 1958, was with the permission of Auto Exchange, Inc. Nor does it show that Speight's operation thereof on May 12, 1958, was necessary or incidental to the operation of the automobile sales agency of Auto Exchange, Inc. On the contrary, the only reasonable inference to be drawn therefrom is that Speight had no permission to use the car after the Saturday on which he was obligated either to pay therefor or to surrender possession thereof to Auto Exchange, Inc.

The conclusion reached is that the admitted *and* excluded testimony, when considered in the light most favorable to plaintiff, was

not sufficient to withstand defendant's motion for judgment of nonsuit, and that the judgment of nonsuit should be and is affirmed.

Affirmed.

MOORE, J., not sitting.

STATE v. ERNEST CHARLES BATTLE, JAMES BELL, JR., YOHANNES HAILE MARIAM, ALIAS HAROLD WESLEY JONES, ROOSEVELT WALLACE.

(Filed 16 June, 1966.)

1. Criminal Law §§ 26, 122—

In this prosecution of defendants for conspiracy to break and enter and with breaking and entering pursuant to the conspiracy, the court withdrew a juror and ordered a mistrial for the incapacitating illness of the sole attorney of one of the defendants during the course of the trial. *Held:* The order of mistrial for the illness of the attorney in the prosecution for less than a capital felony was within the discretionary power of the trial court, and the order of mistrial will not support a plea of former jeopardy in the subsequent prosecution of defendants.

2. Conspiracy § 6; Burglary and Unlawful Breakings § 4; Criminal Law § 101— Circumstantial evidence held sufficient to be submitted to the jury.

Evidence tending to show that one defendant was found hiding in a building immediately after it had been broken into, that another defendant was seen coming from the direction of the rear of the building towards a car, parked some 60 feet from the building, in which the other defendants feigned sleep when the officers approached, and that defendants were together on the previous day when one of them rented a U-Haul truck in a municipality a hundred miles distant, which truck was later found abandoned in the vicinity of the crime, together with other circumstances, *held* sufficient to be submitted to the jury on the question of each defendant's guilt of conspiracy and breaking and entering.

3. Criminal Law § 87—

Where defendants are jointly indicted, their motion for a separate trial is addressed to the sound discretion of the trial court, to be determined in each particular case on the basis of possible prejudice in a joint trial.

4. Same—

Defendants were jointly indicted for conspiracy to break and enter and with breaking and entering pursuant to the conspiracy. *Held:* The court's denial of defendants' motions for a separate trial was not error, the motions being addressed to the sound discretion of the trial court.

5. Trial § 15; Criminal Law § 155— Where answer of witness is unresponsive, objection without motion to strike or limit the answer is ordinarily ineffective.

In this prosecution for conspiracy and with breaking and entering pursuant thereto, one of defendants was found hiding in the building which had been broken into, and the other defendants were connected with the offense only through him. An officer was asked on examination as a witness whether the defendant who had been found in the building had described and identified a U-Haul truck which had been found abandoned in the vicinity, and the officer replied that defendant had done so and that defendant stated it was the one "they rented." The evidence tended to show that the other defendants had rented the U-Haul truck from a dealer in another municipality the day before the offense. The attorney for the appealing defendants objected after the answer was made, but failed to move to strike the unresponsive part of the answer or request that its admission be limited. *Held:* The objection was waived by failure to move to strike or to limit the answer.

MOORE, J., not sitting.

SHARP, J., dissents.

APPEAL by defendants James Bell, Jr., Yohannes Haile Mariam, alias Harold Wesley Jones, from *Johnson, J.*, March, 1966 Criminal Session, ROBESON Superior Court.

The appellants, together with Ernest Charles Battle and Roosevelt Wallace, were charged in a bill of indictment containing three felony counts. The first count charged a conspiracy to break and enter the storehouse of one M. H. McLean, Jr., in Lumberton, with intent to steal the goods, chattels, money, etc. The second count charged the felonious breaking and entering pursuant to the conspiracy with the intent to steal and carry away the merchandise, chattels, etc., the property of M. H. McLean, Jr. The third count charged that pursuant to the conspiracy the defendants did have in possession, without lawful excuse, certain implements of housebreaking, to-wit: railroad wrench, lug wrench, and a pair of gloves.

At the call of the case for trial on the morning of January 13, 1966, the appellants Bell and Mariam, through counsel of their own selection, entered pleas of not guilty and each moved for a severance. The court denied the motions. The defendants Battle and Wallace, through court appointed counsel, entered pleas of not guilty. The jury was impaneled and during the morning session of the court the State began presenting its evidence.

At the beginning of the afternoon session, the court, for the reason indicated, entered the following order:

"Mr. N. L. Britt, attorney for the defendant, Roosevelt Wallace, having become ill during the Noon recess and said attorney be-

ing unable to proceed with the trial of this cause by reason of said illness, and it appearing to the Court and the Court finding as a fact that it would be prejudicial to the rights of the State of North Carolina to attempt to proceed with the trial of this cause against the defendants, James Bell, Jr., Yohannes Mariam, and Ernest Battle, and that since by reason of Mr. Britt's illness the trial cannot proceed against the defendant, Roosevelt Wallace, the court is of the opinion that it has no choice other than to withdraw a juror and declare a mistrial and the court in its discretion and in the interest of justice withdraws juror number 1, Lawrence McDuffie and orders a mistrial. It is ordered that each defendant post a $5,000.00 bond.

"To the signing and entry of the foregoing Order, the defendants, Bell and Mariam, except, and this constitutes Defendants' Exception #3."

The case was again called for trial at the March 7, 1966 Session of the Superior Court. Counsel for Bell and Mariam renewed their motions for a severance. When the court denied the motions, the defendants entered pleas of former jeopardy based on the arraignment and the mistrial order over their protests at the January Session of the court. The court denied the pleas of former jeopardy.

The State introduced evidence of which the following is a summary: Mr. M. H. McLean, owner of a wholesale house in Lumberton, which among other property contained $70,000.00 worth of cigarettes, closed the store and locked the building about 7:00 p.m. on Monday, December 13, 1965. Before leaving, he activated the burglar alarm which connected the entrances to the building with the police department. A breaking into the building sounded the alarm in the police headquarters but made no noise whatever at the building. Shortly before 2:00 a.m. on the morning of December 14, the alarm sounded in the police headquarters. Immediately the officer in charge called the cruising police cars over radio and within four or five minutes a number of cars, which were also in radio communication with each other, converged on the building. When the police car arrived at the front the officers found that a padlock had been broken and the door had been forced open. After a few moments delay, officers entered the door from the front. After searching first the office, they continued the search and found the defendant Battle hiding under a truck which was inside the building.

Officer Walters and others in his police vehicle pulled up behind a 1959 Buick automobile parked across the street 60 or 70 feet from

the rear of the McLean building. At that time the defendant Wallace was approaching the Buick from the rear of the McLean building. He was arrested. In the Buick were appellants Bell and Mariam, with the doors locked. They pretended to be very soundly asleep. However, as the officers came up to the vehicle, Mariam had a lighted cigarette in his hand. This he extinguished before he appeared to arouse sufficiently to open the door. This Buick carried a Georgia license tag.

About one o'clock, a.m., on the same morning, approximately one hour before the burglar alarm sounded, Officer Johnson of the State Highway Patrol, observed a 1959 Buick with a Georgia license tag followed by a U-Haul truck on Interstate 95 a few miles north of Lumberton. Both vehicles stopped, then made a left turn towards Lumberton. Officer Johnson turned to the right and continued on to Red Springs.

Harry Kilpatrick testified he worked for U-Haul Service Company in Raleigh, and on Monday, December 13, 1965, shortly after six o'clock, p.m., he leased to the defendant Wallace a U-Haul truck which was later returned to him by the police in Lumberton. With Wallace at the time were the defendants Bell and Mariam. Another man, whom he did not see well enough to identify, remained in the automobile. The three others, Wallace, Bell and Mariam, entered the building where he worked and rented the U-Haul truck and paid him $40.00 rental. They stated they wanted to use it to move furniture from Raleigh to Durham. The U-Haul truck was found abandoned in Lumberton, a distance of 92 miles from Raleigh.

The defendant Wallace, when arrested, was wearing an "Esso" uniform marked "F. Walker, X-489-5." Another uniform with identical markings and size was found in the Buick in which Bell and Mariam were pretending to be asleep and towards which Wallace was walking at the time of his arrest.

At the close of the State's evidence all defendants moved to dismiss all counts in the bill. The court overruled the motions as to counts (1) and (2) and allowed the motion as to count (3)—the possession of implements of housebreaking.

The defendant Battle testified in his own behalf. He admitted he lived in Raleigh. In consequence of what he told the officers, they located the U-Haul truck. Officer Lovett testified as to admissions made by Battle after his arrest. The officer was asked this question: "Did Battle ever describe to you the truck?" Answer: "He identified one." Question: "Did you show him one?" Answer: "Yes, sir, U-Haul truck at the police station which he said was the truck they rented in Raleigh and left in Lumberton."

Objection by Bell and Mariam. Court: "The objection came too late . . . Overruled." Bell and Mariam excepted.

The defendants did not move to strike the officer's statement as unresponsive to the question. At the close of all the evidence the appellants' motions for nonsuit on counts (1) and (2) were overruled. Exceptions were noted. The jury returned verdicts of guilty against all defendants. From prison sentences of 10-14 years imposed on Mariam and 5-7 years on Bell, both defendants appealed.

T. W. Bruton, Attorney General, George A. Goodwyn, Assistant Attorney General for the State.

Johnson, McIntyre, Hedgpeth, Biggs & Campbell by John W. Campbell for defendant appellants Bell and Mariam.

HIGGINS, J. The appellants argue they are entitled to a reversal of the judgments against them on either of two grounds: (1) Their plea of former jeopardy should have been sustained; (2) their motions for directed verdicts of not guilty, made at the close of all the evidence, should have been allowed. They contend, further, that if the Court should hold they are not entitled to have the judgments reversed and the cause dismissed, they are entitled to a new trial (1) for failure of the court to grant their motions for a severance, and (2) for the alleged error in permitting the unresponsive answers of Officer Lovett (as to Battle's admissions) to remain in the case.

At the January Session, 1966, the defendants were arraigned, entered pleas of not guilty, a jury was impaneled, and the State began the introduction of testimony. Due to the sudden illness of the attorney representing the defendant Wallace, the court, over objection of the appellants, ordered a mistrial and continued the case against all defendants. Decision on the plea of former jeopardy depends upon the validity of the mistrial order. Unless that order can be upheld, jeopardy attached, and the plea would be good. If the order is valid, the plea is not good.

The power of the presiding judge to order a mistrial in a criminal case after the jury has been impaneled, and before verdict, has been the subject of review by this Court beginning with *State v. Garrigues,* 2 N.C. 241. The many subsequent decisions dealing with the court's power to discharge a jury and order a new trial have been analyzed by Parker, J., (now C.J.) in *State v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355; by Bobbitt, J. in *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; by Stacy, C.J., in *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232, and in *State v. Beal,* 199 N.C. 278, 154 S.E. 604. " 'It is

only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused.'" *State v. Boykin,* 255 N.C. 432, 121 S.E. 2d 863.

For obvious reasons the rule against a mistrial finds its maximum rigidity in capital cases. A more flexible rule applies in cases of less gravity. "The ordering of a mistrial in a case less than capital is a matter in the discretion of the judge, and the judge need not find facts constituting the reason for such order." (citing many cases) *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264. "We conclude that the trial judge in cases less than capital may, in the exercise of sound discretion, order a mistrial before verdict, without the consent of the defendant, for physical necessity such as the incapacitating illness of judge, juror or material witness, and for 'necessity of doing justice' . . . His order is not reviewable except for gross abuse of discretion, and the burden is upon defendant to show such abuse." *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838. The incapacitating illness of the only counsel for one defendant, which developed after the trial began, is within the rule. The order withdrawing a juror, declaring a mistrial, and continuing the case to the next session of the court was valid. Hence the plea of former jeopardy was properly denied.

The evidence offered by the State was ample to go to the jury as to all defendants on the first and second counts in the bill. Battle was caught inside the building, hiding under a truck. He lived in Raleigh. Wallace, Bell and Mariam, and another who remained in the automobile and was not identified, appeared at the U-Haul shop in Raleigh where the three rented a U-Haul truck, stating they wanted to move furniture from Raleigh to Durham. A few hours later the same night an officer on highway patrol saw a 1959 Buick with a Georgia license accompanied by a U-Haul truck driving toward Lumberton. Within an hour the burglar alarm alerted the police that a break-in was occurring at the McLean Building. Cruising officers in police vehicles, in radio contact with headquarters and with each other, surrounded the building within minutes after the alarm. Bell and Mariam, pretending to be asleep, though Mariam had a lighted cigarette, were in a 1959 Buick with Georgia license parked 60 to 70 feet from the rear of the building at approximately two o'clock in the morning. Wallace, perhaps on watch at the rear, evidently alerted by the police cars, made for the Buick and his companions. He was arrested between the McLean building and the parked vehicle. He was wearing an "Esso" uniform with these markings: "F. Walker. X-489-5." Another uniform with identical markings was in the Buick occupied by Bell and Mariam.

The foregoing is the main thrust of the State's evidence. Though circumstantial as to all defendants except Battle, it is sufficient to sustain the conviction of all defendants. *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555; *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. The motions for directed verdicts were properly denied.

Did the trial court commit error in denying each of the defendants a separate trial? Ordinarily, where defendants are charged with a conspiracy — an agreement whereby they became partners in crime — they should be tried together unless some sound reason is made to appear which would require a severance. If, for example, the State must rely exclusively on admissions separately made, though involving others as well as the maker, an instruction limiting the testimony to the maker is not too satisfactory. See *State v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45. In *Bonner,* the defendants were separately indicted but tried together and their separate confessions were so tied together that each defendant was prejudiced by his co-defendants' admissions. The Court has established the rule, however, that the motion for severance is left to the sound discretion of the presiding judge. "The granting or refusing of the motion for a separate trial . . . rested in the sound discretion of the trial judge." *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363; *State v. Anderson,* 208 N.C. 771, 182 S.E. 643; *State v. Donnell,* 202 N.C. 782, 164 S.E. 352; See Strong's N. C. Index, Supplement to Vol. I, Criminal Law, § 87. In this case the court did not commit error in denying the motions for a separate trial.

By Assignment of Error No. 13 the appellants raise a question not altogether free from difficulty. The weakest link in the State's evidence is the connection between Battle who was found in the building, and the other defendants who were outside. Only through Battle is the State able to connect the others with the actual breaking and entering. Another man, not identified, remained in the car in Raleigh when Bell, Mariam and Wallace rented the U-Haul truck. In consequence of what Battle had disclosed to the officers after his arrest, they were able to recover the U-Haul truck in Lumberton. After the State had rested, Battle elected to testify in his own behalf. After he had testified, Officer Lovette was recalled and asked these questions "Did Battle ever describe the truck to you?" Answer: "He identified one." Question: "Did you show him one?" Answer: "Yes, sir. U-Haul truck at the police station *which he said was the truck they rented in Raleigh and left in Lumberton.*" After the questions were asked and the answers were in, the attorney for

the appellants objected. The court replied: "The objection came too late, Mr. Campbell. Overruled."

It appears obvious the answer was not responsive to the question. The officer volunteered the underscored portion of the answer before any objection was made. The defendant's counsel should have moved to strike as unresponsive; or, in any event, to have the answer admitted and considered against Battle alone. The unlimited answer strengthened the State's case at its weakest link and tended to tie in Battle with the others. Did failure to request the court to strike the answer or to limit its application to Battle alone waive the objection?

"In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer. Sometimes, however, inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer. In such cases the objection should be made as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." Stansbury, Evidence, § 27, p. 51, citing *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196. McIntosh, 2d Ed., N. C. Practice and Procedure, § 1533, states the rule: "Where a party has failed to object to evidence at the proper time, he may still ask the court to strike it out." (citing *Johnson v. Allen,* 100 N.C. 131, 5 S.E. 666) "The defendants, however, did not move to strike the nonresponsive parts of the doctor's answers. Hence the objection was waived." *Gatlin v. Parsons,* 257 N.C. 469, 126 S.E. 2d 51; *Edgerton v. Johnson,* 217 N.C. 314, 7 S.E. 2d 535; *Bryant v. Construction Co.,* 197 N.C. 639, 150 S.E. 122. "The part of the answer . . . is not . . . responsive to the question. Objection, therefore should have been made to the answer rather than to the question, and a motion submitted to strike it out. This is generally true when the answer is objectionable and is not responsive to the question. . . . There are numerous cases which require that course to be taken in order to save the party's rights." *Hodges v. Wilson,* 165 N.C. 323, 81 S.E. 340. The objectionable part of the answer was volunteered by a witness. If it had been responsive to the question, the evidence would have been competent against Battle. However, the other defendants, upon request, were entitled to have the admission restricted to Battle who made it.

The foregoing and many other authorities recognize that a witness may insert in his answer something which was beyond the question, but when that occurs the attorney for the complaining party should move to strike or to limit the reply, as the interest of his client may require. Even valid objections may be, and are usually

waived in the ordinary case by failure to follow the recognized practice by motion to strike or by motion to limit if the evidence is not competent against all charged. This appears to be such a case.

No error.

MOORE, J., not sitting.

SHARP, J., dissents.

J. A. HORNEY, ADMINISTRATOR OF THE ESTATE OF RICHARD EUGENE HORNEY, DECEASED, v. MEREDITH SWIMMING POOL COMPANY, INC., AND DAVID MEREDITH.

(Filed 16 June, 1966.)

1. Death § 3—

The right of action for wrongful death is purely statutory and the statute confers the right of action solely upon the personal representative to recover only in those instances in which the decedent, had he lived, would have been entitled to maintain an action for damages. G.S. 28-173.

2. Same; Master and Servant § 86—

The personal representative of a deceased employee may not maintain an action for wrongful death of the employee against a fellow employee and the employer for negligent injury causing death inflicted by the fellow employee while both employees were acting in the course of their employment. G.S. 97-10.1.

3. Same—

The fact that an employee, fatally injured by the negligence of a fellow employee in the course of their employment, leaves no one either wholly or partially dependent upon him, so that under G.S. 97-40, as then in effect, no one could claim compensation under the Workmen's Compensation Act, does not entitle the personal representative of the employee to maintain an action for wrongful death.

MOORE, J., not sitting.

APPEAL by plaintiff from *Shaw, J.*, February 14, 1966, Civil Session of GUILFORD, Greensboro Division.

Action for damages for wrongful death, heard below on demurrers to (amended) complaint.

Plaintiff's allegations, in brief summary, are narrated below.

The individual defendant (Meredith) was the president of the corporate defendant (Pool Company). Pool Company had more

than five employees. Horney, plaintiff's intestate, and Homer Wood (Wood) were employees of Pool Company; and, on the occasion of Horney's death, both were acting within the course and scope of their employment by Pool Company.

Defendants, knowing that Horney and Wood were totally unskilled in the field of electronics, ordered them, on August 26, 1964, to proceed to a Greensboro residence, then and there to make electrical connections to an underwater light. While waiting for Wood to make the connections, Horney was on the diving board of the pool. Wood negligently and carelessly connected the wires so that the live or "hot wire" from the electrical supply was connected to the "ground wire" of the line. When Wood turned the power supply on, the entire pool with its fixtures, including the diving board, was energized, as a result of which Horney was electrocuted and drowned.

Horney was survived by "his father, his mother, and two sisters only, no one of whom was in any degree dependent for support on the earnings of decedent, either in fact or within the scope of the definitions of 'whole or partial dependents' as the same are set forth" in the provisions of the North Carolina Workmen's Compensation Act, specifically G.S. 97-38 and G.S. 97-40, "as the same were in force and effect on August 26, 1964."

Plaintiff prays that he recover damages in the amount of $200,000.00.

Separate demurrers were filed by defendants. Each defendant demurred on the ground the court did not have jurisdiction of the subject matter. The court sustained the demurrers and dismissed the action. Plaintiff excepted and appealed.

Schoch, Schoch & Schoch for plaintiff appellant.

Jordan, Wright, Henson & Nichols and Edward L. Murrelle for Meredith Swimming Pool Company, Inc., defendant appellee.

Booth, Osteen, Fish & Adams for David Meredith, defendant appellee.

BOBBITT, J. For purposes of this appeal, we assume, as do the parties in their briefs, (1) that Horney and Pool Company were subject to and bound by the provisions of the Workmen's Compensation Act; (2) that Horney was fatally injured by accident arising out of and in the course of his employment by Pool Company; and (3) that the complaint (sufficiently) alleges Horney's injury and death were proximately caused by the negligence of defendants.

Plaintiff seeks to recover under G.S. 28-173 which, in pertinent part, provides: "When the death of a person is caused by a wrong-

ful 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; . . ." (Our italics.)

At common law there was no right of action for wrongful death. Such right of action exists only by virtue of said statute. *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793, and cases cited; *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807, and cases cited. The right of action conferred by said statute vests in the personal representative of the deceased. *Bank v. Hackney,* 266 N.C. 17, 145 S.E. 2d 352, and cases cited.

The right of action for wrongful death "is limited to 'such as would, if the injured party had lived, have entitled him to an action for damages therefor.'" *Goldsmith v. Samet,* 201 N.C. 574, 160 S.E. 835. Hence, the administrator of an unemancipated child whose death is caused by the negligence of his parent has no cause of action against the parent for the wrongful death of the child because such child, if he had lived, would have had no cause of action against the parent on account of his injuries. *Goldsmith v. Samet, supra; 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. On like grounds, neither a parent nor his personal representative has an action for wrongful death against an unemancipated child or his representative. *Cox v. Shaw,* 263 N.C. 361, 139 S.E. 2d 676.

G.S. 97-9 provides: "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for *personal injury or death* by accident *to the extent and in the manner herein specified.*" (Our italics.)

G.S. 97-10.1 provides: "If the employee and the employer are subject to and have accepted and complied with the provisions of this article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative *shall exclude* all other rights and remedies of the employee, *his dependents, next of kin, or representative* as against the employer *at common law or otherwise* on account of such injury or death." (Our italics.)

It is well established by our decisions, based on G.S. 97-9 and

G.S. 97-10.1, that Horney, if he had lived, could not have maintained a common-law action against the Pool Company, his employer, or against Meredith, who was conducting its business. Under the circumstances alleged, a claim against his employer and its insurance carrier under the Workmen's Compensation Act would have been his exclusive remedy. *McNair v. Ward,* 240 N.C. 330, 82 S.E. 2d 85, and cases cited; *Burgess v. Gibbs,* 262 N.C. 462, 137 S.E. 2d 806, and cases cited. As stated in *Gregutis v. Waclark Wire Works,* 92 A. 354 (N.J.), in considering a similar factual situation, "the condition upon which a right of action is given to the personal representatives of a deceased person by the Death Act is not present in the case at bar."

While the foregoing affords sufficient ground for decision that plaintiff cannot recover under G.S. 28-173, our wrongful death statute, we deem it appropriate to discuss plaintiff's contentions.

G.S. 97-40, at the time of Horney's injury and death, provided: "If the deceased employee leaves neither whole nor partial dependents, no compensation shall be due or payable on account of the death of the deceased employee." Hence, the father, the mother and the two sisters or Horney, although his next of kin, were not entitled to an award of compensation on account of his death because they were not wholly or partially dependent upon him.

In *Patterson v. Sears-Roebuck & Co.,* 196 F. 2d 947, the Court of Appeals for the Fifth Circuit affirmed a judgment dismissing the complaint "for want of a statement of a recoverable claim." As stated in the opinion of Chief Judge Hutcheson, the plaintiff, administrator of the estate of a deceased employee, alleged "that decedent left surviving her only a husband, a father, and a brother, no one of whom was in any degree dependent on said decedent, either in fact or within the scope of the definition of dependents as set forth in the Alabama Workmen's Compensation Act, . . ." Decision required consideration of the Workmen's Compensation Act and of the wrongful death statute of Alabama.

It is contended here, as in *Patterson v. Sears-Roebuck & Co., supra,* that, because the surviving next of kin were not wholly or partially dependent upon the decedent and therefore were not entitled to an award under the Workmen's Compensation Act, the plaintiff is entitled to recover damages under the wrongful death statute. In our opinion, for reasons heretofore and hereafter stated, this contention is unsound. Decisions involving substantially the same factual situation as that considered herein and supporting our conclusion include the following: *Gregutis v. Waclark Wire Works, supra; Patterson v. Sears-Roebuck & Co., supra; Chamberlain v.*

Florida Power Corporation, 198 So. 486 (Fla.); *Howze v. Lykes Bros.,* 64 So. 2d 277 (Fla.); *Bigby v. Pelican Bay Lumber Co.,* 147 P. 2d 199 (Ore.); *Atchison v. May,* 10 So. 2d 785 (La.); *Neville v. Wichita Eagle,* 294 P. 2d 248 (Kan.); *Shanahan v. Monarch Engineering Co.,* 114 N.E. 795 (N.Y.); *McDonald v. Miner,* 32 N.E. 2d 885 (Ind.); *Treat v. Los Angeles Gas & Electric Corporation,* 256 P. 447 (Cal.). See also, *Liberato v. Royer,* 126 A. 257 (Pa.), *affirmed* in 270 U.S. 535, 46 S. Ct. 373, 70 L. Ed. 719; *McDonnell v. Berkshire St. Ry. Co.,* 137 N.E. 268 (Mass.).

The Workmen's Compensation Act "contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved." *Winslow v. Carolina Conference Association,* 211 N.C. 571, 579, 191 S.E. 403. "The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all." *Conrad v. Foundry Company,* 198 N.C. 723, 725-726, 153 S.E. 266. Liability based on negligence was eliminated. *Vause v. Equipment Co.,* 233 N.C. 88, 91, 63 S.E. 2d 173.

The opinion in *Howze* contains this succinct statement: "The philosophy of workmen's compensation is that when employer and employee accept the terms of the act their relations become contractual and other statutes authorizing recovery for negligent death become ineffective." In *Chamberlain,* on which *Howze* is based, this thesis is more elaborately discussed and supporting decisions are cited.

Our Workmen's Compensation Act deals expressly with cases where the compensable injury results in death. The remedies provided thereby "exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death." G.S. 97-10.1.

This excerpt from the opinion in Shanahan is pertinent: "A certain liability is imposed for death, and that liability exclusive. No other responsibility is left which springs from the occurrence upon which liability rests — death — and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances of the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute." As noted in *Schnall v. 1918 Harmon St. Corp.,* 207 N.Y.S. 2d 375: "If the decedent had lived he would have been entitled to a compensation award; and if he had been survived by a dependent, the latter would have been entitled to such an award."

As stated in *Gregutis:* "Since the Workmen's Compensation Act

by its terms repeals all inconsistent legislation, the rights and remedies thereby given are substituted for those theretofore provided by the Death Act. The result is that where, as here, the employee contracts to work under section 2 of the Workmen's Compensation Act, the damages to be paid by the employer in case of death are limited by that act, and an action cannot be maintained in disregard of that act."

As stated in *Patterson:* "Nor is the result . . . that no action could be brought against an employer for death damages where a particular employee has no dependents, of importance in law unless by express provision the statute makes it so. The Legislature could take away all remedy for injuries resulting in death, or condition it as it saw fit. It could provide, as it has done under the Workmen's Compensation Act, and as it does in many death damage cases in other states, for a strictly limited kind of recovery."

As stated in *Chamberlain:* "One of the benefits to the employee is compensation irrespective of the cause of injury, but under our act this does not apply to other than dependents. The right to bring a suit at law for damages for death by wrongful act did not exist at common law. It exists only by virtue of statute. (Citation) It being competent for the legislature to take away this right, it is competent for them to enact that the employee may by contract elect to have damages for injuries or death he may sustain governed by the provisions of the Workmen's Compensation Act."

With reference to *Miller v. Hotel Savoy Co.,* 228 Mo. App. 463, 68 S.W. 2d 929, cited and stressed by plaintiff, we adopt with approval what was said in *Neville v. Wichita Eagle, supra, viz.:* "The above opinion of the Kansas City Court of Appeals need not be reviewed here. That court held in a somewhat similar factual situation that the parents could maintain the action as such action was one not provided for or precluded by the state compensation act. However in the later case of *Holder v. Elms Hotel Co.,* 338 Mo. 857, 92 S.W. 2d 620, 624, 104 A.L.R. 339, the Supreme Court of Missouri commented on the *Miller* decision saying it did not approve of the expression in the *Miller* case that the phrase 'not provided for by this chapter' meant 'not compensated for by this chapter.' The *Miller* decision is not persuasive here."

Plaintiff cites and stresses *Ivey v. Prison Department,* 252 N.C. 615, 114 S.E. 2d 812, in which a judgment sustaining a demurrer to plaintiff's claim was reversed. The proceeding was instituted before the North Carolina Industrial Commission by an administrator to recover under the Tort Claims Act (G.S. Chapter 143, Article 31) for the death of his intestate, a prisoner, allegedly caused by

the negligence of a named employee of the North Carolina Prison Department. When the Tort Claims Act was enacted, G.S. 97-13, captioned "Exceptions from provisions of article," in pertinent part, provided: "(c) Prisoners.—This article shall not apply to prisoners being worked by the State or any division thereof" unless the results of an injury arising out of and in the course of assigned employment "continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article," and also that "no award other than burial expenses shall be made for any prisoner whose accident results in death." *It was held that plaintiff's asserted claim was authorized by the Tort Claims Act.* Decision turned on the significance of the 1957 amendment to G.S. 97-13(c), *viz.:* "The provisions of G.S. 97-10 shall apply to prisoners and discharged prisoners *entitled to compensation* under this subsection and to the State in the same manner as said section applies to employees and employers." (Our italics.) The Tort Claims Act was not amended. It was held that G.S. 97-13(c), originally and after the amendment, presented "a problem in legal quadratics," and that the plain provisions of the Tort Claims Act were not repealed by "an amendment tucked away in a jumbled and confusing subsection." Too, it was held that the payment of burial expenses was not payment of *compensation* within the meaning of the 1957 amendment. Whether the prisoner, if he had survived his injury, would be entitled to compensation under G.S. 97-13(c) could not be determined until the date of his discharge. Definitely, *nobody,* under any circumstances, was entitled to any compensation under G.S. 97-13(c) on account of his death while a prisoner. We find nothing in *Ivey v. Prison Department, supra,* that would support plaintiff's asserted right of action under G.S. 28-173.

It is noteworthy that acceptance of plaintiff's theory would lead to "the most incongruous results." *Bigby v. Pelican Bay Lumber Co., supra.* In case of fatal injury, no employer would be immune from liability based on negligence. Liability would depend solely upon whether the injured employee perchance was survived by dependents. If so, recovery by dependents would be limited to compensation provided by the Workmen's Compensation Act but non-dependent next of kin could be the beneficiaries of the unrestricted recovery permissible in a wrongful death action. Moreover, for the interval, if any, between compensable injury and death within two years thereafter, see G.S. 97-38, the exclusive remedy of the injured employee would be a claim against his employer and its insurance carrier under the Workmen's Compensation Act. However, in such

case, if plaintiff's theory were accepted, in the event the employee was survived by non-dependent next of kin, the administrator would be entitled to maintain an action under G.S. 28-173 on account of death resulting from such compensable injury.

The statutory law in force on August 26, 1964, controls decision on this appeal. It is noted that G.S. 97-40 was amended in 1965 (Session Laws of 1965, Chapter 419) so that, under certain circumstances, the father, mother or sister of a deceased employee, without reference to dependency, would be entitled to receive death benefits under the Workmen's Compensation Act. The fact that Horney's father, mother and sisters, nondependents, happened to be his next of kin, has no significance to decision on this appeal. The asserted basis of plaintiff's theory of recovery would apply equally if Horney's next of kin, nondependents, were remote collateral kin.

For reasons stated, the judgment of the court below is affirmed. Affirmed.

MOORE, J., not sitting.

NATIONWIDE HOMES OF RALEIGH, N. C., INC., v. FIRST-CITIZENS BANK & TRUST COMPANY, AND ELOISE M. CURRIN, ADMINISTRATRIX OF THE ESTATE OF S. T. CURRIN, JR., DECEASED.

(Filed 16 June, 1966.)

1. Banks and Banking § 10—

Where the relationship of debtor and creditor is created between a bank and a person by the deposit of funds in the bank in the name of such person, the bank has the burden of proving its defense of the discharge of the debt, and when the bank pays out funds on checks signed by an agent of the depositor it must show that the agent had authority from the depositor to draw the funds from the account or that the creditor is estopped or otherwise barred from asserting the agent's lack of authority.

2. Appeal and Error § 49—

Findings of fact by the trial court which are supported by competent evidence are conclusive on appeal.

3. Same—

Where there are no exceptions to the findings of fact, the findings are conclusive on appeal.

4. Trial § 6—

A stipulation of the parties amounts to a judicial admission, binding upon the parties.

5. Banks and Banking § 10—

If checks drawn by an agent of the depositor are not forgeries G.S. 53-52 has no application; if the checks are forgeries, the defense of the statute is not available to the bank when the depositor gives notice to the bank within the time provided by the statute.

6. Same—

The rule that a depositor has notice of checks forged on its account upon the mailing of the forged checks to the depositor, even though the checks are received for the depositor by the agent uttering the forgeries, does not apply when the evidence conclusively shows that the bank creditor had no knowledge of the existence of the account but that its agent opened the account without authorization.

7. Same—

G.S. 53-52 does not require notice in any specified form, and when the findings of fact and stipulations of the parties disclose that the principal, in less than 60 days from receipt by the principal of the bank statement gave notice sufficient to advise the bank that the agent had no authority to open the account in the principal's name or draw checks thereon, and that the purported signature of the secretary of the corporate principal on the signature card was a forgery, such notice is sufficient under the statute, notwithstanding that an itemized list of the checks so paid without authorized signature is not furnished until more than 60 days after receipt of the bank statement and vouchers.

8. Same—

There is no duty upon a depositor to examine endorsements on his genuine checks, and the fact that a check of a principal is first endorsed by the payee and thereafter endorsed by the agent of the principal, who then deposits the check in an account, is not notice to the principal that its agent had deposited the check in an account which the agent had, without authority, opened in the name of the principal and upon which the agent had drawn checks without authority, the principal being without knowledge that the unauthorized account had been opened in its name.

9. Trial § 57—

In a trial by the court under agreement of the parties, mere entry of appeal without the filing of any exception to the judgment or to the refusal of the court to find facts as requested until the service of statement on appeal, does not meet the requirements of G.S. 1-186.

10. Appeal and Error § 19—

An assignment of error must disclose the questions sought to be presented without the necessity of going beyond the assignment itself. Rule of Practice in the Supreme Court No. 19(3).

MOORE, J., not sitting.

APPEAL by defendant First-Citizens Bank & Trust Company from *Latham, S.J.*, January 1965 Assigned Session of WAKE.

The plaintiff instituted this action against the First-Citizens

Bank & Trust Company, hereinafter called the Bank. The essence of its complaint is that S. T. Currin, Jr., now deceased, then its employee, without authority from the plaintiff to do so, opened an account in the Bank in the name of the plaintiff and deposited therein, from time to time, $13,956.45 of the funds of the plaintiff, which funds the Bank paid out upon checks which the plaintiff did not sign or authorize and which were not the checks of the plaintiff but were forgeries. The plaintiff seeks judgment against the Bank for the full amount of such deposits, less those disbursements from the account which it concedes were paid out to the ultimate benefit of the plaintiff, though without its authority, the balance so sought to be recovered being $8,663.69.

The answer of the Bank admits the amount so deposited in the account and that the entire amount was paid out by it upon checks drawn by Currin. The remaining material allegations of the complaint are denied by the Bank. For further answers, the Bank alleges in substance:

(1) That the plaintiff's parent corporation is the real party in interest and a necessary party to this action;

(2) The estate of S. T. Currin, Jr. is primarily liable to the plaintiff and is a necessary party to the action;

(3) The plaintiff was negligent in failing to supervise properly the activities of S. T. Currin, Jr., and is thereby estopped to maintain this action;

(4) The plaintiff ratified certain portions of the acts of S. T. Currin, Jr. with reference to this account and is estopped thereby to repudiate the remainder;

(5) The plaintiff clothed Currin with authority over its business operations in the Raleigh area and by negligent failure to exercise proper supervision of his activities made possible the loss of which it complains;

(6) The plaintiff carried a policy of Fidelity Insurance extending to the operations of Currin and must exhaust its remedies against its insurer before proceeding against the defendant Bank;

(7) On or prior to 10 January 1962, the plaintiff received all bank statements and cancelled checks relating to the said account and failed within sixty days after such receipts to notify the Bank that the said checks were forgeries, for which reason the defendant pleads the provisions of G.S. 53-52 in bar of the plaintiff's right to recover.

Upon motion of the plaintiff, the material portions of the Bank's first further answer were stricken. Upon motion of the Bank, Eloise M. Currin, Administratrix of the Estate of S. T. Currin, Jr., was

made a party defendant, but after she filed answer the Bank elected to take a voluntary nonsuit as to her and the action, as against her, was dismissed.

The action came on to trial and at the close of the plaintiff's evidence the Bank's motion for judgment of nonsuit was allowed. From that judgment the plaintiff appealed to this Court and the judgment of nonsuit was reversed. *Nationwide Homes v. Trust Co.*, 262 N.C. 79, 136 S.E. 2d 202.

The matter then again came on for trial and, by consent, was heard by Latham, S.J., without a jury.

Prior to trial the parties stipulated that the signature card presented to the Bank by S. T. Currin, Jr., bearing his signature and purporting to bear the signature of George Coleman, an officer of the plaintiff, was "filled out without the authorization and knowledge of the plaintiff corporation; that the signature of George Coleman was a forgery committed by the said S. T. Currin, Jr." They then further stipulated that "all checks drawn on the subject account are forgeries committed by S. T. Currin, Jr. and are not checks or drafts of the plaintiff."

After hearing this evidence, Latham, S.J., made numerous findings of fact, which are incorporated in his judgment. The defendant did not except to any of these findings of fact and each of them is supported by evidence in the record. Those material to this appeal may be summarized as follows:

Currin had no authority, express or implied, to open a bank account without the approval of the Home Office of the plaintiff. It was his duty to send all bills for labor and materials to the plaintiff's Home Office and all such bills were paid from that office by the parent corporation. Currin falsely represented himself to the Bank as vice-president of the plaintiff corporation and, without authority from the plaintiff, opened an account in the Bank in the plaintiff's name, presenting to the Bank a signature card signed by him and purporting to be signed by George Coleman, secretary of the plaintiff, Coleman's signature thereon being a forgery. The signature card purported to authorize the payment of checks signed in the name of the plaintiff by Currin. Currin deposited in the account, from time to time, a total of $13,956.45, all of which, with the exception of a trivial amount, was disbursed by the Bank upon checks signed in the name of the plaintiff by Currin, which checks were unauthorized by and unknown to the plaintiff or its parent corporation. The Bank is entitled to a credit of $5,292.76 by reason of certain of the disbursements which were to the benefit of the plaintiff. One of the deposits by Currin in the account consisted of a check drawn by the parent corporation payable to A. L. Franklin and

endorsed by Franklin, and then endorsed by Currin for deposit in the Bank to the credit of the plaintiff. When returned to the drawer by the drawee bank, this check bore the rubber stamp endorsement of the defendant and another bank stating "prior endorsements guaranteed." On 28 December 1961, Currin committed suicide. A few days prior to his death, the regional manager of the plaintiff corporation discovered the cancelled checks and check book relating to this bank account in Currin's locked desk at the plaintiff's office in Raleigh. Prior to that time, no officer or authorized employee of the plaintiff knew of the existence of this account. On or about 28 December 1961, the plaintiff's regional manager went to the Bank and notified its head bookkeeper that he had discovered this unauthorized account, asked for a copy of the resolution of the plaintiff corporation authorizing the opening of the account, and upon being shown the signature card filed with the Bank by Currin advised the Bank that Currin was not and never had been a vice-president of the plaintiff and that the signature of Coleman upon the card was a forgery.

Latham, S.J., concluded from his findings of fact so made that Currin had no apparent or implied authority to open the account and draw checks thereon; that the checks paid by the Bank were "forged and unauthorized, were not checks of the plaintiff"; that the endorsement on the check of the plaintiff payable to Franklin, above mentioned, was not notice to the plaintiff of the existence of the Bank account; that all the money deposited in the account belonged to the plaintiff; that $5,292.76 was the full amount of credit to which the defendant is rightfully entitled; that the entire transaction was a scheme designed by Currin to defraud the plaintiff and all of the checks drawn on the account by Currin were in furtherance of this scheme; that the plaintiff did not receive the vouchers showing payments from the account by the Bank until on or about 28 December 1961, and notice was then given to the Bank of "the forged and unauthorized account and checks," in accordance with G.S. 53-52; and that none of the plaintiff's claim is barred.

Upon these findings and conclusions, Latham, S.J., adjudged that the plaintiff have and recover of the defendant $8,663.69, together with interest thereon from 28 December 1961, and costs. From this judgment the Bank now appeals.

Mordecai, Mills and Parker for defendant appellant.

Yarborough, Blanchard, Tucker & Yarborough for plaintiff appellee.

LAKE, J. The principal contention of the Bank is that the plaintiff, on or about 28 December 1961, at which time its regional man-

ager discovered the existence of the bank account and the checks paid prior to that time, did not notify the Bank that the checks were forgeries but merely notified the Bank that the account was unauthorized and the signature of Coleman upon the signature card was a forgery. It contends that, though the plaintiff received the bank statement for December on or before 10 January 1962, and, therefore, on that date had possession of all cancelled checks, the plaintiff did not make demand upon the Bank for re-crediting to his account the amount of such checks, less the credit above mentioned, until 29 March 1962, at which time the plaintiff delivered to the Bank an itemized list of the checks paid by the Bank and charged to the account, together with a statement of the credits acknowledged by the plaintiff to be due the Bank. For this reason the Bank contends that the plaintiff is barred from any right of recovery by G.S. 53-52, which reads as follows:

> "*Forged check, payment of.*—No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged."

When funds were deposited in the defendant Bank for credit to an account opened, and later carried on its books, in the name of the plaintiff, a relation of debtor and creditor between the Bank and the plaintiff was thereby created. The Bank has the burden of proving that it paid the debt when it relies upon payment as a defense to an action for the collection of it. Nothing else appearing, it is not sufficient for the Bank to show simply that it made a debit entry upon the account. It must show that it had authority from the creditor to make such entry or that the creditor is estopped or otherwise barred from asserting the Bank's lack of authority for the making of such entry. *Schwabenton v. Bank*, 251 N.C. 655, 111 S.E. 2d 856.

Here, it is admitted in the answer that "the sum of $13,956.45 was deposited in the defendant Bank in an account in the name of Nationwide Homes of Raleigh, N. C., Inc." Upon the former appeal in this action, *Nationwide Homes v. Trust Co.*, 262 N.C. 79, 136 S.E. 2d 202, Rodman, J., speaking for the Court, said:

> "The admission that funds were deposited with defendant in plaintiff's name placed the burden on it to show payment of the debt so created. * * * Here the stipulation that Currin forged the checks negates express authority to draw on the bank account; * * * The mere fact that an agent makes deposits to the credit of his principal is not of itself sufficient to

> imply authority to draw checks on the account. * * * The burden was on defendant to show plaintiff's recognition of Currin's authority to write checks."

The trial judge found as a fact that all disbursements charged to this account were "by checks signed by Currin, which checks were unauthorized by and unknown to the plaintiff or to the parent corporation." He also found as facts that throughout the existence of this account the Bank was not aware "of any business of the said Currin or of the extent of Currin's practices, was unaware of any business of the plaintiff corporation, and made no effort to acquaint itself with either," and "that the defendant Bank had no notice of Currin's having described himself as general manager of plaintiff's local office." These findings of fact are supported by evidence in the record. Furthermore, the record does not disclose any exception by the defendant to any of them. For both of these reasons, the findings have the same effect as a verdict of a jury and are conclusive upon appeal. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486; *St. George v. Hanson*, 239 N.C. 259, 78 S.E. 2d 885; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351; *Buchanan v. Clark*, 164 N.C. 56, 80 S.E. 424.

The parties stipulated "that all checks drawn on the subject account are forgeries committed by S. T. Currin, Jr. and are not checks or drafts by the plaintiff."

It being thus clearly established that the relation of debtor and creditor existed, and that the payments by the Bank were upon checks drawn by Currin with neither express, implied nor apparent authority, such payments are not a defense to the claim of the plaintiff unless they are made so by G.S. 53-52.

In *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460, Bobbitt, J., speaking for the Court, said:

> "Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury. * * * A stipulation is a judicial admission. As such, 'It is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact.' Stansbury, North Carolina Evidence, Sec. 166."

We need not consider in the present case the interesting question of whether the court is bound by a conclusion of law incorporated into a stipulation of the parties, where the record contains findings of fact, supported by evidence, casting doubt upon the correctness of such conclusion. Nor do we need, in this instance, to determine

whether a check signed in the name of the depositor by one who claims to be an agent, but who has no authority to draw such checks, is a forgery within the meaning of G.S. 53-52. In *State v. Lamb,* 198 N.C. 423, 152 S.E. 154, Adams, J., speaking for the Court, said, "[S]igning as the agent of another without authority does not constitute forgery." See, however, *Trust Co. v. Casualty Co.,* 231 N.C. 510, 57 S.E. 2d 809, 15 A.L.R. 2d 996.

If the checks signed by Currin, without authority from the plaintiff, were not forgeries, G.S. 53-52 has no application and affords to the defendant no defense to the claim of the plaintiff.

If these checks were forgeries, within the meaning of that statute, the defense of the statute is not available to the defendant because the plaintiff gave notice to the defendant Bank within the time provided by the statute.

In *Schwabenton v. Bank, supra,* this Court said, "The burden is on the bank seeking the protection afforded by this statute to show delivery of the voucher to the depositor more than sixty days before the claim is made." In that case, it was also held that the mailing of a bank statement, with cancelled checks, and the acceptance thereof from the Post Office by the depositor "in person or through his authorized agent," constituted a receipt by the depositor of such documents within the meaning of the statute, and that the depositor's failure to give the required notice to the bank, within the specified time thereafter, would bar his right of recovery even though the "authorized agent" so receiving the bank statement was the forger and, again, was unfaithful to his trust by concealing the voucher from the depositor.

In the present case, it is argued that Currin received some of the statements and cancelled checks relating to this account prior to 28 December 1961. Assuming that the evidence would be sufficient to support a finding that Currin did so receive the statements and cancelled checks, the evidence conclusively shows that the plaintiff was not aware of the existence of this account. Currin was not authorized by the plaintiff to open the account, to draw checks on it or to receive and examine bank statements pertaining to it. Therefore, the rule of the *Schwabenton* case, as to when the depositor received the cancelled checks, does not apply to the present situation. Thus, the conclusion of the trial judge that the plaintiff did not receive the vouchers and statements until on or about 28 December 1961 is supported by findings of fact which, in turn, are supported by evidence.

Immediately upon the discovery of the existence of the bank account, through its discovery of the statements and checks so returned by the defendant to Currin, the plaintiff notified the defend-

ant Bank that the account was unauthorized and that the purported signature of its secretary, Coleman, upon the card with which the account was opened, was a forgery. G.S. 53-52 does not require notice in any specified form. It is sufficient that within the time allowed by the statute the depositor gives to the bank notice sufficient in content to advise the bank that the debits charged to the depositor's account are based upon checks which are "forged." Notice to the bank that the entire account is unauthorized and unknown to the person in whose name it is opened necessarily advises the bank that any check charged thereto, which check purports to be drawn in the name of such account holder was drawn without authority and with fraudulent intent — a forgery within the contemplation of the stipulation in this record. Consequently, there was no error in the conclusion of the trial court that notice to the defendant Bank "of the forged and unauthorized account and checks was given on or about December 28, 1961, in accordance with G.S. Sec. 53-52." The defendant having been given the notice required by the statute, there was no error in the court's conclusion that "none of the plaintiff's claim is barred."

Neither the plaintiff nor its parent corporation was put on notice of the existence of the account in the defendant Bank by reason of the fact that a check, drawn by the parent, payable to one A. L. Franklin, was first endorsed by Franklin and thereafter endorsed by Currin for deposit into the account in question. There is no duty upon the depositor to examine endorsements upon his genuine checks. 10 Am. Jur. 2d, Banks, § 513. There is no evidence that the plaintiff did, in fact, observe the endorsements upon this check and thereby learn of the unauthorized account. There was no error in the court's conclusion with respect to this matter.

It appears from the record that the judgment was signed, by consent, out of term and out of the district on 27 August 1965, and that the defendant caused appeal entries to be entered on the docket on 1 September 1965, but did not file any exceptions to the judgment, or to the refusal of the court to find facts as requested by the defendant, until the service of its statement of the case on appeal on 28 December 1965. This was not in accordance with the requirements of G.S. 1-186. Furthermore, the defendant's statement of its assignments of error does not comply with Rule 19(3) of the Rules of Practice in this Court, in that it does not appear from the assignments, themselves, what question is intended to be presented thereby, but we are directed on "a voyage of discovery" through the pages of the record. See *Hines v. Frink*, 257 N.C. 723, 127 S.E. 2d 509; *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405. We have, never-

theless, considered each of the assignments as if it had been properly set forth and we find no merit therein.

No error.

MOORE, J., not sitting.

LARUE B. COX, ADMINISTRATOR OF THE ESTATE OF JANET GAIL COX, DECEASED, v. LLOYD D. GALLAMORE, JR. AND NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 16 June, 1966.)

1. Trial § 21—

Upon motion to nonsuit, plaintiff's evidence must be taken as true and interpreted in the light most favorable to him, giving him the benefit of all inferences favorable to him reasonably deducible therefrom, and resolving in his favor all contradictions or inconsistencies, if any, in his evidence.

2. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence inescapably establishes this defense.

3. Railroads § 6—

A passenger in an automobile cannot be held contributorily negligent as a matter of law in failing to warn the driver of the approach of a train at a railroad grade crossing when the approach of the train is obscured by buildings and obstructions, the track across the highway is not visible until immediately upon it, and the paint on the railroad crossing sign has been allowed to fade so that its warning is not easily distinguishable.

4. Same—

The failure of the State Highway Commission to require the installation of gates, alarm signal, or other safety devices at a grade crossing does not relieve the railroad from its common law duty to give users of the highway adequate warning of the existence of the grade crossing. G.S. 136-20.

5. Same—

While a railroad crossing is, in itself, a warning of danger to a driver who knows of it or who, by keeping a reasonable lookout in his direction of travel, should discover its existence in time to stop his vehicle before entering the path of an approaching train, such driver is not required to assume that he will come upon an unknown, unmarked railroad crossing which is not discoverable by a reasonable lookout.

6. Same—

Even though a railroad crossing has signs posted which are adequate to give a traveler on the highway notice of the presence of the railroad cross-

ing, it is also the duty of the railroad to give timely warning of the approach of its train to the crossing by the blowing of the whistle or horn, by ringing the bell, or by some other device reasonably calculated to attract the attention of those approaching the crossing upon the highway.

7. Same—

The duty of the engineer of a train approaching an obstructed highway crossing to give reasonable and timely warning of the approach of the train to the crossing is the same whether the obstructions are erected by the railroad or by some other person.

8. Same—

The driver of an automobile who knows or, by the exercise of a reasonable lookout in the direction of travel, should know that he is approaching a railroad crossing, is not relieved of his duty to look before entering upon the crossing merely because he has heard no signal of an approaching train, and he is under duty to his passenger to reduce his speed so that he can stop the vehicle, if necessary, in order to avoid a collision with an approaching train, the train having the right of way at the crossing.

9. Negligence § 8—

Negligence of one party cannot insulate the negligence of another unless the negligence of such other is a superseding cause which alone results in the injury; this it cannot do if the primary negligence continues up to the moment of impact.

10. Railroads § 6— Evidence held sufficient to be submitted to the jury on issue of concurring negligence of driver and railroad in causing death of passenger in crossing accident.

Evidence tending to show that a locomotive approached a crossing without giving signal by whistle or otherwise, that the crossing was obstructed and that the train did not come into view of the driver of the car in which plaintiff's intestate was riding until the car was some 175 feet from the crossing, leaving it a question of fact whether the driver, by the use of reasonable care under the circumstances, could have brought his car to a stop before striking the train or whether, by maintaining a reasonable lookout in his direction of travel, he should have discovered the existence of the crossing before the train, itself, came into view, *held* sufficient to be submitted to the jury on the question of concurring negligence of the railroad company and the driver in an action for wrongful death of a passenger in the automobile.

MOORE, J., not sitting.

APPEAL by plaintiff from *Morris, J.*, 6 December 1965 Regular Civil Session of CURRITUCK.

This is an action for the wrongful death of Janet Gail Cox, age 15, as the result of a collision between a train of the Norfolk Southern Railway Company and an automobile driven by the defendant Gallamore, in which automobile she was riding as a passenger. The answer of each defendant admits that the collision occurred on 28 August 1960 at a grade crossing of the Railway Com-

pany's track by a paved public highway in Currituck County, that the automobile was driven by Gallamore, and that Janet Gail Cox died as a result of injuries sustained by her in the collision.

The complaint alleges that the Railroad was negligent in that it failed to erect and maintain adequate signs or signals showing the presence of the crossing, it operated its trains at an excessive speed, failed to keep a lookout for automobiles approaching the crossing, failed to reduce the speed of the train, and failed to give a signal of the train's approach to the crossing by bell, whistle or horn. The complaint alleges that Gallamore was negligent in that he drove the automobile at an excessive speed, failed to decrease his speed, failed to keep a lookout for approaching trains and failed to stop the automobile short of the track so as to allow the train to pass. The complaint alleges that the negligence of the two defendants concurred and that each was a proximate cause of the collision and of the death of the girl.

The answer of each defendant denies negligence by the answering defendant, admits negligence of the other defendant, as alleged in the complaint, and alleges that such negligence of the other defendant was the sole proximate cause of the collision. Each defendant also pleads contributory negligence of the deceased in not warning Gallamore of the danger.

At the close of the evidence offered by the plaintiff, a motion for judgment of nonsuit as to each defendant was granted. From the judgment of nonsuit so entered the plaintiff appeals.

The plaintiff offered evidence which may be summarized as follows:

The deceased, her cousin, Carol Beck, and four male companions were out for a Sunday afternoon ride. This began in Norfolk where all of them resided with the exception of Gallamore, who was also in Norfolk at that time and joined the party there. At the time of the collision, Gallamore was driving the automobile. The deceased and one of the other young men were sitting on the front seat. The other three men in the party had been drinking a substantial quantity of beer, but neither Gallamore nor either of the girls had had anything to drink.

The members of the party who testified were not familiar with the highway upon which they were driving and there is no evidence to indicate that any member of the party had been on this road before or knew of the existence of the railroad crossing. They were traveling west on Highway No. 1148, a paved road with one lane for traffic moving in each direction. The highway crossed the railroad track at grade, rising slightly as it approached the track. The track was not elevated above the surface of the highway approaches

to it or the surrounding terrain. Thus it was not visible as it actually crossed the road until one came practically upon it. One looking for it to the north could see the track when about 400 feet east of the crossing, provided his view was not obstructed by trucks in a parking area adjoining the north side of the road. There were trucks parked there when the collision occurred. As Gallamore approached the crossing there was no sign warning of its existence except that 12 feet from the rails there was the customary railroad crossing sign consisting of two crossed boards, each from three to four feet long and approximately four inches wide, placed upon a dark-colored post, and rising some 15 feet above the ground. The crossed boards had once been painted white but practically all of the paint had worn off so that the condition of the sign was "weather beaten" and "very faded," about like an unpainted house. Other unpainted poles carrying utility wires were nearby. Further west was a wooded area which provided a dark background for the crossing sign.

The train came from the north, the right of the occupants of the automobile. As a driver approached the crossing, thirteen buildings, tanks or other structures, plus several trucks standing in a parking area beside a store, blocked his view of a train coming from the north, although there were, at certain places along the road, open spaces between the buildings through which one could, if looking in that direction at the right instant, have seen to and beyond the line of the track. The track itself would not have been visible.

When the automobile was approximately 175 feet from the crossing, the locomotive came into the sight of the occupants of the car, emerging from behind a long building formerly used as a freight station and, at the time of this occurrence, used as a shed for storing potatoes. At that time the train was approximately 125 feet from the crossing. Gallamore, the driver of the automobile, immediately applied his brakes and cut to his left to bring it to a stop. The car skidded into the side of the locomotive near the front of it and the deceased sustained injuries from which she died, apparently being instantly killed. The brakes of the car were in good condition. There was loose gravel on the surface of the highway.

Gallamore had taken over the driving of the car approximately one mile before reaching the crossing. He was driving 40 miles an hour. The windows of the automobile were all down and the radio was not turned on. The occupants were not engaged in any boisterous conduct. Each of the two who testified said that he did not hear any whistle, bell or other signal indicating the approach of the train to the crossing, that his hearing was excellent and there was nothing to prevent him from hearing such a signal. Neither of them

saw the crossing sign until after he saw the train. All the occupants of the automobile observed the train at the same time and cried out.

A whistle post stood beside the railroad track 1,000 feet north of the crossing.

J. W. Clontz and Wilton F. Walker for plaintiff appellant.

J. Kenyon Wilson, Jr. and John H. Hall for defendant Railroad, appellee.

Leroy, Wells & Shaw for defendant Gallamore, appellee.

LAKE, J. In passing upon the motion for judgment of nonsuit, the evidence of the plaintiff must be taken as true and must be interpreted in the light most favorable to the plaintiff. All reasonable inferences favorable to him must be drawn therefrom. Contradictions or inconsistencies, if any, in his evidence must be resolved in his favor.

The judgment of nonsuit could be affirmed on the ground of contributory negligence by the plaintiff's intestate only if his own evidence, so considered, leads inescapably to the conclusion that she was negligent and thereby contributed to her own injuries. There being no such evidence in the record before us, the judgment cannot be sustained on that ground.

G.S. 136-20, which empowers the State Highway Commission, under certain circumstances, to require a railroad company to install gates, alarm signals or other safety devices at a crossing, does not relieve the railroad from its common law duty to give users of a highway adequate warning of the existence of a grade crossing at which the Commission has not required such devices to be installed. *Highway Commission v. R. R.*, 260 N.C. 274, 132 S.E. 2d 595.

A railroad crossing is, in itself, a warning of danger to a driver who knows of it or who, by keeping a reasonable lookout as he drives along a highway, could discover its existence in time to stop his vehicle before entering the path of a train proceeding over the crossing. *Ramey v. R. R.*, 262 N.C. 230, 136 S.E. 2d 638; *Stevens v. R. R.*, 237 N.C. 412, 75 S.E. 2d 232. On the other hand, one driving upon a highway is not required to assume that he will come upon an unknown, unmarked railroad crossing at grade level which is not discoverable by keeping a reasonable lookout in the direction of his travel. It is the duty of the railroad to give to users of the highway warning, appropriate to the location and circumstances, that a railroad crossing lies ahead. *Davidson v. R. R.*, 170 N.C. 281, 87 S.E. 35; *Stephenson v. Grand Trunk Western R. Co.*, 110 F. (2d) 401, 132 A.L.R. 455; 75 C.J.S., Railroads, § 768b; 44 Am. Jur., Rail-

roads, § 558; Annot., 40 A.L.R. 1309. In 44 Am. Jur., Railroads, § 528, it is said:

> "A traveler's ignorance of the existence of a railroad crossing does not impose any additional duty on a railroad company in the operation of its trains, but the company may, by its omission of some duties, subject itself to a liability for injury to one ignorant of a crossing, where it would not be liable if he knew thereof. One of these is the duty to give appropriate warning to persons using the highway of the presence of railroad crossings. The manner in which this duty shall be discharged varies according to the circumstances and surroundings, and ordinarily it is a question for the jury whether the duty in a particular case has been sufficiently performed. This is usually done by means of sign boards at or near the crossing indicating the presence of the crossing, and these are frequently required by statute."

Even though the railroad has posted signs which are adequate to give a traveler upon the highway notice of the presence of a railroad crossing, it is also the duty of the railroad to give timely warning of the approach of its train to the crossing by the blowing of the whistle or horn, by ringing the bell or by some other device reasonably calculated to attract the attention of those approaching the crossing upon the highway. *Johnson v. R. R.*, 255 N.C. 386, 121 S.E. 2d 580; *Irby v. R. R.*, 246 N.C. 384, 98 S.E. 2d 349; *Caldwell v. R. R.*, 218 N.C. 63, 10 S.E. 2d 680; *Moseley v. R. R.*, 197 N.C. 628, 150 S.E. 184; *Hill v. R. R.*, 195 N.C. 605, 143 S.E. 129; *Blum v. R. R.*, 187 N.C. 640, 122 S.E. 562; *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690; *Hinkle v. R. R.*, 109 N.C. 472, 13 S.E. 884.

In the *Hinkle* case, Avery, J., speaking for the Court, said:

> "In the absence of statutes regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching the crossing of a public highway * * * is evidence of negligence to be submitted to the jury. [Citations omitted.]
>
> "It is negligence *per se* * * * to omit to give in reasonable time some signal from a train moving * * * when it is hidden from the view of travelers, who may be approaching and in danger of coming in collision with it, by the cars of the company left standing on its track, or by an embankment, a cut or a sharp curve in its line, or by any other obstruction allowed to be placed or placed in any way by the company. [Citations omitted.]

> "Where a railroad company has erected a whistle-post at a proper distance from a crossing in order to notify engineers when to give timely warning of the approach of a train to persons using the intersecting highway, and the purpose of the company is known to the public so that persons generally are led to act on the supposition that a signal will be given at the post, it is negligence on the part of the company if the engineer fail to sound the whistle at the point so indicated in passing with a freight or passenger train in his charge."

Where the railroad knows, or should know, that there are not adequate signs warning travelers upon the highway that they are approaching a crossing and knows, or should know, that the view of an approaching train from the highway approach to crossing is obstructed, the duty to give reasonable and timely warning of the approach of its train to the crossing is the same whether the building which obstructs the traveler's view was erected by the railroad or by some other person. The failure of the railroad to give reasonable and timely warning of the approach of its train to such a crossing is negligence.

On the other hand, the driver of an automobile, who knows, or, by the exercise of a reasonable lookout in the direction of his travel, should know, that he is approaching a railroad crossing, may not proceed to and upon it without looking in both directions along the track merely because he has heard no signal of an approaching train. The driver, who knows, or should know, that he is approaching a crossing at which his view of the track is obstructed, owes to the passengers in his vehicle the duty to reduce his speed so that he can stop the vehicle, if necessary, in order to avoid a collision with an approaching train. *Johnson v. R. R.*, 255 N.C. 386, 121 S.E. 2d 580; *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876. The train has the right of way at the crossing and it is the duty of the driver of the automobile who sees, or should see, the approaching train in time to stop, to do so. *Coltrain v. R. R.*, 216 N.C. 263, 4 S.E. 2d 853; *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690.

In *Henderson v. Powell, supra,* suit was brought against a receiver operating a railroad for the wrongful death of a passenger in an automobile struck by a train at a crossing. It was held that the negligence of the driver of the automobile in driving onto the crossing was not an unforeseeable, intervening cause which insulated the negligent failure of the railroad to give a signal of the approach of the train. Speaking for the Court, Seawell, J., said:

> "No negligence is 'insulated' so long as it plays a substantial and proximate part in the injury. Restatement of the Law,

Torts, sec. 447. 'In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury.' Shearman & Redfield on Negligence (1941) Vol. 1, p. 101, sec. 38 * * *

"The negligence imputed to the defendants [the railroad] by the evidence is the operation of the train at an unlawful rate of speed, over an unprotected street crossing in a populous town, without signals or warning of its approach. Assuming this to be true, it was active negligence down to the moment of impact on the McCrimmon car, and proximately effective at that time, at least inferably so. Similarly, the McCrimmon car was in movement disregarding precautions and prudent operation when struck. The omitted acts were all relative to these movements. The default was concurrent."

The plaintiff offered testimony from which the jury could find that the Railroad gave no signal, by whistle or otherwise, that the train was approaching the crossing. Whether this evidence is true and whether, if true, it is sufficient to show that no such signal was given, are questions for the jury. There is evidence that the train came into Gallamore's view when the automobile was 175 feet from the crossing and traveling at a speed of 40 miles per hour. Whether this allowed sufficient time for a driver using reasonable care under the circumstances to bring the car to a stop before striking the train is a question for the jury. Whether Gallamore, by keeping a reasonable lookout in the direction of his travel, should have discovered the existence of the crossing before the train, itself, came into view and thus, before the train came in view, should have reduced the speed of the automobile so that he could have stopped it in safety after the approach of the train became known to him, is also a question for the jury.

Taking the evidence of the plaintiff as true and viewing it in the light most favorable to him, it is sufficient to support a finding of negligence by either or both of the defendants and that the negligence of each was a proximate cause of the collision and the death of the plaintiff's intestate. We, of course, express no opinion as to whether this evidence, or any portion thereof, is true or as to what inferences should be drawn therefrom. The evidence introduced at a further trial of this action may be different in some material particular. We hold only that the evidence in the record now before us, if true, is sufficient to support a finding that the proximate cause of

the death of the plaintiff's intestate was negligent conduct on the part of either or both of the defendants and the judgment of nonsuit was error as to each of them.

Reversed.

MOORE, J., not sitting.

N. J. BRYANT v. DR. R. J. DOUGHERTY.

(Filed 16 June, 1966.)

1. Master and Servant §§ 45, 86—

The relationship of employee and employer within the purview of the Workmen's Compensation Act is jurisdictional and the Industrial Commission has no jurisdiction of claims which do not arise out of this relationship; nor does the Act take away any common law right of the employee for damages, even as against the employer, when the right of action is disconnected with the employment and pertains to the employee as a member of the public. G.S. 97-10.1.

2. Master and Servant § 82—

The Industrial Commission is not a court of general jurisdiction and has no jurisdiction of an action for malpractice against a physician or surgeon who is not employed full time by the employer but is merely selected by the employer to treat the employee for injuries received in the course of his employment, even though as against the employer and its insurance carrier the employee's right to recover for such aggravation of his injury is limited to the benefits provided by the Act. G.S. 97-26.

3. Courts § 3—

The Superior Court is a court of general jurisdiction and has jurisdiction of all actions for personal injury due to negligence except insofar as it has been deprived of such jurisdiction by statute.

4. Master and Servant § 86; Physicians and Surgeons § 11—

The North Carolina Workmen's Compensation Act does not deprive an employee of a right to maintain an action at common law for malpractice against the physician or surgeon selected by the employer to treat his injuries received in the course of his employment when the physician is not a full time employee of the employer. G.S. 97-10.1, G.S. 97-10.2, G.S. 97-26, G.S. 97-9.

MOORE, J., not sitting.

APPEAL by plaintiff from *Riddle, S.J.*, March 1966 Civil Session of MOORE.

The plaintiff alleges in his complaint, in substance, that while he was at work as an employee of West End Table Company, on 31 May 1962, he sustained an injury when a box fell and struck him, fracturing his leg; he went to the defendant, a physician, for treatment; the defendant was negligent in treating him and he was damaged.

The defendant filed an answer in which he admits that the plaintiff, while working as an employee for West End Table Company, received an injury to his thigh for which the plaintiff consulted the defendant on 6 June 1962, but denies that he was negligent in his treatment of the plaintiff. He also sets forth five further answers which may be summarized as follows:

(1) At the time of the plaintiff's injury and at the time he consulted the defendant therefor, the plaintiff and his employer were subject to and had accepted the provisions of the North Carolina Workmen's Compensation Act; the defendant examined the plaintiff at the request of the plaintiff's employer and prescribed treatment, being paid for his services by the employer's insurance carrier; if the plaintiff was injured by any negligent act or conduct of the defendant, the plaintiff's claim therefor is in the exclusive jurisdiction of the North Carolina Industrial Commission and the superior court does not have jurisdiction of this action.

(2) Prior to the institution of this action, the plaintiff instituted a suit in the Superior Court of Moore County to recover damages for the same alleged cause of action; a judgment was entered therein by the superior court, adjudging that it was without jurisdiction and retiring the suit from the civil issue docket for the reason that the North Carolina Industrial Commission had exclusive jurisdiction thereof; the plaintiff did not appeal from that judgment and it is a bar to the right of the plaintiff to maintain the present action.

(3) The plaintiff filed with the North Carolina Industrial Commission notice of his injury by accident arising out of and in the course of his employment by West End Table Company; the Commission conducted a hearing and awarded compensation, from which award the plaintiff did not appeal; the plaintiff received and accepted from the employer's insurance carrier payment of the compensation so awarded to him; the award was for the full amount of the compensation which the plaintiff was entitled to receive on account of the injury sustained by him on 31 May 1962, and it is pleaded in bar of the right of the plaintiff to maintain the present action.

(4) Subsequent to the above mentioned judgment of the Su-

perior Court of Moore County in the former action, the plaintiff requested a further hearing by the Industrial Commission of his claim against his employer and its insurance carrier on account of the damage suffered by reason of the alleged malpractice by the defendant in this action, which rehearing was had; the North Carolina Industrial Commission, on 13 February 1964, dismissed the plaintiff's employer and its insurance carrier as parties to that proceeding and made the present defendant a party defendant thereto; then the Commission dismissed the entire proceeding for lack of jurisdiction; from this order of the Commission the plaintiff did not appeal, and the order is pleaded in bar of his right to maintain the present action.

(5) The right of the plaintiff to maintain this action is barred by the three year statute of limitations.

The plaintiff filed a motion to strike each of the foregoing five further answers of the defendant. This motion came on to be heard before Riddle, S.J. At the hearing the plaintiff admitted that, on the date of his injury and on the date of his visit to the defendant, the plaintiff and his employer were subject to the provisions of the North Carolina Workmen's Compensation Act and had accepted the provisions thereof. The plaintiff further admitted that the defendant examined the plaintiff at the request of the plaintiff's employer, prescribed treatment for his injuries and complaints and was paid for his services by the insurance carrier of the plaintiff's employer. Upon these admissions, the court found and concluded that the action is within the exclusive jurisdiction of the North Carolina Industrial Commission and the superior court was without jurisdiction thereon. Upon this finding and conclusion, the court ordered and adjudged that this action be dismissed and that it be retired from the civil issue docket for lack of jurisdiction in the said court to hear and determine it. It is from this judgment that the plaintiff appeals.

Seawell & Seawell & Van Camp for plaintiff appellant.
W. D. Sabiston, Jr., for defendant appellee.

LAKE, J. In *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762, this Court 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."

G.S. 97-26, which is part of the North Carolina Workmen's Compensation Act, provides:

"[T]he employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such."

The Workmen's Compensation Act relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation. Where that relation does not exist the Act has no application. *Hicks v. Guilford County,* 267 N.C. 364, 148 S.E. 2d 240. Where the employer and the employee are subject to and have accepted and complied with the provisions of the Act, the rights and remedies therein granted to the employee exclude all other rights and remedies in his favor against the employer. G.S. 97-10.1. The Act does not, however, take away any common law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public. *Barber v. Minges,* 223 N.C. 213, 25 S.E. 2d 837.

The Industrial Commission is not a court of general jurisdiction. *Barber v. Minges, supra.* It has no jurisdiction except that conferred upon it by statute. The Workmen's Compensation Act does not confer upon the Commission jurisdiction to hear and determine an action, brought by an injured employee against a physician or surgeon, to recover damages for injury due to the negligence of the latter in the performance of his professional services to the employee. G.S. 97-26 relates to the right of the employee to recover damages or benefits under the Act from the employer, and so from the insurance carrier of the employer. It does not impose liability upon the physician or surgeon or relieve him thereof.

Damages recoverable in a common law action for negligent injury include damages for aggravation of the original injury by the malpractice of a physician or surgeon who undertakes to treat it.

Bost v. Metcalfe, 219 N.C. 607, 14 S.E. 2d 648; *Smith v. Thompson,* 210 N.C. 672, 188 S.E. 395. The purpose of the provision in G.S. 97-26 is to treat the consequences of malpractice by a physician or surgeon as part of the consequences of the original injury as between the employee and the employer, and so, the employer's insurance carrier. Thus, the employee's right to benefit under the Act on account of the consequences of such malpractice does not depend upon the employer's negligence. Conversely, the employer's liability for such consequences of malpractice by a physician or surgeon is limited to those benefits provided under the Act. It was not the purpose of this statute to affect in any way the liability of the physician or surgeon.

In *Hoover v. Indemnity Co.,* 202 N.C. 655, 163 S.E. 758, the plaintiff sued the employer's insurance carrier for alleged wrongful death of the employee due to negligent treatment of the employee by a physician selected by the insurance carrier. The physician was not made a party to the action by the plaintiff. The insurance carrier filed a cross-complaint against the physician for contribution on the theory that if the carrier and the physician were negligent they were joint tort feasors. The physician demurred to the cross-complaint and his demurrer was sustained. Adams, J., speaking for the Court, said, "Injury or suffering sustained by an employee in consequence of the malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action under our statute; it is a constituent element of the employee's injury for which he is entitled to compensation." Obviously, this statement refers to the factual situation then before the Court; that is, the malpractice of the physician or surgeon selected by the employer or carrier is not ground for an independent action against the employer or the carrier but is, as to them, one of the consequences of the original injury and is to be compensated as such in accordance with the provision of the Act. That being true, the Court held that the cross-action for contribution on the theory that the carrier and the physician were joint tort feasors did not lie. The decision in the *Hoover* case does not relate to the right of the injured employee to proceed directly against the physician or surgeon for damages due to negligent treatment of the original injury. That question is now presented to this Court for the first time.

The judgment below dismissed the plaintiff's action against the physician for want of jurisdiction in the superior court to determine the rights of the parties. The superior court, unlike the Industrial Commission, is a court of general jurisdiction. It has the jurisdiction of all actions for personal injuries due to negligence, except in-

sofar as it has been deprived of such jurisdiction by statute. Since the Workmen's Compensation Act does not confer upon the Industrial Commission jurisdiction to hear and determine the right of a patient to recover damages from a physician or surgeon for injury by the negligence of the latter in the performance of his professional duties, unless the Act destroys the common law right of the patient to sue for such damages, that right continues and the superior court has jurisdiction to hear such action and adjudicate the rights and liabilities of the parties.

G.S. 97-10.1 provides that where the employee and the employer are subject to and have accepted and complied with the provisions of the Workmen's Compensation Act, the rights and remedies granted by that Act to the employee, his dependents, next of kin, or personal representative "shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as *against the employer* at common law or otherwise on account of such injury or death." [Emphasis added.] Obviously, this statute applies only to proceedings against the employer, and so against his insurance carrier. It is designed to carry out the purpose of the Workmen's Compensation Act, which is to provide limited benefits to an employee for an injury by accident arising out of and in the course of his employment, and for certain occupational diseases, regardless of negligence or other fault on the part of the employer, and, on the other hand, to limit the liability of the employer so as to protect him against the possibility of a much larger judgment, such as was possible at common law when negligence by the employer was found. This provision of the Act has no relation to the liability of an attending physician or surgeon for negligence in the treatment of an injured employee.

A similar provision is contained in G.S. 97-9, which provides:

> "Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he *or those conducting his business* shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified." [Emphasis added.]

Virginia has a like provision in its Workmen's Compensation Act. The Virginia Act is also similar to ours in all other provisions material to this question. In *Fauver v. Bell,* 192 Va. 518, 65 S.E. 2d 575, the right of an employee to sue a physician or surgeon for malpractice was sustained though the plaintiff had been awarded and

had accepted payment of compensation under the Virginia Act on account of the original injury so treated by the defendant physician. The Court said:

> "It is next argued that the treatment of compensatory injury is a part of the employer's business, because he is compelled to furnish medical attention and made liable for the consequences of malpractice, and that, hence the attending physician or surgeon falls within the category of 'those conducting his (the employer's) business. * * *'
>
> "There is no merit in the contention. * * * The employer was not engaged in the business or profession of practicing medicine or surgery. The physician, on the other hand, was not engaged in the business pursuit of the employer but in his own business or calling. He was an independent contractor and not a fellow servant of the employee. He was a third party, a party conducting his own business, a business other than that of the employer or the employee."

We do not have before us the question of the right of an injured employee to bring suit against a physician who is employed, full time, by the plaintiff's employer to treat and care for those sustaining injuries in the employer's business. Where, as here, the physician is carrying on an independent practice of medicine or surgery, we agree with the Supreme Court of Appeals of Virginia that he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Thus, we hold that, under these circumstances, G.S. 97-9 does not deprive the employee of his common law right to sue a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury.

G.S. 97-10.2 governs the respective rights of the employee, the employer and the employer's insurance carrier to maintain actions for damages against third parties; that is, persons other than the employer and those conducting his business. Paragraph (f) of this section of the Act provides adequate protection against double recovery by the injured employee on account of aggravation of his original injury through the physician's negligence.

There is a wide diversity of opinion among the courts of the several states concerning the right of the employee, who has received compensation under the Workmen's Compensation Act, to maintain a suit for malpractice against the physician or surgeon who treated his original injury. Much of the diversity is due to differences between the statutes of the respective states. It would

serve no useful purpose to attempt to review in this opinion the variety of the views prevailing as to the proper application of the variety of statutes. For compilations and analyses of these authorities, see: Larson, Workmen's Compensation Law, §§ 72.61 and 72.64; Schneider, Workmen's Compensation Text, § 841; Annotations: 82 A.L.R. 932, 139 A.L.R. 1010; 101 C.J.S., Workmen's Compensation, § 1043. Having considered all of these views, we come to the conclusion that the opinion of the Supreme Court of Appeals of Virginia in *Fauver v. Bell, supra,* correctly construes and applies the provisions of a Workmen's Compensation Act similar to our own. We find no basis in our statute for making a distinction between the right to sue a third person who, by negligence, causes the original injury and the right to sue a third person who, by negligence, causes an aggravation of it.

Since the Workmen's Compensation Act does not abrogate the employee's common law right of action against the attending physician or surgeon, and does not confer upon the Industrial Commission jurisdiction to hear and determine such action, the superior court had jurisdiction to do so, and the judgment dismissing this action for want of jurisdiction in the superior court was erroneous.

We express no opinion as to the merits of the plaintiff's claim or as to the ruling which should be made upon any portion of his motion to strike the various further answers filed by the defendant except insofar as they may relate to the jurisdiction of the superior court to adjudicate actions of this general nature. For the determination of those matters, the action must be remanded to the superior court.

Reversed and remanded.

MOORE, J., not sitting.

WALLACE D. BOWLING AND WIFE, ELLA G. BOWLING, AND S. S. ROYSTER, TRUSTEE, v. THE CITY OF OXFORD
AND
SOUTHERN RAILWAY COMPANY v. THE CITY OF OXFORD.

(Filed 16 June, 1966.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and interpreted in the light most favorable to him, giving him the benefit of every reasonable inference deducible therefrom.

2. Municipal Corporations § 10—

When a municipality engages in an activity which is not an exercise of its governmental function but is proprietary in nature, the municipality, like an individual or a privately owned corporation engaged in the same activity, is liable in damages for injury to persons or property due to its negligence or other wrongful act in the conduct of such activity.

3. Municipal Corporations §§ 5, 15—

A municipal waterworks system, including its reservoir as well as its distribution system, when maintained for the sale of water for private consumption, is operated in the city's proprietary capacity, notwithstanding that it also operates the waterworks system to supply water for fire protection or for the washing of its streets.

4. Waters and Watercourses § 4—

One who constructs and maintains a dam to impound waters into a reservoir is not an insurer against damage by the breaking of the dam and the escape of such water, but is liable for damages resulting from the breaking of the dam only if he is negligent in the original construction or subsequent maintenance of the dam.

5. Negligence § 5—

When applicable, the rule of *res ipsa loquitur* does not relieve plaintiff from the burden of proving negligence and creates no presumption of negligence, but merely makes proof of the facts invoking the doctrine sufficient to establish a *prima facie* case so as to place upon defendant the burden of going forward with evidence to explain the occurrence.

6. Municipal Corporations § 15; Waters and Water Courses § 4— Evidence of negligence in maintenance of dam held sufficient for jury in action for damages resulting from break in dam.

Evidence tending to show that for a long period prior to the collapse of defendant municipality's dam, defendant knew that a sizeable stream of water was running from a point at the foot of the earthen dam and that water was seeping through the dam around a drain pipe, that approximately a month prior to the dam's collapse the municipality was notified that water sufficient in volume to fill to half capacity two 24-inch culverts was flowing away from the foot of the dam and that its source was neither an escape of water through the valve of the drain pipe nor recent rainfall, and that for two days prior to the collapse of the dam the volume of water flowing away from the foot thereof was increasing and was muddy in color, *held* sufficient to be submitted to the jury on the issue of the municipality's negligence in the maintenance of the dam in actions to recover for damages resulting to lower proprietors from the sudden release of the water from the breaking of the dam.

7. Municipal Corporations § 40—

The filing of a claim with a city before suit is not necessary when the action is brought for damages for a tort committed by the city in the exercise of a proprietary activity. G.S. 1-53, G.S. 153-64.

8. Parties § 2—

The trustee in a deed of trust upon the land is not a necessary party to an action by the owner of the land to recover for damages to the land.

9. Same—

The failure of defendant to demur is a waiver of his right to insist that another party should have been joined as a necessary additional party plaintiff.

MOORE, J., not sitting.

APPEALS by plaintiffs from *Latham, S.J.*, at the October 1965 Session of GRANVILLE.

These are two suits for damages to the properties of the plaintiffs alleged to have been caused by the breaking of a dam maintained by the defendant. The cases were consolidated for trial. At the close of the evidence offered by the plaintiffs a judgment of nonsuit was entered in each case. From these judgments the plaintiffs appeal.

Mr. and Mrs. Bowling were the owners of a farm lying downstream from the dam. The additional plaintiff Royster is trustee in two deeds of trust upon the Bowling farm. Upon his own motion he was permitted to become a party plaintiff in the Bowling case, adopting as his own the pleadings filed by the Bowlings. The plaintiff Railway Company was the owner of a trestle downstream from the Bowling farm.

The pleadings in the two cases are substantially the same. The complaint in each undertakes to state two causes of action, one based upon negligence and the other upon trespass.

The allegations of the complaints may be summarized as follows:

On and for several years prior to 1 July 1962, the city of Oxford owned a water reservoir known as Lake Devin, the water being impounded therein by an earthen dam. The city sold water from the reservoir to its residents and to nonresidents. On 1 July 1962, the dam broke. A great torrent of water rushed through the breach, flooded portions of the Bowling farm, washed away and otherwise damaged buildings, trees, crops, fences and other properties on the farm and deposited upon it quantities of boulders, stones and other undesirable debris. The trestle of the railroad was undermined and its road bed badly washed and eroded. For a long period of time prior to the break, there had been a leak in the dam of which the city knew, or of which it should have known by the exercise of reasonable care, and which it failed to correct. For several hours before the dam broke the leak had grown larger. The city knew, or should have known, the enlarging leak created a hazard to persons and properties below the dam. It failed to lower the water level in the lake so as to reduce the pressure on the dam. Both the railroad

and the Bowlings filed claims with the city, no action thereon being taken by the city.

In each case, the city filed answer denying every material allegation of the complaint and asserting as further defenses: It is immune from liability for either negligence or trespass for the reason that it constructed, operated and maintained the reservoir in the exercise of a governmental function; the right of action is barred by the statute of limitations; all defects in the dam were unknown to the city and could not have been and were not discovered by reasonable inspection and maintenance of the dam; and if any trespass was committed the city was not at fault and could not have prevented such trespass by the exercise of reasonable prudence and care.

The evidence offered by the plaintiffs, in addition to that showing the filing of claims and the city's failure to take action thereon and showing the nature and extent of the damage, may be summarized as follows:

The city maintained Lake Devin as a water reservoir, selling water therefrom to residents and nonresidents through its waterworks system. It impounded the water therein by an earthen dam 800 feet long and 40 feet high at its highest part. The water of the lake covered approximately 110 acres. Running through the dam were a 14 inch pipe, carrying water to the city's filtration plant below the dam, and a drain pipe. Below the dam the stream bed ran under a highway and thence through the Bowling property and under the railroad trestle. At approximately 8 p.m. on Sunday, 1 July 1962, a section of the dam, approximately 40 feet wide, collapsed. All of the water in the lake rushed out, flooding the Bowling farm and damaging the trestle. For seven or eight months prior to the breaking of the dam, the City Manager had observed a one inch stream of water coming out from what appeared to him to be solid ground at a point on the hillside 25 to 30 feet above the lowest point of the dam. He called engineers who went to the dam and did some drilling. Thereupon the engineers advised the Manager that there was nothing to worry about since this was an underground spring.

Shortly after the dam was built, this being several years before it broke, water leaked through the drain pipe by reason of a defect in a cement structure around the gate and valve by which the water entered the drain pipe. This structure was below the surface of the lake and some 30 feet out into the lake from the dam. The city did not drain the lake to locate and correct this defect, but installed a cut-off valve on the outside end of the drain pipe. This stopped the flow of water through the pipe. There was, however, some

seepage around the pipe thereafter. The water which leaked through the drain pipe prior to the installation of the second valve ran on down the stream bed below the dam. The water which thereafter seeped around the pipe and the one inch stream of water coming from the point up on the hillside also found its way to this stream bed below the dam.

After the dam broke, the pipe which ran through the dam and carried water from the reservoir to the filtering plant appeared not to have been disturbed by the outpouring water. A crack in one joint of this pipe which ran through the dam was then discovered. Other pipes which had led through the dam were found broken up and at a substantial distance below the dam after the flood of water had passed.

Two days before the dam broke, a witness, whose property also lay below the dam and who frequently passed along the highway running near its foot, noticed that the volume of water running under the highway and down the stream bed was larger than customary, and that the stream was red and muddy. It appeared as if the valve on the drain pipe had been opened. For some time this witness had noticed a leak around the drain pipe and also the leak coming from a point higher up on the abutting hill which the City Manager had observed. This stream, which the City Manager so observed, was described by this witness as coming from under the dam at a point up on the abutting hillside. When the dam broke, the water first came from under the dam. Then the section of the dam caved in and was swept away. Both the leak up on the hillside and that around the drain pipe had been observed by this witness for at least several months before the dam broke.

On the morning of the day on which the dam broke, Mr. Bowling noted that the volume of water flowing down the stream bed through his land was larger than usual and was of a red and muddy color. Prior to this, he had noticed the earth around the lower portion of the dam was very moist but had not noticed any increase in the volume of water passing down the stream bed.

During the month of June, 1962, the State Highway Commission had occasion to do work upon two 24 inch culverts running under its road below the dam. At that time each of these culverts was half full of cloudy water though there had been only a little rain during the preceding week. The superintendent of the highway crew requested the City Manager to cut the water off. The City Manager replied that he could not since it was not leaking through the valve.

The only question on appeal is the sufficiency of the evidence to withstand a motion for judgment as of nonsuit.

Royster & Royster for appellants Wallace D. Bowling and wife, Ella G. Bowling, and S. S. Royster, Trustee.

Royster & Royster; Hicks & Taylor and W. T. Joyner for appellant Southern Railway Company.

Watkins & Edmundson and Zollicoffer & Zollicoffer for defendant appellee.

LAKE, J. Upon a motion for judgment as of nonsuit the evidence offered by the plaintiff must be taken to be true and must be interpreted in the light most favorable to the plaintiff. Every reasonable inference favorable to the plaintiff must be drawn therefrom.

When a city or town engages in an activity which is not an exercise of its governmental function but is proprietary in nature, the city, like an individual or a privately owned corporation engaged in the same activity, is liable in damages for injury to persons or property due to its negligence or other wrongful act in the conduct of such activity. *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913; *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289; *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42. Barnhill, J., later C.J., speaking for the Court, in the *Britt* case said:

> "[G]enerally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security or general welfare of the residents of the municipality."

When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage to the property of others to the same extent and upon the same basis as a privately owned water company would be. *Mosseller v. Asheville,* 267 N.C. 104, 147 S.E. 2d 558; *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14; *Candler v. Asheville,* 247 N.C. 398, 101 S.E. 2d 470; *Woodie v. North Wilkesboro,* 159 N.C. 353, 74 S.E. 924; McQuillan, Municipal Corporations, 3d Ed., § 53.104; Dillon, Municipal Corporations, 5th Ed., § 1631; 56 Am. Jur., Waterworks, § 38. There is no distinction, in this respect, between negligence, or other wrongful act, by the city in the construction or maintenance of the reservoir in which the water is

impounded and like acts or omissions in the construction or maintenance of the system of mains and pipes by which the water is distributed to the consumers, both the reservoir and the distribution system being part of the water plant owned and maintained for the same commercial or proprietary purpose. See: *Wiltse v. City of Red Wing,* 99 Minn. 255, 109 N.W. 114; *Bailey v. New York,* 3 Hill (N. Y. Sup. Ct.) 531; Dillon, Municipal Corporations, 5th Ed., § 1669. It is also immaterial that one purpose of the reservoir or the water main is to supply water for fire protection or for washing the streets. See: *Fisher v. New Bern,* 140 N.C. 506, 53 S.E. 342; McQuillan, *op. cit., supra.*

Although there is authority to the contrary *(Wiltse v. City of Red Wing, supra,* and *Lumber Co. v. Power Co.,* 206 N.C. 515, 174 S.E. 427), one who constructs and maintains a dam to impound the waters of a river or other stream into a reservoir from which the water is to be distributed and sold is not an insurer against damage by the breaking of the dam and the escape of such water. *Comrs. v. Jennings,* 181 N.C. 393, 107 S.E. 312; 56 Am. Jur., Waters, § 170. He is not liable for such damage unless he was negligent in the original construction or subsequent maintenance of the dam. In *Lumber Co. v. Power Co., supra,* there was ample evidence of negligence by the defendant in opening gates on the dam so as to permit the escape of a huge torrent of water which washed out the plaintiff's bridge.

In *Schloss v. Hallman,* 255 N.C. 686, 122 S.E. 2d 513, Denny, J., later C.J., speaking for the Court, said:

> "In Restatement of the Law of Torts, section 166, page 394, it is said: 'Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.' "

Thus, though the water from the broken dam flooded over and damaged the properties of the plaintiffs, the city cannot be held liable for the resulting damage unless in the construction or maintenance of the dam the city was negligent.

In the annotation appearing in 11 A.L.R. 2d 1179, 1192, it is said:

> "Dams on natural watercourses are usually deemed to be within the control of the owner, and the manner of their con-

struction and care to be peculiarly within his knowledge, in such degree that evidence merely of the giving way of a dam maintained by the defendant, and the flooding of the plaintiff's lands as a result, calls for application of the rule *res ipsa loquitur.*"

To the same effect see 93 C.J.S., Waters, § 156. When applicable, this rule of *res ipsa loquitur* does not relieve the plaintiff from the burden of proving negligence by the defendant in the construction or maintenance of the dam. It does not create a presumption that the defendant was negligent. It merely makes proof of the facts that the dam broke and that damage to the plaintiff was proximately caused thereby sufficient to establish a *prima facie* case of injury by negligence so as to place upon the defendant the burden of going forward with evidence to explain the occurrence. *White v. Hines,* 182 N.C. 275, 109 S.E. 31.

We need not now determine whether the unexplained collapse of a dam, and injury to the property of the plaintiffs as the direct result thereof, is sufficient to call into play the rule of *res ipsa loquitur* and thus to withstand a motion for judgment as of nonsuit. In the record before us, there is evidence tending to show that, for a long period prior to the collapse of the dam, the defendant knew a sizeable stream of water was running from a point at which the foot of this earthen dam rested upon the abutting hillside and also knew that water was seeping through the dam in the vicinity of the drain pipe. There is also evidence tending to show that, approximately a month prior to the collapse of the dam, the city was notified by the superintendent of a highway construction crew that water in sufficient volume to fill to half capacity two 24 inch culverts was flowing away from the foot of the dam and that its source was neither an escape of water through the valve of the drain pipe nor recent rainfall. There is also evidence tending to show that for two days prior to the collapse of the dam the volume of water flowing away from the foot of it was increasing and was of a muddy color. This is sufficient to raise a question for determination by the jury as to whether a reasonable man in charge of such a dam would have taken action to locate and correct the leak. Whether such evidence is true and what, if any, inference is to be drawn therefrom must be determined by the jury. Viewing this evidence in the light most favorable to the plaintiffs and drawing therefrom all reasonable inferences in their favor, we reach the conclusion that the evidence is sufficient to support a finding that the city was negligent in its maintenance of the dam and that such negligence was the proximate cause of the breaking of the dam and of the damage to the properties of the plaintiffs.

G.S. 1-53 and G.S. 153-64 do not require the filing of a claim with the city before suit may be brought for damages for a tort committed by the city in a proprietary activity. *Dennis v. Albemarle,* 242 N.C. 263, 87 S.E. 2d 561; *reh. dism.,* 243 N.C. 221, 90 S.E. 2d 532; *Sugg v. Greenville,* 169 N.C. 606, 86 S.E. 695. It is, therefore, immaterial that the additional plaintiff, Royster, trustee in the deed of trust from the Bowlings, and the trustee in the deed of trust given by the Railway Company did not file claims with the city. Nor was it necessary that the trustee in the deed of trust given by the Railway Company be made a party to its action. *Watkins v. Mfg. Co.,* 131 N.C. 536, 42 S.E. 983. Although such trustee was a proper party and might have joined in the action by the Railway Company as a party plaintiff, just as the additional plaintiff Royster joined in the action by the Bowlings, he was not a necessary party to the action by the Railway Company. Furthermore, "if the defendant deemed the trustee a necessary party * * * he should have demurred, and his failure to do so was a waiver." *Lanier v. Pullman Co.,* 180 N.C. 406, 105 S.E. 21.

It was error to grant the motion for judgment as of nonsuit as to either plaintiff.

Reversed.

MOORE, J., not sitting.

ROBIE WILLARD CATES v. HUNT CONSTRUCTION CO., INC., EMPLOYER, AND AETNA CASUALTY & SURETY CO., CARRIER.

(Filed 16 June, 1966.)

1. Master and Servant § 45—

The Workmen's Compensation Act must be liberally construed and the benefits therein provided to workmen should not be denied by a strict, narrow and technical construction, the philosophy of the Act being that the wear and tear of the workman, as well as the machinery, should be charged to the industry.

2. Master and Servant §§ 71, 72—

Where injury to a workman received in the course of his employment requires an operation to remove a kidney injured in the accident, leaving a scar approximately 16 inches long just above the belt line, the workman is entitled to compensation for the loss of his kidney, and the holding that compensation for bodily disfigurement precluded compensation for the loss of the kidney under the provisions of G.S. 97-31(22) is erroneous, even prior to the 1963 amendment.

3. Statutes § 7—

A clarifying amendment will not be held to preclude recovery for an element of compensation under the former statute when the former statute by reasonable construction provides for the recovery of such element of damage, and the amendment merely restates the legislative purpose so as to prevent the benefit from being denied by a narrow or strict construction.

MOORE, J., not sitting.

APPEAL by plaintiff from *Hobgood, J.*, January, 1966 Civil Session, DURHAM Superior Court.

This proceeding originated as a compensation claim filed by Robie Willard Cates for injuries suffered by accident while he was performing his duties as a carpenter at work for Hunt Construction Company, Inc. All jurisdictional facts as well as the average weekly wages were stipulated. Actually there is no dispute about the facts other than about the size and appearance of the scar resulting from surgery in the treatment of claimant's injuries.

The parties stipulated that on June 18, 1962, the claimant, while doing carpenter work for Hunt Construction Company, fell from a scaffold, sustaining injuries by accident, the treatment for which required the removal of his right kidney. At the hearing, the claimant testified that since the injury, "I can lift things no heavier than 30 or 35 pounds. Before this accident I lifted 250 pounds or so. . . . The requirement to lift heavy things is there, but I told him (apparently foreman) that before I even went there that I couldn't lift nothing heavy, and he said, '(W)e've got laborers on the job to lift stuff.'" The plaintiff's evidence showed the operative procedure left a well healed scar across plaintiff's right side just above the belt line, approximately 16 inches long; that there appears to be an indentation where the skin had not grown back "even" with the other surface area.

The hearing commissioner awarded claimant $300.00 for disfigurement and $2,500.00 for the loss of an important organ of the body. The parties stipulate the claimant had been paid $245.00 for his temporary disability and, in addition, the employer paid the medical expenses. The Commission did not make any award for permanent disability, either partial or total. Upon appeal from the hearing commissioner, the full Commission affirmed the hearing commissioner's award of $300.00 for disfigurement, but denied recovery for the loss of the kidney, stating:

> "The Full Commission is of the opinion that, as a matter of law, plaintiff cannot recover in this case for the loss of his right kidney. The cases of *Branham v. Panel Company*, 223 N.C.

233, *Davis v. Construction Co.*, 247 N.C. 332, and the recent case of *Arrington v. Engineering Corp.*, 264 N.C. 38, appear to be controlling on the question of compensation as for disfigurement for the loss of a kidney."

On appeal to the Superior Court, Judge Hobgood affirmed the Commission's order. Claimant excepted and appealed.

Powe, Porter and Alphin by Oliver W. Alphin for plaintiff appellant.

Spears, Spears & Barnes by Alexander H. Barnes for defendant appellees.

HIGGINS, J. At the time of plaintiff's injury, June 18, 1962, the Workmen's Compensation Act, G.S. 97-31, provided a list of compensable injuries and the method for determining the rate and period of compensation: "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement."

Subsections (1) through (20) neither included compensation for disfigurement nor for the loss of, or injury to, an internal organ of the body. However, Subsection 21 provided: "In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed thirty-five hundred dollars." Subsection (22) provided:

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

Subsection (21) is mandatory in providing that the Industrial Commission shall award proper and equitable compensation, not to

exceed $3,500.00 for serious facial or head disfigurement. Subsection (22), as of June 18, 1962, provided, "The Industrial Commission *may* award proper and equitable compensation not to exceed three thousand, five hundred dollars ($3,500.00)" in case of serious bodily disfigurement, "including the loss of, or permanent injury to, any important external or internal organ or part of the body . . ."

The hearing commissioner found facts and entered an award of compensation in the amount of $300.00 for the scar and $2,500.00 for the loss of the kidney. On review, the full Commission, "As a matter of law," acting under what it considered the compulsion of the *Branham, Davis,* and *Arrington* cases, struck out the award of $2,500.00 for the loss of the kidney. The Industrial Commission and the Superior Court permitted the Commissioner's finding of disfigurement to stand.

Subsections (1) to (20), inclusive, do not provide any compensation whatever for injuries on account of disfigurement. Neither do they provide compensation for loss of or injury to an organ or part of the body. While Subsection (21) provides compensation for serious disfigurement of the face or head, Subsection (22) provides compensation for serious bodily disfigurement, including the loss of, or injury to, an external or internal organ of the body. Under the facts found in this case, a scar, 16 inches long, unevenly healed, and the complete loss of a kidney in the course of treatment for the industrial accident, would seem to permit, if not compel, the award of compensation for the loss of the kidney. To hold otherwise is to sanction a strict, narrow, and strained construction of the subsection. It must be remembered the Workmen's Compensation Act requires the Industrial Commission and the courts to construe the compensation act liberally in favor of the injured workman. "The Act 'should be liberally construed to the end that the benefits thereof shall not be denied upon technical, narrow, and strict interpretation.'" *Guest v. Iron & Metal Co.,* 241 N.C. 448, 85 S.E. 2d 596; *Henry v. Leather Co.,* 231 N.C. 477, 57 S.E. 2d 760. The philosophy which supports the Workmen's Compensation Act is that the wear and tear of the workman, as well as the machinery, shall be charged to the industry. *Vause v. Equipment Co.,* 233 N.C. 88, 63 S.E. 2d 173.

None of the three cases the Commission relied on as compelling the denial of the right to award compensation for the loss of the kidney is actually in point. In *Branham v. Panel Co.,* 223 N.C. 233, 25 S.E. 2d 865, the claimant had a compressed fracture of one of the vertebrae in his spine. There was no disfigurement and no operation. In *Davis v. Construction Co.,* 247 N.C. 332, 101 S.E. 2d 40, the claimant lost two front teeth. His claim arose under Subsection (21)

for head injuries. The Claim in *Arrington v. Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759, was for the loss of the sense of taste and smell. That case, too, arose under Subsection (21), applicable to head injuries.

The illustration the court used in *Branham v. Panel Co., supra,* (and alluded to with apparent approval in *Davis* and *Arrington*) on which the Commission relies, goes beyond any issue actually involved in the case. The Court said: "There must be an outward, observable blemish, scar or mutilation which tends to mar the appearance of the body, . . . For instance, a puncture of the ear drum or the removal of a kidney would result in injury, perhaps serious, and yet no disfigurement would result." The illustration and the conclusion from it are *dicta.*

In the instant case, not only is there a scar, but it resulted from a necessary cutting operation incident to the complete removal of a kidney injured in the claimant's fall from the scaffold where he was at work. The Commission found disfigurement. The finding is not challenged. Some of the cases, especially *Branham,* seem to attach undue importance to the scar and little or none to the loss of the internal organ of the body. The contention that the claimant's scar and the loss of a kidney do not impair his occupational opportunities scarcely deserve comment. In this industrial age frequently workmen are required to undergo physical examinations in the course of their selection as employees. Certainly they are interrogated about their fitness to do the work required. Such examination or inquiry would disclose the reason for the scar and the loss of the kidney. According to his evidence, the applicant might be required to say he could now lift only 35 pounds. If another applicant, without a scar, with two good kidneys, and the ability to lift 250 pounds is standing in line for the job, does it make sense to say this claimant's occupational ability has not been impaired by the scar and the loss of a kidney?

By Ch. 424, Session Laws of 1963, effective July 1, 1963, the General Assembly rewrote Subsection 22 and added Subsection 24, separating the provisions for awards of compensation for disfigurement and for loss of an important organ of the body. The employer and his insurance carrier in this case argue the Legislature, by the change, is now providing the right of compensation for the loss of the kidney which did not exist before the enactment. It may with as much or more force be argued that the Legislature merely restated what its purpose and intent were from the beginning, and that the courts, by their narrow and strict construction, attached to the original Act a meaning the General Assembly never intended.

In this case the trial court committed error in affirming the de-

cision of the Industrial Commission. The Superior Court should have entered judgment vacating the award of the Industrial Commission and remanding the proceeding for the entry of such an award, not exceeding $3,500.00, as the Commission "may deem proper and equitable compensation," for the loss of the claimant's kidney.

The judgment of the Superior Court is reversed with instructions that the proceeding be remanded for the entry of an award by the Industrial Commission as here indicated.

Reversed.

MOORE, J., not sitting.

J. W. THAMES v. NELLO L. TEER COMPANY.

(Filed 16 June, 1966.)

1. Courts § 20—

In an action instituted in this State to recover for negligent injury occurring in another state, liability must be determined according to the substantive law of such other state, of which our courts must take notice. G.S. 8-4.

2. Appeal and Error § 51—

Upon appeal from denial of motion to nonsuit in a negligence case, the appellate court is required to examine only so much of plaintiff's evidence as is favorable to him and to determine whether, so considered, the evidence is sufficient in law to permit the jury to find that plaintiff was injured by defendant's actionable negligence and, if so, whether plaintiff's own evidence establishes his contributory negligence as the sole reasonable inference.

3. Highways § 7—

In an action by an employee of a subcontractor against the main contractor for injuries alleged to have been caused by the negligence of an employee of the main contractor in the construction of a highway not open to the public, the common law of negligence governs rather than public highway travel statutes.

4. Negligence § 38—

The rule that the person in exclusive control of the premises owes a licensee only the duty not to inflict wilful or wanton injury applies when the injury results from the condition of the premises, and does not apply when the injury is the result of active negligence on the part of the person in control, as where the injury results from a collision of vehicles caused by negligence, in which instance the proprietor owes the duty of due care to a licensee whose presence is known.

5. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff proves himself out of court.

6. Highways § 7— Evidence held for jury in this action by employee of subcontractor against main contractor for negligent injury.

The evidence tended to show that a heavy scraper of the main contractor was traveling at a rapid speed in removing dirt from east to west on the northern section of an unfinished four-lane highway, that plaintiff, an employee of a subcontractor, was driving a truck in the course of his employment some 20 miles per hour in an easterly direction on the unpaved southern section, that as the vehicles had passed, the operator of the scraper turned abruptly left, crossed the median, and, approaching from the left and rear of the truck, struck it on its left side, causing the injury in suit. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence and does not disclose contributory negligence as a matter of law on the part of plaintiff.

MOORE, J., not sitting.

APPEAL by defendant from *Latham, S.J.*, September 27, 1965, Civil Session, DURHAM Superior Court.

The plaintiff instituted this civil action on March 1, 1965, to recover for the personal injuries he sustained as a result of a collision between the pickup truck he was operating for his employer, Wrenn-Wilson Construction Company, and a Caterpillar Scraper (turnapull) owned by the defendant, Nello L. Teer Company, and operated by its agent, James Jones. The collision occurred about 7:30 a.m. on June 29, 1963, near Alexandria, Virginia.

At the time of the accident the defendant was the contractor engaged in the construction of the Beltway around Washington. The Wrenn-Wilson Construction Company, for whom plaintiff worked, was a subcontractor employed to build a concrete culvert under the Beltway.

The plaintiff's allegations of negligence are here summarized: The defendant, through its agent, Jones, was careless and negligent in operating the Caterpillar scraper on the roadbed in disregard of the safety of the plaintiff and others, and at a speed greater than was reasonable and prudent; and, without keeping a proper lookout, made a quick left turn across the median separating the north and south lanes when such movement was dangerous; and negligently struck the left side of plaintiff's pickup truck, causing the plaintiff serious and permanent injuries (describing them in detail.)

The defendant, by answer, denied negligence, and by further defense alleged, in substance, the plaintiff entered into defendant's work area in violation of warning and without keeping a proper

lookout, operated his vehicle negligently and without keeping it under control; that the plaintiff entered a place of known hazard and failed to yield the right of way to defendant's heavier equipment; and that these acts of negligence caused his own injury, or were a participating cause, and he should not be permitted to recover.

Both parties introduced evidence. The defendant made timely motions for judgment of involuntary nonsuit which the court denied. The court submitted these issues which the jury answered as here indicated:

"1. Was the plaintiff J. W. Thames injured by negligence of the defendant corporation, Nello L. Teer Company, as alleged in the Complaint?
Answer: Yes.
"2. 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 of the defendant?
Answer: $18,000.00."

From a judgment on the verdict, the defendant appealed, assigning as its only error the denial of the motion for judgment of nonsuit.

Newsom, Graham, Strayhorn & Hedrick by Ralph N. Strayhorn, E. C. Bryson, Jr., for plaintiff appellee.

Nye & Mitchell by Charles B. Nye, R. Roy Mitchell, Jr., for defendant appellant.

HIGGINS, J. The plaintiff is a resident of Durham County, North Carolina. The defendant is a corporation organized under the laws of Delaware, with its principal office in Durham, North Carolina. The accident in which the plaintiff was injured occurred in Virginia. The action having been instituted in North Carolina, liability must be determined according to the substantive law of Virginia, of which we must take notice. G.S. 8-4; *Kirby v. Fulbright,* 262 N.C. 144, 136 S.E. 2d 652; *Conard v. Motor Express,* 265 N.C. 427, 144 S.E. 2d 269; *Crow v. Ballard,* 263 N.C. 475, 139 S.E. 2d 624; *Doss v. Sewell,* 257 N.C. 404, 125 S.E. 2d 899.

The defendant's assignments of error as shown by the record involve the court's ruling on evidence and the charge to the jury. However, all are abandoned in the brief except the failure of the court to sustain the motion for nonsuit. The single assignment of

error requires us to examine only so much of the plaintiff's evidence as is favorable to him and to determine therefrom whether, in its light most favorable to him, it is sufficient, in law, to permit the jury to find he was injured by the defendant's actionable negligence; and, if the answer be in the affirmative, then whether his own evidence establishes his contributory negligence so clearly that no other reasonable inference may be drawn from it. *Railway Co. v. Woltz,* 264 N.C. 58, 140 S.E. 2d 738.

The plaintiff's evidence disclosed in substance that the defendant was the contractor engaged in constructing the Beltway around Washington. The southern lane where the accident occurred had been graded, had been rolled and scraped, and was in use by the subcontractors on the job. This graded and scraped section was 60 to 80 feet wide. Separating this southern section from the unfinished northern section, of equal width, was an unfinished median strip 20 to 30 feet wide, six to twelve inches lower than the southern lane. At the time, a number of defendant's Caterpillar scrapers, each weighing about 100,000 pounds and equipped to carry about 50 tons of earth, were engaged in spreading dirt to build up the northern traffic lanes. These tractors were moving dirt from east to west. The plaintiff was driving from the west towards the east. He was carrying tools for the use of the men beginning the day's work at the culvert.

One of the dirt-spreading machines, after releasing its load, made a short, quick turn to its left, crossed the median strip, and ran into the left side of the plaintiff's pickup, which was continuing toward the culvert. The left door of the pickup was cut almost in two, the windshield broken, and the plaintiff thrown from the vehicle. He was seriously and permanently injured.

The plaintiff testified: "I was driving up the road and over to the left of me they were still building another lane of the road upon which they were using heavy equipment and this turnapull came down spreading dirt. He was running fast, is why we taken notice of him. He looked like he was coming terrific fast and we passed. I did not look back and the next thing I knew we received a blow. At the time, I did not know where the blow came from. I didn't even know what had struck us. I was lying on the ground when I came to. The front end of this heavy piece of equipment was over the top of the truck from the left side." . . . "I had gotten by him and he came up from my left rear. I . . . was traveling 20 to 25 miles per hour."

Mr. Gray, riding with the plaintiff, testified: "When I observed the turnapull it was coming between 40-45 miles per hour. When we got just about . . . opposite each other . . . we were going on

down, then I heard the motor — some motor — seemed like right close to us and I glanced around to my left and saw the turnapull and it was right on the truck. . . . The turnapull had room to turn around right or left to make his U-turn. He was about the middle of the right-hand lane."

Another eye-witness testified: "The turnapull made a 90-degree turn. He turned 90 degrees and came straight across that median and hit Mr. Thames."

This action grew out of a collision between a vehicle operated by contractor and another operated by subcontractor on an unfinished, unopened Beltway under construction. The common law of negligence governs the use of the vehicles rather than the public highway travel statutes. "While the law does not require a person to know that he is absolutely safe before taking a given course, he is required to exercise ordinary care to avoid accidents, such care as a reasonably prudent person would exercise under the circumstances." *Alford v. Frye,* 205 Va. 7, 135 S.E. 2d 101. "Once the act or omission is determined to be negligent with respect to the injured party, the negligent party becomes liable for all the injurious consequences which result naturally from such act or omission." *Barnette v. Dickens,* 205 Va. 12, 135 S.E. 2d 109.

The defendant appears to pitch its defense on the ground the defendant was in exclusive control of the premises and that plaintiff, at most, is a licensee, hence the defendant's only duty is not to inflict wilful or wanton injury. The doctrine is applicable when the injury arises from the condition of the premises. The rule, however, does not apply if there is active negligence. "In the case of licensees, the occupant is charged with the knowledge of the use of his premises by the licensee, and, while not chargeable with the duty of prevision or preparation for the safety of the licensee, he is chargeable with the duty of lookout, with such equipment as he then has in use to avoid injury to him at the time and place where the presence of the licensee may be reasonably expected." *Pettyjohn & Sons v. Basham,* 126 Va. 72, 100 S.E. 813. "(I)t is now generally held in cases involving injury resulting from *active conduct,* as distinguished from conditions of the premises, the landowner or possessor may be liable for failure to exercise ordinary care towards a licensee whose presence on the land is known or should reasonably be known . . . At any rate, there is well-nigh universal agreement that the duty of care is owed to licensees whose presence is to be expected. And, of course, the duty of care to the licensee whose presence is actually known is clear." *Bradshaw v. Minter,* 206 Va. 450, 143 S.E. 2d 827. The evidence was sufficient to support the issues of defendant's negligence and the plaintiff's damages. It was not sufficient to show

plaintiff's contributory negligence as a matter of law. Only when a plaintiff proves himself out of court is he to be nonsuited for contributory negligence. *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51.

In the absence of the charge, we must assume the court properly instructed the jury as to the law applicable to the evidence and properly placed the burden of proof on the three issues. We hold that the evidence in the light most favorable to the plaintiff was sufficient to go to the jury on the issues of negligence and damages. No other burden was on him.

No error.

MOORE, J., not sitting.

ELVA P. HAMMOND, BY HER NEXT FRIEND, IRVIN RAY HAMMOND, v. G. T. BULLARD AND WIFE, EDNA K. BULLARD; WORTH D. WILLIAMSON, TRUSTEE, AND AMERICAN DISCOUNT CORPORATION.

(Filed 16 June, 1966.)

1. Cancellation and Rescission of Instruments § 3—

The rule that a grantor may not himself bring an action attacking his deed for mental incapacity when he fails to show any change in his mental condition subsequent to the execution of the deed, has no application when the action is brought in the grantor's name by her duly appointed next friend, and the evidence, though conflicting, is sufficient to be submitted to the jury on the question of the grantor's mental incapacity at the time of the execution of the deed and at the trial, and further, that the deed was procured by fraud or undue influence.

2. Evidence § 37—

The admission of testimony of witnesses to the effect that in their opinion the grantor did not have sufficient mental capacity to understand what she was doing and the nature and consequences of her act when she executed the deed will not be held for error for failure of the witnesses to state what opportunity they had had to observe grantor when each of the witnesses testifies that he had had close personal association with the grantor for a period of years up to the time of the execution of the instrument.

3. Appeal and Error § 42—

A technical inaccuracy in the court's charge to the jury will not be held for prejudicial error when it is apparent from the charge, construed contextually, that the jury could not have been misled.

MOORE, J., not sitting.

HAMMOND *v.* BULLARD.

APPEAL by defendants G. T. Bullard and wife, Edna K. Bullard, from *Hobgood, J.*, September-October Civil Session 1965 of COLUMBUS.

This is a civil action which allegedly arose on 5 September 1962, at which time Elva P. Hammond and her husband, Perry C. Hammond, executed what purports to be a fee simple deed to the defendants Bullard for the land described in the complaint, consisting of 17 acres. This land belonged to Elva P. Hammond.

At the time of the execution of the purported deed Elva P. Hammond and her husband were residing on the premises involved. Perry C. Hammond was about 73 years of age at the time of the execution of the instrument involved, but was incapacitated physically and had not been gainfully employed for many years. On 28 January 1960 Elva P. Hammond suffered a severe stroke and since that time she has been limited and restricted in her physical and mental health to the extent she is scarcely able to transact any business or perform any physical labor. She was 71 years of age at the time of the trial below and, according to the evidence, has never been able to walk since 1960, but has been continuously confined to bed or a wheel chair.

This action was instituted on 14 August 1963 by Irvin Ray Hammond, son of Elva P. Hammond, as her next friend. He was appointed next friend on the ground that his mother was incapable by reason of her mental and physical infirmities to prosecute this action to set aside a purported deed, allegedly procured by fraud and undue influence and without adequate consideration.

Perry C. Hammond has died since the purported deed was executed and has never been a party to this action, although he was living at the time the action was instituted and the pleadings were drafted.

It is alleged that appellants at the time of the execution of the purported deed paid Perry C. Hammond $1,000, which was later put in a joint account of Elva P. Hammond and Perry C. Hammond and is "still intact for the most part and has never been used."

As further consideration, the grantors in the purported deed were to convey the premises subject to Elva P. Hammond's life estate, and the defendants Bullard were to assume and pay off six loans obtained by Elva P. Hammond and Perry C. Hammond from the defendant American Discount Corporation in the total amount of approximately $3,000. These loans were secured by six deeds of trust on the premises involved, in which deeds of trust the defendant Worth D. Williamson was trustee.

It is alleged that the premises involved on 5 September 1962 were worth $11,500, while the defendants Bullard agreed to pay a total

consideration of approximately $4,000. Other witnesses fixed the value of the premises conveyed at $8,000 to $11,500.

It is further alleged that the defendants Bullard have renewed the loans they assumed which are held by the American Discount Corporation; however, they have not canceled the deeds of trust and notes executed by Elva P. Hammond and her husband to the said Discount Corporation.

It is alleged that defendants Bullard attempted to get Elva P. Hammond to convey the land in question with the promise that her debts would be taken care of, and that she would retain the right to live on the premises in her homeplace for life; that these defendants were successful in getting Perry C. Hammond to agree to their proposition and that he agreed to attempt to pressure his wife into signing the conveyance to the premises. It is alleged that on 5 September 1962 the defendant G. T. Bullard, with the consent of Worth D. Williamson, had an attorney prepare a fee simple deed to the premises involved, and that he and H. G. McQueen, a justice of the peace of Chadbourn, N. C., went to the home of Elva P. Hammond and through the exercise of coercion and pressure obtained the signature of Elva P. Hammond on some sort of paper and the mark of Perry C. Hammond, which said paper writing is the purported deed involved in this action. It is further alleged that Elva P. Hammond was mentally incompetent on 5 September 1962 to know what she was doing or the consequences of her acts.

The defendants Bullard answered, alleging that Elva P. Hammond at the time of the execution of the conveyance was mentally alert and fully capable of transacting business, and that she freely and with full knowledge conveyed the property involved to the defendants Bullard. The defendants denied any coercion or undue influence.

The plaintiff's evidence tends to show that since Elva P. Hammond had a stroke in 1960 she has never been able to walk or perform any labor; that she has not been mentally capable of understanding what she was doing or the nature and consequences of her acts; that she has been in bed or a wheel chair ever since she suffered a stroke on 28 January 1960. Elva P. Hammond is practically blind and cannot read anything except large print.

Plaintiff's evidence further tends to show that Irvin Ray Hammond, who at the time of the trial was 33 years of age, was living with his parents at the time of the execution of the purported deed and was employed by the Chadbourn Veneer Company; that he and his father did the cooking after his mother had the stroke, and since his father's death his mother had lived with him and his wife or with one of his sisters; that he did not learn of the execution of

the purported deed until Saturday after its execution on the previous Tuesday; that he went to see G. T. Bullard on that day and offered to return the $1,000, but Bullard said "he didn't want to take it." The following week the witness offered to defendant Bullard $2,000 to let his parents have their home back, but Bullard said "he didn't want to get rid of the place." The premises has a six-room house on it, a tobacco barn and other farm buildings, and a tobacco allotment of 1.44 acres.

A number of witnesses testified that in their opinion Elva P. Hammond on 5 September 1962 did not have sufficient mental capacity to understand what she was doing or the consequences of her acts.

Elva P. Hammond testified that she recalled signing the paper, but she did not know what she was signing; that she did not read the instrument, and it was not read to her. "I didn't want to sell the land to G. T. Bullard. I told him I didn't. He said he gave me a check for $1,000 * * * I don't know what went with it."

At the close of plaintiff's evidence the defendant Worth D. Williamson, Trustee, and the American Discount Corporation moved for judgment as of nonsuit and the motion was allowed.

G. T. Bullard testified that Elva P. Hammond discussed selling her land to him in the fall of 1961. "She finally agreed to sell in the fall of 1962." He was to assume her indebtedness, pay her $1,000, and give her a life estate in the land. He, according to his testimony, instructed his attorney not to put anything in the deed about the life estate, that "my word is my bond."

The defendants offered a number of witnesses who testified that in their opinion on 5 September 1962 Elva P. Hammond had the mental capacity to transact business and to know the consequences of her acts.

The following issues were submitted to the jury and answered as indicated below:

"1. Did Elva P. Hammond on September 5, 1962, have sufficient mental capacity to execute the deed in question?

ANSWER: No.

"2. Was the deed in question obtained by fraud and undue influence?

ANSWER: Yes.

"3. What amount is the plaintiff entitled to recover of the defendants G. T. Bullard and wife, Edna K. Bullard, for rents since September, 1962, to date?

ANSWER: $1,000.00."

It was stipulated that on 20 November 1962 the actual amount Elva P. Hammond and her husband owed American Discount Corporation was $2,971.95. On the verdict returned by the jury it was ordered and decreed that the deed dated 5 September 1962 from Elva P. Hammond and husband, Perry C. Hammond, be and the same is adjudged null and void; that since the third issue was answered in the sum of $1,000 and G. T. Bullard has paid to or on behalf of Elva P. Hammond $1,000 at the time of the execution of the deed, it was ordered and adjudged that plaintiff recover nothing of the defendants and that the defendants recover nothing of the plaintiff. It was ordered and decreed that the American Discount Corporation has a lien secured by a deed of trust for $2,971.95, said deed of trust having been executed by the defendants Bullard on 20 November 1962, without prejudice as to any state of accounts between the defendants G. T. Bullard and wife and the American Discount Corporation. The costs were taxed against the defendants Bullard.

The defendants Bullard appeal, assigning error.

Powell, Lee and Lee for plaintiff appellee.
Williamson & Walton for defendant appellants.

DENNY, E.J. The appellants assign as error the failure of the court below to sustain their motion for judgment as of nonsuit made at the close of plaintiff's evidence and renewed at the close of all the evidence. The defendants contend the court erred in denying their motion for judgment as of nonsuit, on the ground that the plaintiff seeks to do something indirectly that she could not do directly, citing *Davis v. Davis,* 223 N.C. 36, 25 S.E. 2d 181. This position is untenable for two reasons. The first one is that in the instant case the action was brought by a next friend, which was permissible under the law. *Lamb v. Perry,* 169 N.C. 436, 86 S.E. 179; *Carroll v. Montgomery,* 128 N.C. 278, 38 S.E. 874; *Hicks v. Beam,* 112 N.C. 642, 17 S.E. 490. The second reason is that in *Davis v. Davis, supra,* the jury found there was no fraud or undue influence involved in the procurement of the contested conveyance. Here, the jury found that Elva P. Hammond on 5 September 1962 was mentally incompetent to execute the deed, and also found that the defendants Bullard obtained the deed in question by fraud and undue influence. *Davis v. Davis, supra,* is not controlling on the facts in this case.

The defendants admit that if their contention with respect to the manner in which this action was brought is not sustained, the plaintiff's evidence, when considered in the light most favorable to her,

is sufficient to carry the case to the jury on the issue of mental capacity. This assignment of error is overruled.

The appellants' assignment of error No. 3 is based on the alleged failure of the witnesses to state what opportunity they had had to observe Elva P. Hammond on or prior to 5 September 1962, before stating whether or not the witness had an opinion satisfactory to himself or herself as to whether or not Elva P. Hammond on 5 September 1962 had sufficient mental capacity to understand what she was doing and the nature and consequences of her act in making a deed.

The three witnesses who testified they did have an opinion satisfactory to themselves as to whether or not Elva P. Hammond on 5 September 1962 did have the mental capacity to understand what she was doing and the nature and consequences of her act in making a deed, were as follows: Irvin Ray Hammond, who had lived with his mother all his life except for two months; E. K. Bullard, 53 years of age and brother of the defendant G. T. Bullard, who testified that he had known Mrs. Elva P. Hammond all his life, that he had helped the Hammonds for many years on their farm since 1950, that he had tended the farm one year since 1950, and had seen Mrs. Elva P. Hammond once or twice a week since 1950, and sometimes more often; and Mrs. Hattie Strickland, a niece of Mrs. Hammond, who testified that she had known her aunt for 29 years and that she had been nursing her for the past five months. Each of these witnesses testified that in his or her opinion Elva P. Hammond did not have on September 5, 1962 the mental capacity to understand what she was doing and the nature and consequences of her act in making a deed. In our opinion there is no merit to these exceptions, and this assignment of error is also overruled.

Defendants' assignment of error No. 4 is directed to the following portion of the charge to the jury: "The plaintiff has offered evidence also tending to show the plaintiff did not have sufficient mental capacity to execute the deed in question on 5 September 1962." This instruction is technically erroneous. However, the court used the same language in summarizing the defendants' evidence, to wit: "The defendant has offered evidence tending to show that the plaintiff did have sufficient mental capacity to sign the deed in question on 5 September 1962 through the testimony of several witnesses as you will recall."

The court, however, in giving final instructions on issue No. 1 did so as follows: "So, the Court instructs you, members of the jury, that if you find from the evidence and by its greater weight that the plaintiff, Elva P. Hammond, on 5 September 1962 lacked sufficient mental capacity to understand the nature, scope and effect of

signing the deed in question, then you would answer Issue No. 1, No. If you fail to so find, you will answer Issue No. 1, YES."

In our opinion the jury was not misled by the instruction about which the defendants complain. *In re Efird's Will,* 195 N.C. 76, 141 S.E. 460. In the last cited case this Court held that where both caveator and propounders questioned their witnesses on the conjunctive proposition, including all the elements as to testamentary capacity to make a will, the jury could not have been misled; that under the facts and circumstances disclosed by the record the error was technical and harmless.

In our opinion the remaining assignments of error present no prejudicial error that would warrant our disturbing the verdict and judgment entered below.

No error.

MOORE, J., not sitting.

CONSOLIDATED VENDING CO., INC., v. CURTIS M. TURNER AND O. BRUTON SMITH.

(Filed 16 June, 1966.)

1. Appeal and Error § 31; Courts § 9—

Rulings of the court in regard to the admissibility of evidence prior to order of mistrial for the inability of the jury to agree upon a verdict are in no way binding upon the court upon subsequent trial, and therefore it is not error for the court upon appeal from the verdict and judgment in the second trial to strike from the record the charge of the court at the former trial, sought to be included in the record to show that evidence excluded at the subsequent trial was admitted at the former.

2. Pleading § 24—

A motion to be allowed to amend at the trial is of necessity addressed to the discretion of the court and its ruling denying the amendment is not reviewable in the absence of a clear showing of abuse of discretion, and the contention of movant that he was taken by surprise by the court's intimation that, in view of the pleadings, it would not permit the introduction of evidence on a particular aspect, does not tend to show abuse of discretion by the court in denying the motion.

3. Evidence § 15—

The court correctly excludes evidence pertaining to a matter not supported by any allegation in the pleadings.

4. Pleadings § 28—

Proof without allegation is unavailing.

5. Bills and Notes § 17—

In an action on a note, the maker's allegation that the note should be credited under agreement of the parties with sums received by the payee from distributors for the exclusive use of their products in the operation of the payee's concession at designated speedways in which the maker was a stockholder, *held* evidence relating to such "promotion money" received by the payee in connection with its operations at another speedway not specified in the allegations is properly excluded as not being supported by allegation.

6. Same—

Contention of the maker of a note that under the terms of the contract he was entitled to a credit for the amount the payee could have collected from a distributor for the exclusive use of its merchandise in the operation of the payee's concession at a speedway, *held* untenable when the evidence discloses that the payee received no such "promotion money" but relinquished it, and there is neither allegation nor proof that the payee promised to exact from its suppliers "promotion money" or that the payee received any direct benefit as the result of foregoing the opportunity to exact the payment of the "promotion money."

7. Appeal and Error § 41—

Where the transcript of the adverse examination taken by defendant is not contained in the record, the exclusion of the transcript from the evidence will not be held for error, since it cannot be determined whether defendant was prejudiced by the exclusion of the evidence.

8. Trial § 33—

Where defendant's own testimony is to the effect that he signed a note later filled in by the payee, who brought suit thereon, defendant may not object to reference in the charge to pertinent provisions of the Negotiable Instruments Law.

9. Trial § 37—

Appellant may not object that the court failed to declare and explain the law arising on evidence which had been correctly withdrawn from the consideration of the jury.

10. Bills and Notes § 17—

The maker may not contradict the terms of his written note by parol testimony that he would not be called upon to pay in accordance with its terms.

MOORE, J., not sitting.

ON *certiorari* to review judgment entered by *Latham, S.J.*, at the 30 August 1965 Schedule C Jury Session of MECKLENBURG.

Plaintiff sues upon a negotiable note for $22,500, dated 23 February 1962, payable to its order and signed by the two defendants as co-makers. Only the defendant Smith filed answer.

The answer alleges: Turner was operating a speedway at Danville, Virginia, and Smith was operating a speedway at Concord,

North Carolina; at each such speedway the plaintiff had food and drink concession rights; at the time the note was made the parties agreed that all "promotion money" received by the plaintiff from its suppliers at "said speedways" would be credited upon the note, as if paid by the defendants, and would be reported by the plaintiff to the defendants at reasonable intervals; the consideration for this collateral agreement was that the plaintiff was to have continued concession rights "at said speedways"; the plaintiff has collected "promotion money" at "both said speedways" in amounts not known to Smith but did not credit them upon the note "prior to filing this law suit"; the plaintiff having failed to account to Smith for payments so received, is not entitled to recover in this action and if the plaintiff is not barred from all recovery by such failure, it should be required to account fully for all such payments received by it "at the two aforesaid speedways."

The plaintiff offered evidence tending to show: The note upon which it sues was a renewal of an earlier one for $30,000. At the time the original note was made, the defendants were officers of a company which was then building, and which later operated, the Charlotte Motor Speedway. They sought a loan on its behalf, but the plaintiff preferred to make the loan to the defendants and did so. At the same time the plaintiff was given food and drink concession rights at the Charlotte Speedway, and it agreed that any "promotion money" received by it from suppliers of food and drinks would be credited upon the note. "Promotion money" is money paid to the plaintiff by such suppliers in return for the plaintiff's agreement to use their products, exclusively, at the speedway.

The plaintiff also introduced evidence tending to show: Prior to the execution of the renewal note now sued upon, the plaintiff received from one supplier $7,500 in "promotion money" which was credited upon the original note, making the balance $22,500, the amount of the renewal note. In addition, the plaintiff received from another supplier $1,000, which it now acknowledges should have been credited upon the note, and which it informed Smith would be so credited, but which its bookkeeper failed to so credit. This additional credit would reduce the balance due to $21,500. The plaintiff also received a check for $350 as "promotion money" at the Concord Speedway but the check was not paid and the plaintiff returned it to the drawer without bringing suit thereon. If this be also credited upon the note, the balance due would be reduced to $21,150 plus interest. The plaintiff has received no other "promotion money."

Smith introduced evidence tending to show: He and Turner endorsed the plaintiff's check for $30,000, the original loan, to Curtis Turner, Inc., Smith receiving none of the proceeds. At the time the

original note was made plaintiff's president, Fitzgerald, told Smith he would have no responsibility for the payment of the note since it would be paid with funds received from the plaintiff's suppliers. Smith has sought from the plaintiff an accounting for such "promotion money" but has received no such accounting except for the $7,500 and the $1,000, referred to in the plaintiff's testimony. Smith knows of no other "promotion money" received by the plaintiff. Smith ceased to be an officer of the Charlotte Motor Speedway Company in June, 1961, and a receiver was appointed for it in November of that year. The renewal note now sued upon was executed thereafter. The amount of it was blank when Smith signed it and Fitzgerald, the plaintiff's president, thereafter filled in the amount.

Smith also testified that he was informed by Fitzgerald that the latter had waived "his right to promotion money from Coca-Cola Company" because of an agreement by that company to pay $12,500 to the Charlotte Motor Speedway Company for the privilege of advertising upon a score board to be erected at the speedway. However, the court withdrew this testimony from consideration by the jury, having previously sustained objections to questions propounded by the defendant to the plaintiff's president, Fitzgerald, on cross examination, concerning such agreement between the Coca-Cola Company and the Speedway Company.

The jury found that the defendant Smith executed the note, that there was a collateral agreement between the plaintiff and Smith by virtue of which Smith is entitled to a credit of $1,350, and that the balance due the plaintiff, after such credit, is $21,150 plus interest. Judgment was entered upon the verdict.

Smith, in due time, gave notice of appeal to this Court, but was unable to perfect his appeal within the time allowed. This Court thereupon allowed *certiorari.*

The defendant assigns as error the denial of his motion to amend his answer. This motion was made and denied orally just before the start of the trial, some six months after the original answer was filed. It was occasioned by the trial judge's statement, just prior to trial, that he would hold incompetent, under the pleadings, testimony designed to show a payment by the Coca-Cola Company to the Charlotte Motor Speedway Company and a resulting waiver by the plaintiff of payments of "promotion money" to it by the Coca-Cola Company for use of the latter's product at the Charlotte Speedway.

Previously, there had been a trial of this action before another judge and jury, which resulted in a mistrial due to the inability of the jury to agree upon a verdict. For the purpose of showing that the presiding judge at the former trial had admitted the proposed

evidence and, therefore, the pre-trial statement of Latham, S.J., took him by surprise, the defendant included in his statement of the case on appeal the charge of the court at the former trial. In the settlement of the case on appeal, this was stricken by Latham, S.J., which ruling the defendant also assigns as error.

Craighill, Rendleman & Clarkson by Francis O. Clarkson, Jr. and John R. Ingle for defendant appellant.

Hugh M. McAulay for plaintiff appellee.

LAKE, J. It was not error to strike from the record on this appeal the charge of the presiding judge at the former trial. A mistrial having been ordered, the rulings of the judge presiding at that trial as to the admissibility of evidence offered before him are in no way determinative of the admissibility of like evidence upon a subsequent trial or of the defendant's right to amend or need to amend his answer. There is no reason to suppose that the defendant would have been any less surprised by the rulings of Latham, S.J., concerning such evidence had there never been any former trial of the action.

The motion to amend, originally oral, was reduced to writing after the trial and inserted into the record. The oral ruling denying the motion was not so reduced to formal writing. There being no indication to the contrary, we assume that the written motion, so filed and now appearing in the record, is in the same terms as the oral motion. It states that the defendant "moves the court that it, *in its discretion,*" allow the defendant to amend his answer. (Emphasis added.) The record shows that, on objection by the plaintiff, this motion was denied, but the record does not show the reason, if any, given by the court for its ruling. The defendant now contends that, since the court did not state that the motion was denied in its discretion, we must deem it to have been denied on the ground that, as a matter of law, the defendant could not so amend his answer and, therefore, the ruling is reviewable by us.

This Court has repeatedly held that after the time allowed for answering a pleading has expired, as in this instance, such pleading may not be amended as a matter of right, but only in the discretion of the court. *Hardy v. Mayo,* 224 N.C. 558, 31 S.E. 2d 748; *Cody v. Hovey,* 219 N.C. 369, 14 S.E. 2d 30; *Osborne v. Canton,* 219 N.C. 139, 13 S.E. 2d 265; *Biggs v. Moffitt,* 218 N.C. 601, 11 S.E. 2d 870. Since the motion to amend was, by its very terms, directed to the discretion of the court and, as a matter of law, was necessarily so directed, we find no merit in the defendant's contention. See *Osborne v. Canton, supra.* Since the motion to amend was denied in the dis-

cretion of the trial judge, his ruling is not reviewable in the absence of a clear showing of abuse of discretion, which does not appear on this record. See in addition to the authorities above cited: *Service Co. v. Sales Co.*, 264 N.C. 79, 140 S.E. 2d 763; *Crump v. Eckerd's, Inc.*, 241 N.C. 489, 85 S.E. 2d 607.

There was no error in sustaining the objections to the proposed cross examination of the plaintiff's witness relative to the plaintiff's foregoing of an opportunity to receive "promotion money" in connection with the Charlotte Speedway, or in withdrawing from the consideration of the jury testimony of the defendant with reference thereto. The unamended answer asserts that credits should have been allowed upon the note because of "promotion money" received by the plaintiff in connection with its operations at the Danville and Concord Speedways, no claim being made in the answer to any credit as a result of the operations at the Charlotte Speedway. The proposed evidence, relating to operations at Charlotte, is a substantial variance from the defense so pleaded. It is elementary that proof without allegation is as unavailing as allegation without proof. *Eason v. Grimsley*, 255 N.C. 494, 121 S.E. 2d 885; *Lucas v. White*, 248 N.C. 38, 102 S.E. 2d 387; *Poultry Co. v. Equipment Co.*, 247 N.C. 570, 101 S.E. 2d 458; *Bank v. Caudle*, 239 N.C. 270, 79 S.E. 2d 723; *Wilkins v. Finance Co.*, 237 N.C. 396, 75 S.E. 2d 118, *rehear. den.*, 238 N.C. 745, 76 S.E. 2d 164; McIntosh, North Carolina Practice and Procedure, 2d Ed., § 981. This principle applies to evidence offered to establish an affirmative defense not pleaded in the answer as truly as it does to evidence offered to show a cause of action not alleged in the complaint. Payment, or the right to a credit, upon a note is an affirmative defense. *White v. McCarter*, 261 N.C. 362, 134 S.E. 2d 612.

Furthermore, the testimony in question did not purport to show the receipt by the plaintiff of any "promotion money" in connection with its operation at the Charlotte Speedway. It purported to show that the Coca-Cola Company made certain payments direct to the Speedway Company in return for advertising rights granted by it to the Coca-Cola Company, and that the plaintiff, for this reason, gave up its opportunity to receive "promotion money" from the Coca-Cola Company. Even had the proposed amendment to the answer been allowed, it would have alleged only that the plaintiff agreed to credit the note with "promotion money" which it received. There is neither allegation nor proof that the plaintiff promised to exact from its suppliers all possible "promotion money" and that it would not, in the exercise of its own best business judgment, forego an opportunity to require such payments to it. The food and drink concessions at the Charlotte Speedway would be of little value if

the speedway, itself, ceased to operate. The proposed testimony did not purport to show any interest of the plaintiff in the Charlotte Speedway, or in any payment to it, other than a desire to keep its concession rights alive and valuable.

The defendant also assigns as error the sustaining of the plaintiff's objection to the offer in evidence of transcripts of adverse examinations of the president and auditor of the plaintiff. Since no part of these transcripts is included in the record before us, it cannot be determined from the record that the defendant was prejudiced by this ruling, even if it be assumed that the transcripts were competent. Therefore, this assignment cannot be sustained. *Cooperative Exchange v. Scott,* 260 N.C. 81, 89, 132 S.E. 2d 161; *Service Co. v. Sales Co.,* 259 N.C. 400, 411, 131 S.E. 2d 9.

The defendant next contends that the court below erred in including in the instructions to the jury abstract principles of law not germane to the issues; namely, references to certain provisions of the Negotiable Instruments Law, G.S. 25-7, 25-20, 25-29 and 25-34. The defendant testified that he received no part of the loan for which the original note was given, that the amount of the renewal note, upon which this suit was brought, was blank at the time he signed it and that such blank was filled in thereafter by the plaintiff. In view of this evidence it was not error for the court to include these instructions in the charge to the jury. The defendant makes no contention that there was any error in the content of these instructions.

There is no merit in the assignment of error asserting that the court failed to state correctly the contentions of the defendant and failed to declare and explain the law arising on the evidence in accordance with G.S. 1-180. Specifically, the defendant complains that the court did not instruct the jury as to the contention that the plaintiff gave up its opportunity to receive "promotion money" at Charlotte and as to the contention that there was a collateral agreement between the parties that the defendant would not have to pay the note since it would be paid entirely by receipts of "promotion money." Since the testimony concerning the plaintiff's supposed relinquishment of its opportunity to receive "promotion money" at Charlotte was properly withdrawn from the consideration of the jury, no further instruction with reference thereto was required. The promise set forth in the note could not be contradicted or destroyed by parol testimony that the makers thereof would not be called upon to pay in accordance with the terms of the note. *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594; *Manufacturing Co. v. McCormick,* 175 N.C. 277, 95 S.E. 555; *Cherokee County v. Meroney,* 173 N.C. 653, 92 S.E. 616.

Other assignments of error have been waived by failure to present argument or cite authorities in support thereof in the defendant's brief. We have nevertheless considered them and find no merit therein.

No error.

MOORE, J., not sitting.

AMERICAN AIR FILTER COMPANY, INC., PLAINTIFF, v. GEORGE ROBB, TRADING AS ROBB PLUMBING AND HEATING COMPANY, ORIGINAL DEFENDANT, AND RICHARD K. HUNTER, TRADING AS RICHARD K. HUNTER AND COMPANY, ADDITIONAL DEFENDANT.

(Filed 16 June, 1966.)

1. Sales § 14a—

Where it is admitted that the purchaser is entitled to some sum for authorized changes necessarily made by him to make the equipment purchased conform to the specifications, the purchaser is entitled to a credit therefor against his total liability on the contract.

2. Principal and Agent § 7—

Where the principal discloses the agency and sues on the contract for the balance of the purchase price, the purchaser, as between himself and the principal, is liable only to the principal, and the agent is neither a necessary nor a proper party, but an adjudication of agency as between the principal and the purchaser would not be binding on the alleged agent if the asserted agent is not a party to the action.

3. Pleadings § 12—

A demurrer admits the allegations of the pleading to which it is directed solely for the purposes of the demurrer, and therefore the act of the court in sustaining a demurrer filed by an additional party, joined at the instance of the original defendant, would not preclude the additional party from thereafter instituting action against the original defendant asserting that the amount sued for by plaintiff was due by the original defendant to the additional party rather than to the plaintiff.

4. Parties § 2—

Where defendant is liable to one of two parties in the alternative, so that if he is liable to one he is not liable to the other, and defendant is not sure to which of the parties liability obtains, upon being sued by one he is entitled to join the other as an additional party.

5. Same; Pleadings § 18; Sales § 12— In action by supplier, purchaser is entitled to joinder of distributor to adjudicate controverted question whether distributor was merely agent.

The supplier sued the purchaser for the balance due on the purchase price. The purchaser alleged that his contract was solely with the distributor, asserted he was entitled to credits for sums expended to make the equipment conform to the specifications, and had the distributor joined as an additional party. The supplier filed a reply, alleging that the distributor was acting solely as the supplier's agent. The distributor demurred for misjoinder of parties and causes and for failure of the answer to allege cause of action in regard to him. *Held:* The demurrer should have been overruled, the distributor being a necessary party to a final determination of the controversy, since the distributor cannot be bound by any adjudication of liability in the action solely between the purchaser and the supplier, and the purchaser being uncertain as to whether his liability was to the distributor under the contract between them or to the supplier as principal or assignee.

MOORE, J., not sitting.

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

APPEAL by original defendant from *Gambill, J.*, May 17, 1965 Civil Session of GUILFORD (High Point Division), docketed in the Supreme Court as Case No. 684 and argued at the Fall Term 1965.

Plaintiff, American Air Filter Company, Inc., instituted this action to recover of original defendant, George Robb, trading as Robb Plumbing and Heating Company (Robb), the sum of $9,005.31. It alleges that this sum is the balance due on an account of $32,621.79 for heating and ventilating materials which Robb ordered from plaintiff.

Answering the complaint, Robb denied that he ordered the equipment in question from plaintiff and alleged: His contract for the purchase of the materials was in writing, and it was with additional defendant Richard K. Hunter, trading as Richard K. Hunter and Company (Hunter), who agreed to furnish him, for $35,600.00 plus State and Federal taxes, the materials he required to perform a contract he had made with Forsyth County on a school construction project. Thereafter, Hunter ordered these materials from plaintiff, which invoiced and delivered them directly to Robb. Upon Hunter's instructions, Robb paid plaintiff the sum of $23,616.48, and this amount was credited upon his account with Hunter. Robb declined to pay plaintiff the sum for which it sues, because a part of the equipment furnished did not meet the requirements in Robb's contract with Hunter. When Robb determined that the equipment was faulty, he notified Hunter, who notified plaintiff. Both plaintiff and Hunter requested that Robb make the changes necessary to con-

form the equipment to specifications, and he did so at a cost of $8,942.75. He returned other nonconforming equipment in the amount of $299.73. Plaintiff, however, issued a credit memorandum for only $237.17, leaving a credit due defendant of $62.56. The sum of this item and $8,942.75 is $9,005.31, the amount in controversy between plaintiff and Robb.

In a "further answer and counterclaim" and "as a cross complaint," Robb reiterated the preceding allegations and alleged that he had a setoff or recoupment in the amount of $9,005.31 against his liability under his contract with Hunter; that he is unable to determine whether his setoff is against plaintiff or Hunter; that a genuine controversy exists among the three; and that Hunter is a necessary party to a complete determination of the controversy. Upon the filing of this pleading, the Clerk of the Superior Court entered an order making Hunter an additional party defendant and requiring him to answer the pleadings within 30 days.

In due time plaintiff filed a reply to defendant's answer in which it averred: In all his dealings with Robb, Hunter was — as Robb well knew — acting as plaintiff's agent. Robb's only liability, therefore, is to plaintiff. Robb did make some changes in the equipment which plaintiff furnished him, and plaintiff has offered to allow him a reasonable credit on account of such changes. Robb, however, insists on a credit which is grossly excessive and unreasonable. He is not entitled to the credit for which he contends. On the contrary, Robb is indebted to plaintiff in the full amount for which it sues. No genuine controversy exists between defendant and Hunter, who is not a necessary party to a complete determination of this controversy.

Thereafter, Hunter demurred to Robb's further answer, counterclaim, and cross complaint against him for that: (1) in them Robb states no cause of action against him; (2) Robb is entitled to no affirmative relief against him; (3) no actual controversy exists between him and Robb; and (4) there is a misjoinder of parties and causes. Judge Gambill entered an order sustaining Hunter's demurrer, and defendant Robb appeals.

Schoch, Schoch and Schoch by Arch K. Schoch, Jr., for original defendant appellant.

McLendon, Brim, Holderness & Brooks by Hubert Humphrey for Richard K. Hunter & Company, additional defendant appellee.

SHARP, J. This case is presently in the pleading stage. On the facts as detailed by Robb's "cross complaint" — which we take as

true in passing upon Hunter's demurrer — defendant is entitled to a recoupment in some amount on the contract price of the equipment which he contracted to buy from Hunter and which plaintiff, upon Hunter's order, furnished defendant. Plaintiff alleges the amount is "inconsequential"; Robb avers it is $9,005.31. Whatever the amount, however, defendant is entitled to credit it against his total liability under the contract.

Plaintiff alleges that, in all his dealings with Robb, Hunter acted as its agent. If this be true, Hunter is neither a necessary nor a proper party to the action for, plaintiff having instituted this action and disclosed the agency, defendant would be liable only to plaintiff. *Pontiac Co. v. Norburn,* 230 N.C. 23, 51 S.E. 2d 916; Restatement (Second), Agency § 302 (1958); 3 Am. Jur. 2d, Agency § 322 (1962); 3 C.J.S., Agency § 276(a) (1936). But *plaintiff's allegation* does not establish the agency. At this point in the proceedings Robb does not know whether plaintiff was Hunter's principal, assignee, or supplier, for Hunter is completely silent. Obviously, Hunter is not bound by plaintiff's allegations, and, if this action goes to judgment without Hunter having been made a party to it, an adjudication herein that Hunter was plaintiff's agent would not be *res adjudicata* in a future suit against Robb by Hunter. Without his presence, whatever the outcome of this action, Robb will still be subject to suit by Hunter, who might sue for the difference between the payments which he *authorized* defendant to make to plaintiff and the contract price of $35,600.00 which Robb agreed to pay Hunter. In addition, Hunter could also sue him for any amount which the jury might have allowed Robb as a recoupment against plaintiff's claim of $9,005.31. Furthermore, if the jury should allow Robb no recoupment against plaintiff's claim, and judgment be entered against him for the amount in suit, Hunter would not be precluded from suing Robb for this amount. Hunter's demurrer admits the allegations of Robb's cross complaint against him only for the purpose of testing the sufficiency of the pleading. 3 Strong, N. C. Index, Pleadings § 12 (1960). It admits nothing which would estop Hunter should he hereafter institute an action against Robb. If Hunter were indeed plaintiff's agent, or if he had assigned his contract with Robb to plaintiff, and if he intends to make no demand against Robb, he need only file an answer disclosing the facts and disavowing any claim against him in order to go without day from this action. If, however, Hunter will contend that he acted only for himself in procuring the contract upon which the equipment in question was furnished Robb, the termination of this action without his presence as

a party will leave defendant open to another suit and perhaps double liability.

If Hunter has a claim against defendant, now is the time for him to assert it. If he has none, now is the time for him to say so. Under the circumstances, we can conceive of no legitimate reason why he should be unwilling to do so. To make Hunter a party to this action can prejudice neither him nor plaintiff with respect to any legal right. Not to make him a party will seriously prejudice Robb, for he risks a second suit no matter what the outcome of this one. In addition, he risks double liability. See *Bullard v. Oil Co.*, 254 N.C. 756, 119 S.E. 2d 910. With reference to a similar situation in *Russello v. Mori*, 153 Cal. App. 2d 828, 833, 315 P. 2d 343, 346, the court said: "(W)here there is an issue as to the existence of an agency . . . both the alleged agent and principal may be joined for the purpose of determining their relationship and liability."

It was the purpose of the code system to avoid multiplicity of actions. While *plaintiff's* right under the contract which Hunter made to furnish material to Robb may be finally determined in this action, Robb's total liability cannot be unless Hunter is made a party. In *Conger v. Insurance Co.*, 260 N.C. 112, 131 S.E. 2d 889, the plaintiff alleged that one of two defendants was liable to him, and that if the one were, the other was not. We held that plaintiff could join them alternatively in the same cause of action. If Robb is liable to plaintiff as Hunter's principal, he is not liable to Hunter. In this aspect of the case, we have another situation of mutual exclusiveness, and the rationale of *Conger v. Insurance Co., supra,* is applicable, for there is no sound reason why alternative joinder of defendants should be allowed and alternative joinder of plaintiffs should be denied. G.S. 1-68. Here, of course, Hunter does not seek to join himself as a plaintiff; on the contrary, for some undisclosed reason, he seeks to avoid this litigation entirely. However, Hunter's potential claim against Robb is that of a plaintiff, and defendant Robb seeks to require him to assert it now or waive it. Hunter relies upon *Foote v. Davis & Co.*, 230 N.C. 422, 53 S.E. 2d 311. In that case, two plaintiffs asserted mutually exclusive claims against the defendant. In an opinion which has been the subject of critical comment (see Brandis and Graham, *Permissive Joinder of Parties and Causes in North Carolina,* 34 N.C.L. Rev. 405, 422-23 (1956) and Note, 42 N.C.L. Rev. 242, 245-46 (1963)), the Court dismissed the action for a misjoinder of parties and causes. It pointed out, however, that "the new party was not brought in on motion of defendant." In this case, it is upon defendant Robb's motion that Hunter, a potential plaintiff, was brought in as a new party. Since

Foote and the case at bar present different factual situations, no further discussion of that case is presently required.

When a defendant, liable to one of two persons (or perhaps to them both in varying amounts) for goods sold and delivered, is sued by the supplier, common sense dictates that he be allowed to join the seller so that the entire controversy, and his total liability, may be determined in one action. Robb does not seek to make Hunter a party for the purpose of litigating a cross action which is foreign or collateral to plaintiff's claim. Robb's liability to Hunter, if any, arises out of the same transaction, and is connected with the same subject matter, upon which plaintiff bases this action; it involves the identical equipment for which plaintiff seeks to recover. The amount of Robb's recoupment will determine not only his liability on plaintiff's claim, but it will affect his total liability to Hunter on the contract, should Hunter assert thereunder an independent claim against him.

If, when the facts of this case are developed, Robb is liable to both plaintiff and Hunter, his liability to Hunter must be credited with all amounts which he has heretofore paid plaintiff upon Hunter's instructions and which it may be determined he properly expended to make the equipment which plaintiff furnished him upon Hunter's order conform to the contract. Obviously, there cannot be a complete determination of this controversy without the presence of these three parties in the action. There was no misjoinder of either parties or causes.

The order sustaining the demurrer is

Reversed.

MOORE, J., not sitting.

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

DORIS J. FESMIRE, PLAINTIFF, v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR OF JESSE BURNS EARLE, DECEASED, DEFENDANT.

(Filed 16 June, 1966.)

1. Gifts § 1—

The burden is on the party claiming a gift *inter vivos* to show the intent of the donor to give her the gift so as to divest himself immediately of all right, title and control therein; and the delivery, actual or constructive, to the donee.

2. Corporations § 17—

Delivery of a stock certificate endorsed in blank is constructive delivery of the shares which it represents, and possession of such certificate establishes *prima facie* the fact of delivery.

3. Gifts § 1—

The fact that the donor, after a completed gift *inter vivos*, retains physical access to the gift, or obtains possession solely for the purpose of safekeeping for the benefit of the donee, does not defeat the gift.

4. Same—

Evidence tending to show that intestate endorsed the certificate for certain shares of stock in blank and delivered it to plaintiff, that plaintiff put the certificate in an envelope with another chose, admittedly hers, and placed the envelope in intestate's safe deposit box to which she had the key, with testimony of intestate's brother that intestate stated he had given the stock to plaintiff, *held* sufficient to establish a gift *inter vivos*, entitling plaintiff to possession of the certificate against intestate's personal representative.

5. Same—

In this action to establish a gift *inter vivos* as against the personal representative of the alleged donor, it was competent for plaintiff to introduce in evidence the inventory, made by an officer of the bank, of the donor's safe deposit box in order to show that the certificate of stock claimed as the gift had been endorsed in blank by intestate and had been physically separated from other unendorsed certificates by being enclosed in an envelope on which was typed the name of plaintiff and in which another document of value, admitted to be her property, was also enclosed.

6. Evidence § 11—

In an action to establish a gift *inter vivos* of a certificate for shares of stock endorsed in blank and found after donor's death in his safe deposit box, it is competent for plaintiff to testify that she had access to the safe deposit box at the time the endorsed stock certificate came into her hands, and that for a long period prior to donor's death she had been keeping her own valuable papers in the safe deposit box, the testimony not being of a personal transaction between plaintiff and decedent but being testimony concerning independent facts. G.S. 8-51.

MOORE, J., not sitting.

APPEAL by defendant from *Bone, E.J.*, September 1965 Session of CHATHAM.

The plaintiff sues to recover the possession of Certificate No. D2342 for 500 shares of stock in the First Union National Bank of North Carolina. She alleges the certificate was originally issued by the corporation to Dr. Jesse Burns Earle, now deceased, that he made an *inter vivos* gift of the stock to her. The gift is denied by the defendant. The jury found for the plaintiff and from judgment in accordance with the verdict the defendant executor appeals.

The following facts are not disputed: The stock certificate was originally issued in the name of Dr. Earle and he was the owner of the shares. He rented a safety deposit box from the bank. When the box was opened after his death this stock certificate, endorsed by him in blank, was found in the box, within an envelope. On the outside of the envelope was typed "Doris J. Fesmire for Michael Fesmire." Within the envelope, in addition to this stock certificate, was a savings certificate in the name of "Michael Fesmire or Doris J. Fesmire (joint tenants)" in the amount of $300.00. Mrs. Fesmire and Dr. Earle were engaged to be married on 13 July 1964. He died 3 April 1964. For many years prior to his death, Mrs. Fesmire was employed by Dr. Earle as secretary in the office wherein he carried on the practice of medicine. Two keys to the safety deposit box were issued to Dr. Earle. Both keys were held by Mrs. Fesmire following the death of Dr. Earle and were delivered by her to the defendant executor so that the box could be opened and an inventory of its contents made. One of these keys, together with the master key retained by the bank, had to be used in order to open the box.

Upon oral argument of the appeal, counsel for the defendant stated that the bank kept no record of the persons who opened the box or the times when such openings occurred.

The brother of Dr. Earle, called as a witness for the plaintiff, testified, without objection, to a conversation with the deceased in which the deceased told him that he "had given" 500 shares of his stock in the First Union National Bank of North Carolina to Mrs. Fesmire and that the stock was kept for her in his safety deposit box in the bank, to which box Mrs. Fesmire had a key.

The plaintiff introduced in evidence, over objection, the inventory of the contents of the safety deposit box made after the death of Dr. Earle and the testimony of the vice-president of the defendant, who made the inventory, to the effect that the box contained many other stock certificates issued to Dr. Earle, including numerous certificates for other shares of stock in the First Union National Bank, none of them being endorsed by him. None of these other cer-

tificates was in the envelope above mentioned. The box also contained a life insurance certificate which was the property of Dr. Earle's brother and some savings bonds belonging to Dr. Earle's three daughters.

Over objection, the plaintiff, herself, testified that she first saw this stock certificate on 13 March 1964, at which time it came into her possession; at that time she placed it in the above mentioned envelope with the savings certificate; she typed on the envelope "Doris J. Fesmire for Michael Fesmire," and placed the envelope in the desk drawer in her office; she kept the stock certificate in her possession approximately one week; she had the keys to the safety deposit box on and after 13 March 1964; for about three years prior to that date, she had been keeping her valuable papers in this safety deposit box; on 6 April 1964, following the death of Dr. Earle, she gave the keys to the box to officers of the defendant executor and was present when the box was opened for the purpose of making an inventory of its contents; when the box was so opened, it contained the envelope and within the envelope was the certificate for the stock and the savings certificate.

The defendant introduced in evidence the rental agreement between the bank and Dr. Earle concerning the safety deposit box, which provided that no person other than the renter or an authorized deputy should have access to the box, except as provided in the agreement. No such "deputy" was appointed by Dr. Earle except his former wife, now deceased. The defendant also offered in evidence the will of Dr. Earle bequeathing to his children certain tangible property and devising and bequeathing to the bank, as trustee for his children, all of the residue of his estate, the net value of which, after taxes, was approximately $242,000.

When the safety deposit box was opened, the defendant delivered the savings certificate found in the above mentioned envelope to the plaintiff, but refused her demand for the delivery of the stock certificate to her.

Barber & Holmes for defendant appellant.
Moody & Moody and T. F. Baldwin for plaintiff appellee.

LAKE, J. The burden of proof was upon the plaintiff to show each element of the gift *inter vivos* under which she claims. *Cartwright v. Coppersmith,* 222 N.C. 573, 24 S.E. 2d 246; *Duckworth v. Orr,* 126 N.C. 674, 36 S.E. 150. These elements are: (1) The intent by Dr. Earle to give to her the shares of stock so as to divest himself immediately of all right and title to and control of the stock;

and (2) the delivery, actual or constructive, of the stock certificate endorsed by him. G.S. 55-75; *Smith v. Smith,* 255 N.C. 152, 120 S.E. 2d 575; *Scottish Bank v. Atkinson,* 245 N.C. 563, 96 S.E. 2d 837; *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222, *rehear. den.,* 226 N.C. 778, 39 S.E. 2d 599; *Cartwright v. Coppersmith, supra; Patterson v. Trust Co.,* 157 N.C. 13, 72 S.E. 629; *Newman v. Bost,* 122 N.C. 524, 29 S.E. 848.

Delivery of an endorsed stock certificate is constructive delivery of the shares which it represents, and possession of such certificate by the endorsee establishes *prima facie* the fact of delivery. *Scottish Bank v. Atkinson, supra.* The act relied upon to establish the delivery must be unequivocal and must deprive the donor of his right to dominion over the thing given. *Cartright v. Coppersmith, supra; Handley v. Warren,* 185 N.C. 95, 116 S.E. 168. It is not essential, however, that the article be placed beyond the physical power of the donor to retake it, as is illustrated by the case of a gift of coins to a child by dropping them in a container recognized as the property of the child though the container, itself, remains in the home of the donor and thus subject to his physical control. *Patterson v. Trust Co., supra.* Furthermore, when there has been an actual transfer of possession with the requisite intent, the gift is not defeated by the subsequent return of the article to the possession of the donor for safe keeping, or its return to a container or place of deposit owned and controlled by the donor. *Bynum v. Bank,* 221 N.C. 101, 19 S.E. 2d 121; *Swindell v. Swindell,* 153 N.C. 22, 68 S.E. 892. In the *Swindell* case, the gift of a horse by a husband to his wife was not defeated by the subsequent return of the horse to the stable or pasture of the husband and the use of it by the husband. In the *Bynum* case, the donor delivered to the donee a tin box and the keys thereto with intent to make a gift of the documents in the box, and then instructed the donee to return the box to its former resting place in the donor's closet. Again, in *Zollicoffer v. Zollicoffer,* 168 N.C. 326, 84 S.E. 349, a retaking of a stock certificate by the donor and placing it in her Bible for safe keeping did not defeat the gift of the stock.

The testimony by the brother of Dr. Earle that Dr. Earle said he "had given" 500 shares of his stock in the First Union National Bank to the plaintiff and that the stock was kept for her in his safety deposit box in the bank, to which box she had a key, is ample evidence to show a delivery of the certificate by him to her. *Zollicoffer v. Zollicoffer, supra; Gross v. Smith,* 132 N.C. 604, 42 S.E. 111. To this testimony there was no objection by the defendant and it was clearly competent.

There is no merit in the exception by the defendant to the admission in evidence of the inventory of the contents of the safety deposit box made by its officer, or in its exception to the testimony of such officer as to the contents of the box. This evidence shows conclusively that the certificate in question was endorsed by Dr. Earle, no other certificate in the box was so endorsed, and this certificate was physically separated from the remaining certificates by being enclosed in an envelope, on which was typed the name of the plaintiff, and in which was another document of value admitted to be her property.

The defendant's major contention is that there was prejudicial error in permitting the plaintiff, herself, to testify that the stock certificate came into her possession on 13 March 1964, that she then placed it in the envelope and typed upon the envelope her name, whereupon she placed the envelope in the drawer of her own desk at the office and kept it there approximately one week. The defendant also contends that there was error in permitting the plaintiff to testify that she had the keys to the box in her possession at the time the stock certificate came into her hands, and that for a long period prior to that date she had been keeping her own valuable papers in this safety deposit box. The admission of this testimony was not forbidden by G.S. 8-51 since it is not testimony by the plaintiff of a personal transaction between her and the defendant's testator. It is testimony concerning independent facts. *Lister v. Lister,* 222 N.C. 555, 24 S.E. 2d 342; *Jones v. Waldroup,* 217 N.C. 178, 7 S.E. 2d 366; *Thompson v. Onley,* 96 N.C. 9, 1 S.E. 620; Stansbury, North Carolina Evidence, § 73, Note 45. In the *Lister* case, this Court, speaking through Winborne, J., later C.J., said:

> "Where in the trial of this action plaintiff produces paper writings, in the form of negotiable notes purporting to be payable to him and to be signed by intestate of defendants, administrator and administratrix, upon which the action is based, and testifies to his possession of them since certain dates, even though such dates correspond with the purported dates of such paper writings, and identifies the purported signatures thereto to be in the handwriting of said intestate, are such paper writings admissible in evidence? Yes."

Since the admission of this testimony by the plaintiff was not error, the defendant's exception to those portions of the court's instruction to the jury summarizing and referring to this testimony are also without merit.

We have examined each of the defendant's assignments of error and find no basis therein for a new trial of this action.

No error.

MOORE, J., not sitting.

BEULAH MAE KING v. HILARY LAVERNE BRITT
AND
WOODROW WILSON KING v. HILARY LAVERNE BRITT.

(Filed 16 June, 1966.)

1. Damages § 3—

Damages for personal injury negligently inflicted should include reasonable satisfaction for actual physical and mental suffering, past, present and prospective, naturally resulting to plaintiff from the injury, but the award of prospective damages shauld be limited to the present cash value or present worth of such damages.

2. Damages § 14—

Allegation and proof tending to show that in the accident in suit plaintiff suffered a laceration of her forehead requiring six or eight stitches to suture, that the injury severed a nerve in her forehead causing permanent loss of mobility of her forehead and leaving a permanent scar, is sufficient basis for the award of damages for mental suffering, notwithstanding the absence of direct testimony that plaintiff suffered any mental pain or embarrassment or humiliation because of the injury, and in such instance it is prejudicial error for the court to fail to instruct the jury in regard to damages for such mental pain and suffering.

3. Trial § 33—

The trial court is under duty to charge the law on all substantial features in the case arising on the evidence, even in the absence of request for special instructions. G.S. 1-180.

MOORE, J., not sitting.

APPEAL by plaintiff Beulah Mae King from *Clark, S.J.*, January-February 1966 Civil Session of CUMBERLAND.

Civil action by plaintiff Beulah Mae King to recover damages for bodily injuries allegedly caused by the actionable negligence of Hilary Laverne Britt in the operation of his automobile. Beulah Mae King was riding as a guest passenger in an automobile operated by her husband.

Woodrow Wilson King, the husband of plaintiff Beulah Mae King, also instituted a separate action against defendant Hilary Laverne Britt to recover damages apparently for personal injuries and property damage allegedly caused by the actionable negligence of defendant Britt in the operation of his automobile which occasioned a collision between defendant's automobile and the automobile operated by Woodrow Wilson King.

The defendant Hilary Laverne Britt, who is an infant, defended the action by H. Dolph Berry, his duly appointed guardian *ad litem.*

Separate complaints were filed by each plaintiff and separate answers thereto by Hilary Laverne Britt appearing herein by his duly appointed guardian *ad litem.* The two cases were consolidated for trial.

After the jury had been selected, sworn and empaneled, and prior to a reading of the pleadings, the defendant represented by his guardian *ad litem,* through counsel, and in open court, admitted negligence and proximate cause in each of the consolidated cases, and expressly waived the presentation to the jury of the issues relating thereto and stipulated and agreed that the only issue to be considered by the jury in each of the consolidated cases was: "What amount, if any, is the plaintiff entitled to recover of the defendant?" In the case of the appellant Beulah Mae King, the jury answered the issue submitted in the amount of $1,000. The pleadings in the case of her husband Woodrow Wilson King are omitted from the record. The issue in his case and the jury's answer thereto are omitted from the record.

From a judgment on the issue in her case that Beulah Mae King shall recover from defendant the sum of $1,000, she appeals to the Supreme Court. In the case of Woodrow Wilson King against defendant, there was no appeal.

Nance, Barrington, Collier & Singleton by Carl A. Barrington, Jr., for plaintiff appellant.

Anderson, Nimocks & Broadfoot by Henry L. Anderson for defendant appellee.

PARKER, C.J. Appellant alleges in her complaint her injuries in substance as follows: In the collision of the two automobiles she was thrown about the inside of the automobile in which she was riding and against the glass and metal portions thereof with such force that she received marked shock, a costochondral sprain to the right side of her back, a deep two-inch laceration of her forehead, an abrasion of the nose, and numerous abrasions and contusions over

a large portion of her body. She was taken by ambulance to the Cape Fear Valley Hospital, where there was painful suturing of the deep cut on her face; that she was totally disabled by reason of her injuries for a period of three weeks, thereby losing her usual salary; that she was forced to remain under the constant care of her physicians for approximately ten weeks; that she suffered many weeks of excruciating pain, which will continue to some extent in the future; and that she incurred considerable doctor and medical bills and expenses, and that this will continue in the future. Her injuries have left her with a disfiguring ragged and raised scar on her forehead with permanent damage to the right frontal nerve in her face, resulting from the deep laceration, and have left her with severe anxiety neuroses because of the embarrassment and humiliation suffered by her as a result of this large, plainly visible, severe, disfiguring scar on her face.

Appellant's evidence in respect to her injuries tends to show in substance the following facts: In the automobile collision caused by defendant's actionable negligence, she received painful bruises and abrasions and a severe laceration of approximately one and a half or two inches in length in her forehead over her right eye, which laceration severed the nerve in her forehead leading to the frontal portion of her head. Dr. Bundy, who was admitted to be a medical expert specializing in the field of general surgery, testified in respect to this laceration in substance as follows: This laceration over her right eye apparently severed the nerve which comes out of the skull at this level and goes up across the forehead. As a result of this laceration, plaintiff has a lack of feeling there, as well as inability to wrinkle her forehead. Six or eight stitches were required to suture this laceration. In his opinion, when a nerve is cut in two there is a lack of function in that nerve and there is no particular treatment for it. He believes that this lack of feeling in her forehead would not respond to any operative treatment, will cause some loss of mobility of facial expression, and, in his opinion, is a 95% permanent disability to her forehead. The permanent disabilty of her forehead due to this severed nerve would have nothing to do with her earning capacity or ability to work. Appellant's evidence further tends to show that as a result of her injuries she missed two weeks from work at $12 per week, suffered pain for several weeks, and incurred hospital, medical, and ambulance bills of $114, and that the scar on her forehead causes numbness but not pain, and is permanent.

Appellant's assignments of error relate solely to the judge's charge to the jury. The judge in his charge, after stating in substance that there is some evidence in this case to show that each of the plaintiffs

were injured about the forehead and that as a result thereof they had scars, mutilation in the area of the forehead, which were visible, instructed the jury as follows:

> "I instruct you that any outward observable blemish, scars, or mutilation, which tend to mar the appearance to the extent that it lessens or abuses the opportunities of the injured parties to obtain remunerative employment should be considered by you in determining what amount if any that you award to the plaintiffs in this case."

Appellant assigns the above quotation from the charge as error on the ground that it limited any award of damages for the permanent scar on appellant's forehead to the extent that it lessened the opportunity of the appellant to obtain remunerative employment. Appellant further assigns as error that the court, pursuant to G.S. 1-180, should have gone further and instructed the jury that they should award to appellant such amount as they found to be fair and reasonable compensation for mental suffering and pain by appellant naturally and proximately resulting from the permanent scar on her forehead.

In *Muse v. Motor Co.,* 175 N.C. 466, 471, 95 S.E. 900, 902, the Court said: "In actions for personal injuries, one of the elements for the assessment of actual or compensatory damages is mental anguish."

In the instant case defendant in open court admitted negligence and proximate cause, expressly waived presentation to the jury of the issues relating thereto, and stipulated and agreed that the only issue to be considered by the jury was: "What amount, if any, is the plaintiff entitled to recover of the defendant?" Therefore, defendant, whose negligence proximately caused bodily injuries to appellant, is liable for all damages to appellant naturally and proximately resulting from his negligent act. *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104; *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648.

The law is well settled in this jurisdiction that in cases of personal injuries resulting from defendant's negligence, the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from defendant's tort. The plaintiff, *inter alia,* is to have a reasonable satisfaction for actual suffering, physical and mental, which are the immediate and necessary consequences of the injury. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective. In assessing prospective damages, only the present cash value or present worth of such damages is to be awarded as the plaintiff is to be paid

in advance for future losses. *Williamson v. Bennett,* 251 N.C. 498, 112 S.E. 2d 48; *Mintz v. R. R.,* 233 N.C. 607, 65 S.E. 2d 120; 2 Strong's N. C. Index, Damages, § 3. We have not stated the entire rule for compensatory damages for injury to the person, but only so much of it as is strictly relevant to the assignments of error here to the charge.

Generally, mental pain and suffering in contemplation of a permanent mutilation or disfigurement of the person may be considered as an element of damages, and it would seem that the weight of authority is to that effect. However, there is authority to the contrary. 25 C.J.S., Damages, § 66; *Gray v. Washington Water Power Co.,* 30 Wash. 665, 71 P. 206; 10 Blashfield, Cyclopedia of Automobile Law and Practice, perm. Ed., § 6469.

Plaintiff did not testify that she suffered any mental pain or anguish or embarrassment or humiliation because of the permanent scar on her forehead. However, as a general rule, in personal injury cases where mental pain and suffering form an element of recoverable damages by reason of mutilation or disfigurement of the person, direct proof of such pain and suffering is not necessary, but it may be inferred by the jury from the facts of the case or there may be substantial evidence from which the jury may imply its existence. *Muse v. Motor Co., supra;* 25A C.J.S., Damages, § 162(7), p. 100. In our opinion, and we so hold, plaintiff's evidence would permit a jury to infer and find that the permanent scar on appellant's forehead caused her to suffer mental pain.

Nowhere in the charge did the court instruct the jury that they could award damages for mental pain and suffering. In addition, appellant has no evidence that the permanent scar on her forehead lessened her opportunity to obtain remunerative employment. See *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683. In a retrial of this case appellant may or may not be able to offer evidence tending to show that the permanent scar on her forehead lessened her opportunity to secure remunerative employment. The assignments of error to the charge are good. The judge should have charged the jury that if they found from appellant's evidence that appellant suffered mental pain as a result of the permanent scar on her forehead negligently inflicted by defendant's tort, as he admitted, this mental pain should be considered by the jury as an element of actual or compensatory damages in passing upon the issue submitted to them. The trial court is required to charge the law upon all substantial features of the case arising on the evidence even though

there is no request for special instructions. G.S. 1-180; *Yarn Co. v. Mauney,* 228 N.C. 99, 44 S.E. 2d 601.

For prejudicial error in the charge, appellant is entitled to a New trial.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. WILLIAM ROBERT BULLARD, III.

(Filed 16 June, 1966.)

1. Searches and Seizures § 2—

While averments in the affidavit for a search warrant need not be competent under the strict rules of evidence, they must disclose justifiable and probable cause to believe that a search will reveal the presence of the particular object sought.

2. Same—

Affidavit of an officer that he had reasonable grounds to believe that defendant possessed a quantity of peyote, that a person known to him to be reliable had stated that he had in the immediate past seen peyote at defendant's address, and that the informant had delivered to the affiant peyote, obtained from the address and identified by a chemist, *held* to justify the issuance of a search warrant, and to render competent in evidence peyote and marijuana obtained by a search of defendant's premises.

3. Narcotics § 1—

Defendant's contention that peyote and marijuana are not narcotic drugs within the purview of the statute is untenable, since the statute specifically includes peyote and marijuana within its definitions. G.S. 90-87(1); G.S. 90-87(9). Further, in this case, there was expert testimony that peyote and marijuana are narcotic drugs.

4. Constitutional Law § 22—

The constitutional guarantees of religious liberty relate to religious beliefs but do not extend to practices, even though such practices are engaged in pursuant to religious beliefs, when such acts are proscribed by statutes enacted in the interest of the public safety, morals, peace or order.

5. Same; Narcotics § 1—

The possession of peyote and marijuana in violation of statute cannot be justified under the guise that they were used by defendant in the exercise of his religious beliefs.

MOORE, J., not sitting.

APPEAL from *Latham, S.J.*, December 13, 1965 Criminal Session, ORANGE Superior Court.

The defendant was tried on a bill of indictment charging in two counts that he did unlawfully, wilfully and feloniously have in his possession on the 4th day of August, 1965 both peyote and marijuana, in violation of N.C.G.S. 90-88, 90-87(1)d and 90-87(9). These statutes provide, among other things, that it shall be unlawful for any person to possess, have in his control, sell, etc., any narcotic drugs in which is included cannabis. Cannabis is defined as "including peyote or marijuana." The defendant entered a plea of not guilty, the cause was heard before a jury, and upon conviction and judgment imposed, he appealed to the Supreme Court.

The State's evidence tends to show that on August 4, 1965 the State's witness, SBI Agent, Haywood Ray Starling and several officers of the Chapel Hill Police Department obtained a search warrant and, under this authority, entered and searched the apartment of the defendant, William Robert Bullard, III, on 127 Rosemary Street in Chapel Hill. As a result of the search a quantity of peyote and marijuana was found and the defendant was charged with the violation of the statutes referred to above.

The defendant testified in his own behalf that the peyote and marijuana were his and that they were used in religious beliefs. He said that as a member of the Neo-American Church that both peyote and marijuana, being plants which grow from the earth, are believed to be the incarnation of the spirit of God, and it is necessary to use them in the practice of his religion and he thereupon claimed immunity on constitutional grounds. The jury convicted the defendant on both charges and he appealed.

T. W. Bruton, Attorney General, Wilson B. Partin, Jr., Staff Attorney, for the State, Appellee.

Cooper & Winston by Barry T. Winston Attorney for Defendant Appellant.

PLESS, J. The facts in this case are not in dispute. That is, the State's evidence was overwhelmingly that the defendant had peyote and marijuana in his possession in his Chapel Hill apartment and the defendant admits this. The trial judge, in effect, told the jury that if they found these to be the facts the defendant would be guilty. The defendant interposes three grounds of defense. (1) That the search warrant used by the officers was not validly issued, that evidence obtained under it was incompetent, and that without that evidence, the cause should have been non-suited. (2) That peyote and marijuana are not narcotics and, therefore, their possession can-

not constitute a violation of the law. (3) That as a Peyotist the use of this substance is necessary in the practice of his religion; that its possession under those conditions is not a criminal offense, and to forbid its use constitutes a violation of his constitutional rights.

In support of his claim that the search warrant used by the officers was not valid, the defendant relies principally upon the case of *Aguilar v. Texas,* 278 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509. In that case the U. S. Supreme Court reversed *Aguilar's* conviction upon a charge of possessing narcotics because certain requirements it laid down for the issuance of search warrants were not met in that case. It said that "(T)he magistrate must be more than a mere rubber stamp for the police officers; that the officers must provide their reasons for believing and relying upon the credibility of their informant." These objections are not valid here. The search warrent was issued upon the oath of Sergeant W. F. Hester, an officer of the Chapel Hill Police Force, that he had reasonable grounds to believe that the defendant possessed a quantity of peyote; that a person known to him to be reliable had stated that "He has in the immediate past period seen peyote" at the defendant's address; that the informer had also delivered to the affiant portions of the peyote and that this had been examined by one skilled in the identification of peyote who had identified it as such.

It must be remembered that the object of search warrants is to obtain evidence — if it were already available there would be no reason to seek their issuance. They must be issued upon information which may not at that time be competent as evidence by strict rules, but there must be justifiable and probable cause to believe that a search will reveal the presence of the object sought. There can be no doubt that upon the affidavit of Sgt. Hester the Clerk of the Recorder's Court was justified in issuing the search warrant. The defendant's exception to its issuance and the evidence obtained as a result thereon was properly overruled.

The defendant's second objection to the State's case is that the possession of peyote and marijuana are not unlawful because they are not narcotic drugs. Here the defendant is confronted with the provisions of the Statute § 90-87(9) which says, " 'Narcotic drugs' means * * * cannabis, etc.," and § 90-87(1): " 'Cannabis' includes * * * Peyote or marihuana."

In addition, the State's witness, Starling, testified he was a graduate of the Federal Bureau of Narcotics Advanced Training School; that he had worked for four years "exclusively on narcotic investigation;" that he had "taught school to local police officers on various aspects of narcotic investigation." While the record does not show that the court held Mr. Starling to be an expert in this field, he un-

doubtedly qualifies as such. He describes peyote "as a plant that grows wild and * * * is used sometimes by persons who use narcotics illegally * * * to produce certain hallucinations type effects." He also testified that marijuana "is a narcotic * * * and is a type of weed that distorts the senses."

Also, the State's witness Best, who qualified as an expert in the field of chemistry, as it pertains to the identification and analysis of narcotic drugs, referred to "the narcotic known as Marijuana," and testified that prior to this case he had "had occasion to examine, identify and analyze the narcotic known as marijuana." Thus, defendant's second ground of defense is successfully met and it is denied.

The third and most emphasized position for the defendant is that he is now a Peyotist with Buddhist leanings and that he has recently joined the Neo-American Church and that "peyote is most necessary and marijuana is most advisable in the practice of my church's beliefs." The very interesting and informative brief filed on behalf of the defendant describes the ceremonies connected with the defendant's religion. They have "meetings" which are marked by the sacramental use of peyote and which composes the cornerstone of the peyote religion. Thereupon, "the members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle, and prayer cigarette, the symbolic emblems of their faith. The central event, of course, consists of the use of peyote in quantities sufficient to produce a hallucinatory state. * * * (P)eyote constitutes in itself an object of worship. * * * When taken internally by chewing the buttons or drinking a derivative tea, peyote produces several types of hallucinations, depending primarily upon the user. In most subjects it causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. In others it engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia."

The defendant's position is that to convict him of the possession of a substance which is a necessary part of his religion, constitutes a violation of his rights under the first amendment, and cites a number of cases in support, including *Reynolds v. U. S.*, 98 U.S. 145; *People v. Woody*, 40 Cal. Rptr. 69, 394 P. 2d 813; *Marsh v. Alabama*, 326 U.S. 501 and *Tucker v. Texas*, 326 U.S. 517. He claims that the first amendment constitutes "a guarantee by government that all citizens shall be free to believe whatsoever they choose as to the nature of and the relationship between God and man and that the practices founded upon those beliefs shall not be hindered or impaired unless and until the conduct reaches the proportions of mal-

eficient criminal conduct. Hence, the State is forbidden from adopting any regulation dictating what any person's religious beliefs may or may not be," citing *Cantwell v. Connecticut,* 310 U.S. 296.

Some doubt may be cast upon the validity of the defendant's claim that he uses these drugs only in connection with his religion. The officers testified that in their discussion with him at the time the drugs were found in his apartment that the defendant made no mention of his religion nor the need for the drugs in connection therewith. A jury might well have found that this claim was a defense invented by the defendant long after his arrest. Even if he were sincere, the first amendment could not protect him. It is true that this amendment permits a citizen complete freedom of religion. He may belong to any church or to no church and may believe whatever he will, however fantastic, illogical or unreasonable, but nowhere does it authorize him in the exercise of his religion to commit acts which constitute threats to the public safety, morals, peace and order. As stated in *Reynolds v. U.S.,* 98 U.S. 145, 25 L. Ed. 244, at 250:

> "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"
>
> "* * * To permit * * * (a man to execute his practices because of his religious beliefs) would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

And in 16 Am. Jur., Constitutional Law, § 302, p. 595, it is said:

> "The freedom of religion guaranteed by state and federal constitutional provisions may properly be limited * * * (and) (t)he constitutional protection of religious freedom does not provide immunity from compliance with reasonable civil requirements imposed by the State in the interest of public welfare, and * * * State legislatures may regulate conduct for the protection of society."

The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here — in law nor in morals.

The defendant knowingly and intentionally possessed narcotic drugs in violation of the laws of the state and in his trial, after considering all of his positions, we find

No error.

MOORE, J., not sitting.

L. E. BAGWELL, JR., v. TOWN OF BREVARD, AN INCORPORATED MUNICIPALITY.

(Filed 16 June, 1966.)

1. Municipal Corporations § 17—

An advertisement for the sale of municipal property on a date less than 30 days after the first publication of the notice cannot relate back to a prior publication of notice, even though the prior notice related to substantially the same land, when the prior notice stipulates a different date for the sale and contains material differences in the terms of payment, as well as a discrepancy in the quantity of land to be sold and whether the land would be offered for sale as a whole or in separate tracts, and therefore the purported sale on the date specified in the second advertisement is a nullity. G.S. 160-59.

2. Same—

Even in regard to the sale of land which a municipality has the power to sell, the sale must be made in conformity with G.S. 160-59, and if the publication of the notice fails to comply in substance with the requirements of the statute, the sale is a nullity.

3. Municipal Corporations § 4—

All acts of a municipality beyond the scope of the powers granted to it are void.

MOORE, J., not sitting.

APPEAL by plaintiff from *Campbell, J.*, October-November 1965 Session of TRANSYLVANIA.

In this action plaintiff seeks specific performance of an alleged contract by defendant Municipality to convey certain real property to him. The facts, which are undisputed, are stated in chronological order:

At a special meeting on July 19, 1965, the Board of Aldermen of the Town of Brevard decided to sell the town's Country Club property. By resolution, the Board directed that its sale at public auction on August 16, 1965, be advertised for four consecutive weeks, beginning July 22, 1965. Pursuant to this resolution, the first advertisement of the proposed sale appeared in the *Transylvania Times*, a weekly newspaper of general circulation in the county, in the issue which was published as of July 22, 1965. Copies, however, were available at newsstands during the late afternoon of the 21st. This advertisement described the property by metes and bounds and as containing 132.98 acres, less 7.77 acres also described by metes and bounds, and "Lots 35 and 36 in section 2 of the Montclove Estates." The advertisement announced that the Board of Aldermen reserved the right to reject any and all bids; that 10% of the final bid must be paid at the sale; and that the balance would be payable in cash upon delivery of the deed. Thereafter it was discovered that one lot, intended to be included, had been omitted from the metes and bounds description in the advertisement. At a special session on July 26, 1965, the Board ordered a new publication of the notice, advertising all the land for sale on August 21st. The manner of this sale was to be materially different from the one previously advertised for August 16th, in that the property would first be offered for sale as four separate tracts and then as a whole, the highest bid or bids to take the property. The second advertisement appeared in the *Times* for the first time on July 29, 1965. Thereafter, it was republished on August 5th, 12th, and 19th. It described each of the four tracts by metes and bounds and as containing 38.8 acres, 27.1 acres, 55.3 acres, and 4.3 acres respectively. Pursuant to these advertisements, on August 21, 1965, the town attorney offered the property for sale at public auction. When the tracts were sold separately, the bids totaled $61,700.00. When the land was offered in gross, plaintiff became the highest bidder at $72,500.00, and immediately gave his check to defendant for the required 10% deposit. On August 23, 1965, the Board of Aldermen met in a called session and duly authorized the town attorney "to take any legal steps he feels necessary to properly complete the Country Club property sale and get payment by the specified date of October 1, 1965." The minutes show no other entry with reference to this sale.

Sometime between August 23rd and August 30th, "the Allison Brothers" submitted a bid of $80,000.00 to the Town for the prop-

erty. The Board of Aldermen met on August 30th and "accepted an offer of $80,000.00 for the Country Club property, together with an additional proposal and a good-faith check in the amount of $10,000.00 from the Allison Brothers. The town treasurer was authorized to deposit this check in a Savings Account awaiting the final sale of the property on October 9, 1965." The town attorney was authorized "to readvertise the Country Club property for sale October 9, 1965, at 10:00, at the door of the City Hall." His instructions were to advertise that the opening bid at this sale would be $80,000.00 and that this sale would be final. This time the property was advertised as one tract, described by metes and bounds as containing 132.98 acres, more or less, from which 7.77 described acres and lots 35 and 36 in section 2 of Montclove Estates were excepted.

On September 22, 1965, plaintiff instituted this action, alleging that on August 23, 1965, he entered into a binding contract with the Town to purchase the Country Club property; that defendant has refused his repeated demands for a deed to the property; and that he tenders the balance due on the purchase price of $72,500.00. His prayer for relief is: (1) that the Town be required to specifically perform its contract with him by executing and delivering to him a deed to the property in question, and (2) that defendant be restrained from reselling the County Club property. On October 5th, four days prior to the proposed sale date, Judge Campbell issued a temporary injunction prohibiting the sale on October 9th. When the matter came on for hearing, the parties waived a jury trial, and Judge Campbell heard the case upon the merits. He entered judgment in which he made findings of fact substantially as set out above and concluded as a matter of law:

> "That the Town of Brevard did not advertise the Country Club property for sale for a period of thirty (30) days as required under the provisions of North Carolina General Statutes 160-59, and therefore any purported sale on August 21, 1965, is a nullity."

He adjudged that the purported sale to plaintiff was void and that plaintiff is not entitled to a deed to the property. From this judgment plaintiff appealed. Pending the appeal, Judge Campbell continued the restraining order.

Hamlin, Ramsay and Monday and Williams, Williams and Morris for plaintiff appellant.

Potts & Hudson for defendant appellee.

SHARP, J. If the sale which the attorney for the Town of Brevard purported to conduct on August 21, 1965, was properly advertised, the action of the Board of Aldermen on August 23rd amounted to an approval and affirmation of it, and plaintiff will be entitled to a deed to the property. The question presented by this appeal, therefore, is: Was the purported sale of August 21st held in conformity with G.S. 160-59? This statute, in pertinent part, provides:

> "The governing body of any city or town shall have power at all times to sell at public outcry, after thirty days' notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best. . . ."

Plaintiff, of course, cannot contend that 30 days elapsed between July 29th and August 21st, the date of the sale at which he became the last and highest bidder. His contention is that the time should be counted from July 22nd, the date on which the land was first advertised for sale. This contention, however, is untenable. The first advertisement gave notice of a sale to be held on August 16th — not August 21st. Furthermore, the four later notices announcing the sale of this property, together with the additional lot, on August 21st, described the property in terms of four separate tracts which would be sold individually and in gross.

Only two cases in this jurisdiction have been called to our attention in which a sale of municipal real estate was attempted without the statutory notice of 30 days. In *Carstarphen v. Town of Plymouth,* 180 N.C. 26, 103 S.E. 899, on one night, the mayor and councilmen passed a resolution looking to the sale of the town's one building, which contained its "lock-up," market, and city hall; on the next night, they attempted to sell this property at a public meeting attended by 75 people. Before the sale was consummated, a restraining order was issued and made permanent. On appeal, this court affirmed on the double basis that the councilmen were without authority to sell real estate devoted to governmental purposes and that "said sale, or attempted sale, was not made after thirty days' public notice, as required by Rev., 2978 (now G.S. 160-59)."

In *City of Asheville v. Herbert,* 190 N.C. 732, 130 S.E. 861, the mayor and commissioners attempted to sell 90 acres of the City's land, the "Ryerson property," to defendants at a private sale. When they refused to accept the deed, the City brought suit to compel specific performance of their contract. The trial court held that the tendered deed was valid, and ordered defendants to pay the purchase

price in accordance with their contract. On appeal, this Court reversed, saying:

> "(T)he 'Ryerson property' is such as can be sold by the plaintiff, provided the method of sale required by law is followed.
> * * *
> "(W)e are minded to conclude that both the plaintiff's charter and the general law, grant the power to sell the land in controversy, and that C.S. 2688 (now G.S. 160-59), must be complied with by plaintiff in order to make a valid sale thereof." *Id.* at 734, 736, 130 S.E. at 863-64.

It seems clear, therefore, that compliance with G.S. 160-59 is required before the Town of Brevard can make a valid sale of its Country Club property. This is also the rule elsewhere. "If the publication of notice fails to comply in substance with the law, especially as to the time of publication, a purchaser does not acquire a marketable title." 10 McQuillan, Municipal Corporations § 28.45 (3rd Ed. 1950). While it now appears that plaintiff will suffer, and that the Town will profit, from a number of inadvertencies on the part of one or more of its employees, yet the statute specifies the terms upon which cities and towns are empowered to sell their property. "All acts beyond the scope of the powers granted to a municipality are void." *City of Asheville v. Herbert, supra at* 735, 130 S.E. at 863.

The judgment of the court below is in all respects
Affirmed.

MOORE, J., not sitting.

BROGDEN PRODUCE COMPANY v. ALLMOND STANLEY.

(Filed 16 June, 1966.)

1. Execution § 3—

An execution must be returned to the place from which it originated, with such endorsements as the law requires, not more than 90 days after its issuance. G.S. 1-310.

2. Sheriffs § 4—

Where it is stipulated or proven that a sheriff failed to return execution of a judgment to the court issuing it within the 60 days required by the execution, the party aggrieved is entitled to judgment *nisi* against the

sheriff as a matter of course, G.S. 162-14, G.S. 162-15, and amercement of the sheriff should be entered at the next succeeding term after the judgment *nisi* unless the sheriff shows to the court sufficient cause to vacate the judgment, the amercement being a penalty imposed upon the sheriff as a punishment for his failure to discharge a duty imposed by statute.

3. Same—

Findings that plaintiff's attorney failed to give the sheriff information with reference to the whereabouts of the judgment debtor or his property, that the sheriff's territory was extensive and his staff small, and that the sheriff, within the time allowed, had made diligent effort to locate defendant but was unable to do so, *held* insufficient to show cause why the judgment *nisi* against the sheriff for failure to return execution within the statutory time should not be made final.

4. Same—

The courts have no "dispensing power" to relieve a sheriff of the penalty imposed by G.S. 162-14.

MOORE, J., not sitting.

APPEAL by plaintiff from *Copeland, S.J.*, January 1966 (Non-jury) Civil Session of WAKE.

Rule on the Sheriff of Johnston County to show cause why an amercement *nisi* for failing to make timely return of an execution in plaintiff's favor should not be made absolute. These facts appear of record:

Plaintiff, Brogden Produce Company, recovered judgment in the principal sum of $354.37 against defendant, Allmond Stanley, in the Superior Court of Wake County on November 9, 1964. A transcript of this judgment was docketed in the Superior Court of Johnston County, and, on August 5, 1965, the Clerk of the Superior Court of Wake County issued execution, returnable within 60 days, to the Sheriff of Johnston County. The sheriff received this execution on August 7, 1965. He had not returned it on December 29, 1965, and, on that day, plaintiff moved under G.S. 162-14 and G.S. 162-15, that a judgment *nisi* be entered against the sheriff. His Honor, James H. Pou Bailey, entered judgment *nisi* for $100.00 against Rayford Oliver, Sheriff of Johnston County, and directed him to show cause why the judgment should not be made absolute. Thereafter, on January 6, 1966, the sheriff returned the execution endorsed "Payment demanded. Payment refused. Nothing found to levy on."

The rule to show cause came on to be heard before his Honor, J. William Copeland, judge presiding at the January 1966 Session. He entered an order in which, in addition to the facts set out above, he found the following:

1. Neither counsel for plaintiff nor anyone else ever informed the sheriff where defendant or his property could be found, nor did he give the sheriff any assistance whatsoever.

2. Geographically, Johnston County is one of the three largest counties in this State, and it has a population in excess of 60,000.

3. The Sheriff of Johnston County has only 6 deputies to assist him in performing the duties of his office.

4. Upon receipt of the execution in question, and within 60 days thereafter, Sheriff Oliver and his deputies, from time to time, made diligent search for defendant, but were unable to locate him.

5. In December 1965, counsel for plaintiff came to the sheriff's office in Johnston County and "about that time the judgment debtor was located," and the execution returned *nulla bona.*

6. Sheriff Oliver "was not negligent in any regard, but, on the contrary, did exercise diligence at all times."

Judge Copeland concluded that these findings were "sufficient cause to relieve" the sheriff of the judgment *nisi,* and he vacated the amercement. From this judgment plaintiff appeals.

Allen Langston for plaintiff appellant.

Knox V. Jenkins and Harry E. Canaday for Sheriff of Johnston County.

SHARP, J. The law requires that executions "shall be returnable to the court from which they were issued not more than 90 days from the date of issue." G.S. 1-310. The term *return* implies that the process is taken back, with such endorsements as the law requires, to the place from which it originated. *Watson v. Mitchell,* 108 N.C. 364, 12 S.E. 836. The execution with which we are concerned was issued on August 5, 1965, and it was made returnable within 60 days, that is, on or before October 4, 1965. Sheriff Oliver stipulates that he did not return the execution "until sometime after the 4th day of October." Actually, he returned it on January 6, 1966 — 154 days after its issuance, and not until after judgment *nisi* had been entered against him in this amercement proceeding.

G.S. 162-14 (our codification of Laws of 1777, ch. 118 § 5 (Potter's Rev.); Rev. Code, ch. 105 § 17; Code, § 2079), provides in pertinent part that every sheriff who fails to execute and make due return of all process legally issued and delivered to him shall forfeit $100.00 to the party aggrieved "unless the sheriff can show sufficient

cause to the court at the next succeeding term" after judgment *nisi* has been entered against him. Upon motion and proof that a sheriff has failed to return process delivered to him, as directed in the process and required by law, the party aggrieved is entitled, as of course, to judgment *nisi* against him. G.S. 162-14; G.S. 162-15; *Ex-parte Schenck,* 63 N.C. 601. "An amercement is a *penalty,* and is for a fixed sum without regard to the little or much of the plaintiff's damage." *Thompson v. Berry,* 65 N.C. 484, 485. The penalty is imposed upon the delinquency of the sheriff for failing to make due return of the execution unless, at the next succeeding term after judgment *nisi* is entered against him, he shows to the court sufficient cause to vacate the tentative amercement. *Turner v. Page,* 111 N.C. 291, 16 S.E. 174. If the issue is in dispute, whether the return was made in proper time is a question of fact to be decided by the jury. *Waugh v. Brittain,* 49 N.C. 470. The one hundred dollars is given to the plaintiff in the execution "upon the theory that he is aggrieved, but chiefly as a punishment to the officer, and to stimulate him to active obedience." *Richardson v. Wicker,* 80 N.C. 172, 173. *Accord, Yeargin v. Wood,* 84 N.C. 326; *Hathaway v. Freeman,* 29 N.C. 109.

This appeal presents one question: Is the conclusion of the trial court that the judgment *nisi* should be vacated, and the rule against Sheriff Oliver discharged, supported by his findings of fact? *Cratch v. Taylor,* 256 N.C. 462, 124 S.E. 2d 124. In substance, the judge's findings are these: (1) Plaintiff's attorney did not give the sheriff any information with reference to the whereabouts of defendant or his property; (2) Johnston County is a large county and the sheriff's office is not staffed commensurately; (3) The sheriff and his deputies, "within the time prescribed by law for return of said execution," made diligent effort to locate defendant but were unable to do so. Do these findings constitute "sufficient cause" for the court to discharge the rule against Sheriff Oliver?

In *Morrow v. Allison,* 33 N.C. 217, the sheriff's defense to an amercement *nisi* was that, before the day for the return of the execution, the plaintiff and his judgment debtor entered into an agreement "to suspend the collection of the money mentioned in the writ, with a view to a settlement between them in relation to it." The trial judge instructed the jury that the sheriff's defense was good. On appeal, this Court ordered a new trial, saying through Ruffin, C.J., "An agreement to suspend the collection of the debt, or to stay the execution, as it is commonly called, even if communicated to the sheriff, gives no authority to the officers not to return the writ."

In *Bell v. Wycoff,* 131 N.C. 245, 42 S.E. 608, the sheriff failed to make timely return of a summons which he had been unable to serve upon a defendant who was out of the state. Judgment *nisi*

was entered. At the subsequent hearing, the officer offered evidence tending to show that (1) he was under the impression that the process was returnable "the latter part of August," and (2) he had used due diligence in seeking out the person to be served and had retained the process upon information that defendant might return to the state. It was held that neither contention afforded "sufficient cause." Addressing itself to the latter point, the Court said:

> "Before undertaking to obey the precept he should have read and learned its contents and known what he was 'commanded' to do. This he neglected and failed to do, for which he was inexcusable, and will have to bear the burden of his own (or his deputy's) carelessness.
>
> "His diligence in undertaking to locate the defendant and to serve the summons upon him when he should reach the county was incumbent upon him, and in doing so he only discharged his duty to that extent. But in holding the summons *after* the return day for the purpose, as he conceived, of performing his duty and accommodating the plaintiff, was a misconception of duty and does not protect him against the penalty. To accommodate the plaintiff was no part of his duty. An officer should discharge his duties faithfully and impartially, and accommodate his acts and doings to the requirements of law and his oath of office, and not to aid friends and favorites, or to incur the favor of any particular person or persons. Why a case so utterly devoid of merit should be taken by appeal to this Court we are unable to conceive." *Id.* at 249, 42 S.E. at 609.

The courts have no "dispensing power" to relieve a sheriff from the penalty imposed by G.S. 162-14. *Swain v. Phelps,* 125 N.C. 43, 34 S.E. 110. In *Swain,* the sheriff failed to serve a summons, but plaintiff suffered no injury because the defendant voluntarily appeared in court. The trial judge discharged the amercement *nisi* against the sheriff. On appeal this Court reversed, saying,

> "It is no excuse that the sheriff had no corrupt or bad intentions and that the plaintiff was saved from any resulting injury by the voluntary appearance of the defendant . . . This amercement of $100 is given for the neglect to serve process when no sufficient cause is shown, and none has been shown.
>
> "The highest considerations of public policy require that sheriffs shall not be negligent in the service of process committed to them. . . . Ignorance of the officer is no excuse. . . . Whether any damage was done to the plaintiff is immaterial. The amercement is for failure to discharge an official duty." *Id.* at 44, 34 S.E. at 111.

Obviously, Judge Copeland's findings, although they may explain why the sheriff did not execute the writ and collect the money due on plaintiff's judgment, cannot excuse his failure to comply with the court's order that he return the execution, with the appropriate endorsement, within 60 days of its issuance.

In this century, few cases involving the amercement of a sheriff have reached this Court, but, as the cases cited herein indicate, amercement was a frequent occurrence in years gone by. The public policy which prompted the enactment of Chapter 118 of the Laws of 1777 (unchanged as G.S. 162-14 except that the penalty of $100 was then 50 pounds) is no less valid today — and the need for such a statute, as this case indicates, is no less real. The statute imposes no undue hardship upon sheriffs. To have avoided liability in this instance, Sheriff Oliver need only have written upon the execution that, after due diligence and search, he was unable to find defendant or any property belonging to him in Johnston County and, within the 60 days specified in the execution, mailed it to the Clerk of the Superior Court of Wake County. *Massengill v. Lee,* 228 N.C. 35, 44 S.E. 2d 356. *Cf. Turner v. Page, supra.* Instead, he held the process for 154 days. Having made no return in 60 days, and having shown no sufficient cause for such failure, the amercement *nisi* against him should have been made absolute. *Graham v. Sturgill,* 123 N.C. 384, 31 S.E. 705.

The judgment below is vacated, and this cause is remanded for the entry of judgment absolute.

Reversed and remanded.

MOORE, J., not sitting.

FELICIA S. SNELL v. CAUDLE SAND & ROCK COMPANY, INC.

(Filed 16 June, 1966.)

1. Automobiles § 17—

The act of a driver in entering an intersection so closely in front of an automobile plainly visible to him approaching along the intersecting four-lane highway, that the driver of the car does not have sufficient time in the exercise of reasonable care to avoid a collision, constitutes a violation of G.S. 20-140(a) and G.S. 20-140(b), and is negligence *per se.*

2. Automobiles §§ 41g, 42g— Evidence held for jury on issue of negligence of defendant driver in entering intersection with dominant highway and not to show contributory negligence as matter of law on part of plaintiff.

Allegations and evidence, with judicial admissions, tending to show that defendant driver, acting in the course of his employment, was driving defendant's truck in a westerly direction in the northern section of a four-lane highway, that he turned left, traversed the cross-over for a paved rural road and across the southern section of the four-lane highway in front of plaintiff's vehicle, which was clearly visible to him, traveling east in the right lane of the southern section of the four-lane highway, that the driver of the car did not have time to avoid a collision, and struck the right rear wheel of the truck after the front of the truck had entered the rural road, *held* sufficient to be submitted to the jury on the issue of the negligence of the truck driver and not to disclose contributory negligence as a matter of law on the part of plaintiff in failing to see the truck in time to have avoided collision, her attention being focused on traffic moving in her direction of travel.

3. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to her, so clearly establishes this defense that no other reasonable inference can be drawn therefrom.

4. Negligence § 7—

What is the proximate cause of an injury is ordinarily a question for the jury to be determined as a fact from the attendant circumstances, and conflicting inferences of causation arising from the evidence carry the case to the jury.

MOORE, J., not sitting.

APPEAL by plaintiff from *Hall, J.*, Second September 1965 Regular Civil Session of WAKE.

Civil action to recover damages for personal injuries and damage to an automobile allegedly caused in a collision between an automobile owned and driven by plaintiff and a dump truck owned by the corporate defendant and driven by its employee George Lawrence Sledge, who at the time was acting in the scope of his employment, and in furtherance of his employer's business.

Defendant in its answer admitted as true the allegations contained in paragraph 3 of the complaint as follows: "The collision herein complained of occurred on February 26, 1964, at approximately 1:55 P.M. near the intersection of U. S. Highway No. 70 and State rural paved road No. 1666, at a point approximately 2.5 miles west of the city limits of Raleigh, Wake County, North Carolina"; it also admitted as true the allegations contained in paragraph 4 of the complaint reading as follows: "At the point of the collision, U. S. Highway No. 70 is a four-lane highway, with a grass median

separating the westbound lanes from the eastbound lanes, with the exception of a 'cut-across' at the intersection of said highway with rural paved road No. 1666; rural paved road No. 1666 is a two-lane paved road approximately 19 feet wide and runs in a generally North-South direction"; it also admitted as true the allegations contained in paragraph 7 of the complaint that at the time of the collision its dump truck was being operated by its employee George Lawrence Sledge, who at the time was its employee and was acting in the course of his employment, and in the furtherance of his employer's business; it denied that it was negligent in any manner as alleged in the complaint. As a further answer and defense in its answer, defendant conditionally pleaded contributory negligence on plaintiff's part as a bar to any recovery by her; and as a further defense and counterclaim it alleged that its dump truck was damaged by reason of actionable negligence on the part of plaintiff in the operation of her automobile, and prays for damages to its dump truck.

Plaintiff filed a reply to defendant's counterclaim in which she alleged that if plaintiff was guilty of any negligent act as alleged in defendant's counterclaim, then defendant's employee was guilty of negligence in the operation of defendant's dump truck, and that if plaintiff was guilty of any negligence which was a proximate cause of the alleged damage to defendant's dump truck, then defendant's employee was guilty of contributory negligence which bars any recovery by it on its counterclaim.

At the close of plaintiff's evidence, defendant moved for a judgment of compulsory nonsuit on plaintiff's action, and announced that it desired to submit to a voluntary nonsuit as to its counterclaim against plaintiff. Whereupon, the court entered a judgment that defendant's counterclaim is dismissed as of voluntary nonsuit, and that plaintiff's action is nonsuited.

From this judgment, plaintiff appeals to the Supreme Court.

Maupin, Taylor & Ellis by Wm. W. Taylor, Jr., for plaintiff appellant.

Teague, Johnson and Patterson by Ronald C. Dilthey for defendant appellee.

PARKER, C.J. Plaintiff assigns as error the judgment of compulsory nonsuit of her action.

The admissions in defendant's verified answer of facts alleged in the verified complaint, as set out above, are judicial admissions conclusively establishing the admitted facts as true for all purposes connected with the trial of the case. *Wells v. Clayton,* 236 N.C. 102,

72 S.E. 2d 16; Stansbury, N. C. Evidence, 2d Ed., § 177. This is so even though such admitted facts are not introduced in evidence. *Wells v. Clayton, supra.* Such admitted facts as here do not have to be introduced in evidence. I McIntosh, N. C. Practice and Procedure, 2d Ed., § 994. *Edwards v. Hamill,* 266 N.C. 304, 145 S.E. 2d 884, relied on by defendant, is factually distinguishable, in that the admissions here are of facts alleged in the complaint.

Considering plaintiff's evidence in the light most favorable to her, and giving her the benefit of every legitimate inference to be reasonably drawn therefrom, and considering the judicial admissions in defendant's answer, as set forth above, it tends to show the following facts: The collision alleged in the complaint occurred on 26 February 1964, at approximately 1:55 p.m., near the intersection of U. S. Highway No. 70 with State rural paved road No. 1666, at a point approximately 2.5 miles west of the city limits of Raleigh. At the point of collision U. S. Highway No. 70 is a four-lane highway, with a grass median separating the westbound lanes from the eastbound lanes, with the exception of a "cut-across" at the intersection of said highway with rural paved road No. 1666; rural paved road No. 1666 is a two-lane paved road approximately 19 feet wide, and runs in a generally north-south direction. At the time of the collision and immediately prior thereto the defendant's 1959 GMC dump truck was being operated by one George Lawrence Sledge, who was the employee of defendant and was acting in the course of his employment, and in furtherance of his employer's business. Immediately prior to the collision she was driving an automobile belonging to her husband and herself in an easterly direction in the right lane of the two lanes of U. S. Highway No. 70 designed for eastbound traffic. Three passengers were in the automobile with her. She was traveling 45 to 50 miles an hour. At the point of collision the posted speed limit for automobiles was 60 miles an hour. It was a clear day, and there was not any traffic on the highway traveling east. She was not paying any attention to the traffic on the westbound lanes of U. S. Highway No. 70 across the median strip traveling west. She was paying attention to the traffic on the highway going east. There was nothing to obstruct her view on the two eastbound lanes. When she was about 138 feet from the point of impact in the intersection of U. S. Highway No. 70 and State rural paved road No. 1666, she saw for the first time defendant's dump truck in and crossing the eastbound lanes of travel immediately in front of her. She testified: "I did not see the truck giving a left-turn signal. When I saw the truck it was just dashing across the highway. . . . I saw the right side of the truck. I could not see from my position whether or not the left front turning signal was in operation.

I didn't see any signal, but if he had a signal on it to turn — I didn't see a signal." Traveling at a speed of 45 to 50 miles an hour, she was going at a speed of 66 to 73⅓ feet per second, and she was not more than two seconds or a fraction of more than two seconds from collision with the dump truck. When she first saw its truck, she put on her brakes. Her car skidded. The right front of her car collided with the back right wheel of the dump truck. When she collided with the right rear wheel of the dump truck, the dump truck had entered rural paved road No. 1666 and the rear of the dump truck was from one to two feet on U. S. Highway No. 70 north of its southern edge. There were skid marks behind plaintiff's automobile 45 feet in length. Skid marks at their starting point were one foot eight inches from the south edge of Highway No. 70, and at the point where they ended they were one foot from the south edge of Highway No. 70. There was nothing to obstruct the view of the driver of defendant's dump truck of traffic proceeding east on U. S. Highway No. 70 for four-tenths of a mile down the highway in the direction from which plaintiff was approaching. By reason of the collision she sustained serious injuries and the automobile she was driving was badly damaged. Her evidence would permit a jury to find that the driver of defendant's dump truck drove the dump truck into the intersection in front of her approaching automobile, which was plainly visible to him, when he did not have sufficient time to pass through the intersection so that plaintiff in the exercise of reasonable care could avoid a collision with the dump truck, and that this constituted a violation of G.S. 20-140(a), and a violation of G.S. 20-140(b), and is negligence *per se,* which acts of negligence on defendant's part are alleged in the complaint; that the driver of the dump truck failed to keep a proper lookout, because if he had, he could have seen that plaintiff's approaching automobile, which was plainly visible to him, was not sufficiently far away to enable him to pass through the intersection in time to enable plaintiff in the exercise of reasonable care to avoid the collision, which failure to keep a proper lookout is alleged as an act of negligence on the part of the defendant; that such acts on the part of the driver of the dump truck constituted negligence, and that such negligence on the part of the driver of the dump truck was a proximate cause of the collision and injuries to plaintiff and damage to her automobile, and that such negligence on the part of the driver of the dump truck under the judicial admissions here as above set forth is attributable to the defendant. *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330; *Graham v. Gas Co.,* 231 N.C. 680, 58 S.E. 2d 757.

The evidence of the plaintiff, when considered in the light most

favorable to her, makes out a *prima facie* case of actionable negligence on the part of defendant.

Considering plaintiff's evidence in the light most favorable to her, it does not show contributory negligence on plaintiff's part so clearly that no other inference can be reasonably drawn therefrom. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40.

What is the proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360.

We conclude that plaintiff has not proved herself out of court, and that her evidence was sufficient to withstand a motion for compulsory nonsuit.

The judgment of compulsory nonsuit was improvidently entered, and is

Reversed.

MOORE, J., not sitting.

STATE v. FRANK LEON CONYERS.

(Filed 16 June, 1966.)

1. Criminal Law § 71—

Upon challenge of the competency of a confession, it is the duty of the trial court upon the *voir dire* to hear the evidence and to find facts sufficient to enable the reviewing court to determine whether the confession was voluntary, the court's findings which are supported by evidence being conclusive but its conclusion of law from the facts found being reviewable.

2. Same—

Where officers testify upon the *voir dire* to the effect that defendant confessed orally and did so voluntarily, that a writing was prepared in accordance with the oral confession and read to him, and that defendant freely and voluntarily signed it, but defendant denies making any oral confession, testifies the writing was not read to him and that he was induced to sign it by certain promises, *held* it is incumbent upon the trial judge to find the facts with respect to the conflicting contentions, and the court's finding merely that defendant's statements were voluntary is insufficient predicate to enable the reviewing court to determine the matter, and requires remand for new trial.

MOORE, J., not sitting.

STATE *v.* CONYERS.

APPEAL by defendant from *Bickett, J.,* Second January 1966 Regular Criminal Session of WAKE.

Criminal prosecution on bill of indictment returned at November 1965 Session charging that defendant, in Wake County, North Carolina, "about the hour of one o'clock A.M. in the night of March 26, 1960, the dwelling house of one Mr. and Mrs. F. J. Williams there situate, and then and there actually occupied by Mrs. F. J. Williams, feloniously and burglariously did break and enter, with intent to unlawfully, willfully and feloniously ravish and carnally know the said Mrs. F. J. Williams, a female, by force and against her will," against the form of the statute, etc.

State's evidence: Evidence that an intruder broke and entered her home in the nighttime when she and her three children were sleeping consists of the testimony of Mrs. Williams and corroborative circumstances, including the finding of a cap. Evidence that defendant was the intruder, that the cap belonged to him and that defendant's purpose was to rape Mrs. Williams consists of the testimony of Melvin T. Munn and Ed Watkins, each a deputy sheriff, as to incriminating statements made to them by defendant shortly after his arrest and as to a writing (confession) signed by defendant.

Defendant's evidence: Defendant's testimony and the testimony of Hattie Perry, his grandmother, tends to show defendant was in bed at Hattie Perry's home when the alleged burglary was committed. Defendant denied he had entered the Williams home at any time for any purpose. He testified in substance: Although questioned persistently by the officer, he made no oral admissions or confessions. On the contrary, he denied knowledge of the alleged burglary and denied the cap exhibited to him was his cap. He signed the writing because he was tired and sleepy. One of the officers told him he could go home and would come out light if he signed the writing.

The jury returned a verdict of "Guilty of Burglary in the First Degree; with the recommendation that the defendant be confined to the State Prison for the term of his natural life." Thereupon, the court, in accordance with G.S. 14-52, pronounced judgment imposing a sentence of life imprisonment. Defendant excepted and appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.

Johnson, Gamble & Hollowell for defendant appellant.

BOBBITT, J. It seems appropriate to refer briefly to events in connection with defendant's arrest and prosecution which occurred prior to his indictment at November 1965 Session, to wit:

1. Defendant was arrested March 30, 1960; and on April 11, 1960, he was bound over without privilege of bond to the Wake County Superior Court.

2. At April "A" Term 1960, Lester V. Chalmers, Jr., Esq., then solicitor, signed an accusation, drafted in the form of a bill of indictment, charging defendant with first degree burglary; and defendant and Earle R. Purser, Esq., his court-appointed counsel, signed a written waiver of bill of indictment and tendered a plea of guilty of burglary in the second degree. The tendered plea was accepted by the State. The presiding judge, His Honor (the late) W. Jack Hooks, pronounced judgment that defendant be confined in the State's Prison for the term of his natural life.

3. In 1965 defendant, then a prisoner, filed in Wake County Superior Court a petition alleging with particularity the denial of his constitutional rights.

4. At "2nd September Session 1965" of Wake County Superior Court, a post-conviction hearing under G.S. 15-217 *et seq.* was held. Defendant was represented by William L. Thompson, Esq., court-appointed counsel. At the conclusion thereof, the presiding judge, the Honorable C. W. Hall, on the ground there was no bill of indictment and defendant's purported waiver of indictment was void, vacated the said plea and judgment entered at said April "A" Term 1960 and ordered that defendant be released by the Director of Prisons to the Sheriff of Wake County to be held without bond pending other lawful proceedings in Wake County Superior Court. (Note: With reference to Judge Hall's order, see G.S. 14-52. The State did not and does not seek a review thereof.)

Thereafter, defendant was indicted at November 1965 Session as set forth in our preliminary statement. Prior to his arraignment and trial thereon, the court having determined defendant was an indigent, appointed counsel, namely, Edward E. Hollowell, Esq., to represent defendant.

The primary question for decision is whether there was error in admitting, over defendant's timely objections, the testimony of the officers as to defendant's confessions.

Upon defendant's objection(s), the court, as required by our practice, conducted a preliminary inquiry, in the absence of the jury, to determine whether the confessions were voluntary. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344.

As stated by Higgins, J., in *S. v. Barnes, supra:* "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 com-

petent evidence, they are conclusive on appellate courts, both State and Federal. (Citations.) Of course, the conclusions of law to be drawn from the facts found are not binding on the reviewing courts." This excerpt is quoted with approval in *S. v. Hines,* 266 N.C. 1, 11, 145 S.E. 2d 363.

After such preliminary inquiry has been conducted, the approved practice requires that the judge, in the absence of the jury, make findings of fact. These findings are made to show the basis for the judge's decision as to the admissibility of the proffered testimony. *S. v. Walker,* 266 N.C. 269, 145 S.E. 2d 833.

The testimony on said preliminary inquiry, the *voir dire,* to determine whether the evidence as to confession(s) should be admitted, was substantially the same as the testimony subsequently offered in the presence of the jury. The general purport thereof is indicated in our preliminary statement. Suffice to say, the testimony was in direct conflict. The officers testified defendant confessed orally and did so voluntarily. Defendant denied making an oral confession notwithstanding he was questioned persistently with reference to the alleged burglary. Too, the officers testified the writing was prepared in accordance with defendant's oral confession, was read to defendant, and that defendant freely and voluntarily signed it. Defendant testified the writing was not read to him and that he was induced to sign it by certain (unfulfilled) promises.

The present case is distinguishable from *S. v. Keith,* 266 N.C. 263, 267, 145 S.E. 2d 841, in which Denny, C.J., states: "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."

For discussion of the impact of recent decisions of the Supreme Court of the United States upon the admissibility of confessions, see Stansbury, North Carolina Evidence, Second Edition, § 183, and the majority and dissenting opinions in *S. v. Barnes, supra.*

"Obviously, unless the statement was made, it could not be made freely and voluntarily." *S. v. Walker, supra.* Hence, a factual finding that defendant made the alleged incriminating statements (confessions) was prerequisite to factual findings relating to the circumstances under which they were made.

At the conclusion of the preliminary hearing, the trial judge made this entry: "Let the records show that the Court finds the statement and admissions to Officer Munn and Officer Watkins were made freely and voluntarily by the defendant without reward or hope of reward, or inducement, or any coercion from said officers."

While under earlier decisions this ruling would have been sufficient, it is insufficient under the rule established in *S. v. Barnes,*

supra, and referred to with approval in *S. v. Hines, supra,* and in *S. v. Walker, supra.* The court did not make findings of fact. The statements in the court's ruling are conclusions. Indeed, the ruling here falls short of the ruling held insufficient in *S. v. Barnes, supra.* The following statement of Higgins, J., in *S. v. Barnes, supra,* is applicable here: "Judge Bundy did not resolve the conflicts by findings of fact. This was the exclusive function of the trial court. Absent findings of fact, this Court is unable to say whether Judge Bundy committed error in admitting the contested confession. We may, it seems, no longer rely on the presumption of regularity in such matters."

The admission of the testimony relating to confessions without factual findings from which a determination may be made as to whether the court committed legal error was erroneous and entitles defendant to a new trial.

New trial.

MOORE, J., not sitting.

REDEVELOPMENT COMMISSION OF GREENSBORO, PETITIONER, v. BERNICE T. HAGINS (HAGAN) AND HUSBAND, J. G. HAGINS; CITY OF GREENSBORO; AND COUNTY OF GUILFORD, RESPONDENTS

AND

REDEVELOPMENT COMMISSION OF GREENSBORO, PETITIONER, v. BERNICE T. HAGINS (HAGAN) AND HUSBAND, J. G. HAGINS; CITY OF GREENSBORO; AND COUNTY OF GUILFORD, RESPONDENTS.

(Filed 16 June, 1966.)

Eminent Domain § 7a—

Testimony of respondent to the effect that she had on separate occasions talked to two of petitioner's agents in regard to selling the land and that she had refused to admit court appointed appraisers on the property because she maintained the property was not for sale, *held* sufficient to show that petitioner had made an attempt in good faith to purchase respondent's land before instituting condemnation proceedings.

MOORE, J., not sitting.

APPEAL by respondents from *Johnston, J.,* October 4, 1965 Civil Session, GUILFORD Superior Court, Greensboro Division.

These are special proceedings instituted before the Clerk by notice and petitions in condemnation filed January 14, 1963, by the

Redevelopment Commission of Greensboro against Bernice C. Hagins and husband, J. G. Hagins, to acquire the fee simple title to two lots within the redevelopment area.

The respondents on February 1, 1963, filed demurrers to the petitions based upon a number of grounds: (1) That the petition fails to allege the petitioner has made an effort to acquire the land by purchase; (2) the respondents' property sought to be acquired does not qualify for inclusion in the redevelopment project; (3) the plan for the redevelopment does not meet the requirements of law.

On February 20, 1963, the petition was amended to allege the petitioner had made good faith but unsuccessful efforts to acquire the lots by purchase; that the petitioner had on hand nontax funds sufficient to pay for the lots. The clerk, after hearing, found the petitioner was by law authorized to acquire the two lots for redevelopment purposes and appointed appraisal commissioners to assess the amount of just compensation due the owners for the taking. The appraisers fixed May 2, 1963, as the date for the hearing. On April 29, Samuel S. Mitchell, attorney of record for the respondents, gave this notice: "Dear Mr. Clerk: This informs you that neither Mr. Whitted nor I intend to participate in the Commissioner's hearing of May 2, 1963. This is in accordance to the wishes of our client."

The commissioners found and reported to the clerk that the respondents are entitled to recover as just compensation for one lot the sum of $1,500.00, and for the other the sum of $1,800.00. The respondents excepted to the report and excepted to the clerk's order of confirmation, and gave notice of appeal to the Superior Court.

At the call of the case for hearing in the Superior Court, the parties entered these stipulations:

> "1. That at the time these actions were instituted, the respondent Bernice T. Hagins was the owner of the properties described in the petitions filed by the Redevelopment Commission of Greensboro.
>
> "2. That said properties are within the Cumberland Redevelopment Area and are a part of the overall redevelopment plan for said area.
>
> "3. That said petitions of the Redevelopment Commission were filed on January 14, 1963, with the Clerk of the Superior Court for Guilford County for the purposes of acquiring fee simple titles to said properties.
>
> "4. That notice of all hearings, filing of motions, orders, and other proceedings before the Clerk was duly given to opposing counsel, as provided by law.

"5. That the properties described in said petitions at one time had a dwelling house on one lot and a beauty parlor, with other improvements, on the other lot.

"6. That at the time said petitions were filed, on January 14, 1963, both structures had been removed and destroyed by the petitioner under an order of the Superior Court in an action entitled, *'Redevelopment Commission of Greensboro v. Bernice T. Hagins, et al.,'* which was reversed by the Supreme Court on appeal; that there is now pending in the Superior Court of Guilford County a suit against petitioner, Redevelopment Commission of Greensboro, et al., to recover damages for the taking and destroying of the improvements on said lands and for other causes alleged in said suit.'

"7. That the plan of redevelopment, under which the Redevelopment Commission of Greensboro instituted these proceedings, was duly adopted by the City Council of the City of Greensboro; that there were adequate funds on hand for the Redevelopment Commission to finance said plan and to acquire said pieces of property owned by the respondent Bernice T. Hagins; that regulations, provisions, safeguards, maps showing the property before taking and reuse maps, design of streets, density of population, restrictions, and methods of financing entire plan in establishing said redevelopment plan had been complied with.

"8. That in said plan of redevelopment was a plan and system of relocation of persons displaced by said plan, and same was in existence at the time said petitions were filed, on January 14, 1963."

The petitioner introduced evidence of its unsuccessful efforts to purchase the two lots. Mrs. Hagins, one of the respondents, testified: "I talked with Mr. Barkley one time concerning my properties. I also talked with Mr. Jim Greer, from the Redevelopment Commission, about my properties. I refused to admit the court appointed appraisers on my property. I have maintained all along that my property was not for sale for a price but we could swap."

The court overruled all respondents' motions, submitted issues of just compensation due by the petitioner to the respondents on account of the taking. The jury awarded $3,300.00 as just compensation for both lots. From judgment on the verdict, the respondents appealed.

Mitchell & Murphy, Earl Whitted, Jr., for respondent appellants.

Cannon, Wolfe & Coggin by James B. Wolfe, Jr., for petitioner appellee.

HIGGINS, J. The origin and background of the Redevelopment Commission of Greensboro are set forth in the opinion of this Court on the first appeal reported in 258 N.C. 220, 128 S.E. 2d 391. Actually, the question now presented and argued before the Court is whether the Redevelopment Commission made an attempt in good faith to purchase from the respondents the two lots described in the petition before instituting the proceeding to take the property by condemnation. The petitioner introduced competent and substantial evidence of its attempt to negotiate in good faith prior to the filing of the present petition. One of the respondents admitted that she refused to permit the appraisers to go upon the premises and that she had "maintained all along that my property was not for sale . . ." Hence, objection on which the respondents rely is not sustained. The evidence was sufficient to justify the court in holding that a good faith effort had been made by the Redevelopment Commission to acquire the two lots by purchase. The stipulations appear to eliminate all other objections. On the oral argument here, no other question was debated.

The stipulations disclose that between the time Judge Shaw rendered judgment in the first proceeding, decreeing that the title to the lots and the improvements had passed to the Redevelopment Commission, and the time this Court reversed the judgment, the ". . . structures had been removed and destroyed by the petitioner under an order of the Superior Court . . . that there is now pending in the Superior Court of Guilford County a suit against the petitioner, Redevelopment Commission of Greensboro, et al., to recover damages for the taking and destroying of the improvements on said lands and for other causes alleged in said suit."

The present action involves only the validity of the proceeding instituted January 14, 1963, for the condemnation of the two vacant lots and the award of just compensation due the respondents for the taking. In that connection the respondents have failed to show error in the proceedings now before us. The reference by the stipulations to another action for damages resulting from the destruction of the improvements on the lots is made solely for the purpose of disclosing that this Court has not taken into account that action or any issues involved therein.

In this present proceeding the respondents have failed to show error. The judgment of the Superior Court entered by Judge Johnston on October 13, 1965, is

Affirmed.

MOORE, J., not sitting.

JACKIE RAY WALKER, ADMINISTRATOR OF THE ESTATE OF JACKIE RAY WALKER, JR., v. ANNIE YOUNG SPRINKLE AND REGINALD F. SPRINKLE.

(Filed 16 June, 1966.)

1. Negligence § 36—

An ordinary outhouse or privy is not an attractive nuisance or an inherently dangerous instrumentality.

2. Same—

In order for a person in control of premises to be held liable for injury to a trespassing child of tender years, it must be shown that he maintained a condition dangerous to children on the premises and knew, or should have known, that children were in the habit of playing on the premises and would likely be exposed to the hazards of the dangerous condition maintained by him on said premises and were likely to be injured thereby.

3. Same—

The person in control of premises is not an insurer of the safety of children trespassing, and may not be held liable merely because the premises may appeal to the youthful fancies of children, but it is a prerequisite of such liability that it be shown that he failed to take precautions reasonably sufficient to prevent trespass by children, and it is not required that he take precaution against every conceivable danger to which an irrepressible spirit of adventure may lead a child.

4. Same; Health § 3—

In the absence of specific allegation, it cannot be held as a matter of law that an ordinary outhouse or privy was not constructed in conformity with G.S. 130-160 and in conformity to rules and regulations promulgated by the State Board of Health.

5. Negligence § 36—

This action was instituted to recover for the wrongful death of a three year old child who was drowned on defendant's premises when the child fell into the pit of an outdoor privy maintained by defendants. There was no allegation in the complaint that defendants knew or should have known that the pit in the privy contained water at the time of the accident, nor allegation that defendant knowingly maintained the privy in that condition. *Held:* Nonsuit was proper, since it was not reasonably foreseeable that a child of such tender years would be permitted to trespass on defendants' premises, go into the privy located thereon, climb on the seat and fall into the pit over which the privy had been constructed.

6. Pleadings § 21.1—

Upon sustaining a demurrer to the complaint for its failure to state a cause of action, the court should not dismiss the action until plaintiff has had an opportunity to amend.

MOORE, J., not sitting.

APPEAL by plaintiff from *Riddle, Special Judge,* December Civil Session 1965 of VANCE.

This is an action for the wrongful death of Jackie Ray Walker, Jr.

The pertinent allegations of the complaint are stated below.

That at the times alleged in the complaint the defendant Annie Young Sprinkle was the owner of a tenant house and lot located on Elm Street, being lot No. 101 in block No. 5 as shown on the plat of the Harriett Cotton Mills property. This property is in a thickly populated area near the city limits of the City of Henderson. In the neighborhood there were many families having large numbers of small children who habitually played about the streets, on vacant lots and unoccupied premises, there being no parks, playgrounds or recreational facilities available.

Prior to 11 March 1964 the defendant Annie Young Sprinkle rented said premises to a tenant for residential purposes.

In the rear of said dwelling house on said premises there was located an outdoor privy, consisting of a wooden superstructure covering a pit several feet in depth. Enclosed within said structure was a bench or seat into which a hole or holes had been cut, designed for the use of persons answering the call of nature.

On 11 March 1964 there had accumulated in the pit in said privy a substantial quantity of water.

On 11 March 1964 and at all times mentioned in the complaint, the defendant Reginald F. Sprinkle was the agent of the defendant Annie Young Sprinkle in the care and management of the property involved.

For a considerable time prior to 11 March 1964 numerous children habitually played on or about said premises, in the dwelling house and privy.

A short time prior to 11 March 1964, the defendant Reginald F. Sprinkle was warned that children were playing in or about said premises. In consequence of said warning, the defendant Reginald F. Sprinkle secured the entrance to the dwelling house, but did not secure the entrance to the toilet.

On 11 March 1964 the plaintiff's intestate, a child three years of age, who resided across the street, while playing on said premises fell into and was drowned in the pit over which said privy was constructed.

That the death of plaintiff's intestate was caused directly and proximately by the defendants' negligence in the following respects, among others:

"a. The defendants maintained on their premises a privy in violation of the provisions of G.S. 130-160.

"b. The defendants negligently permitted a concealed pit

of water to remain in a thickly populated community where children habitually played, well knowing that such children are attracted to vacant buildings and premises and to explore the same."

The defendants demurred to the complaint on the ground "That the complaint does not state facts sufficient to constitute a cause of action against defendants, in that plaintiff has failed to allege facts sufficient to raise the doctrine of attractive nuisance or to constitute negligent acts or omissions of defendants which were a direct and proximate result of the death of plaintiff's intestate."

The demurrer was sustained and the plaintiff appeals, assigning error.

Banzet & Banzet for plaintiff.

Teague, Johnson & Patterson and Ronald C. Dilthey for defendants.

DENNY, E.J. The sole question presented for our determination is whether or not the court below committed error in sustaining the defendants' demurrer to the complaint on the grounds hereinabove set out.

The rule with respect to liability in cases of this character was so aptly stated by Connor, J., in the case of *Briscoe v. Lighting and Power Co.*, 148 N.C. 396, 62 S.E. 600, we quote therefrom as follows:

"It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have con-

templated that children would be attracted or allured to go upon his premises and sustain injury."

The outdoor privy has been in common use in this country for centuries and is still used on thousands of premises. We cannot hold that the ordinary outhouse or privy is an attractive nuisance or an inherently dangerous instrumentality: "The courts which have adopted the doctrine of the *Turntable* case have uniformly held that it was not to be extended to other structures or conditions." *Briscoe v. Lighting and Power Co., supra.*

The complaint herein alleges that "on March 11, 1964 there had accumulated in the pit of said privy a substantial quantity of water." There is nothing in the complaint to indicate that the defendants knew or should have known that the pit in the privy contained water on 11 March 1964. Neither is there any allegation that the defendants knowingly maintained the privy in that condition.

In order for a plaintiff to recover for injuries to a child trespasser of tender years, it must be shown that defendant maintained a condition dangerous to children on his premises and knew, or should have known, that children were in the habit of playing on the premises and would likely be exposed to the hazards of the dangerous condition maintained by him on said premises and were likely to be injured thereby. Or, stated another way, "A party's liability to trespassers depends upon the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing thereon." 21 Am. and Eng. Enc., 473, cited with approval in *Briscoe v. Lighting and Power Co., supra.*

It would seem from the allegations in the complaint that since there were no parks, playgrounds or recreational facilities available for the children in the neighborhood, the parents sent their children out on the streets, vacant lots and unoccupied premises to play. In the case of *Fitch v. Selwyn Village,* 234 N.C. 632, 68 S.E. 2d 255, we quoted with approval from the opinion in *Peters v. Bowman,* 115 Cal. 345, 47 P. 598, in which the Court said:

" 'The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding cir-

cumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care.'"

In the case of *Matheny v. Mills Corp.* and *Erwin v. Mills Corp.*, 249 N.C. 575, 107 S.E. 2d 143, Moore, J., speaking for the Court, said:

"No one is an insurer of the safety of children merely because he is the owner of places that may appeal to their youthful fancies. It is required only that he take reasonable precautions to prevent injury to them. He is not bound to make a trespass by or injury to children impossible. All that is required of him is to take such precautions, by way of erecting guards, providing fences or furnishing other means, as are reasonably sufficient to prevent trespassing by children. He need not take precautions against every conceivable danger to which an irrepressible spirit of adventure may lead a child. * * *."

The plaintiff alleges the defendants maintained on their premises a privy in violation of G.S. 130-160, which reads as follows:

"Any person owning or controlling any residence, place of business or place of public assembly shall provide a sanitary system of sewage disposal consisting of an approved privy, an approved septic tank, or a connection to a sewer system, under rules and regulations promulgated by the State Board of Health."

On the pleadings herein it cannot be said the privy involved in this action was not constructed in conformity with the statute and the rules and regulations promulgated by the State Board of Health.

In our opinion it was not reasonably foreseeable that a child of such tender years as plaintiff's intestate would be permitted to trespass upon the defendants' premises, go into the privy located thereon, climb up on the seat therein and fall into the pit over which the privy had been constructed.

As regrettable as the unfortunate death of plaintiff's intestate was, in our opinion the allegations of the plaintiff's complaint do not make out a cause of action for actionable negligence against the defendants.

The demurrer was properly sustained. However, that portion of the judgment entered below dismissing the action is reversed. The

plaintiff may amend the complaint if so advised. Except as herein modified, the judgment below is affirmed.

Modified and affirmed.

MOORE, J., not sitting.

STATE v. WOODROW W. KING.

(Filed 16 June, 1966.)

1. Perjury § 2—

The fact that defendant, charged with procuring perjured testimony by a witness at his former trial, obtains a nonsuit on appeal in such former trial, is no defense in the prosecution against him for subornation of perjury, since such judgment of nonsuit in no way establishes the truth of the testimony of the witness at the former trial.

2. Perjury § 5—

In a prosecution for perjury or subornation of perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or one witness and corroborating circumstances.

3. Same—

The fact that the statement of the alleged suborned witness that he had given false testimony at the former trial at the instance of the accused is corroborated by the testimony of three witnesses that the alleged suborned witness made statements to the effect that he had been suborned by the defendant, *held* not to constitute testimony of adminicular circumstances tending to show the falsity of the oath of the suborned witness, and therefore nonsuit should have been entered.

4. Criminal Law § 152—

The testimony of witnesses should be set out in narrative form in the record. Rule of Practice in the Supreme Court No. 19(4).

MOORE, J., not sitting.

APPEAL by defendant from *Latham, S.J.*, 17 January Criminal Session 1966 of ALAMANCE.

Defendant was tried upon a bill of indictment charging him with having suborned one Rainey Harris to commit perjury at the March Criminal Session 1965 of the Superior Court of Alamance County in an action in which the State was plaintiff and Woodrow W. King was defendant, being case No. 84 which charged the defendant Woodrow W. King with the ownership and possession of three

gallons of taxpaid whiskey, the ownership of said taxpaid whiskey being material to the issue being tried in said action; that Woodrow W. King procured the said Rainey Harris to falsely, wilfully and corruptly assert under oath that he, the said Rainey Harris, was the owner of the three gallons of whiskey found upon the premises of Woodrow W. King on 21 November 1964, the said Woodrow W. King knowing at the time that the statement that Rainey Harris was the owner of said three gallons of taxpaid whiskey was false.

Upon the call of the case, upon the original bill of indictment, the defendant filed a written motion to quash the bill of indictment, which was denied.

The court granted the Solicitor's motion to amend the bill of indictment so that it alleged that one gallon of liquor was involved in the trial of this defendant and as falsely claimed by the alleged suborned, rather than three gallons; the property of M. C. Hayes was substituted for defendant's property as the place where the one gallon was found instead of three gallons.

The defendant was convicted in case No. 84 in which the false testimony is alleged to have been given. On appeal from said conviction, the Supreme Court reversed on the ground that the evidence was insufficient to survive the defendant's motion for judgment as of nonsuit.

In the trial of this case, Rainey Harris testified that he had testified falsely in the trial of the case No. 84, having been induced to testify by the defendant that the whiskey involved was his whiskey; that defendant had promised to get him an attorney and pay his fine if he should be indicted as a result of claiming the whiskey; that defendant did not keep his promise and he decided to tell the truth — that he testified falsely, and that he did not own, buy, or have in his possession the whiskey he had testified was his.

Three witnesses were permitted, over objection, to testify as to what the witness Harris told them about having been suborned by the defendant to commit perjury.

The defendant did not offer any evidence in the trial below.

The jury returned a verdict of guilty. From a judgment imposing an active prison sentence, defendant excepted and appeals, assigning error.

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

Elreta Melton Alexander for defendant.

DENNY, E.J. The defendant argues and contends that since the case in which the perjured testimony is alleged to have been given

was nonsuited on appeal to this Court — *State v. King,* 264 N.C. 578, 142 S.E. 2d 130, it is immaterial whether Harris' testimony in that case was material or immaterial to the issue involved. There is no merit in this contention. If, in the trial of King at the March Criminal Session 1965, in the Superior Court of Alamance County, Harris had not sworn that the whiskey involved was his whiskey and not King's, the ultimate result in that case might have been different. In discussing this point in the case of *State v. Leonard,* 236 N.C. 126, 72 S.E. 2d 1, this Court said: "* * * (W)e cannot hold that a verdict of acquittal is equivalent to an affirmative finding that all of defendant's testimony at the former trial was true. Surely, the law should not permit a defendant by his own perjured testimony to secure a verdict in his favor, with immunity from a charge of perjury, while other witnesses testifying in his defense would be subject to conviction and punishment for false swearing. Such a doctrine would place a premium upon perjury and a penalty upon probity. * * * To hold that a person could go into a court of justice and by perjured testimony secure an acquittal and by that acquittal be shielded from a charge of perjury would be a dangerous doctrine." Certainly this Court will not adopt any such doctrine.

In the case of *State v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191, this Court quoted with approval from the opinion in *Bell v. State,* 5 Ga. App. 701, 63 S.E. 860, as follows: " 'The crime of subornation of perjury consists of two elements — the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury.' "

The most serious question involved in this appeal is whether or not the court below committed error in overruling the defendant's motion for judgment as of nonsuit interposed at the close of the State's evidence. The correctness of this ruling is challenged by the defendant's assignment of error No. 20.

In a prosecution for perjury or subornation of perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances, sometimes called adminicular circumstances. *State v. Lucas,* 247 N.C. 208, 100 S.E. 2d 366; *State v. Arthur,* 244 N.C. 582, 94 S.E. 2d 646; *State v. Sailor, supra; State v. Webb,* 228 N.C. 304, 45 S.E. 2d 345; *State v. Hill,* 223 N.C. 711, 28 S.E. 2d 100; *State v. Rhinehart,* 209 N.C. 150, 183 S.E. 388; *State v. Hawkins,* 115 N.C. 712, 20 S.E. 623.

In the instant case we have a witness who swears unequivocally

to the falsity of his testimony in the trial of *State v. King* in the Superior Court of Alamance County at the March Criminal Session 1965. The State then undertook to supply the additional evidence required by putting three officers on the stand, each of whom testified that Harris had told him he testified falsely in the former trial of King. Such evidence does not meet the requirements of the law in a trial for perjury or subornation of perjury. The rule as heretofore stated requires that the falsity of the oath must be established by *two witnesses or by one witness and corroborating circumstances.* The evidence of these officers to the effect that Harris had told them that he had sworn falsely at King's trial in March 1965 did not constitute corroborating circumstances.

The requirement is stated in 70 C.J.S., Perjury, sec. 70c(1) in the following language:

> "The general rule is that the corroborative evidence means evidence *aliunde* which tends to show the perjury independent of any declaration or admission of accused. The corroboration must be by proof of material and independent facts and circumstances, which, taken and considered together, tend in confirmation of the testimony of the single witness to establish the falsity of the oath; and evidence merely showing that the account of the witness is probable will not do. * * *"

The factual situation here seems to be identical with that in the case of *State v. Sailor, supra,* where this Court said:

> "* * * All that the evidence tends to show is that the alleged suborned witness at one trial swore, and at another time stated, that she did not purchase from defendant the whiskey found in her possession, and that she, on another trial swore, and at other times stated, that she did purchase the whiskey from defendant. And while there is testimony of officers, admitted for the purpose of corroboration, and tending to corroborate as to what she had testified and stated, there is no evidence of corroborating circumstances tending to show which statement was false. Indeed, the Attorney-General, in brief filed here, states: 'It is true that all the evidence presented goes directly back to the State's witness * * * the alleged suborned perjurer.' There is no evidence of any independent circumstances. Hence, motion of defendant for judgment as of nonsuit entered at the close of the State's evidence should have been sustained."

In view of the conclusion we have reached, we deem it unnecessary to consider and pass upon the remaining numerous assignments

of error. We do wish, however, to call attention to the state of the record on this appeal. Appellant's counsel apparently made no attempt to comply with the rules of this Court in preparing the case on appeal. The record consists of 190 pages, and the evidence for the most part is set out in question and answer form, in violation of Rule 19(4), Rules of Practice in the Supreme Court, 254 N.C. 800. Moreover, the 33 assignments of error, based on 162 exceptions, cover 48 pages of the record. It so happens that in the instant case the defendant has not been prejudiced by the condition of the record, but if the State's evidence had been sufficient to support the verdict below, the appeal would have been subject to dismissal for failure to comply with the rules of the Court.

The judgment of the court below is

Reversed.

MOORE, J., not sitting.

RAYFORD R. SELPH v. ANNA S. SELPH.

(Filed 16 June, 1966.)

1. Trial § 48—

The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion.

2. Trial § 46—

After the verdict has been rendered and received by the court, and the jury has been discharged, jurors will not be allowed to attack or overthrow it, nor will evidence from them be received for such purpose.

3. Trial § 48—

Where the trial court finds from his examination of one of the jurors that at least three jurors were confused as to the legal effect of their verdict, and thereupon orders that the verdict be set aside in the discretion of the court, there being no suggestion by the juror of any clerical error in the written verdict or that the jurors had been confused about the facts, *held*, it appearing from the court's order that it was based upon grounds which the law does not recognize nor sanction, the order must be vacated for error of law and the cause remanded for judgment on the verdict which the court had accepted.

MOORE, J., not sitting.

SELPH *v.* SELPH.

APPEAL by defendant from *Carr, J.*, January 17, 1966 Civil Session of CUMBERLAND.

Plaintiff brought this action for an absolute divorce from defendant upon the grounds of one year's separation. Defendant, alleging that plaintiff had abandoned her without just cause or excuse, counterclaimed for alimony without divorce. Upon the trial, issues were submitted to the jury and answered as follows:

"1. Has the plaintiff been a resident of the State of North Carolina for at least six months next preceding the institution of this action?

ANSWER: Yes.

"2. Were the plaintiff and defendant lawfully married to each other as alleged in the Complaint?

ANSWER: Yes.

"3. Have the plaintiff and defendant lived continuously separate and apart from each other for at least one year next preceding the institution of this action?

ANSWER: No.

"4. Did the plaintiff wrongfully abandon the defendant without adequate provocation, as alleged?

ANSWER: Yes."

Upon the coming in of the verdict, at the request of plaintiff's counsel, the jury was polled, and each juror stated that he had answered the issues in accordance with the written verdict returned. The verdict was recorded, and the court dismissed the jury. With counsel's consent, he continued until the following week the hearing to determine the amount of alimony which plaintiff should pay defendant. Thereafter, one of the jurors who had not left the courtroom informed plaintiff's attorney "that there was some question in his mind as to the legal effect of his answer to the fourth issue." Counsel immediately took the juror to Judge Carr, who examined him in Chambers. The juror stated to the judge "that he and two other jurors were mistaken as to how and on what basis of law the charge in the third and fourth issues were to be answered, that they were confused, mistaken, and misunderstood how some of the issues were to be answered and were under the impression that the plaintiff would not be required to support the defendant."

Based upon the foregoing statement of the juror, plaintiff filed a written motion on January 24, 1966, that the verdict be set aside and a new trial granted. Judge Carr heard the motion and, on January 28, 1966, entered an order in which he found as a fact that the juror, whom he had examined "in chambers before he left the courtroom, . . . and at least two others, were mistaken as to the legal

effect of their answer to the fourth issue." He thereupon ordered "that the verdict rendered by the jury be, and the same is hereby set aside in the discretion of the court, and a new trial is ordered."

Defendant excepted to this order and appealed.

Elizabeth C. Fox for plaintiff appellee.

Smith, Herring & Swaringen by W. Ritchie Smith, Jr., for defendant appellant.

SHARP, J. No two rules are better settled in North Carolina than these:

(1) The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion. *Goldston v. Wright,* 257 N.C. 279, 125 S.E. 2d 462; *Walston v. Greene,* 246 N.C. 617, 99 S.E. 2d 805; *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373; *Pruitt v. Ray,* 230 N.C. 322, 52 S.E. 2d 876; 4 Strong, N. C. Index, Trial § 48 (1961). (2) After their verdict has been rendered and received by the court, and they have been discharged, jurors will not be allowed to attack or overthrow it, nor will evidence from them be received for such purpose. *State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235; *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1.

In this case, the judge did not purport to set aside the verdict because he considered it against the weight of the evidence or a miscarriage of justice. No motion was made upon those grounds; and apparently no motion to set aside the verdict was contemplated upon *any* ground until the juror informed counsel for plaintiff that he and two others "were under the impression that the plaintiff would not be required to support the defendant." The basis of the motion to set aside the verdict was evidence furnished by a juror which tended to impeach his verdict, and the judge — specifically designating the reasons for his action — allowed the motion upon this evidence. The law says, however, that such testimony will not be received. If admitted at all, evidence for that purpose "must come from some other source" than the jurors themselves. *State v. Hollingsworth, supra.* Obviously, evidence such as that given by the juror in this case could come only from a member of the jury.

It is interesting to note that this juror did not suggest any clerical error in the written verdict which he and the other eleven had returned, and which they had all affirmed upon the poll, a short time before. "Yes" and "No" had been correctly recorded. Furthermore, the juror did not intimate that either he or the other two

whom he represented as having been confused as to the law had been confused about the facts. Obviously, they had simply been mistaken as to the legal effect of their findings of fact. A similar situation occurred in *Livingston v. Livingston,* 213 N.C. 797, 197 S.E. 597. In that case, fifteen minutes after the judge had received the verdict, ordered it recorded, and dismissed the jury, a juror informed him that the jury had agreed to decide the case for Mrs. Livingston, and had thought that the answer "Yes" constituted a decision in her favor. Upon receiving this information, the judge reassembled the jury in the box and permitted them to change the word "Yes" to "No." In declaring the second verdict to be "without legal sanction," Stacy, C.J., speaking for the Court, said:

> "But whether the case should ultimately be decided in favor of the plaintiff or Mrs. Livingston was not for them (the jurors) to determine. . . . The error, if any they made, was an error of law and not one of fact. . . . They did what they intended to do but misconceived the legal effect of their action. They were not aware of any mistake or error on their part even after the matter had been called to their attention, and not until the legal effect of the verdict was explained to them did they express any desire to change it." *Id.* at 799, 197 S.E. at 598-99.

The court treated the first verdict as having been set aside in the judge's nonreviewable discretion and ordered a new trial.

Jurors likewise make an error of law, but not of fact, when — in a negligence action — they answer the issues of negligence and contributory negligence "Yes," and then award the plaintiff damages on the third issue. In such cases it is held that the court should accept the verdict and render judgment thereon for defendant. *Swann v. Bigelow,* 243 N.C. 285, 90 S.E. 2d 396; *Butler v. Gantt,* 220 N.C. 711, 18 S.E. 2d 119; *Allen v. Yarborough,* 201 N.C. 568, 160 S.E. 833.

In this case no abuse of discretion appears, nor is any abuse suggested. However, error in law does appear, for the motion upon which Judge Carr acted was based on grounds which the law does not recognize or sanction. To permit his order to stand would permit a juror to impeach the verdict and thus violate a public policy which had "been long settled" when the case of *State v. M'Leod,* 8 N.C. 344, was reported in 1821. If Judge Carr, without finding any facts except that the ends of justice required the action, had set aside the verdict in the exercise of his discretion, his order would have been unassailable on appeal.

> "The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the

proper administration of justice. . . . When the verdict is set aside as a matter of discretion it is not necessary to find the facts . . . and if no reason is given it is presumed that the new trial was granted as a matter of discretion, and the appeal will be dismissed." *Bird v. Bradburn,* 131 N.C. 488, 489-90, 42 S.E. 936-37. *Accord, Brittain v. Aviation, Inc.,* 254 N.C. 697, 120 S.E. 2d 72; *Jones v. Insurance Co.,* 210 N.C. 559, 187 S.E. 769; 2 McIntosh, N. C. Practice & Procedure § 1594 (2d Ed. 1956 and Supp. 1964).

Had Judge Carr felt that the verdict in this case was against the weight of the evidence, that it was affected by prejudice, or that any circumstances not furnishing a legal ground for setting aside the verdict had weighed too heavily against the plaintiff, and had resulted in inequity, he could have adopted the method approved in *Bird v. Bradburn, supra,* to set it aside. See *In re Will of Hall, supra* at 88, 113 S.E. 2d at 13. It is significant that he did not do so. Instead, in an order which fails to suggest that the verdict represented a miscarriage of justice, he "spelled out" the grounds upon which he set it aside. These grounds, as a matter of law, require that his order be vacated and the case remanded for judgment on the verdict which the court had accepted.

Reversed.

MOORE, J., not sitting.

E. M. JENKINS, SR., v. JOE W. WINECOFF, TRADING AS JOE W. WINECOFF AGENCY, REALTORS.

(Filed 16 June, 1966.)

1. Appeal and Error § 2—

The Supreme Court will take cognizance *ex mero motu* of want of jurisdiction in the lower court.

2. Courts §§ 3, 17—

A justice of the peace has exclusive original jurisdiction of causes of action arising *ex contractu* when the sum demanded is not in excess of $200, and the Superior Court has no original jurisdiction of such actions. Constitution of North Carolina, Art. IV, § 27; G.S. 7-63; G.S. 7-121.

3. Same; Brokers § 6; Actions § 8—

The vendor instituted this action against his broker to recover $200 representing the balance of "earnest money" paid to the broker by the pur-

chaser, the purchaser having later defaulted upon his written contract to purchase the property. *Held:* The right of the broker to retain the sum depends upon the contract between the vendor and the broker, and therefore arises out of contract and is within the exclusive jurisdiction of a justice of the peace.

MOORE, J., not sitting.

APPEAL by plaintiff from *May, Special Judge,* September 1965 Special Civil Session of CABARRUS.

Plaintiff's action is to recover from defendant, a realtor, the sum of $200.00, being a portion of $500.00 paid by H. W. Bray to defendant as "earnest money" to guarantee compliance with his written contract of September 14, 1963, to purchase described real estate from plaintiff and pay a total purchase price of $4,500.00 therefor.

Plaintiff's allegations and evidence are to the effect he and defendant entered into an oral contract whereby defendant was authorized to sell plaintiff's property at a price such that plaintiff would receive $4,300.00 therefor, it being agreed that defendant was to receive as compensation all he could get for the property above $4,300.00.

Plaintiff alleged, in substance, the provisions of said written contract of September 14, 1963. This contract, consisting of an offer addressed by Bray to defendant, as agent, signed by Bray, and an acceptance thereof signed by plaintiff, was offered in evidence by plaintiff. The pertinent parts thereof are as follows: "I (Bray) agree to pay $4,500.00 for said property, the said purchase price to be paid in the following manner: $500.00, which I hand you (defendant) herewith as earnest money, which is to be held by Joe W. Winecoff Agency until this transaction is completed, guaranteeing the faithful performance of this offer. $4,000.00 to be paid upon delivery to me of a deed conveying a good and marketable title to said property. . . . In case of acceptance, it is understood and agreed that this offer shall become a contract binding on each party, and I agree to execute the necessary papers in connection therewith and make final settlement on or before the 1st day of May, 1964. . . . In case of rejection of this offer or in case the present owners are unable to convey a good and marketable title, the $500.00 which I hand you herewith is to be returned to me, and this offer shall become null and void."

Plaintiff's testimony, other than that relating to his oral agreement with defendant, tends to show the following: Plaintiff executed a deed in accordance with said written contract and left it with his lawyer with instructions to deliver it when Bray paid the balance

of the purchase price in the amount of $4,000.00. Bray did not pay the $4,000.00 notwithstanding plaintiff allowed him 30 days or 60 days after May 1st in which to do so. After the sale had fallen through, solely on account of Bray's failure to comply with his contract, defendant gave plaintiff a check for $300.00 bearing the notation: "payment for sale." Plaintiff endorsed and cashed defendant's $300.00 check but when doing so did not notice the words "payment for sale" appearing thereon.

At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Thomas K. Spence for plaintiff appellant.
Robert L. Warren for defendant appellee.

BOBBITT, J. The more serious question confronting us on this record is whether the court below had jurisdiction of plaintiff's action. This question is not discussed in the briefs. However, this Court considers the jurisdictional question *ex mero motu. Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644, and cases cited.

The Constitution of North Carolina, Article IV, Section 27, in pertinent part, provides: "The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars . . ." (Note: The amendment of Article IV, submitted by the 1961 Session Laws, Chapter 313, and adopted by vote of the people at the general elections held November 6, 1962, has not, as of now, superseded or repealed the quoted constitutional provision. See Section 21 of said 1961 Act.)

G.S. 7-63, in pertinent part, provides: "The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court . . ."

G.S. 7-121, in pertinent part, provides: "Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract except — 1. Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars. . . ." Thus, "(b)y statute, exclusive original jurisdiction is given to a justice of the peace in contract up to two hundred dollars . . ." McIntosh, North Carolina Practice and Procedure, § 56, citing cases.

Plaintiff seeks to recover $200.00 and costs. If his action is "founded on contract," the superior court did not have jurisdiction thereof. Exclusive original jurisdiction was in the court of a justice of the peace.

Plaintiff's brief quotes from *Peed v. Burleson's, Inc.*, 244 N.C. 437, 94 S.E. 2d 351, an action involving the conversion of potatoes by a person having no title or interest therein. The facts in the present case are quite different. In *Peed,* no question relating to jurisdiction was involved.

Plaintiff's evidence is to the effect that, in accordance with the written contract, Bray gave defendant a check for $500.00 as a guarantee of compliance with his offer. While the written contract obligated defendant to return the $500.00 to Bray if plaintiff was unable to convey a good and marketable title, it contained no provision as to disbursement thereof in the contingency that arose, namely, the failure of Bray to comply with the terms of his offer. Having received the $500.00 lawfully, to be held subject to the terms of the oral contract between plaintiff and defendant and the written contract between plaintiff and Bray, the questions raised by the pleadings and evidence are the respective rights of plaintiff and defendant under said contracts to the $500.00 of "earnest money." Defendant paid plaintiff $300.00. If, under his pleadings and evidence, plaintiff is entitled to recover the remaining $200.00 from defendant, he is entitled to do so under and by virtue of the contractual relationships subsisting between them. We are of opinion, and so hold, that plaintiff's cause of action is "founded on contract." Therefore, exclusive jurisdiction thereof was and is in the court of a justice of the peace.

Present disposition of this appeal renders unnecessary any discussion relating to the merits of plaintiff's action. For a full discussion, see Annotation, "Relative rights and liabilities of vendor and his broker to down payment or earnest money forfeited by vendee for default under real estate contract," 9 A.L.R. 2d 495 *et seq.*

The judgment of involuntary nonsuit is affirmed solely on the ground it appears from plaintiff's allegations and evidence that the superior court had no jurisdiction of plaintiff's action.

Affirmed.

MOORE, J., not sitting.

LAWSON *v.* LAWSON.

J. ROSCOE LAWSON AND WIFE, ELIZABETH M. LAWSON, INA ROSE LAWSON DENNING AND HUSBAND, BRUCE DENNING; J. ALVA LAWSON AND WIFE, LIZZIE B. LAWSON; AND SADIE LAWSON LONG, WIDOW, PETITIONERS, v. WILLIAM LAWSON AND WIFE, BETTY JAN LAWSON; LEO HAROLD LAWSON, UNMARRIED; KENNETH BRYAN LAWSON AND WIFE, MRS. KENNETH BRYAN LAWSON; BONNIE JEWEL LAWSON, UNMARRIED; AND BARBARA ANN LAWSON WEST AND HUSBAND HUBERT WEST, RESPONDENTS.

(Filed 16 June, 1966.)

Wills § 34—

The will in suit devised the property in question to one of testator's children for life and at her death to her children with limitation over, in the event she should die without children, to her brothers and sisters. The life tenant died without issue. *Held:* The limitation over to the life tenant's brothers and sisters was contingent and did not vest until the life tenant died without issue, and therefore only her brothers and sisters living at her death could answer the roll, and children of brothers who predeceased the life tenant have no interest in the land.

MOORE, J., not sitting.

APPEAL by respondents from *Johnson, J.*, January 17, 1966 Civil Session of ROBESON.

Petition for partition. Petitioners, J. Roscoe Lawson, Ina Rose Lawson Denning, J. Alva Lawson, and Sadie Lawson Long allege that each of them owns a one-fourth undivided interest in the land described in the petition and that respondents have no interest in it. Respondent William Lawson alleges that he owns a one-sixth undivided interest in the property; respondents Leo Harold Lawson, Kenneth Bryan Lawson, Bonnie Jewel Lawson and Barbara Ann Lawson West allege that together they own a one-sixth undivided interest. The facts are admitted in the pleadings.

J. Rad Lawson, the father of petitioners and the grandfather of respondents, died testate in March 1950. He devised the land in suit to his daughter, Opal Lawson Long, with the following provision:

> "To be hers for and during the term of her natural life, and at her death to her children, if any, in fee simple; if none, to the whole brothers and sisters of my daughter, Opal Lawson Long, in fee simple. Should my daughter, Opal Lawson Long predecease me, then the lands herein devised shall go to her children, if any, in fee simple; if none, to the whole brothers and sisters of my said daughter, in fee simple."

Opal Lawson Long died in November 1965. She left no children or descendants of children. The whole brothers and sisters who sur-

vived her are the petitioners named above. Respondent William Lawson is the only child and descendant of Earl Lawson, a whole brother who died in 1950. The other respondents are the only children and descendants of Leo Lawson, a whole brother who died in 1953.

Upon these facts, Judge Johnson entered judgment decreeing that petitioners own the described property in fee simple and that respondents have no interests in the land. He ordered that it be sold for partition among petitioners. Respondents excepted to this judgment and appealed.

David M. & W. Earl Britt for petitioner appellee.
Walter Clark, Jr., for respondent appellant.

SHARP, J. Respondents contend that at the death of the testator, J. Rad Lawson, the six whole brothers and sisters of the life tenant, all of whom were then living, took a vested remainder in the land, and that they, as children of the two whole brothers who predeceased Opal Lawson Long, inherited their interest. The law, however, is otherwise.

This case presents a typical example of a contingent remainder.

> "'*A* devises to *B* for life, remainder to his children but if he dies without leaving children remainder over, both the remainders are contingent; but if *B* afterwards marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs.'" 4 Kent's Commentaries, p. 284 quoted in *Blanchard v. Ward,* 244 N.C. 142, 146, 92 S.E. 2d 776, 779.

In *Watson v. Smith,* 110 N.C. 6, 14 S.E. 649, testator devised land to *J* for life, and at *J's* death to such child or children of his that might then be living, but should he die without issue, then to *G, W, H,* and *O* in fee. The Court held that the limitation to *G, W, H,* and *O,* was a contingent remainder. "Alternative remainders limited upon a single precedent estate are always contingent. Such remainders are created by a limitation to one for life, with remainder in fee to his children, issue, or heirs, and, in default of such children, issue, or heirs, to another or others. . . ." 33 Am. Jur., Life Estates, Remainders, etc. § 148 (1941), citing *Watson v. Smith, supra.*

Clearly the interests of the whole brothers and sisters was contingent and could not vest before the death of the life tenant, for not until then could it be determined that she would leave no issue surviving. *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341. "Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted." *Strickland v. Jackson,* 259 N.C. 81, 84, 130 S.E. 2d 22, 25. Respondents' parents, having predeceased the life tenant, could not answer the roll call at her death.

The judgment of the court below is

Affirmed.

MOORE, J., not sitting.

GLADYS TROGDEN DOVE v. LEVI CLARENCE CAIN, JR., AND SHELBY JEAN KINLAW.

(Filed 16 June, 1966.)

1. Automobiles § 46—

The car in which defendants were riding struck the rear of plaintiff's automobile, which could have been seen by defendants for about a mile, while plaintiff was stopped awaiting opportunity to make a left turn into an intersecting rural road. One of defendants testified that when she saw plaintiff's car it had already stopped and that she thought defendant driver realized plaintiff's car was stopped at about the same time. *Held:* An instruction to the effect that defendants contended that plaintiff suddenly stopped in front of defendants' automobile must be held for prejudicial error as having no support in the evidence.

2. Trial § 33—

It is prejudicial error for the court to submit for the consideration of the jury facts material to the issue which are not supported by evidence.

MOORE, J., not sitting.

APPEAL by plaintiff from *Mallard, J.,* November Session 1965 of BLADEN.

This is a civil action to recover for personal injuries allegedly sustained in an automobile collision.

The plaintiff alleged and offered evidence tending to show that she was operating her 1962 Chevrolet automobile in a northerly di-

rection on N. C. Highway 242 on the morning of 2 February 1963; that she intended to make a left turn on rural paved highway No. 1114 at a "T" intersection of said rural highway with N. C. Highway 242; that for a distance of 600 feet before she reached the intersection she turned on her left signal to turn, and at the time the defendant's automobile was about 600 feet behind her; that she slowed down to about five miles an hour, and while she was still in her lane of travel waiting for an oncoming vehicle to pass before starting her left turn, defendants' car struck plaintiff's car in the rear, resulting in serious injuries to the plaintiff.

The plaintiff offered evidence tending to show serious injury, extensive medical expenses, and loss of wages.

The defendants in their further answer and defense alleged that plaintiff was on 2 February 1963, at the time and place aforesaid, operating her automobile in a northerly direction on said highway several hundred yards in front of the automobile of the defendant Shelby Jean Kinlaw, which was being operated by Levi Clarence Cain, Jr.; that the automobile being operated by the plaintiff suddenly and without any visible signal of any kind stopped in said highway. "* * * (T)he sudden stopping of the plaintiff's vehicle without any signal or indication thereof made a collision between said vehicles unavoidable, and the defendant's vehicle collided with the rear portion of the plaintiff's vehicle."

According to defendants' evidence, the defendants have married since 2 February 1963. The defendants allege in their answer that defendant Shelby Jean Kinlaw (now Cain) and her boy friend prior to the collision were traveling several hundred yards behind the plaintiff's car. The defendants' evidence is to the effect that it had been "raining and was still drizzling and misting"; that the male defendant was driving the car with the consent and approval of the owner. The feme defendant testified: "We were riding along and I was probably talking to Levi and he was probably talking to me. * * * I saw the Dove car there in the road and * * * the time I saw it it was stopped. I don't know how far we were from it when we first saw it. * * * I think Mr. Cain and I both realized that it was stopped at the same time. Mr. Cain mashed the brakes. * * * my car * * * went directly into the back of Mrs. Dove's car, about the rear center, * * * The first instant that I observed the Dove car it was not moving and it was stopped in the road." This witness also testified, "Highway 242 is a straight road. That before getting to the intersection, * * * it is straight for more than a mile * * * There was nothing to have prevented me from seeing the Dove automobile for a distance of more than a mile

and I could have seen it." The male defendant did not testify in the trial below.

The case was submitted to the jury on the issues of negligence, contributory negligence and damages. The jury answered the negligence issue in the negative, and the plaintiff appeals, assigning error.

Grady & Clark for plaintiff appellant.
Hester & Hester for defendants, appellees.

DENNY, E.J. The plaintiff assigns as error the following portion of the court's charge to the jury: "That she (Shelby Jean Kinlaw) saw no signal nor no turn indicator or no signal of any kind; and that plaintiff suddenly stopped her automobile in front of defendants' automobile, and that defendants' automobile struck plaintiff's automobile in the center of the rear with the left front fender and bumper of the defendants' automobile * * * That the defendant Clarence Cain, Jr., was driving prior to this collision and before the collision down the road at a speed of 50 to 55 miles per hour; that the plaintiff suddenly stopped in front of him without giving any signal whatever."

It is apparent that the able and conscientious trial judge who tried this case below inadvertently overlooked the fact that there is no evidence tending to show that the plaintiff stopped her car suddenly in front of the defendants' car.

The defendants' evidence does not support their allegations in this respect. The defendants' evidence is unequivocally to the effect that there was nothing to have prevented the defendants from seeing the Dove car for more than a mile and that plaintiff's car was already stopped when defendant Shelby Jean Kinlaw first saw it. The defendant Kinlaw also testified, "I think Mr. Cain and I both realized it was stopped at the same time."

Where the court in its charge submits to the jury for their consideration facts material to the issue, which were no part of the evidence offered, it constitutes prejudicial error. *State v. McCoy,* 236 N.C. 121, 71 S.E. 2d 921; *Darden v. Leemaster,* 238 N.C. 573, 78 S.E. 2d 448, *State v. Alston,* 228 N.C. 555, 46 S.E. 2d 567; *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576; *Cummings v. Coach Co.,* 220 N.C. 521, 17 S.E. 2d 662; *Smith v. Hosiery Mill,* 212 N.C. 661, 194 S.E. 83.

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

New trial.

MOORE, J., not sitting.

STATE v. CLYDE LOUIS DOGGETT.

(Filed 16 June, 1966.)

Escape § 1; Criminal Law § 133— Prior to 1965 amendment, it was mandatory that sentence for escape begin at expiration of sentence defendant was then serving.

Under G.S. 148-45, prior to the 1965 amendment, it was mandatory that a sentence for escape commence upon the completion of any and all sentences under which defendant was confined at the time of the escape, and therefore when prayer for judgment is continued upon conviction of defendant for escape and defendant is later convicted of a third unrelated offense providing that sentence should begin upon completion of the sentence for the original offense, the later execution of the sentence for escape must also commence at the completion of the sentence for the first conviction, so that the sentence for escape and the sentence for the third offense must run concurrently, notwithstanding provision of the sentence for escape that it should commence at the expiration of the sentence for the third offense.

MOORE, J., not sitting.

ON *certiorari* to review order of *Mallard, J.*, entered January 27, 1966, in the Superior Court of WAKE County, denying the petition of Clyde Louis Doggett for a writ of *habeas corpus*.

The facts necessary to an understanding of the asserted grievance of petitioner (referred to hereafter as Doggett) are stated below.

In Case No. 35-127, at September 4, 1961, Term of Mecklenburg Superior Court, Doggett pleaded guilty of larceny (from the person) and was sentenced to a term of not less than twelve (12) nor more than twenty-four (24) months. He escaped on February 12, 1962, while serving said sentence, and was recaptured April 4, 1962. He completed service of said Mecklenburg County sentence on May 16, 1963.

In Case No. 7653, at April 17, 1962, Session of Wake Superior Court, Doggett was found guilty of said escape. Prayer for judgment was continued to the June 1962 Session and then was continued to the August 1962 Session.

In Case No. 1130, at May 1962 Session of Union Superior Court, Doggett pleaded guilty to (felonious) assault; and a sentence of not less than two (2) nor more than four (4) years was pronounced, this sentence to begin upon expiration of the sentence in the Mecklenburg larceny case. He completed service of said Union County sentence on July 23, 1965.

In Case No. 7653, at the August 1962 Session of Wake Superior Court, and based on the verdict of guilty at April 1962 Session in said escape case, judgment imposing a sentence of eighteen (18)

months was pronounced with provision that this sentence was to commence upon expiration of the sentence in the Union County assault case. Since July 23, 1965, Doggett has been imprisoned under the purported authority of a commitment for the sentence of eighteen (18) months in the Wake County escape case.

In Case No. SC 1507, at August 6, 1963, Session of Northampton Superior Court, upon his plea of guilty of assault (with a deadly weapon), a judgment imposing a sentence of two (2) years was pronounced with provision that this sentence was to begin upon expiration of the sentence in the Wake County escape case.

In this Court, at Fall Term 1964, in our Case No. 442, Doggett applied for *certiorari* to review the sentence in the Wake County escape case, alleging that, under G.S. 148-45, the sentence for escape began at the termination of the sentence he was serving at the time of said escape, namely, the sentence in the Mecklenburg County larceny case. In denying Doggett's said petition, the order of this Court stated: "Petitioner, upon completion of his Union County sentence, may apply to the Superior Court of Wake County for a writ of *habeas corpus.*"

In January 1966, Doggett applied to Judge Mallard for a writ of *habeas corpus.* His petition was denied by Judge Mallard's order of January 27, 1966. On April 22, 1966, Doggett filed in this Court a petition for *certiorari* to review Judge Mallard's said order.

Attorney General Bruton and Staff Attorney White for the State.
Clyde Louis Doggett, pro se.

PER CURIAM. Doggett's handwritten petition does not allege facts sufficient to show he is now unlawfully imprisoned. Hence, we find no error in Judge Mallard's order. However, based on facts disclosed by our records in connection with his 1964 petition for *certiorari* and by the Attorney General's answer to his present petition for *certiorari,* Doggett, in our opinion, is entitled to relief to the extent set forth below.

In 1962 G.S. 148-45, the statute providing punishments for escapes, contained the following provision: "Any term of imprisonment imposed hereunder shall commence *at the termination* of any and all sentences to be served in the State prison system under which the prisoner is held at the time an offense defined by this statute is committed by such prisoner." (Our italics.)

This Court is of the opinion that, under the mandate of the quoted statutory provision, the sentence imposed in the Wake County escape case began *at the termination* (completion) of the sentence

in the Mecklenburg County larceny case. This being true, the sentences in the Union County assault case and the Wake County escape case ran concurrently.

Doggett completed service of his sentence in the Mecklenburg County larceny case on May 16, 1963. The sentence of 18 months in the Wake County escape case was imposed by judgment pronounced at August 1962 Term. The full period of 18 months from May 16, 1963, without any allowance of credit for good behavior, expired November 16, 1964. Thus, Doggett completed service of his sentence in the Wake County escape case on or before November 16, 1964.

The judgment in the Northampton County assault case provided expressly that the 2-year sentence imposed thereby was to begin upon expiration of the Wake County escape sentence. After completion of service of his sentence in the Wake County escape case, Doggett has been lawfully imprisoned under commitment issued pursuant to said judgment in the Northampton County assault case. Thus, Doggett has already served the major portion of his sentence in the Northampton County assault case. The exact date of release from further service of said sentence in the Northampton County assault case depends upon the credits for good behavior, if any, earned by Doggett while serving the Wake County escape sentence and while serving the Northampton County assault sentence.

For the reasons stated, Doggett is not lawfully imprisoned under commitment issued pursuant to judgment in the Wake County escape case. However, he is lawfully imprisoned under commitment issued pursuant to judgment in the Northampton County assault case. The North Carolina Prison Department, in conformity with this opinion, will determine the date on which the sentence Doggett is now serving, to wit, the sentence in the Northampton County assault case, will terminate.

This disposition, very favorable to Doggett, results from the quoted mandatory provision of G.S. 148-45 prior to the 1965 amendment thereof. By virtue of the 1965 amendment (Session Laws of 1965, Chapter 283), G.S. 148-45 now provides: *"Unless otherwise specifically ordered* by the presiding judge, any term of imprisonment imposed hereunder shall commence at the termination of any and all sentences to be served in the State prison system under which the prisoner is held at the time an offense defined by this section is committed by such prisoner." (Our italics.)

The Clerk will forward a certified copy of this opinion to each of the following: (1) The Clerk of the Superior Court of Wake

County; (2) the North Carolina Prison Department; (3) the Clerk of the Superior Court of Northampton County; and (4) Doggett.

Petition allowed and relief granted to the extent set forth in the opinion.

MOORE, J., not sitting.

A. P. HUBBARD AND WIFE, MARION T. HUBBARD; RANDOLPH KABRICH AND WIFE NANCY B. KABRICH, v. CLAUDE K. JOSEY AND WIFE, LINNELL B. JOSEY.

(Filed 16 June, 1966.)

Declaratory Judgment Act § 2—

Where, in proceedings under the Declaratory Judgment Act, the complaint and answer present an existing controversy between the parties as to their conflicting claims in a strip of land lying between their respective lots, the action is justiciable under the Declaratory Judgment Act and should be determined by judgment declaring the respective rights of the parties, and nonsuit is inapposite.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Johnston, J.*, 18 October 1965 Session of GUILFORD (Greensboro Division).

This is a civil action for a declaratory judgment, instituted pursuant to G.S. 1-253 *et seq.*, to determine the rights of the parties in a 20 foot wide strip of land known as Hawthorne Lane in Irving Park in Greensboro, N. C.

The plaintiffs own adjoining lots, numbered 2 and 3 as shown on a map, plaintiffs' exhibit 11, fronting on the south side of Sunset Drive in said Park, the rear lines of which abut on the northern margin of Hawthorne Lane. The defendants Josey own a lot fronting on Edgedale Road, the north side line of which abuts on the southern margin of Hawthorne Lane. The defendants have allegedly acquired a deed from the receiver of Irving Park Company in fee simple to all of the 20 foot strip of land which abuts their north side line and the rear, or south, lot lines of the plaintiffs' lots, which is the land in controversy and which is shown on a plat of Irving Park made by W. B. Trogdon, C. E., as Hawthorne Lane, dated December 1, 1913.

At the close of plaintiffs' evidence the defendants moved for judgment as of nonsuit. The motion was allowed and the action dismissed. The plaintiffs appeal, assigning error.

Thomas Turner and Harry Rockwell for plaintiffs, appellants.

Douglas, Ravenel, Josey & Hardy for defendants Josey, appellees.

PER CURIAM. Unquestionably the instant case presents a justiciable controversy and the parties are entitled to a declaration of their rights, and the action should be disposed of only by a judgment declaring them. *Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654, where it is said:

> " 'The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment. And where a complaint in a proceeding for a declaratory judgment stated a justiciable controversy, a demurrer should have been overruled, and after the filing of an answer a decree containing a declaration of right should have been entered.' " 1 Anderson, Declaratory Judgments, (2d Ed.) § 318; *Cabell v. Cottage Grove,* 170 Ore. 256, 130 P. 2d 1013, 144 A.L.R. 286.
>
> "In the absence of a stipulation, a declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing. For the same reason, a judgment of nonsuit may not be entered. *Board of Managers v. Wilmington,* 237 N.C. 179, 194, 74 S.E. 2d 749. This rule is analogous to that which prohibits a nonsuit in a caveat proceeding. *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544."

We held in *Shingleton v. State,* 260 N.C. 451, 133 S.E. 2d 183, that a controversy between an individual and the State as to the extent of an easement granted by the State may be determined in an action brought in the Superior Court pursuant to the provisions of the Declaratory Judgment Act.

It was also held a controversy as to whether the deeds in question created a fee upon special limitation and as to whether title

would revert to grantors upon the happening of the contingency, may be maintained under the Declaratory Judgment Act. *Charlotte Park & Recreation Commission v. Barringer,* 242 N.C. 311, 88 S.E. 2d 114.

We likewise held the right to close an alley at the cul-de-sac end could be determined under the Declaratory Judgment Act. *Hine v. Blumenthal,* 239 N.C. 537, 80 S.E. 2d 458.

In the case of *Carver v. Leatherwood,* 230 N.C. 96, 52 S.E. 2d 1, it was held that an action to obtain a judicial declaration of plaintiff's right to an easement appurtenant over the lands of defendants is authorized by the Declaratory Judgment Act.

The judgment of nonsuit entered below is set aside. The cause is remanded for a trial *de novo* and for an adjudication of the respective rights of the parties.

Reversed.

MOORE, J., not sitting.

STATE OF NORTH CAROLINA v. HAROLD THOMPSON.

(Filed 16 June, 1966.)

1. Criminal Law § 127—

After a conviction or plea, the court has the power to pronounce judgment and place it into immediate execution, or to pronounce judgment and suspend or stay its execution, or to continue prayer for judgment; where no conditions are imposed, the court has the power to continue prayer for judgment with or without defendant's consent.

2. Criminal Law § 154—

An assignment of error not supported by an exception in the record will not be considered on appeal.

3. Criminal Law §§ 131, 135—

In a hearing to determine what punishment should be imposed upon defendant, the court is not confined to evidence relating to the offense charged, but, within reasonable limits, may consider any other facts calculated to enable the court to act wisely in fixing judgment.

4. Same—

Active sentence was imposed upon defendant's plea of guilty on indictments consolidated for judgment, and as to other consolidated indictments prayer for judgment was continued. *Held:* Upon prayer for judgment it is proper for the court to consider defendant's prison record while serving the active sentence in determining proper sentence upon the prayer for judgment.

5. Criminal Law § 135—

The requirements of G.S. 15-200.2 that the solicitor serve upon defendant a bill of particulars relates to the execution of a suspended sentence and has no application to entry of judgment upon motion of the solicitor when prayer for judgment had been continued.

MOORE, J., not sitting.

APPEAL by defendant from *Latham, S.J.*, December 1965 Criminal Session of ALAMANCE.

These facts appear of record and are unchallenged: At the January 1964 Criminal Session of Alamance, defendant stood indicted for forging and uttering 20 checks in amounts varying from $31.69 to $65.83. These charges were contained in 20 separate bills of indictment numbered 2 to 13 inclusive and 63 to 70 inclusive. Defendant was represented by competent counsel, who advised him completely in the premises. After due deliberation, and with full awareness of the possible consequences, defendant entered a plea of guilty to each bill of indictment. Cases numbered 2 through 13 were consolidated for judgment, and defendant was sentenced to the State's prison for a term of 5 years. In cases numbered 63 through 70, the minute entry was, "Let prayer for judgment be continued for three years."

During the December 1965 Criminal Session, on December 7, 1965, the solicitor informed counsel for defendant that he would pray judgment in cases numbered 63 through 70 (then renumbered 105 through 112). The matter was heard on December 9, 1965, at which time defendant and his counsel "indicated that they were ready to proceed."

The solicitor examined Major B. F. Turner, a division superintendent of the North Carolina Prison Department, with reference to defendant's prison record since his commitment in January 1964. Without objection, Major Turner testified to various infractions of prison rules and regulations by defendant since that date. Thereafter, defendant testified in explanation and in contradiction of the violations shown on his prison record. Consolidating cases 105 through 112 for judgment, the court sentenced defendant to a term of 8-10 years in the State's prison, this sentence to begin at the expiration of the 5-year sentence imposed in January 1964 in cases 2 through 13. From this judgment defendant appeals.

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

Fred Darlington, III, for defendant appellant.

PER CURIAM. After a conviction or a plea, the court has power: (1) to pronounce judgment and place it into immediate execution; (2) to pronounce judgment and suspend or stay its execution; (3) to continue prayer for judgment. *State v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49. In this case, at the time of defendant's pleas of guilty, the court followed procedure (1) in twelve of the cases; in the remaining eight cases, procedure (3). Since, in continuing prayer for judgment in the eight cases, the court imposed no terms or conditions, it had the right to impose judgment at any time within the specified 3-year period. "It is sometimes found to be expedient, if not necessary, to continue a prayer for judgment and when no conditions are imposed, the judges of the Superior Court may exercise this power with or without the defendant's consent." *State v. Graham,* 225 N.C. 217, 219, 34 S.E. 2d 146, 147.

On appeal here, defendant contends, for the first time, that his Honor erred in permitting Major Turner to testify with reference to alleged acts of misconduct by him in prison. An assignment of error which is not supported by an exception in the record will not be considered on appeal. *Suits v. Insurance Co.,* 241 N.C. 483, 85 S.E. 2d 602. Nevertheless, we point out that in determining what punishment should be imposed upon a defendant, a court is not confined to evidence relating to the offense charged. "It may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment. Hence, it may inquire into such matters as the age, character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced." *State v. Cooper,* 238 N.C. 241, 244, 77 S.E. 2d 695, 698.

Defendant also contends that the sentence from which he appeals is illegal because the solicitor failed to serve upon him a bill of particulars setting forth the time, the place, and the manner in which it was contended that he had violated prison rules and regulations. He relies upon G.S. 15-200.2 which requires a solicitor, before praying that a *suspended sentence* be put into effect, serve upon defendant a bill of particulars setting forth the time, place, and manner in which the terms of the suspended sentence are alleged to have been violated. The answer to this contention is that G.S. 15-200.2 applies only to sentences which have been *suspended* upon specified terms and conditions. When prayer for judgment has been continued, G.S. 15-200.2 does not require that the solicitor, before

praying judgment, shall serve defendant with a bill of particulars setting forth his reasons for doing so.

Upon the grounds stated, the judgment is

Affirmed.

MOORE, J., not sitting.

LULA MAE JONES, ADMINISTRATRIX OF THE ESTATE OF ROY LEE JONES, DECEASED, v. OZELL JOHNSON AND HIS WIFE, MARGARET PURCELL JOHNSON.

(Filed 16 June, 1966.)

1. Automobiles § 41m—

Evidence favorable to plaintiff which permits the inferences that defendant saw or should have seen small children near the edge of the highway, but that defendant did not reduce speed nor blow her horn or apply her brakes until after she saw plaintiff's intestate, a six year old boy, run into the highway, and that the car skidded about 150 feet before it struck the child, inflicting fatal injury, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Trial § 22—

Discrepancies in plaintiff's evidence do not warrant nonsuit, and if diverse inferences can be drawn from the evidence, some favorable to plaintiff and others to defendant, the cause should be submitted to the jury.

MOORE, J., not sitting.

APPEAL by plaintiff from *Braswell, J.*, October Session 1965 of SCOTLAND.

This is a civil action to recover for the wrongful death of plaintiff's intestate, a six-year old boy, who was struck and killed by an automobile while crossing the highway.

The tragedy occurred about 4:45 P.M. on 18 August 1964 in front of the child's home on rural paved road No. 1338 in Scotland County, about five miles north of Laurel Hill. The automobile involved was admittedly a family purpose car owned by Ozell Johnson and was being operated by his wife, Margaret Purcell Johnson.

The plaintiff's evidence in substance is to the effect that Margaret Purcell Johnson was operating her husband's car in a southerly direction on the aforesaid highway, and as she approached the scene of the accident, the view to her left was obscured by a tomato

field in and along which the weeds were 3 to 4 feet high, and the view to her right was obscured by a pine thicket, bushes and a china-berry tree. The road was straight and level for about one-fourth mile. The house in which plaintiff's intestate resided was obscured to a driver traveling south on the highway until the car was practically in front of the house, which was located 30 or 35 feet from the highway.

On the day of the accident the five children of plaintiff, including a baby, had been left at the Jones home in care of Thelma Johnson, a fifteen-year old girl. Thelma testified: "I remember the day that Roy Lee Jones was killed. I saw him * * * just before he was killed. He went across the road to move a tomato out of the road. When he started back across, when he got almost to the middle the car got him. * * * I was taking care of the Jones children that afternoon and was babysitting for the mother. When he went to get the tomato he was walking. But he was running when he came back across. * * * I was sitting on the porch. I heard the brakes squealing before he was hit. They were squealing loud. I didn't hear the sound when he was hit. The horn was blowing. It was not far from him when I heard the horn begin to blow. After he was hit, the car ran on in the ditch * * * on the right hand side * * *. That was the same side of the road the house was on."

On cross-examination this witness testified that there were four rooms in the house; that the baby was in the first room, "coming in from the porch," that she was in the room changing the baby's diaper, "and while I was in there changing diapers, I heard the horn blow * * * I was just laying the baby down. * * * The child was on the bed at the back of the room. * * * I was facing the back of the room and had my back to the children at that time. * * * I couldn't see them. * * * When I actually heard these brakes squeal I also heard a horn blow, while I was in the house. I did not have the baby up when I heard that. After I got through changing the diaper, I was sitting on the porch. I was sitting in the middle of the porch at the time Roy Lee was actually struck. From the time I heard the horn blow and the brakes squeal I had time to go from the room to the porch and sit down before the accident happened."

N. C. Hester, a Highway Patrolman, testified he investigated this accident; that he talked to Margaret Johnson, the driver of the car, and asked her how the accident happened. The Patrolman's evidence most favorable to the plaintiff was as follows: "She stated that she was driving south on 1338 * * * and there was a small child or small children to her left side of the road; that as she ap-

proached, one ran out into the road in the path of her automobile. She stated she was driving about 45 miles per hour." The Patrolman further testified that there were skid marks from about the middle of the right hand lane of the highway going south to the point where the automobile came to rest in the ditch on the right hand side of the highway, a distance of approximately 195 feet. The plaintiff's evidence further tends to show that the automobile traveled approximately 45 feet after the child was hit.

At the close of plaintiff's evidence the defendants interposed a motion for judgment as of nonsuit and the motion was allowed. The plaintiff appeals, assigning error.

King & Cox for plaintiff.
Mason, Williamson and Etheridge for defendants.

PER CURIAM. This is a borderline case. However, when those parts of the plaintiff's evidence most favorable to her are considered in such light, as they must be on a motion for judgment as of nonsuit, we are of the opinion the evidence is sufficient to carry the case to the jury. There is nothing in the defendant driver's statement to the investigating officer that tends to show that she decreased her speed or blew her horn when she saw a child or children on the left side of the highway. On cross-examination, the Patrolman testified that the defendant driver said she did not apply her brakes until the child ran into the highway. According to the Patrolman's testimony, the car skidded 150 feet to the point where it struck the child and continued to skid for an additional 45 feet before it came to rest in the ditch on the right side of the road.

Discrepancies and contradictions in the plaintiff's evidence are for the jury and not for the court. *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793.

"The rule applicable in cases of this kind is that if diverse inferences may be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the case should be submitted to the jury for final determination." *Hobbs v. Mann,* 199 N.C. 532, 155 S.E. 163. The judgment as of nonsuit is

Reversed.

MOORE, J., not sitting.

STATE v. J. C. SMITH.

(Filed 16 June, 1966.)

1. Criminal Law § 159—

Exceptions not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 111—

Where, in a prosecution for conspiracy, the State's witnesses include only one of the conspirators, a correct charge as to the duty of the jury to scrutinize the testimony of an accomplice could not be misleading for failure of the court to identify the accomplice, and even if the jury should have interpreted the instruction as applying also to another witness, it would not have been prejudicial to defendant.

MOORE, J., not sitting.

APPEAL by defendant from *Latham, S.J.*, 17 January 1966 Criminal Session of ALAMANCE.

The indictment charges that the defendant and one Leslie Wertz Wagoner did unlawfully and wilfully combine, conspire, confederate and agree, each with the other, to accuse or threaten to accuse another person or other persons, at the time unknown to them, of the commission of a crime against nature with the said Leslie Wertz Wagoner with the intent to deceive and defraud and to extort money from such other person. The defendant was found guilty and was sentenced to imprisonment in the common jail of Alamance County for a period of two years to be assigned to work under the supervision of the State Prison Department. From this judgment he appeals.

The State offered three witnesses, these being Leslie Wagoner, the alleged co-conspirator, Hal Waynick, the alleged victim, and J. W. McCauley, a police officer of the city of Burlington. The defendant offered no evidence. The evidence so offered by the State, if true, is sufficient to support the verdict.

The only assignment of error discussed in the appellant's brief, or with reference to which authorities are cited therein, is the inclusion by the court of the following instruction in the charge to the jury:

> "Now, the law provides, ladies and gentlemen, where an accomplice testifies you shall scrutinize his testimony, that you shall weigh it and consider it carefully because he may not tell the truth; that he may be biased or interested or both, but after you have weighed it and find that he has told the truth

about the matter, then you are to give his testimony the same weight as that of any truthful, disinterested witness."

Immediately preceding the instruction to which this exception is directed, the court instructed the jury:

"The defendant contends that the evidence tends to show and that you should find that you cannot believe the witnesses for the State. That by their own admission they are felons, by their own admission they have attempted or have committed a felony, a crime against nature. That one of the witnesses admitted on the witness stand that he was drunk on the evening of the 12th. The defendant contends that the evidence tends to show and you should find that the witnesses for the State, Mr. Waynick and Mr. Wagoner, had broken the law, that to escape retribution, that they had created this fiction, this story, that these charges are false. * * * In short, ladies and gentlemen, the defendant contends that you cannot believe the testimony of the witnesses for the State and that you cannot be satisfied of his guilt and that your verdict should be not guilty."

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

Hines & Dettor for defendant appellant.

PER CURIAM. Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, are deemed abandoned by him. Rule 28 of the Rules of Practice in the Supreme Court of North Carolina. We have, however, examined the entire record and find no merit in any exception noted therein.

There is no error in the instruction of the court concerning the rule that the testimony of an accomplice is to be carefully scrutinized. *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165; Strong, N. C. Index, Criminal Law, § 111, Supplement. The defendant contends that the court's instruction failed to identify the accomplice to whose testimony it related. Since there were only three witnesses, a co-conspirator, the victim, and a police officer, it is obvious that the jury could not have been under any misapprehension as to which witness was the accomplice. If, however, the jury interpreted the court's instruction as applicable both to the testimony of Wagoner, the alleged co-conspirator, and to that of Waynick, the alleged victim, this could not be prejudicial to the defendant.

No error.

MOORE, J., not sitting.

STATE v. JOHN BYNUM STINSON.

(Filed 16 June, 1966.)

1. Criminal Law § 86—

A motion for a continuance is directed to the sound discretion of the trial court, and no abuse of discretion is disclosed by the fact that the motion was made upon defendant's contention that two of his relatives were then under charge for criminal offenses and that the publicity incident thereto would prevent a fair trial.

2. Burglary § 4; Larceny § 7—

In this prosecution for breaking and larceny, the evidence is held sufficient to be submitted to the jury, and therefore the denial of defendant's motion for a directed verdict was not error.

MOORE, J., not sitting.

ON *certiorari* to review judgment entered by *Braswell, J.*, June, 1965 Session, ALAMANCE Superior Court.

This criminal prosecution originated by Superior Court indictment charging (1) the felonious breaking and entering a building occupied by C. W. Morris; and (2) the larceny of his property as follows: cigarettes; Two Dollars in pennies; 4 boxes 12-guage shotgun shells; 4 boxes 16-guage shotgun shells; 2 boxes 20-guage shotgun shells; and 50 ball point pens of the value of $75.00.

The defendant, through counsel of his own selection, announced his readiness for trial and entered a plea of not guilty. After the selection of the jury, the defendant "moved for a continuance . . . on the grounds his uncle . . . was in jail charged with murder, and a brother . . . was charged with larceny of an automobile and assault, and that the publicity given to the crimes committed by these two relatives would prevent . . . a fair trial." The court overruled the motion.

The State introduced evidence of the breaking, the description of the articles missing, the defendant's admission to the investigating officer before his arrest that he had participated in the breaking and the theft. When this admission was first offered, the court conducted inquiry in the absence of the jury and ascertained the admissions were competent and voluntarily made, and permitted their introduction in evidence. At the conclusion of the State's testimony and the court's charge, the jury returned a verdict of guilty of breaking and larceny. The court imposed a judgment of five years in prison. The defendant gave notice of appeal but failed to perfect it within the time allowed. We granted *certiorari.*

STATE *v.* LEAKE.

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

Lee W. Settle, John D. Xanthos for defendant appellant.

PER CURIAM. We have carefully examined the defendant's assignments of error and find them without merit. The motion for continuance was addressed to the discretion of the court. The motion for a directed verdict was properly denied. The court's charge presented fairly the burden the law required the State to carry before the jury could render a verdict of guilty on either of the charges. Error in the trial or reason why the verdict and judgment should be disturbed are not disclosed.

No error.

MOORE, J., not sitting.

STATE v. CARL LEAKE AND MABEL LEAKE.

(Filed 16 June, 1966.)

APPEAL by defendants from *Burgwyn, E.J.*, December, 1965 Criminal Session, ROBESON Superior Court.

The defendants, Carl Leake and Mabel Leake, were tried and convicted on a bill of indictment containing two felony counts. The first count charged that the appellants, together with three other members of their family (naming them) and others not named, conspired to burn the dwelling house occupied by the named defendants. The second count charged those named in the first count with the substantive offense of actually burning the building.

The evidence disclosed that the appellants, husband and wife, prior to a sale had owned the equity of redemption in the tract of land on which the dwelling house was located. A foreclosure sale had been held under the power contained in their deed of trust, the land had been sold, and the defendants had been notified to vacate. The State's evidence consisted of circumstances, including the evidence of removal and concealment of much of the household immediately prior to the fire. There was direct evidence of incriminating admissions.

The defendants' motion to dismiss was sustained and the action dismissed as to all defendants except Carl Leake and Mabel Leake,

the appellants, both of whom testified as defense witnesses, denying guilt.

The jury returned verdicts of guilty on both counts against both defendants. From the judgments of imprisonment, both appealed.

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

F. D. Hackett for defendant appellants.

PER CURIAM. This case is a repeat of the usual complaints that incriminating admissions should have been excluded as involuntary: that the court in its charge failed to comply with G.S. 1-180. The evidence presented issues of fact which the jury resolved against the defendants. In the charge the court explained the principles of law involved and properly related them to the evidence, and properly placed the burden on the State of proving all the essential elements of the offenses beyond a reasonable doubt. Review of the record fails to disclose any error of law or any reason why the verdicts and judgments should be disturbed.

No error.

MOORE, J., not sitting.

STATE v. ERTLE EMANUEL AND CARL STANTLIFF.

(Filed 16 June, 1966.)

1. Receiving Stolen Goods § 5—

Where, in a prosecution of defendant for receiving stolen goods with knowledge that they had been stolen, the only evidence against the defendant is testimony that stolen goods were found on this defendant's premises shortly after they had been stolen, testimony of a codefendant tending to implicate defendant having been admitted solely against such codefendant, nonsuit should have been allowed.

2. Criminal Law § 99—

Exculpatory statements offered in evidence by the State are properly considered on motion for nonsuit.

MOORE, J., not sitting.

APPEAL by defendant Stantliff from *Braswell, J.*, Regular October-November Session 1965 of ROBESON.

The appellant, Carl Stantliff, and his codefendant were charged in a bill of indictment containing four counts: (1) That on 6 April 1965, the defendants did conspire to feloniously break and enter the dwelling house of one Addie Locklear, (2) that on 6 April 1965, the defendants did break and enter the aforesaid dwelling of Addie Locklear with the felonious intent to steal and carry away the goods and merchandise of the said Addie Locklear, (3) that on said date the defendants did break and enter the dwelling of Addie Locklear and did steal and carry away a 50-pound stand of lard and two country hams, and (4) that the defendants did feloniously receive and have said lard and hams, the property of Addie Locklear, the said defendants knowing the same to have been stolen.

The State's evidence tends to show that during the nighttime on 6 April 1965 Ertle Emanuel, one of the defendants herein, and James Spivey broke into and entered the unoccupied dwelling of Addie Locklear; that Emanuel and Spivey took from the Locklear dwelling two cured hams and one 50-pound stand of lard; that the stolen goods were put in a smoke house located near the filling station of the defendant Stantliff; that Stantliff's filling station is located within sight of the Locklear home.

The stolen goods were found in Stantliff's smoke house on the morning of 7 April 1965 by deputy sheriff Freeman; that the appellant Stantliff denied knowing the stolen items were on his property or how they got there.

The deputy sheriff testified to certain statements made to him by the defendant Emanuel which tended to implicate the defendant Stantliff and further tending to show that Stantliff planned the theft. This evidence, however, was admitted only against the defendant Emanuel.

Neither Emanuel nor Stantliff testified at the trial below, but defendant Stantliff offered evidence tending to show that he spent the entire night of 6 April 1965 in Lumberton and did not go to his filling station until early on the morning of 7 April 1965.

At the close of the State's evidence both defendants moved for judgment as of nonsuit on all four counts in the bill of indictment. The motion was denied as to the defendant Emanuel, but as to defendant Stantliff, his motion was allowed as to the first two counts in the bill of indictment and denied as to the third and fourth counts.

The jury returned a verdict against the defendant Stantliff of guilty of receiving stolen goods knowing them to have been stolen. He appeals, assigning error.

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

Musselwhite and Musselwhite and J. H. Barrington, Jr., for defendant appellant.

PER CURIAM. The defendant assigns as error the failure of the court below to allow his motion for judgment as of nonsuit on the fourth count, made at the close of all the evidence.

There was ample evidence to go to the jury against the defendant Stantliff on the fourth count had the confession of Emanuel been admissible against the defendant Stantliff. Emanuel's statement, however, was admitted only against him and excluded as to Stantliff. Therefore the only evidence we have against Stantliff is the possession of the stolen goods. Furthermore, the State introduced in evidence the exculpatory statement of Stantliff.

In our opinion the case of *State v. Hoskins,* 236 N.C. 412, 72 S.E. 2d 876, is controlling on the record before us and the motion for judgment as of nonsuit should be allowed.

Reversed.

MOORE, J., not sitting.

JAMES D. HOBBS AND JOHN C. GRIER, JR., ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND TAXPAYERS OF MOORE COUNTY v. COUNTY OF MOORE AND JOHN M. CURRIE, W. LYNN MARTIN, J. M. PLEASANTS, W. SIDNEY TAYLOR AND WILEY PURVIS, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF MOORE COUNTY, S. C. RIDDLE, J. HUBERT McCASKILL AND COY S. LEWIS, SR., CONSTITUTING THE MOORE COUNTY BOARD OF ELECTIONS; AND T. WADE BRUTON, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA.

(Filed 6 July, 1966.)

1. Statutes § 3—

A statute which is so loosely and obscurely drawn as to be incapable of enforcement is void; but a statute is presumed to have meaning and will be upheld if its meaning is ascertainable with reasonable certainty by proper construction.

2. Statutes § 4—

A statute will not be declared unconstitutional unless it is clearly so.

3. Statutes § 5—

Where a statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted; the language of a statute will be interpreted so as to avoid an absurd consequence.

4. Statutes § 11—

Where there is a conflict between a general statute and a subsequently enacted local statute, the local act prevails in the area where it is intended to apply.

5. Statutes § 5—

In ascertaining the intent of the General Assembly, the terms of a statute will be construed in the light of related statutes then existing, which must be deemed to have been known to, and considered by, the General Assembly.

6. Schools §§ 3, 7—

Chapter 1051 of the Session Laws of 1965, providing for the holding of an election in a designated county to determine whether school administrative units in the county should be merged, for the appointment and election of members of the county board of education if the merger was approved, and whether the county commissioners should be authorized to levy a county-wide school supplemental tax not to exceed an annual rate of 30 cents per 100 dollars of assessed property valuation, *held* susceptible to definite interpretation and therefore not void for ambiguity or indefiniteness.

7. Statutes § 2—

A school administrative unit is not a school district within the meaning of Art. II, § 29 of the North Carolina Constitution, and an Act providing for the merger of two or more school administrative units in a county upon the assent of the county commissioners, and the approval of the merger by a majority of the voters participating in the election, does not violate this section of the Constitution.

8. Constitutional Law § 20—

A statute requiring that one member of a newly constituted board of education should be appointed from each of the five districts theretofore established by law and that two other members of the board of education should be appointed from the county at large, and that such members should serve until their successors, subject to the same geographical limitations, are elected and qualified, the election of all such members to be by vote of the county as a whole, does not offend the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution.

9. Public Officers § 5—

A statute specifying that one member of a new county board of education must be appointed from the members of the existing county board of education and a designated county administrative unit, does not offend the constitutional proscription against dual office holding, Constitution of North Carolina Art. XIV, § 7, there being no provision in the statute that those selected from the sources stipulated and accepting the appointment by taking the oath of office should continue to hold their former offices.

10. Statutes § 4—

A statute may be constitutional in part and unconstitutional in part, and if the unconstitutional provisions are separate and the statute, with such sections omitted, constitutes a complete statute capable of being executed in accordance with the apparent legislative intent, the invalid part may be rejected and the valid part may stand.

11. Schools § 9; Constitutional Law § 4—

Provisions of a statute giving school authorities permissive power to acquire a school site up to 75 acres by gift, purchase or condemnation will not be held void as being in violation of G.S. 115-125 in an action by plaintiffs who do not assert that any property owned by them, or any member of the class they purport to represent, is about to be condemned or, indeed, that any property is to be condemned under the statute. Further, the statute attacked was a special statute enacted after the general statute proscribing the condemnation of a site in excess of 30 acres.

12. Appeal and Error § 6—

The Supreme Court on appeal from judgment sustaining the validity of the statute attacked will not determine questions not adjudicated in the court below and which are not necessary to the determination of the correctness of the judgment appealed from.

13. Taxation § 12—

Where there is no evidence to support any finding of intent by the school authorities to use the proceeds of a bond issue for purposes not authorized by the bond order, the question is not presented for determination.

14. Appeal and Error § 38—

Assignments of error not brought forward in appellants' brief and in support of which no argument is had nor authorities cited, are deemed abandoned.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Gambill, J.*, January 1966 Civil Session of MOORE.

The plaintiffs are citizens and taxpayers of Moore County, and residents of the Southern Pines School Administrative Unit and the Pinehurst School Administrative Unit, respectively. They brought this suit for a determination that Chapter 1051 of the Session Laws of 1965 is unconstitutional and void, and for the issuance of an injunction enjoining the defendants from proceeding with the holding of an election pursuant to such Act and from doing or performing any other act or thing pursuant thereto. They sought a temporary restraining order to prevent the holding of the election provided for under the Act, but this was denied and the election was held.

Thereafter, the matter came on for final hearing before the judge, without a jury, it being stipulated that the court might find the

facts, enter its conclusions of law, and render judgment upon the basis of the pleadings and the stipulations of the parties. Upon such hearing, the court below entered its judgment, reciting findings of fact and conclusions of law. It adjudged the Act constitutional, ruled that the members of the Moore County Board of Education, appointed pursuant to the Act, were duly appointed, qualified and acting, denied the injunctive relief prayed for and ordered the action retired from the civil issue docket, the plaintiffs to pay the cost.

From this judgment the plaintiffs appeal, assigning a large number of alleged errors.

The Act in question was adopted by the General Assembly on 14 June 1965. At that time, the county was divided into three School Administrative Units — Southern Pines, Pinehurst, and the Moore County Administrative Unit, the last including all of the county except the areas within the two city units. For many years prior to 1 April 1965, the Moore County School Administrative Unit included thirteen school attendance districts, nine with reference to the schools attended by white children and four with reference to schools attended by Negro children, the four overlapping and including all the area included in the nine. These school attendance districts had been created by the State Board of Education, from time to time, at the request of the then Moore County Board of Education. On 1 April 1965, acting upon the petition of the then Moore County Board of Education, the State Board of Education abolished all county school districts previously established in the Moore County School Administrative Unit, so that on and after 1 April 1965, there was only one school attendance district in the Moore County Administrative Unit.

Prior to the passage of the Act in question, a valid school supplement tax was levied and collected upon property within the Southern Pines School Administrative Unit, pursuant to the vote of the people therein in elections held in prior years. Similarly, a valid school supplement tax was in effect, levied and collected upon property in the Pinehurst School Administrative Unit. School supplement taxes were also then in effect, levied and collected upon property in the Aberdeen School District and in the West End School District, these districts being within the Moore County School Administrative Unit. There was no school supplement tax in effect in any other district of that unit. The rates of these school supplement taxes varied as between the several units or districts.

On or about 23 August 1963, bonds were issued, pursuant to a bond order adopted by the County Board of Commissioners, in the total amount of Three Million Dollars, for the erection in each of

the three administrative units of various new school buildings and additions to and improvements of existing school buildings. The bond order provided that, of the total, $2,195,700 "shall be used to finance the cost of erecting such new buildings or reconstructing or enlarging such existing buildings in the Moore County School Administrative Unit or to finance the cost of acquiring lands or furnishings or equipment necessary for such purposes," $249,600 "shall be used" for such purposes in the Pinehurst City School Administrative Unit, and $554,700 "shall be used" for such purposes in the Southern Pines City School Administrative Unit. The order also provided for the annual levy and collecting of a tax sufficient to pay the principal of and interest on such bonds. The order was to take effect when approved by the voters of the county at an election, which was held and at which the bond issue was approved.

In 1943 the General Assembly adopted "an Act creating five districts for the nomination of members of the Board of Education of Moore County." Chapter 76 of the Session Laws of 1943.

A summary of the Act of 1965, Chapter 1051 of the Session Laws of 1965, the object of the plaintiffs' attack, is set forth in the opinion. In brief, that Act provided for the holding of an election in Moore County to determine (1) whether the Southern Pines, Pinehurst and Moore County School Administrative Units should be merged, and (2) whether the Board of Commissioners of Moore County should be authorized to levy a county-wide school supplement tax not to exceed the annual rate of thirty cents per one hundred dollars of assessed property valuation. The election was held. The merger was approved by a majority vote. The tax was rejected by a majority vote.

Thereupon, the Board of Commissioners of the County appointed a new Moore County Board of Education, consisting of seven members, one from each of the five districts referred to in the 1943 Statute, including a member of the Board for the County Administrative Unit, and two at large, one of these, at the time of appointment to the new County Board of Education, being a member of the Board of Education for the Pinehurst Administrative Unit and the other being a member of the Board of Education for the Southern Pines Administrative Unit. These seven members thereupon took their oaths of office as members of the Moore County Board of Education. This seven member Board thereupon elected its chairman from its membership.

The Moore County Administrative Unit has $717,000, remaining from its share of the proceeds of the 1963 bond issue, plus $613,000, allotted to it from State funds, making a total of $1,330,000 now in its hands available for school building construction. Within

the past two years it constructed two high schools in the northern part of the county, each adequate to accommodate 900 students, and each costing approximately $1,300,000. The Pinehurst and Southern Pines Administrative Units have substantial funds remaining from their respective shares of the bond issue and of the allotment of State funds. The funds so available to the Moore County Administrative Unit would be sufficient to construct a high school building, adequate to accommodate all high school pupils residing within the area of that unit and not presently accommodated at the other two new high school buildings and those funds, plus the funds so remaining in the hands of the Pinehurst and Southern Pines Units, would be sufficient to construct a consolidated high school building, adequate to take care of the high school pupils from those units as well, according to the evidence offered by the defendants.

The substance of the plaintiffs' complaint is that, Chapter 1051, Session Laws of 1965, is "invalid, unconstitutional, and void" because: (1) Its provisions for the appointment and election of the members of the new County Board of Education are vague and meaningless so that they cannot be carried into effect; (2) the residents of the Pinehurst and Southern Pines Administrative Units are not afforded representation on the new Board comparable to that afforded the residents of the area of the Moore County School Administrative Unit; (3) the Act provides authority in the Board to condemn a site for a new high school extending to a total of 75 acres, which is contrary to the general law contained in G.S. 115-125; (4) the provisions of the Act for the continuation of school supplement taxes, heretofore authorized, constitute an unlawful, unequal and unconstitutional taxation of the residents of the areas in which such taxes were previously adopted; (5) the Act violates Article II, Section 29, of the North Carolina Constitution in that it is a special or local act establishing a school district or changing the lines thereof; (6) the provision requiring that one member of the Board of Education of each of the existing administrative units be a member of the new County Board of Education violates the provisions of Article XIV, Section 7, of the North Carolina Constitution relating to dual office holding; and (7) the newly constituted County Board of Education does not have sufficient funds to build an adequate consolidated high school as directed in the Act and intends, unlawfully, to use proceeds of the 1963 bond issue for such purpose. The answer alleges that the defendants have available sufficient funds for the implementation of all provisions of the 1965 Act with reference to the construction of schools.

Smith, Leach, Anderson & Dorsett by Henry A. Mitchell, Jr., and Pollock & Fullenwider by R. F. Hoke Pollock for plaintiff appellants.

Boyette and Brogden and William D. Sabiston, Jr., for defendant appellees.

LAKE, J. The first step in the solution of this matter is to construe the 1965 Act, Chapter 1051 of the Session Laws of 1965. It is well established that an act of the General Assembly must be held void if it is so loosely and obscurely drawn as to be incapable of enforcement. *State v. Morrison,* 210 N.C. 117, 185 S.E. 674; *State v. Partlow,* 91 N.C. 550; *Drake v. Drake,* 15 N.C. 110. In the *Drake* case, Ruffin, C.J., said:

> "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it, be itself intelligible."

However, as was said in *State v. Partlow, supra,* "It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable." It is also well established that this Court will not adjudge an act of the General Assembly unconstitutional unless it is clearly so. *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187. Where a statute is susceptible of two interpretations, one of which will render it constitutional and the other will render it unconstitutional, the former will be adopted. *City of Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902; *Finance Co. v. Leonard,* 263 N.C. 167, 139 S.E. 2d 356; *Nesbitt v. Gill,* 227 N.C. 174, 41 S.E. 2d 646. If possible, the language of a statute will be interpreted so as to avoid an absurd consequence. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *State v. Scales,* 172 N.C. 915, 90 S.E. 439. A statute is never to be construed so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms. *Comrs. v. Prudden,* 180 N.C. 496, 105 S.E. 7. "A statute or amendment formally passed is presumed and if permissible should be construed so as to have some meaning." *Mitchell v. R. R.,* 183 N.C. 162, 110 S.E. 859. See also *State v. Humphries,* 210 N.C. 406, 186 S.E. 473. Where there is conflict between a general statute and a local act, subsequently adopted, the local act prevails within the area where it is intended to apply. *Kornegay v. Goldsboro, supra.*

Applying these principles, we turn to the Act in question, Chap-

ter 1051 of the Session Laws of 1965. It is lengthy and by no means free from ambiguity. Nevertheless, its meaning can be ascertained from its own terms read in the light of existing statutes which must be deemed to have been known to and considered by the General Assembly. Omitting those provisions which, by the terms of the Act, itself, were to take effect only if the voters approved the county-wide school supplement tax, which tax they rejected, passing over those provisions which are not germane to the controversy before us, using our own numbering of its provisions, and quoting the exact language only as indicated, we construe this statute to mean:

(1) The Board of County Commissioners may, at a date in 1965, to be fixed by them, cause to be held in Moore County an election on the issue of whether Southern Pines, Pinehurst and Moore County Administration Units shall be merged into a "single county administrative unit," and a special supplemental school tax levied on all property in the county at a rate not to exceed thirty cents per one hundred dollars of assessed value.

(2) In the event that the majority vote shall be in favor of the merger of the three administrative units, the Board of County Commissioners shall appoint a new County Board of Education consisting of seven members.

(3) One member of the new Board shall be appointed from each of the five districts established by Chapter 76 of the Session Laws of 1943, as amended by the Session Laws of 1957 and the Session Laws of 1959, and the other two members shall be appointed from the county at large.

(4) Of the seven members so appointed, one shall be appointed from the membership of the Board of Education of the Moore County Administrative Unit as of 14 June 1965, one shall be appointed from the membership of the Board of Education of the Southern Pines Administrative Unit as of that date, and one shall be appointed from the membership of the Board of Education of the Pinehurst Administrative Unit as of that date.

(5) The seven members of the newly appointed Moore County Board of Education shall qualify for office within seven days after their appointment.

(6) The new Moore County Board of Education, so constituted, shall thereupon have jurisdiction and control over and the duty of administering the public schools of the Moore County Administrative Unit until 30 June 1967, at which time such Board shall assume jurisdiction over and control and ad-

minister all of the public schools of Moore County, including those located within the present area of the Southern Pines Administrative Unit and those located within the present area of the Pinehurst Administrative Unit.

(7) The Board of Education of the Pinehurst Administrative Unit and the Board of Education of the Southern Pines Administrative Unit shall continue to administer the public school systems of those units until 30 June 1967, on which date the said two Boards of Education shall cease to exist, the terms of their members shall terminate and they shall transfer title to all property vested in them to the new Moore County Board of Education.

(8) The members of the new Moore County Board of Education, so appointed, shall serve until their successors are elected and qualified.

(9) At the time of qualifying for office, the members of the new Moore County Board of Education shall hold the first meeting of the Board and shall elect one of its members as its chairman.

(10) The new Moore County Board of Education, so constituted, shall exercise all powers and have all duties heretofore vested in and imposed upon Boards of Education by the General Statutes of North Carolina, except as changed or modified by this Act.

(11) "For the purpose of representation on the Board of Education, Moore County shall be divided into three areas," described as Area I, Area II and Area III, the territory of each area being specified.

(12) On the first Tuesday in April 1967, and biennially thereafter, the County Board of Elections shall conduct an election of members of the Moore County Board of Education, all qualified voters residing in Moore County being eligible to vote therein, and the election to be nonpartisan.

(13) At the 1967 election, there shall be elected seven members, one of whom shall be a resident of each of the said five districts established by Chapter 76 of the Session Laws of 1943, as amended by the Session Laws of 1957 and the Session Laws of 1959, and the other two shall be elected from the county at large; that is, these two may be residents of any part of Moore County.

(14) At each such election, all members then to be elected shall be voted upon and elected by the voters of the entire county, voting at large.

(15) The three candidates receiving the largest number of votes at the 1967 election shall be elected for four year terms, the four candidates receiving the next highest number of votes shall be elected for two year terms and in subsequent elections all members, then to be elected, shall be elected to four year terms.

(16) At any such election, any qualified voter, residing in Moore County and eligible under the provisions of G.S. 115-125, may become a candidate for the Moore County Board of Education upon paying the filing fee of five dollars ($5.00) and filing a notice of candidacy with the Moore County Board of Elections between January 1 and March 1 of the year in which the election is held, such notice of candidacy to state the name of the candidate and the "area" in which he resides *(i.e.,* the district established by Chapter 76 of the Session Laws of 1943, as amended).

(17) If, in any year in which members of the Moore County Board of education are to be elected, the number of candidates filing as candidates from any district (the entire county being a district with reference to "at large" candidates) exceeds twice the number of members to be elected from such district, a primary election shall be conducted by the Moore County Board of Elections two weeks prior to the regular election, in which primary election all qualified voters residing in the county shall be eligible to vote.

(18) The two candidates in each such district receiving the highest number of votes in such primary shall be declared nominated as candidates to be voted upon in the regular election to be held two weeks after the primary.

(19) Vacancies upon the new Moore County Board of Education shall be filled by appointment by the Board of County Commissioners, such appointment to run to the next election of members of the Moore County Board of Education, at which time the vacancy shall be filled by election for the remaining portion of the unexpired term, if any.

(20) The County Board of Education, so constituted, "shall proceed to consolidate the high schools of the Southern Pines, Pinehurst, West End and Aberdeen Areas and to build and construct a consolidated high school on some convenient site," for which site it may acquire by purchase, gift or condemnation up to 75 acres, such condemnation proceeding, if any, to be conducted in accordance with Chapter 40 of the General Statutes.

(21) "All school district taxes and supplemental taxes heretofore authorized shall continue in full force and effect until and unless modified according to law."

(22) All elections authorized by this Act shall be conducted by the Moore County Board of Elections in accordance with the provisions of Chapter 163 of the General Statutes governing general elections, except that such elections shall be nonpartisan and absentee voting shall not be permitted.

(23) Expenses of all elections shall be paid by the Board of County Commissioners from the county's general fund.

Article II, Section 29, of the Constitution of North Carolina provides:

"The General Assembly shall not pass any local, private, or special act or resolution * * * establishing or changing the lines of school districts * * *"

Article IX, Section 3, of the Constitution provides:

"Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year * * *"

The term "school district" in Article II, Section 29, means a "district" provided for in Article IX, Section 3. That is, a "school district" is an area within a county in which one or more public schools must be maintained. It is so defined in G.S. 115-7. The three areas established by the present statute are not "school districts." The statute declares that these areas are "for the purpose of representation on the Boards of Education." These "Areas" relate to the residence of members of the Board of Education, not to the location of schools. An "administrative unit" is not a "school district" within the meaning of Article II, Section 29. See G.S. 115-4. Consequently, the merger of two or more administrative units is not a changing of school district lines. Even if it were, this Act does not merge administrative units. It provides machinery by which they may be merged. The merger requires both the assent of the Board of County Commissioners to the holding of an election and the approval of the merger by the majority of the voters participating therein. For this reason, also, the Act does not violate Article II, Section 29, of the Constitution of North Carolina. *Peacock v. Scotland County,* 262 N.C. 199, 136 S.E. 2d 612; *Fletcher v. Comrs. of Buncombe,* 218 N.C. 1, 9 S.E. 2d 606.

Having been able to arrive at the above interpretation of the provisions of this Act from the language of the Act, itself, and the provisions of Chapter 76 of the Session Laws of 1943, as amended,

we hold that the Act now before us is not void on the ground of vagueness and uncertainty.

We find no merit in the contention, advanced in the appellants' brief, that this Act violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as interpreted in *Baker v. Carr,* 369 U.S. 186, 82 S. Ct. 691; *Gray v. Sanders,* 372 U.S. 368, 83 S. Ct. 801; *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362. Under this Act, every member of the Board of Education is to be elected by the voters of the entire county voting at large. Since two of the seven members are, themselves, to be "at large" members, it follows that three of the seven members comprising the entire Board may be residents of the same election district referred to in this statute, if the people of the county, voting at large, see fit to elect them.

The appellants contend that this statute provides for dual office holding, forbidden by Article XIV, Section 7, of the Constitution of North Carolina, since it specifies that one member of the new County Board of Education must be appointed from the members of the existing Board of Education of the Moore County Administrative Unit, one from the members of the existing Board of the Southern Pines Administrative Unit and one from the members of the existing Board of the Pinehurst Administrative Unit. This contention is without merit. When such appointee took the oath of office as a member of the newly constituted County Board of Education, his office as a member of the board of the administrative unit was automatically vacated. The provision of the Act in question merely directs the Board of County Commissioners to certain sources from which they are to select appointees to the Moore County Board of Education. The statute does not provide that one selected from such source, and accepting the appointment by taking the oath of office, shall continue to hold his former office. *Harris v. Watson,* 201 N.C. 661, 161 S.E. 215

The plaintiffs do not seek to enjoin the defendants from putting into effect any specific provision of the Act. Their suit is to have the entire Act declared invalid. In addition to the contentions heretofore noted, they assert that it is invalid in its entirety because (1) it contains a provision authorizing condemnation of a school site containing up to 75 acres, whereas G.S. 115-125 provides for the acquisition by condemnation of a school site not to exceed 30 acres; and (2) it provides that school supplement taxes heretofore authorized in certain parts of the county shall continue in effect.

In *Constantian v. Anson County,* 244 N.C. 221, 93 S.E. 2d 163, Bobbitt, J., speaking for the Court, quoted with approval the following statement found in 82 C.J.S., Statutes, § 92:

"A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement."

In *Lowery v. School Trustees,* 140 N.C. 33, 52 S.E. 267, Connor, J., speaking for the Court, said:

"* * * If the general scope and purpose of the statute are constitutional, and constitutional means are provided for executing such general purpose, the entire statute will not be declared void, because some one or more of the details prescribed, or minor provisions incorporated, are not in accordance with the Constitution, provided such invalid parts may be eliminated without destroying or materially affecting the general purpose. The rule is thus stated: 'Where the unconstitutional portions are stricken out and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained.' 26 Am. & Eng. Enc. (2 Ed.), 570, in which a large number of illustrative cases are cited. This Court has frequently recognized and enforced the rule."

See also: *Power Co. v. Clay County,* 213 N.C. 698, 97 S.E. 603; *Bank v. Lacy,* 188 N.C. 25, 123 S.E. 475; *R. R. v. Reid,* 187 N.C. 320, 121 S.E. 534; *Comrs. v. Boring,* 175 N.C. 105, 95 S.E. 43.

Even if it should be determined that the provisions of this Act with reference to the authority to condemn a site of 75 acres and with reference to the continuation of school supplement taxes heretofore in effect are invalid, the remaining provisions of the Act are capable of standing alone and of being carried into effect, and there is nothing in this record or appearing upon the face of the Act, itself, to suggest that the General Assembly would not have adopted such remaining provisions had the two here in question been omitted.

It is not necessary for us now to determine, and we do not determine, whether those two provisions of the Act are valid. As to the condemnation of the school site, the plaintiffs do not assert that any property owned by them, or by any member of the class they purport to represent, is about to be condemned. They do not, indeed, assert that any property is to be condemned. The provision of the Act is that the defendants may acquire a site, up to 75 acres, by gift, purchase or condemnation. It is to be noted, furthermore, that the present statute was enacted after the general statute upon which the appellants rely. See *Kornegay v. Goldsboro, supra.* The appellants do not contend that this portion of the Act, in itself, violates any provision of the Constitution of North Carolina.

Likewise, it is not necessary for us now to determine, and we do not determine, whether the provision of the Act for the continuation of school supplement taxes heretofore authorized is valid, or what use may be made of the proceeds of such taxes. To declare the entire Act unconstitutional and void, as the plaintiffs would have us do, would leave in effect the very taxes of which they now complain. This Act makes no change in those taxes, and makes no provision as to the use to be made of the proceeds thereof.

The appellants also contend that the proceeds of the 1963 bond issue allocated to the Pinehurst and Southern Pines Administrative Units cannot be used by the defendants for the construction of the consolidated high school which the statute here in question directs the new Moore County Board of Education to construct. We are not required upon this record to determine that question. The statute does not purport to deal with it. The judgment from which this appeal is taken does not purport to determine it. It contains no finding of fact with reference to any contemplated use of such proceeds of the 1963 bond issue. The allegation of the complaint that the Board does not have sufficient funds with which to build such high school is denied in the answer. The record does not contain evidence sufficient to support a finding of an intent by the defendants to use for such construction that portion of the proceeds of the bonds heretofore allocated to the Pinehurst and Southern Pines Administrative Units. For a recent and thorough discussion of the use of proceeds of a bond issue for the construction of a school other than those contemplated when the bonds were approved by the voters, see *Dilday v. Board of Education, ante* p. 438.

All assignments of error relating to the rulings of the court below on the admissibility of evidence and to the findings of fact made by the court have been abandoned, these not having been brought forward into the appellants' brief and no argument being made or authorities cited therein in support of them. We have, nevertheless, examined all of them and find no basis therein for disturbing the judgment rendered below. We have also considered each assignment of error brought forward into the briefs, including those not specifically discussed in our opinion, and find them without merit.

Affirmed.

MOORE, J., not sitting.

THE SAFEGUARD INSURANCE COMPANY v. WILMINGTON COLD STORAGE COMPANY, A N. C. CORPORATION; AND C. L. AUSTIN, HERBERT W. CANNADY, JULIEN H. SQUIRES AND ALEXANDER P. MERCER, D/B/A PORT CITY COLD STORAGE COMPANY, A CO-PARTNERSHIP.

(Filed 6 July, 1966.)

1. Trial § 21—

Upon motion for compulsory nonsuit, plaintiff's evidence is to be taken as true and considered in the light most favorable to it, giving it the benefit of every fact and inference of fact reasonably to be drawn therefrom consistent with the allegations of its complaint.

2. Pleadings § 29—

Admissions in the answer of facts alleged in the complaint are judicial admissions conclusively establishing the admitted facts for all purposes connected with the trial without the necessity of introducing the admitted facts in evidence.

3. Insurance § 96.1—

An insurer paying to insured a loss under the obligations of its policy for property damaged by the tortious act of another is subrogated to the rights of the insured against the tort-feasor to the extent of the loss paid by insurer.

4. Same—

Insurer may establish its right to maintain its action as subrogee of the insured by the introduction in evidence of its cancelled check issued to insured in payment of the loss and the receipt signed by insured stating that it was in full satisfaction of claims under the designated policy and subrogating insurer to any rights of insured against third parties causing the damage, and objection to such evidence on the ground that the policy itself was not offered in evidence by insurer is untenable.

5. Parties § 2—

An insurer who has paid insured the entire loss properly brings action in its own name against third person tort-feasors allegedly causing the loss.

6. Bailment § 1—

Warehousemen accepting property for cold storage under contract providing for the payment by the owner of monthly fees for such service, are bailees for hire.

7. Bailment § 3—

Bailees for hire are not insurers of the property entrusted to their possession, but are under duty to exercise ordinary care to protect the property against loss, damage or destruction, and the duty to return the property in as good condition as it was when received by them, and are liable for negligence proximately causing loss, damage or destruction of the property.

8. Negligence § 1—

While a person may not be held liable for damage resulting from an "act of God" when there is no fault or negligence on his part, he may be

held liable for his own negligence which concurs with an "act of God" in producing the damage.

9. Negligence § 7—

What is the proximate cause of an injury is ordinarily a question for a jury, to be determined as a fact from the attendant circumstances, and conflicting causations arising from the evidence carry the case to the jury.

10. Appeal and Error § 51—

On appeal from compulsory nonsuit, any incompetent evidence admitted at the trial must be considered in passing upon the sufficiency of the evidence, since, if the incompetent evidence had been excluded, plaintiff might have introduced competent evidence upon the point.

11. Bailment § 8— Evidence held for jury on issue of bailees' negligence in failing to take steps to mitigate damage resulting from act of God.

Evidence and judicial admissions tending to show that bailor delivered bales of raccoon skins in a dry and good condition to the original bailee for hire, that while the property was in the exclusive control of this bailee a storm damaged the roof of the warehouse in which the goods were stored, that a few days thereafter the successor of the original bailee purchased the warehouse business and had exclusive control of the property until the bales of skins were surrendered to the bailor more than a month thereafter, that the skins delivered were damaged by mold and had the appearance of having been wet, and that neither bailee inspected the bales after the storm and took no steps to mitigate damage already caused by water from the storm, and that neither bailee notified bailor of their wet condition so that he could take proper precaution to prevent further deterioration, *held* sufficient to be submitted to the jury on the question of negligence on the part of each bailee concurring with the act of God in proximately causing the loss.

12. Trial § 23—

A *prima facie* case takes the issue to the jury, but the ultimate burden of establishing the cause of action remains upon plaintiff.

MOORE, J., not sitting.

DENNY, E.J., took no part in the consideration and decision of this case.

FROM a judgment of compulsory nonsuit of plaintiff's action entered at the close of plaintiff's evidence by *Mintz, J.*, November 1965 Civil Session of NEW HANOVER, plaintiff appeals to the Supreme Court.

Aaron Goldberg and David H. Scott for plaintiff appellant.

Hogue, Hill & Rowe by C. D. Hogue, Jr., for defendant appellee Wilmington Cold Storage Company.

Carter, Murchison, Fox & Newton by Oliver Carter for defendant appellees C. L. Austin, Herbert W. Cannady, Julien H. Squires

and Alexander P. Mercer, d/b/a Port City Cold Storage Company, a partnership.

PARKER, C.J. Plaintiff assigns as error the entry of the judgment of compulsory nonsuit of its action entered at the close of its evidence.

In considering whether the court erred in entering the judgment of compulsory nonsuit here, plaintiff's evidence is to be taken as true, and its evidence must be considered in the light most favorable to plaintiff, giving it the benefit of every fact and inference of fact reasonably to be drawn therefrom consistent with the allegations of its complaint. *Benton v. Montague,* 253 N.C. 695, 117 S.E. 2d 771; 4 Strong's N. C. Index, Trial, § 21.

Considering plaintiff's evidence in accordance with these rules, it tends to show the following facts:

T. T. Ward on 27 May 1958 stored 39 bales of raw raccoon skins in a cold storage warehouse owned and operated for hire by Wilmington Cold Storage Company in Wilmington, North Carolina. The 39 bales contained about 20,000 raw raccoon skins, and each bale was a little smaller than a 500-pound bale of cotton. The raw raccoon skins in these 39 bales were in good condition when he delivered them to the Wilmington Cold Storage Company. He knew he had to get these raw raccoon skins in cold storage during the hot summer months. These bales of raw raccoon skins were stored on the top or fifth floor of the cold storage warehouse, on top of two-by-fours standing on edge with strips across the two-by-fours so that the bales of raccoon skins were about four inches above the floor. On 5 July 1958 Ward removed one bale of the raccoon skins from the cold storage warehouse, and the condition of the raccoon skins in that bale was good, and the raccoon skins were not damaged at all.

On 19 December 1958 Ward withdrew the remaining 38 bales of raw raccoon skins from the cold storage warehouse. He opened the bales and examined the raw raccoon skins; at that time the raccoon skins were in a bad moldy condition. Ward testified: "When the bales were delivered to my place of business, with the exception of the one they told me was wet, the outside appearance of the other bales indicated to me that they had been wet; they were moldy."

Plaintiff alleged in its verified complaint, and both defendants admitted in their separate verified answers, facts in substance as follows: On 1 October 1958 defendants C. L. Austin, Herbert W. Cannady, Julien H. Squires, and Alexander P. Mercer, d/b/a Port City Cold Storage Company, a co-partnership, bought the cold storage warehouse in which Ward's raw raccoon skins were stored from

Wilmington Cold Storage Company, and began the operation of a cold storage warehouse for hire. Plaintiff alleged in its verified complaint "that on or about the 27th day of September 1958, while the furs were still in said storage, a storm known as Hurricane Helene struck Wilmington, N. C., which was known to the defendants, parties to this action," and defendant Wilmington Cold Storage Company admitted in its answer "that a storm known as Hurricane Helene struck Wilmington, North Carolina on the 27th day of September 1958. All other allegations of paragraph 13 of the complaint, not herein admitted, are denied." Plaintiff alleged in its verified complaint "that this storm did so much damage to the roof covering the warehouse building of the defendant Wilmington Cold Storage Company in which the furs were stored that it had to be replaced by a new roof, all of which was known to the defendants, parties to this action," and defendant Wilmington Cold Storage Company admitted in its answer "that the storm did some damage to the roof of the building in which the coon skins were stored; it is further admitted that the said roof had to be repaired, which was done immediately. All other allegations of paragraph 14 of the complaint, not herein admitted, are denied." These admissions are judicial admissions conclusively establishing the admitted facts as true for all purposes connected with the trial of the case, and such admitted facts do not have to be introduced in evidence. *Snell v. Caudle Sand and Rock Company, Inc.*, 267 N.C. 613, 148 S.E. 2d 608.

Woodrow W. Lennon, supervising meteorologist, U. S. Department of Commerce Weather Bureau, stationed in Wilmington on 27 September 1958, testified as a witness for plaintiff in substance: On 27 September 1958 Hurricane Helene visited Wilmington.

A reasonable inference to be drawn from the judicial admissions by Wilmington Cold Storage Company that a storm known as Hurricane Helene struck Wilmington, North Carolina, on 27 September 1958 and that the storm did some damage to the roof of the warehouse building in which the furs were stored and that the roof had to be repaired, and from plaintiff's evidence considered in the light most favorable to it, is that water from the hurricane came through the roof and into the top floor of the cold storage warehouse owned and operated at that time by Wilmington Cold Storage Company and caused the 38 bales of raccoon skins to become wet. T. T. Ward testified in part: "I said I did hear about Hurricane Helene, occurred on September 20 *(sic)*, 1958. I did not come to Wilmington then to check, to see about these skins; it didn't cross my mind. I thought they were safe; I hadn't thought about it either way. . . . I got no word from the cold storage plant after Hurricane Helene that the roof of that plant had been blown off."

While these bales of raccoon skins were stored in the cold storage warehouse Ward received seven bills for the cost of such storage, and he gave his checks in payment. Five of these bills, going from May 1958 through September 1958, were from Wilmington Cold Storage Company, and two for 1 November and 1 December 1958 were from Port City Cold Storage Company. The parties stipulated that these bills were paid by Ward. Wilmington Cold Storage Company had possession of the 39 bales of raccoon skins from the time that it received them and gave Ward a receipt for them until 5 July 1958, and of the 38 bales of raccoon skins from 5 July 1958 until it sold its cold storage warehouse on 1 October 1958 to Port City Cold Storage Company, a co-partnership; and Port City Cold Storage Company, a co-partnership, had possession of the 38 bales of raccoon skins from 1 October 1958 until they were taken out by Ward on 19 December 1958.

T. T. Ward lives in Rocky Mount, North Carolina, and is engaged in business under the trade name of North Carolina Hide & Fur Company. George Wilkinson, a witness for plaintiff, testified in substance as follows: He lives in Rocky Mount and in May 1958 and thereafter was engaged in the insurance business as a general agent, and represented the Safeguard Insurance Company. He did not know T. T. Ward of Rocky Mount personally. He knew the account, the North Carolina Hide & Fur Company. T. T. Ward, the owner of the North Carolina Hide & Fur Company of Rocky Mount, made application to his agency for the issuance of a policy of insurance covering some furs which Ward had placed for storage in the Wilmington Cold Storage Company in Wilmington, North Carolina. He was permitted to testify over the objection of counsel for Wilmington Cold Storage Company that his agency acted upon that application. The policy was issued on or about 27 May 1958 under his direction by Safeguard Insurance Company. The court refused to permit him to answer the amount of the policy. Upon cross-examination by counsel for Port City Cold Storage Company, he testified without objection: "I do not have the original of that insurance policy in my possession now. I did have the original in my possession. I had it when it was cancelled. As to what I did with it then, the cancelled policy was ultimately sent to the home office of the insurance company in Hartford. I sent the original back to the Safeguard Insurance Company. Safeguard is the plaintiff in this action. I don't have that original policy with me here today." Immediately thereafter Wilkinson, without objection, testified in response to questions by the court in substance as follows: After the settlement with the insured the policy was sent back to his agency for cancellation, and that was when he saw the policy. It is customary for the in-

sured to surrender his policy at the time he is paid. By simply referring to his records he knows the face value of the policy was $20,000. Wilkinson was permitted to testify over the objection of counsel for Wilmington Cold Storage Company, which objection was overruled, that the loss draft was payable to T. T. Ward, trading as North Carolina Hide & Fur Company, in the sum of $12,063.60. This draft was issued by his office. Wilkinson was further permitted to testify over the objection of counsel for both defendants that this was a standard fire policy carrying extended coverage. Wilkinson testified without objection as follows: "I have stated that my company had issued a policy of insurance to Mr. Ward, as North Carolina Hide & Fur Company." Then the record shows the following:

"Q. Mr. Wilkinson, did you pay a claim for damage to the furs that were stored in the cold storage warehouse in Wilmington, North Carolina, to Mr. Ward?

MESSRS. HOGUE AND CARTER: OBJECTION — OVERRULED.

"A. I did.

MESSRS. HOGUE AND CARTER: Move to strike the answer — MOTION DENIED.

"Q. I hand you a paper and ask you to examine it and tell me what it is?

"A. This is a copy of the draft that was issued in payment of the loss.

MESSRS. HOGUE AND CARTER: Move to strike the answer — MOTION DENIED.

"It was issued to T. T. Ward, trading as North Carolina Hide & Fur Company. It was issued on Safeguard Insurance Company.

"(This copy of draft above mentioned was identified as Plaintiff's Exhibit 16)."

The court permitted, over objection of both defendants, plaintiff to introduce in evidence plaintiff's Exhibit marked for identification Plaintiff's Exhibit 16. Both defendants excepted to its admission. The court permitted, over objection of both defendants, plaintiff to introduce in evidence a subrogation receipt marked Exhibit 15. Both defendants excepted to its admission. The joint brief of both defendants states: "Plaintiff did not attach a copy of the policy to its complaint. It did not offer the alleged policy in evidence. It offered only a subrogation receipt (Plaintiff's Exhibit 15, R. pp. 9, 115) and a copy of a draft it had given to Ward (Plaintiff's Exhibit 16, R. p. 115)."

The pertinent parts of this subrogation receipt read as follows:

"Received of the Safeguard Insurance Company the sum of TWELVE THOUSAND SIXTY-THREE AND 60/100 DOLLARS ($12,063.60) in full satisfaction of all claims and demands of the undersigned against the said company under its policy No. 192926 arising from or connected with any loss or damage by reason of Water Damage To Furs On Storage which loss or damage occurred on or about the 27th day of September 1958.

"In consideration of and to the extent of said payment, the undersigned hereby subrogates, assigns and transfers to the said company all of the rights, claims, demands and interest which the undersigned has or may have against any parties for said loss or damage. . . . Said insurance company shall thereupon be subrogated to all rights of the undersigned against any such parties for such loss and damage. The undersigned has not released and will not release any portion of said claims, except as hereinafter indicated.

"Exceptions: No exceptions.

"Dated: January 3, 1959.

..... (L. S.)

N. C. HIDE & FUR COMPANY

By: T. T. WARD, Officer."

Both defendants contend in their joint brief that the judgment of nonsuit should be sustained for the reason "plaintiff did not prove a contract of insurance to support its alleged subrogation." In respect to this contention they state in their joint brief: "In its complaint, plaintiff alleged only that 'said Ward insured these bales of furs with the Plaintiff for the sum of $20,000.00.' (Complaint, par. 8, R. p. 2.) No allegation was made as to the terms of the alleged insurance or the extent of the coverage or the nature of the perils insured against. Plaintiff did not attach a copy of the policy to its complaint. It did not offer the alleged policy in evidence. It offered only a subrogation receipt (Plaintiff's Exhibit 15, R. pp. 9, 115) and a copy of a draft it had given to Ward (Plaintiff's Exhibit 16, R. p. 115)." This contention is specious, but not convincing.

The doctrine of subrogation originated in equity and is a creature of equity, based on principles of natural justice, and it is well-settled law that an insurance company paying a loss under the obligations of its policy to its insured for insured property damaged by the tortious act of another is entitled to subrogation to the rights of the insured against the person whose tortious act caused damage to the insured property to the extent of the loss paid by the insurance company. *Insurance Co. v. Faulkner,* 259 N.C. 317, 130 S.E. 2d 645; *Insurance Co. v. Trucking Co.,* 256 N.C. 721, 125 S.E. 2d 25; *Insurance Co. v. R. R.,* 179 N.C. 255, 102 S.E. 417.

Where insured property is damaged by the tortious act of another, *and the insurance paid the owner of the property covers the loss in full,* the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation of the owner's indivisible cause of action against the tort-feasor. *Insurance Co. v. Trucking Co., supra,* and cases cited; *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231. Defendants make no contention in their joint brief that the amount paid by plaintiff to Ward did not cover his loss in full.

The right of subrogation, based upon principles of equity and natural justice, has been liberally applied by the courts for the protection of those who are its natural beneficiaries. It is not necessary to produce the insurance policy in evidence when the fact of insurance and payment by insurer are otherwise proved by competent evidence. A written assignment from the insured to the insurer is admissible in evidence. *Firestone Service Stores v. Wynn,* 131 Fla. 94, 179 So. 175, *rehearing denied* 3 March 1938; *London Guarantee & Acc. Co. v. Enterprising Services,* 192 A. 2d 292, D. C. Court of Appeals (1963); 46 C.J.S., Insurance, § 1209, p. 175; 6 Appleman, Insurance Law and Practice, § 4101.

Plaintiff's evidence, considered in the light most favorable to it, shows the following facts: T. T. Ward, who is engaged in business under the trade name of North Carolina Hide & Fur Company, in May 1958 made application to George Wilkinson, who is engaged in the insurance business in Rocky Mount, North Carolina, as a general agent and who represented the Safeguard Insurance Company, for the issuance of a policy of insurance covering some furs which Ward had placed for storage in the Wilmington Cold Storage Company in Wilmington, North Carolina. Pursuant to his application, a policy of insurance No. 192926 was issued to Ward on or about 27 May 1958 by Safeguard Insurance Company, the plaintiff. Safeguard Insurance Company, plaintiff, paid Ward for damage to his furs stored in the cold storage warehouse in Wilmington the sum of $12,063.60, which payment by plaintiff was certainly a recognition on its part that it was liable for water damage to his raccoon skins under its policy issued to Ward. The subrogation receipt signed by Ward recognizes the fact that Safeguard Insurance Company had issued him its policy No. 192926, that there had been water damage to furs on storage which occurred on or about 27 September 1958, and that the insurance company had paid the loss under the obligation of its policy of insurance and was subrogated to the rights of the insured Ward against any person or persons whose tortious act or acts caused damage to the insured property to the extent of the loss paid by Safeguard Insurance Company, if there be any such

person or persons. It seems clear that plaintiff has sufficient evidence to permit a jury to find that it had a contract of insurance to support its alleged subrogation. Although defendants complain that they were not afforded an opportunity at the time of the trial to see and examine the insurance policy or to have it admitted for their own benefit, they seem to overlook the fact that having filed their answers they had a right to examine plaintiff in respect to the policy of insurance for the purpose of obtaining evidence to be used at the trial, G.S. 1-568.1 *et seq.*

In respect to the 39 bales of raccoon skins in this case, Ward was bailor and Wilmington Cold Storage Company was a bailee for hire in that it took the 39 bales of raccoon skins from Ward into its sole care and custody for hire on 27 May 1958, and from 5 July 1958 until 1 October 1958 it had in its sole care and custody for hire 38 bales of these raccoon skins; and Port City Cold Storage Company, a co-partnership, was a bailee for hire and had in its sole care and custody the same 38 bales of these raccoon skins from 1 October 1958 until 19 December 1958 when Ward withdrew these 38 bales of raccoon skins from cold storage. Ballentine, Law Dictionary, 2d Ed., p. 133, definition of "bailee for hire."

This is said in 1 Am. Jur. 2d, Act of God, § 11: "All the authorities without exception agree that a person is not liable for injuries or damages caused by an act which falls within the meaning of the term 'act of God,' where there is no fault or negligence on his part. Even where the law imposes liability irrespective of negligence, liability will not be imposed where the injury or damage is solely the result of an act of God. But one may be held liable for his own negligence even though it concurs with an act of God." To the same effect, *Southern Ry. Co. v. Cohen Weenen & Co.*, 156 Va. 313, 157 S.E. 563. Reducing the principle to the terseness of a maxim, "He whose negligence joins with the act of God in producing injury is liable therefor." *Kindell v. Franklin Sugar Refining Co.*, 286 Pa. 359, 133 A. 566.

Under the circumstances here disclosed by plaintiff's evidence, each defendant here was under a legal duty while the 38 bales of raccoon skins owned by Ward were in its possession as a bailee for hire — each defendant was not an insurer — to exercise ordinary care to protect Ward's raccoon skins against loss, damage or destruction and to return them in as good condition as when each defendant received them, and liability for damages to the 38 bales of raccoon skins while in the possession and custody of each defendant as bailee for hire turns upon the question of the presence or absence of actionable ordinary negligence on its part or on the part of its agent. Commensurate care, or due care under the circumstances, is

the measure of the obligation of a bailee for hire, in the absence of express contract. *Electric Corp. v. Aero Co.*, 263 N.C. 437, 139 S.E. 2d 682; *Dellinger v. Bridges*, 259 N.C. 90, 130 S.E. 2d 19; *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416; *Vincent v. Woody*, 238 N.C. 118, 76 S.E. 2d 356; *Beck v. Wilkins*, 179 N.C. 231, 102 S.E. 313; *Hanes v. Shapiro*, 168 N.C. 24, 84 S.E. 33. Of course, the negligence of a bailee to be actionable must proximately result in the injury or damage for which damages are claimed. 8 Am. Jur. 2d, Bailments, § 177.

What is the proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury. *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360.

Freter v. Embassy Moving and Storage Co., 218 Md. 12, 145 A. 2d 442, was an action against a warehouseman by the owner of goods for water, moisture and mildew damage to goods which were received by warehouseman in dry and good condition. From an adverse judgment of the circuit court, the owner appealed. In the opinion this is stated: "In the suit of the owner against the warehouseman, the trial judge, sitting without a jury, found that all of the damage had been caused by water which had entered the warehouse on August 12 and 13 (through the walls or under the door of the warehouse or both), 'not by moisture or standing in a humid place' and occurred as a result of water from hurricane Connie 'and that was an act of God, and, under an act of God, you couldn't hold the defendant responsible.'" The Court of Appeals held that the act of the warehouseman in letting the goods stay wet in wet cardboard cartons for over three weeks without any effort to mitigate damage already caused or to prevent further deterioration, was evidence of negligence on the part of the warehouseman to be weighed by the trier of facts.

Plaintiff's allegations in its complaint are in brief summary: When Ward placed his 39 bales of raw raccoon skins in a cold storage warehouse owned and operated for hire by Wilmington Cold Storage Company in Wilmington, North Carolina, these raw raccoon skins were in excellent condition, dry and undamaged, and when the Wilmington Cold Storage Company received these 39 bales of raw raccoon skins, it stored them on the top floor of its cold storage warehouse; on or about 27 September 1958 a storm known as Hurricane Helene struck Wilmington, North Carolina; that the hurricane did so much damage to the roof of the cold storage warehouse owned and operated by Wilmington Cold Storage Company that it had to be replaced by a new roof, and that the damage to the roof

of said building permitted the entrance into the storage room where the raw raccoon skins were stored of great quantities of rain water; that the rain water thoroughly soaked each and every bale of raw raccoon skins; that on 1 October 1958 Port City Cold Storage Company, a co-partnership, bought the business and warehouse owned and operated by Wilmington Cold Storage Company in which these raw raccoon skins owned by Ward were stored, and operated for hire the cold storage warehouse from that date until after the 38 bales of raw raccoon skins were removed by Ward on 19 December 1958; that when Ward removed his raw raccoon skins from storage it was discovered that at least one of the bales was damaged, the same being wet and moldy, and then for the first time Port City Cold Storage Company, a co-partnership, notified Ward of this condition; that both defendants were guilty of negligence after Hurricane Helene struck Wilmington in failing to properly and carefully inspect the bales of raw raccoon skins, and in failing to make any effort to mitigate the damage already caused by water from the hurricane on these 38 bales of raw raccoon skins or to prevent further deterioration or damage to the 38 bales of raw raccoon skins, and in negligently failing to notify Ward of their wet condition so that he could make proper efforts to prevent further deterioration of the raw raccoon skins. Considering plaintiff's evidence in the light most favorable to it, it has offered evidence in substantial support of the allegations in its complaint above summarized. Ward testified that in his opinion the fair market value of the raccoon skins he placed in the Wilmington Cold Storage Company on 27 May 1958 was $22,000, and the fair market value of the 38 bales of raw raccoon skins that were delivered to him on 19 December 1958 was around $10,000.

In passing upon plaintiff's assignment of error to the entry of the judgment of compulsory nonsuit of its action, if any incompetent evidence offered by plaintiff was permitted by the judge to be admitted over defendants' objections and exceptions, it must be considered. *Langley v. Insurance Co.*, 261 N.C. 459, 135 S.E. 2d 38. As Higgins, J., said in *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919, "Though erroneously admitted, nevertheless, we must consider them as a part of the plaintiff's case on the question of nonsuit for the reason that their admission may have caused the plaintiff to omit competent evidence of the same import."

Considering plaintiff's evidence with that degree of liberality required on motions for judgment of compulsory nonsuit, and the judicial admissions in the separate answer of each defendant as above set forth, plaintiff's evidence makes out a *prima facie* case against each defendant, consistent with the allegations of the complaint, that

on 27 September 1958, and prior thereto, Wilmington Cold Storage Company had in its exclusive possession on the top floor of its cold storage warehouse in Wilmington, North Carolina, as a bailee for hire, 38 bales of raw raccoon skins owned by T. T. Ward, bailor; that on 27 September 1958 Hurricane Helene, an act of God, 1 C.J.S., Act of God, pp. 1427-30 (defendants in their joint brief contend Hurricane Helene was an act of God), struck Wilmington and damaged the roof of the cold storage warehouse in which Ward's 38 bales of raw raccoon skins were stored, and water from the hurricane came through its roof and wet Ward's bales of raw raccoon skins; that on 1 October 1958 Port City Cold Storage Company, a co-partnership, bought from Wilmington Cold Storage Company its cold storage warehouse, and from that date until 19 December 1958, when Ward withdrew his 38 bales of raw raccoon skins from storage, it had in its exclusive possession as a bailee for hire Ward's 38 bales of raw raccoon skins; that both defendants knew, or in the exercise of ordinary care could have discovered, that Ward's 38 bales of raw raccoon skins were wet by reason of water coming into the top floor of the cold storage warehouse as a result of Hurricane Helene causing damages to its roof; that the acts of each defendant in letting the 38 bales of raw raccoon skins stay wet in the bales without making any effort to mitigate damage already caused by water or to prevent further deterioration, and without making any effort to notify Ward before he withdrew his 38 bales of raw raccoon skins from storage on 19 December 1958 that his 38 bales of raw raccoon skins were wet, so that Ward could make efforts to mitigate the damage already done to his raw raccoon skins by water, and to prevent further deterioration, were acts of negligence on the part of each defendant, which joined with an act of God proximately resulted in loss and damage to Ward; that plaintiff under the obligations of a policy of insurance with extended coverage, No. 192926, issued by it to Ward and covering loss to Ward's raw raccoon skins in storage has paid to Ward his entire loss on his raccoon skins in the sum of $12,063.60, and is entitled to subrogation to the rights of its insured Ward against each defendant to the extent of the loss paid by plaintiff, and must sue in its own name to enforce its rights of subrogation of Ward's indivisible cause of action against each tort-feasor. The facts here are easily distinguishable from the facts in *Swain v. Motor Co.*, 207 N.C. 755, 178 S.E. 560, relied on by defendants, and in *Morgan v. Bank,* 190 N.C. 209, 129 S.E. 585.

While plaintiff's evidence makes out a *prima facie* case of negligence against each defendant, and is sufficient to carry its case to

the jury, the ultimate burden of proof of establishing actionable negligence against each defendant is on plaintiff, and remains on it throughout the trial. *Electric Corp. v. Aero Co., supra.* As to the measure of damages in a case like this, see *Insurance Co. v. Lumber Co.,* 186 N.C. 269, 119 S.E. 362; Appleman, *ibid,* § 4103.

The judgment of compulsory nonsuit was improvidently entered, and is

Reversed.

MOORE, J., not sitting.

DENNY, E.J., took no part in the consideration and decision of this case.

M. H. VAUGHAN AND J. LANSING SMITH, PARTNERS, T/D/B/A VAUGHAN AND CO. v. WILLIAM G. BROADFOOT, JR. AND CAPE FEAR TELECASTING, INC.

(Filed 6 July, 1966.)

1. Process § 5.1—

A subpoena *duces tecum* is the process by which a court, in its inherent power, requires any person who can be a witness to produce at the trial, documents, papers, or chattels material to the issue.

2. Same—

A subpoena *duces tecum* must describe the document or other items which the witness is required to bring with him to the trial with such definiteness that the witness can identify them without prolonged or extensive search, and will not lie to permit a party to conduct a mere "fishing expedition."

3. Same—

The relevancy and materiality of documents required by a subpoena *duces tecum* may be tested by a motion to quash, vacate, or modify the subpoena.

4. Same; Bill of Discovery § 3—

While a subpoena *duces tecum* and a bill of discovery are in some respects analogous, G.S. 8-89 and G.S. 8-90 do not supersede the subpoena *duces tecum,* and the affidavit required for discovery is not required for a subpoena *duces tecum.*

5. Process § 5.1— Subpoena duces tecum held properly quashed for want of definiteness.

In an action by investment dealers to recover commissions due under contract for procuring capital investments by designated persons in a proposed corporate venture, a subpoena *duces tecum* issued by the clerk requiring a corporate officer to bring into court at the trial the corporation's stock book and any and all agreements between the corporation and any persons and entities relating to investments in the corporation, and "all preliminary and final feasibility studies," prognostications, and estimates by consulting engineers of cost of the proposed venture, etc., *held* properly quashed upon motion, since all of the documents requested are not material to the issue and most of the documents desired were not specified.

MOORE, J., not sitting.

APPEAL by plaintiffs from *Morris, J.*, August 1965 Session of NEW HANOVER.

Action upon an alleged contract.

Plaintiffs allege: Defendant W. G. Broadfoot, Jr., and defendant corporation, Cape Fear Telecasting, Inc., employed plaintiffs to secure the financing necessary for the corporate defendant to begin business. The contract provided that plaintiffs were to find persons or entities who would invest capital in the corporation. For this service they were "to be paid a flat brokerage fee of $6,500.00." Plaintiffs performed their part of the contract, but defendants have refused to pay them the agreed compensation. Plaintiffs are entitled to judgment against defendants, jointly and severally, in the sum of $6,500.00. Answering, each defendant denied the alleged indebtedness. They aver that the parties agreed that *if* plaintiffs procured $250,000.00 for defendant corporation it would pay plaintiffs $6,500.00; that otherwise, plaintiffs were to be paid nothing; that plaintiffs made an effort to procure the money but failed; that plaintiffs did introduce a Mr. Sledge to defendant Broadfoot but that after several conferences, Sledge invested the sum of only $20,000.00 in defendant corporation.

On the 23rd day of August, 1965, at the instance of plaintiffs, the assistant clerk of the Superior Court signed a subpoena *duces tecum* requiring W. G. Broadfoot, Jr., president of defendant corporation, to appear at the courthouse in Wilmington on August 24, 1964, to give evidence in this action and to bring with him the following documents:

"1. Corporate Stock Book of Cape Fear Telecasting, Inc.

2. Any and all agreements between Cape Fear Telecasting, Inc., or any of its agents, with any and all persons or en-

tities relative to stock purchases or financing, or investments in Cape Fear Telecasting, Inc.

3. Copies of all preliminary and final feasibility studies had by Cape Fear Telecasting, Inc., during months of February and March, 1964.
4. Copies of cash flow prognostications used in determining or attempting to determine financial needs of Cape Fear Telecasting, Inc. during January, February and March, 1964.
5. All estimates by Consulting Engineers of necessary equipment and construction to put Station on air."

On "the ..... day of August 1965," defendants moved to quash the subpoena *duces tecum,* "for that none of the matters and things nor the documents therein set out are material, pertinent, or competent in the trial of this cause, which is one simply for the collection of a commission for the performance of certain duties." At the beginning of the trial, after arguments by counsel, the court allowed this motion. The trial then proceeded. Two witnesses testified for plaintiffs; plaintiff Vaughan and defendant Broadfoot. The latter was examined adversely. Defendants offered no evidence.

The evidence tended to show: Plaintiffs are licensed investment dealers. In February 1964, defendant corporation had a permit from the Federal Communications Commission to operate a telecasting station in the Wilmington area, but it lacked sufficient capital to purchase and install the transmitting equipment required to open the station. Its permit had twice been extended, and it was imperative that the corporation acquire capital by a definite time. Defendant Broadfoot, president of defendant corporation, sought the services of plaintiffs in obtaining the necessary money. As a result of conversations between him and plaintiff Vaughan, plaintiffs agreed to secure investors who would commit themselves to invest, as needed, a total of $250,000.00 in defendant corporation. "In the presence of other satisfactory conditions," defendants were "willing to give up 33⅓% of equity." Plaintiffs were to be paid a flat fee of $6,500.00 if they secured the required capital which the parties then thought plaintiffs could procure from Carolina Capital Corporation in Charlotte. At this point in the negotiations only that one corporation was involved, and it was understood that if plaintiffs did not get the money from it, they were to receive nothing. Defendants cautioned plaintiffs "with respect to shopping the deal."

On the 22nd or 23rd of February, Carolina Capital Corporation declined to make the investment. Thereafter, Vaughan asked Broadfoot's permission to arrange a meeting between him and a Mr. Sledge of Columbus County, who, he thought, might be interested in

investing in defendant corporation. Broadfoot acquiesced and Vaughan brought Sledge to his office. Thereafter, Sledge "brought in" Messrs. Wall and Gibson, and the three men, in return for 33⅓% of the corporation's stock, made an investment in defendant corporation which permitted it to begin construction of the broadcasting station and to acquire the necessary engineering instruments and equipment to go on the air. Their money was not enough by itself, however, to enable the corporation "to go into business," but with it Broadfoot was able to get other capital and a network affiliation (ABC). Plaintiffs have no information as to the amount of money which Sledge and his associates invested with defendants other than defendants' allegation that it was $20,000.00. A tentative agreement had been made at a meeting in Whiteville in March 1964 between Wall, Sledge, and Broadfoot that Sledge and Wall would invest $250,000.00 in return for 40% ownership of the corporation. Plaintiffs do not know the terms of the final agreement. In June 1964, plaintiffs demanded that defendant corporation pay them a fee of $6,500.00 for securing the necessary financing for the station. The demand was refused and, on October 21, 1964, plaintiffs instituted this action against Broadfoot individually and the Cape Fear Telecasting Company, Inc.

During defendants' cross-examination of plaintiff Vaughan, he was asked if he knew that "ABC and RCA had invested $300,000.00 in this Station" and that General Electric had also "put money in new equipment." Counsel for plaintiff then stated to the court: "I renew my motion for my subpoena *duces tecum*." At no time during the trial did he ask Broadfoot how much money Messrs. Sledge, Wall, and Gibson had put into the business. The motion was denied.

At the conclusion of all the evidence, defendant Broadfoot moved for judgment of nonsuit. His motion was allowed and plaintiffs did not except. As to the corporate defendant, issues were submitted to the jury and answered as follows:

> "I. Did the plaintiffs have an agreement with the corporate defendant whereby plaintiffs were to be paid $6,500.00 for services rendered in obtaining investment capital for corporate defendant, as alleged in the Complaint?
>
> ANSWER: No.
>
> II. Did the plaintiffs obtain such capital pursuant to said agreement, as alleged in the Complaint?
>
> ANSWER: No.
>
> III. If so, in what amount is corporate defendant indebted to the plaintiffs?

ANSWER: ....."

From judgment entered upon the verdict, plaintiffs appealed.

Stevens, Burgwin, McGhee & Ryals by Karl W. McGhee for plaintiff appellants.

Aaron Goldberg for Cape Fear Telecasting, Inc., defendant appellee.

SHARP, J. This appeal presents only the question whether the trial judge erred in quashing the subpoena *duces tecum.* To answer it, we must consider the history and purpose of this process.

The subpoena *duces tecum,* an ancient writ well known to the common law, is the process by which a court requires the production at the trial of documents, papers, or chattels material to the issue. 8 Wigmore, Evidence § 2200 (McNaughton rev. 1961); 58 Am. Jur., Witnesses § 20 (1948); Annot., Subpoena *Duces Tecum,* 128 Am. St. Rep. 755 (1909). See *Carter v. Graves,* 12 N.C. 74. A court in which an action is pending has the inherent power (frequently confirmed by statute) to issue a subpoena *duces tecum* to any person who can be a witness, and the common rule that a party to the suit was not subject to a subpoena *duces tecum* was a corollary to the rule that a party was incompetent as a witness. 97 C.J.S., Witnesses § 25(b), (d) (1957). Except in a few cases, common law courts lacked the power to compel a party to produce his books and papers. These could finally be obtained, however, by a bill of discovery in a court of equity. *Smith v. Russo-Asiatic Bank,* 170 Misc. 408, 10 N.Y.S. 2d 10.

Blackstone considered "the want of a compulsive power for the production of books and papers belonging to the parties" to be the "height of judicial absurdity," for "in the hands of third persons they can generally be obtained by rule of court, *or by adding a clause or requisition* to the writ of subpoena, which is then called a subpoena *duces tecum.*" 3 Blackstone, Commentaries *382 (Emphasis added.) The "writ of subpoena" to which Blackstone referred was the familiar writ of subpoena *ad testificandum,* the process by which the personal attendance of witnesses was compelled. The procedure is described in 2 Saunders, Pleading & Evidence, pp. 1288-89 (5th Am. Ed. 1851): "A copy of the subpoena should be served on the witness personally and the original must be shown though not demanded (*Woodsworth v. Marshall,* 1 C. & M. 87) a reasonable time before the day of trial." In North Carolina today, subpoenas *ad testificandum* may even be served by telephone (G.S. 1-589). When a witness can be found he is not ordinarily served by leaving

a copy with him but, so that there may be no mistake as to the document or thing required, subpoenas *duces tecum* continue to be served by copy.

A subpoena *duces tecum* must describe the document or other items which the witness is commanded to bring with him to the trial with such definiteness that the witness can identify them without prolonged or extensive search. Annot., Subpoena *Duces Tecum* — Form — Contents, 23 A.L.R. 2d 862 (1952).

> "A peculiarity of the subpoena *duces tecum* is that, in the nature of things, it must *specify*, with as much precision as is fair and feasible, the *particular documents desired*. This is because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand. It is at this point that most disputes arise, for the specification is often so broad and indefinite that the demand is oppressive and exceeds the demandant's necessities. Courts are constantly called upon to scrutinize and control the scope of these specifications." 8 Wigmore, *op. cit. supra* § 2200(1)(iv).

"Anything in the nature of a mere fishing expedition is not to be encouraged. . . . (A party is not entitled) to have brought in a mass of books and papers in order that he may search them through to gather evidence." *American etc. Co. v. Alexandria etc. Co.*, 221 Pa. 529, 535, 70 Atl. 867, 869, 128 Am. St. Rep. 749, 752.

The law recognizes the right of a witness subpoenaed *duces tecum* to refuse to produce documents which are not material to the issue or which are of a privileged character. *State ex rel. Spokane & E. T. Co. v. Superior Ct.*, 109 Wash. 634, 187 Pac. 358, 9 A.L.R. 157; 58 Am. Jur., Witnesses § 26 (1948); 97 C.J.S., Witnesses, § 25(i) (1957). Nevertheless, "whether a witness has a reasonable excuse for failing to respond to a subpoena *duces tecum* is to be judged by the court and not by the witness." Annot., 128 Am. St. Rep. 755, 773 (1909). "Though he may have valid excuse for not showing it (the document) in evidence, yet he is bound to produce it, which is a matter for the judgment of the court and not the witness." 2 Saunders, *op. cit. supra*, p. 1273.

The approved method of testing the relevancy and materiality of documents required by a subpoena *duces tecum*, and of thwarting a "fishing expedition," is to move to quash, vacate, or modify the subpoena. 97 C.J.S., Witnesses § 25(j) (1957). Such a motion gives the court the opportunity to examine the issues raised by the pleadings and, in the light of that examination, to determine the apparent

relevancy of the documents or the right of the witness to withhold production upon other grounds. An adverse ruling upon movant's motion to quash, however, gives counsel no right to inspect the books, documents, or chattels ordered to be produced at the trial, nor does it determine the admissibility of these items at the trial. The subpoena merely requires the witness to bring them in so that the court, after inspection, may determine their materiality and competency, or so that the witness, by reference to the books or papers, can answer any questions pertinent to the inquiry. *Southern Pacific Co. v. Superior Court,* 15 Cal. 2d 206, 100 Pac. 2d 302, 130 A.L.R. 323; Annot., 128 Am. St. Rep. 755, 779 (1909); 58 Am. Jur., Witnesses § 20 (1948).

> "The subpoena is merely the means whereby the documents or other things required to be produced are brought into court. Even if the opposite party fails in his motion to recall the subpoena *duces tecum,* or fails to make such a motion and the documents are brought into court, their admissibility is to be determined when they are offered in evidence. *Equitable Life Assurance Society v. Mpasstas,* 256 App. Div. 878, 9 N.Y.S. (2d) 221." *Southern Pacific Co. v. Superior Court, supra* at 210, 100 P. 2d at 304, 130 A.L.R. at 326.

When the propriety of a subpoena *duces tecum* is challenged, it is often said that the question is addressed to the sound discretion of the court in which the action is pending. 97 C.J.S., Witnesses § 25(g) (1957).

> " 'But a motion to its discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles'; *United States v. Burr,* Fed. Cas. No. 14,692d. 'Discretion here does not mean that the court has power to refuse the compulsory production of a paper which is material evidence in the case, but that, before compelling its production by a subpoena *duces tecum,* it will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point will refuse to issue the writ': *Dancel v. Goodyear Shoe Machinery Co.,* 128 Fed. 753." Annot., 128 Am. St. Rep. 755, 760.

Defendants in this case argue that a subpoena *duces tecum* is governed by the rules applicable to the equitable remedy of a bill of discovery which is incorporated and extended in G.S. 8-89 and 8-90. *Bank v. McArthur,* 165 N.C. 374, 81 S.E. 327. As a prerequisite to an order for pretrial discovery and inspection of documents un-

der G.S. 8-89 and 8-90, the courts, following their own procedure for discovery in aid of a bill of equity, have required the applicant to show by affidavit the necessity for the inspection and the materiality to the issue of the documents sought to be inspected. If the affidavit is insufficient, any order based upon it is invalid. *Manufacturing Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32; *Patterson v. R. R.*, 219 N.C. 23, 12 S.E. 2d 652; *Dunlap v. Guaranty Co.*, 202 N.C. 651, 163 S.E. 750; *Mica Co. v. Express Co.*, 182 N.C. 669, 109 S.E. 853. See also *Bailey v. Matthews*, 156 N.C. 78, 72 S.E. 92, cited in *Bank v. McArthur, supra.* Since plaintiffs' application to the clerk of the Superior Court for the subpoena *duces tecum* was not accompanied by any affidavit, defendants contend that the clerk was without authority to issue it and that the court was required to quash the subpoena. *Hooks, Solicitor v. Flowers*, 247 N.C. 558, 101 S.E. 2d 320. Plaintiffs' position is untenable. G.S. 8-89 and 8-90 did not supercede the subpoena *duces tecum.* Although the two are in some respects analogous, a subpoena *duces tecum* may not be used as a bill of discovery. 97 C.J.S., Witnesses § 25e (1957); Annot., 128 Am. St. Rep. at 755.

The common law required no affidavit of materiality and necessity from an applicant for a subpoena *duces tecum.* As a result of statutes in some states, however, a subpoena *duces tecum* will not issue except upon a verified application showing its necessity and the materiality and competency of the items which the witness is ordered to produce. 97 C.J.S., Witnesses § 25f (1957); 58 Am. Jur., Witnesses § 22 (1948). In North Carolina, however, in contrast to an order for a pretrial inspection of documents, no affidavits showing the necessity and materiality of the documents subpoenaed is required. Although G.S. 2-16(1) limits the power of the clerk of the Superior Court to compel the production of documents to those which are "material to any inquiry pending in his court," it is the long-established practice of clerks of court to issue subpoenas *duces tecum* as a matter of course upon the oral request of counsel. The issuance of the subpoena is treated merely as a ministerial act which initiates proceedings to have the documents or other items described in the subpoena brought before the court. At the trial, the court will pass upon the competency of the evidence unless the subpoena has been quashed prior thereto. This practice is similar to that in the Federal courts, in that Rule 45(a), Fed. R. of Civ. P. provides: ". . . The Clerk shall issue a subpoena or a subpoena for the production of documentary evidence, which is a subpoena *duces tecum,* signed and sealed but otherwise blank, to a party requesting it who shall fill it in upon service."

Attorneys have customarily used the subpoena *duces tecum* only for the purpose for which it was intended, *i.e.,* to require the production of a specific document or items patently material to the inquiry, or — as indicated by Christian's Footnote 23 to Blackstone's discussion of the process, as a notice to produce the original of a document.

> "Where one party is in possession of papers or any species of written evidence material to the other, if notice is given him to produce them at the trial, upon his refusal copies of them will be admitted; or if no copy has been made, any parol evidence of their contents will be received. The court and jury presume in favor of such evidence; because, if it were not agreeable to the strict truth, it would be corrected by the production of the originals." 3 Blackstone, Commentaries *382 (12th Ed. 1794).

Here, however, plaintiffs' purpose in securing the subpoena *duces tecum* was obviously that of discovery. But where discovery is counsel's objective, he must, before trial, avail himself of the remedies provided by G.S. 8-89 and 8-90. Clearly, the court should not and will not delay the trial while a party examines in detail a corporation's books and records which he has subpoenaed for the day of the trial. Yet plaintiffs argue that the court's action in quashing, on the day of the trial, the subpoena which they had issued the day before trial deprived them of documentary evidence "to effectively prove their case and impeach defendant's testimony." Whether a detailed examination of (1) the corporate defendant's stock book; (2) any and all agreements "between defendant corporation and any and all persons and entities" relating to investments in defendant corporation; (3) "all preliminary and final feasibility studies" (subject undisclosed) had by the corporate defendant during February and March 1964; (4) "cash flow prognostications used in determining or attempting to determine financial needs" of defendant corporation during January, February and March 1964; and (5) "all estimates by consulting engineers of necessary equipment and construction to put Station on air" would have disclosed evidence material to plaintiffs' case we have no idea. Plaintiffs' right to examine the items listed in the subpoena *duces tecum* should have been determined before trial in a proceeding under G.S. 8-89 or 8-90 — not by the judge on the day of the trial. *Prima facie,* plaintiffs' attempt to subpoena the specified records and documents, was a "fishing or ransacking expedition" which the law will not permit either by subpoena *duces tecum* or a bill of discovery. *Griners' & Shaw, Inc. v. Casualty Co.,* 255 N.C. 380, 385, 121 S.E. 2d 572, 575.

The heart of plaintiffs' case was the amount of money which Mr. Sledge (and perhaps Messrs. Wall and Gibson) had invested in defendant corporation. To the extent that items 1 and 2 would have disclosed these sums, those documents were material to the inquiry; but even under G.S. 8-89 and 8-90, plaintiffs would not have been entitled to discover defendants' dealings with other persons. An order of examination is "only in respect to those matters which relate to the action. . . ." *Griners' and Shaw, Inc. v. Casualty Co., supra.* Yet plaintiffs attempted to subpoena the corporate stock book and "any and all agreements between Cape Fear Telecasting, Inc., or any of its agents with any and all persons or entities relative to stock purchases or financing or investments in Cape Fear Telecasting, Inc." Plaintiffs had no legitimate interest in "any and all agreements" of this type. His Honor, with sound legal reason, was not satisfied that the documents plaintiffs sought to subpoena were material to the case. His action in quashing the subpoena will not be disturbed.

Almost certainly, the amount of the investment by Messrs. Sledge, Wall, and Gibson in defendant corporation was a matter within the knowledge of its president, Mr. Broadfoot, who had negotiated with them and whom plaintiffs examined as an adverse witness. Since it was their money which enabled the corporation to begin broadcasting, it is unlikely that he had forgotten the amount they invested. Yet, in the face of the allegation in the answer that this amount was $20,000.00, plaintiffs studiously avoided questioning Broadfoot with reference to this crucial point. Had they asked him for the specific information, and had he hedged, suffered a lapse of memory, or been unable to answer positively, his Honor would, upon motion, doubtless have required the production of the necessary records.

It is also noted that plaintiffs based their right to recover solely upon the express contract which they alleged. Although our practice would have permitted, they offered no evidence, and tendered no issues, with reference to the reasonable value of their services in procuring the investment in defendant corporation attributable to Sledge. *Cline v. Cline,* 258 N.C. 295, 128 S.E. 2d 401; *Gales v. Smith,* 249 N.C. 263, 106 S.E. 2d 164; *Thormer v. Mail Order Co.,* 241 N.C. 249, 85 S.E. 2d 140. They proceeded on the theory that they were entitled to recover $6,500.00 or nothing. The jury answered the issue NOTHING, and in the trial we find

No error.

MOORE, J., not sitting.

GLADYS L. COLEY v. MORRIS TELEPHONE COMPANY, INCORPORATED.

(Filed 6 July, 1966.)

1. Boundaries § 7—

The sole purpose of a processioning proceeding is to establish the true location of a disputed boundary line; what constitutes the line is a matter of law, where it is is a matter of fact.

2. Same—

The burden of proof rests upon petitioner in a processioning proceeding to establish the true location of the disputed boundary line, and if petitioner is unable to show by the greater weight of evidence the location of the line at a point more favorable to him, the jury should answer the issue in accord with the contention of defendants.

3. Boundaries § 5—

A description contained in a junior conveyance cannot be used to locate the lines called for in a senior conveyance.

4. Same—

A petitioner in processioning proceedings is not entitled to offer in evidence documents and testimony tending to establish his corner as a corner in a prior deed to contiguous land when there is no evidence of any conveyance to or from the grantee in the prior deed, and thus the prior deed is not established as constituting a link in respondent's chain of title, and the location of the crucial corner in the description in the prior deed is not established by competent evidence.

MOORE, J., not sitting.

APPEAL by respondent from *Latham, Special Judge,* November 1965 Civil Session of ORANGE.

This special (processioning) proceeding was instituted April 29, 1964, under G.S. 38-1 *et seq.*, to establish the location of the north-south and east-west dividing lines of adjoining lands owned in fee simple by petitioner and respondent.

The lands of petitioner and respondent front on the south side of King Street, Hillsborough, North Carolina. Respondent's land extends south from King Street between (approximately) parallel lines. It is bounded on the east and on the south by lands of petitioner. The west line of petitioner's land is a common line with the east line of respondent's land. The south line of respondent's land coincides with a line of petitioner's land. A map made by William B. Dozier, Court Surveyor, showing the contentions of the parties, was in evidence pursuant to stipulation. Mr. Dozier did not testify.

The jury answered the issues in accordance with petitioner's

contentions, *viz.:* "1. What is the true location of the North-South dividing line between the lands of the plaintiff and those of the defendant? ANSWER: A — B. 2. What is the true location of the East-West dividing line between the lands of the plaintiff and those of the defendant? ANSWER: B — C."

Judgment in accordance with the verdict was entered. Respondent excepted and appealed.

Sawyer & Loftin and Gordon Battle for petitioner appellee.

Graham & Levings and Lucius M. Cheshire for respondent appellant.

BOBBITT, J. Respondent's brief discusses matters relating solely to the location of the north-south dividing line, a line extending south from King Street. On the court map, this line is shown as the line A to B, according to petitioner's contention, and as the line 2 to 4, according to respondent's contention. The land between A-B and 2-4 has a width of 5.07 feet at its northern terminus (King Street) and a width of 8.32 feet at its southern terminus.

Respondent, in its brief, states it "does not desire to pursue the matter of the southern boundary."

Well established legal principles, applicable here, include the following:

The sole purpose of a processioning proceeding is to establish *the true location* of disputed boundary lines. *Pruden v. Keemer,* 262 N.C. 212, 136 S.E. 2d 604, and cases cited. "What constitutes the line, is a matter of law; where it is, is a matter of fact." *McCanless v. Ballard,* 222 N.C. 701, 703, 24 S.E. 2d 525; *Jenkins v. Trantham,* 244 N.C. 422, 426, 94 S.E. 2d 311.

The burden of proof rests upon the petitioner to establish the true location of a disputed boundary line. *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501; *McCanless v. Ballard, supra.* "If the plaintiffs are unable to show by the greater weight of evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the issue in accord with the contentions of the defendants." *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633, and cases cited.

"A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance. The location of the lines called for in the prior conveyance is a question of fact to be ascertained from the description there given." *Carney v. Edwards,* 256 N.C. 20, 25, 122 S.E. 2d 786, and cases cited.

Petitioner acquired title to the land adjoining respondent on the east by (recorded) deed dated May 14, 1943, from E. R. Liner and wife, Ollie Mae Liner. The description in said deed begins as follows: "Beginning at the northeast corner of A. F. Crabtree's blacksmith lot on the south side of King Street and runs east along said street . . ." It concludes as follows: "thence west . . . to the southeast corner of the Blacksmith lot; thence with the line of said lot to the beginning." E. R. Liner and wife, Ollie Mae Liner, acquired title to this land by (recorded) deed from Farmers & Merchants Bank dated September 1, 1937.

Respondent acquired title to its land by (recorded) deed dated April 15, 1957, from R. P. Burns, Commissioner. The description in said deed is as follows: "(B)eginning at a stake on King Street, E. R. Liner's northwest corner, running thence with his line south approximately 112½ feet to a stake in the property line of Orange County, thence westward with the property line of Orange County and Mrs. Parker, and parallel with King Street approximately 86 feet to a stake in the line of H. W. and J. C. Webb estate; thence with the Webb line northward approximately 112½ feet to a stake on King Street, Webb's Northeast corner, thence with King Street approximately 86 feet to the beginning, said lot having been acquired by John D. Morris under deed from Walter S. Crabtree (unmarried), dated September 1, 1941, and recorded in . . . Book 115, page 62."

The description in the (recorded) deed dated September 1, 1941, from Walter S. Crabtree (unmarried) to John D. Morris is the same (except as to minor immaterial variations) as the description in said deed from R. P. Burns, Commissioner, to respondent. This deed, after the particular description, refers to the instruments in Crabtree's chain of title described below.

Walter S. Crabtree acquired title under the will (dated August 18, 1928) of his grandfather, A. F. (Albert) Crabtree, and Albert Crabtree acquired title under the will (dated March 28, 1898) of Charles F. Crabtree.

The land was conveyed to Charles F. Crabtree and Fannie Crabtree by (recorded) deed dated September 26, 1888, from Steven T. Forrest, Executor of George A. Faucette, in which the land is described as follows: "Adjoining the lands of John Laws, Bedford Wilson and Empson Moore and others and bounded as follows: Beginning at an iron spike on King Street, corner of Empson Moore lot, thence south 1 chain and 60 links to a rock, John Laws corner, thence east one chain and 12 links to a post, thence north 1 chain and 60 links to the corner of the shop on King Street, thence west

one chain and 12 links to the beginning, containing 18/100 of an acre."

The description in the 1941 deed to John D. Morris and in the 1957 deed to respondent begins on King Street, "E. R. Liner's northwest corner." The description in the 1943 deed to petitioner and in the 1937 deed to E. R. Liner and wife, Ollie Mae Liner, begins "at the northeast corner of A. F. Crabtree blacksmith lot on the south side of King Street." All of said deeds, except the 1888 deed to Charles F. Crabtree and Fannie Crabtree, identify the northwest corner of petitioner and the northeast corner of respondent as being one and the same. The earlier of said deeds is the 1937 deed to the Liners.

The description in the 1888 deed to Charles F. Crabtree and Fannie Crabtree, being the oldest deed *in evidence* in either chain of title, *begins* at the *northwest* corner (rather than the northeast corner) of the land conveyed therein and identifies said beginning point as "an iron spike on King Street, corner of Empson Moore lot."

The evidence as to the location of the east line of the Crabtree blacksmith lot was in sharp conflict. There was no evidence of any monument marking the northwest corner of petitioner's land, that is, the northeast corner of respondent's land. There was evidence tending to show the blacksmith shop, which was torn down about 1940, was located in the northeast corner of the Crabtree lot. There was evidence a hedgerow planted by the Liners ran north-south along the line 2-4 as shown on the court map; that the northern terminus of this hedgerow was the west end of a rock retaining wall built by the Liners, parallel with King Street, across the front of their land; and that south of said hedgerow and in line therewith there was a series of fence posts. Evidence favorable to respondent tends to show this hedgerow was immediately to the east (a foot or so) of the east wall of the blacksmith shop. Evidence favorable to petitioner tends to show this hedgerow was more than five feet east of the east wall of the blacksmith shop and of the line A-B.

The crucial question on this appeal is whether the court committed prejudicial error by admitting in evidence, over objections by defendant, certain documents and testimony offered by petitioner in an attempt to locate the northeast corner of the Empson Moore land and thereby fix the beginning point of the description in said 1888 deed to Charles F. Crabtree and Fannie Crabtree.

Conceding, *arguendo,* that the Crabtree deed of 1888 was junior to some deed to Empson Moore, and that the location of the northeast corner of the Empson Moore land determined the location of the northwest (beginning) corner of the Crabtree land, these mat-

ters have no significance unless and until the location of the northeast corner of the Empson Moore land as of 1888 is established by competent evidence.

The documents referred to below were offered by petitioner and admitted in evidence over objections by respondent.

1. A deed dated March 23, 1936, recorded in Book 104, p. 170, from Sarah T. Webb (unmarried) *et al.*, to the Board of Commissioners of Orange County.

2. A *quitclaim* deed (date not shown), recorded in Book 189, p. 292, from Elizabeth D. Webb (widow), Elizabeth Webb Matheson and husband, D. S. Matheson, *et al.*, to Orange County.

3. A deed dated June 14, 1917, recorded in Book 72, p. 586, from Hillsboro Milling and Manufacturing Company to W. H. Walker, H. J. Walker and Charles M. Walker (W. H. Walker & Brothers).

4. A map prepared by Robert A. Jones, registered surveyor, purporting to show the location of petitioner's land, bearing the legend, "Surveyed March 1964," on which the land described in the deed recorded in Book 104, p. 170, is shown as "County Agricultural Building Lot, Formerly Webb Heirs," and the land described in the *quitclaim* deed, recorded in Book 189, p. 292, is shown as "Orange County Agricultural Building Parking Lot, Formerly Webb Heirs." The land described in the deed to the Walkers is shown as lying immediately south of the lands described in the deeds recorded in Book 104, p. 170, and in Book 189, p. 292. It is noteworthy that the land shown on the Jones map as adjoining on the west the land of respondent is the land described in said *quitclaim* deed.

5. Map of the Plan of the Town of Hillsboro, dated 1863, bearing this notation: "Scale 1″=4 chains=264′." Streets shown on this map include King Street (running east-west) and Churton Street (running north-south). The lots fronting on the south side of King Street, proceeding east from Churton Street, are numbered 1, 2, 44, 45 and 46. No courses and distances are shown with reference to streets or lots. There appears on Lot 1 a diagram and the words "Court House" and a strip of land immediately west of the east line of Lot 1 is shown as "Court Street."

Using the documents referred to in the above numbered paragraphs as a basis therefor, plaintiff's surveyor and witness (Robert A. Jones) testified to the location of the northeast corner of the land described in said deeds from the Webb heirs to Orange County; that this corner was on the south side of King Street 330 feet from a point he had determined to be the southeast corner of King and Churton Streets as shown on the 1863 map; and that, based on his testimony that the frontage of each lot shown on the map was 165

feet, the corner he identified as the northeast corner of the land described in the deeds from the Webb heirs to Orange County was the northeast corner of Lot 2 and the northwest corner of Lot 44 as shown on said 1863 map and was the corner designated on the Jones map of March 1964 (petitioner's Exhibit No. 1) by the letter "D."

Jones was asked this question: "Can you point out to the jury and court where the lot known as the Empson Moore lot is located on plaintiff's Exhibit No. 1?" Respondent objected. The objection was overruled and respondent excepted. This follows: "A. Let the records show that witness pointed out the lot designated (on) plaintiff's Exhibit 1, as Orange County Agricultural Building Parking Lot, formerly Webb heirs."

It is noted that the lot so pointed out is that described in said *quitclaim* deed. The northeast corner thereof is indicated by the letter "D." Jones testified the letter "D" as shown on his map is at the location shown on the court map as the northwest corner of respondent's land and identified on the court map by the letter "D." If, in fact, Empson Moore's northeast corner as of 1888 was at the point indicated by the letter "D," this would constitute material support for petitioner's contention.

The record is silent as to the source of Empson Moore's title. No deed *to or from* Empson Moore was offered in evidence. Empson Moore's northeast corner was not established by running the courses of a deed to him. Nor was there evidence purporting to prove its location by testimony of common reputation in the neighborhood in the manner set forth in Stansbury, North Carolina Evidence, Second Edition, § 150.

None of the documents referred to in the above five numbered paragraphs affords a basis for establishing Empson Moore's northeast corner as of 1888. With reference to the three deeds, all were made years *after* the deed of 1888 to Charles F. Crabtree and Fannie Crabtree; and nothing in the record purports to show the connecting links, if any, between Empson Moore and the Webb heirs or between Empson Moore and Hillsboro Milling and Manufacturing Company. With reference to the 1863 map, no deed in evidence refers to said map in any manner. None of these documents affords any basis for the testimony of Jones to the effect the respondent's northwest corner as shown on the court map is the same as Empson Moore's northeast corner as of 1888. Nothing in the record supports the theory or speculation that the northeast corner of the Empson Moore lot was the northeast corner of Lot 2 as shown on said 1863 map.

Petitioner cites *McKay v. Bullard,* 219 N.C. 589, 14 S.E. 2d 657,

an action in ejectment, as authority for the admission of said 1863 map. In *McKay,* the court admitted in evidence a map referred to in testimony as the official map of the old part of the town of Elizabethtown. The land involved was described as, "In the Town of Elizabethtown, beginning at the Northeast corner of the intersection of Queen and Poplar Streets, and running thence as the East line of Poplar Street, . . ." Presumably, the map was considered in locating the streets called for in said description. Assuming, without deciding, the 1863 map may have been competent for the purpose of locating streets shown thereon, here there is no controversy as to the location of the south side of King Street.

The conclusion reached is that said documents were incompetent and the admission thereof and of testimony based thereon was prejudicial error.

There was evidence that E. R. Liner died prior to the trial of this action. We pass, without discussion, questions relating to the competency of certain testimony as to statements (declarations) attributed to E. R. Liner. Suffice to say, the established rules relating to the admissibility of such testimony are stated in Stansbury, *op. cit.,* § 151.

For the errors indicated, the verdict and judgment as to the first issue are set aside and a new trial as to the first issue is awarded. However, since respondent has abandoned its appeal with reference to the second issue, the verdict and judgment with reference to the second issue will not be disturbed.

Partial new trial.

MOORE, J., not sitting.

MARION RUTH PEARCE v. BEULAH P. BARHAM, ADMINISTRATRIX OF CALVIN W. BARHAM, DECEASED, AND DOLLY BARHAM.

(Filed 6 July, 1966.)

1. Evidence § 15—

The test of the relevancy of evidence is whether it has a bearing on the issues joined by the pleadings and tends to aid the jury in finding the proper answer to them.

2. Same—

Evidence of tenuous relevancy should be excluded when it has no direct bearing upon the issues and is of little probative force in aiding in the

ascertainment of the crucial facts, but has great likelihood of playing upon the passions and prejudices of the jury.

3. Automobiles § 37—

In an action by a passenger against the personal representative of the deceased driver to recover for injuries sustained when the driver lost control of the vehicle and ran off the road, testimony of witnesses tending to show that plaintiff, a married woman living with her husband, had been guilty of immoral sexual relations with the driver, *held* irrelevant to the issue of contributory negligence, and cannot be held competent as tending to show that plaintiff was not a captive in the car when there is no allegation and no issue raised that plaintiff was other than a passenger.

4. Evidence § 58—

Where defendant cross-examines plaintiff with respect to her immoral relationship with intestate for the purpose of impeaching her testimony as a witness, defendant is bound by her answers in regard to this collateral matter, and may not offer testimony of other witnesses to contradict plaintiff in regard thereto.

5. Evidence § 11— Introduction by opposing party of evidence of transaction between plaintiff and decedent, opens door to plaintiff's testimony in regard thereto.

In this action by a passenger against the personal representative of the deceased driver to recover for injuries sustained when the driver lost control of the vehicle and ran off the road, defendant offered in evidence the adverse examination of another passenger, taken by plaintiff but not introduced in evidence by plaintiff, tending to show that plaintiff, immediately prior to the accident, was slapping the driver, fighting with him, and attempting to grab the ignition key. *Held:* Even conceding the adverse examination was relevant as bearing upon defendant's contention of contributory negligence, by introducing the examination defendant opened the door to the extent that plaintiff was entitled to be heard and to give her version of the matter. G.S. 8-51.

MOORE, J., not sitting.

APPEAL by plaintiff from *Hall, J.*, December, 1965 Regular Civil Session, WAKE Superior Court.

The plaintiff instituted this civil action against the personal representative of Calvin W. Barham and against Dolly Barham to recover damages for the personal injuries she sustained while riding as a passenger in a 1956 Ford automobile owned and operated on the public highway by Calvin W. Barham. Specifically, the plaintiff alleged she was riding as a passenger in the Ford being driven northwardly on rural paved road No. 2224 in Wake County; that the driver was operating the vehicle at a dangerous and excessive rate of speed without maintaining proper control, and that he negligently permitted the vehicle to run off the highway, to strike a mail box, to cross a ditch and to turn over in a field, killing the driver

and seriously and permanently injuring the plaintiff. The time was near midnight, on February 19, 1964. She alleged she sustained a broken back, a punctured spinal cord, causing permanent paralysis of the legs and of the elimination processes of the body; the sum total of which caused her to lose her former good health and to become permanently and totally disabled.

The plaintiff alleged that the defendant's intestate was the owner and driver of the Ford at the time of the accident but he was also at the time acting as the agent of Dolly Barham who was made a party defendant.

The personal representative of Calvin W. Barham filed answer in which she alleged on information and belief that her husband was not the driver of the Ford involved in the wreck; but as a conditional and further defense, she alleged if he were shown to be the driver, that the three occupants of the car — the plaintiff, the defendant's intestate, and Dolly Barham — were under the influence of intoxicants to the extent that all were guilty of negligence, and the plaintiff especially so, because she voluntarily continued to be a passenger in a vehicle being operated by a drunken driver; that plaintiff and the driver were engaged in a fight, which caused the driver to lose control of the vehicle; and because of her contributory negligence, the plaintiff should not be permitted to recover.

The defendant Dolly Barham denied ownership of, or responsibility for, the operation of the vehicle, or that the driver was his agent.

After the pleadings were filed, the plaintiff adversely examined the defendant, Dolly Barham, concerning the operation of the vehicle prior to and at the time of the accident. At the trial the plaintiff testified and offered medical evidence of the nature and extent of her injuries which resulted in her permanent and total disability; that prior to the accident she was 28 years of age, was in excellent health; that as a result of the accident she is now practically helpless; that her hospital and medical bills have already amounted to approximately $4,000.00. As a witness in her own behalf, she undertook to describe the acts and conduct of each of the occupants of the vehicle just before and at the time the vehicle left the road and wrecked. The court refused to admit the evidence on the ground it involved her personal transactions with the deceased.

The plaintiff offered a witness, Albert Lee Jeans, who testified that a short distance from the scene of the accident, and just before it occurred, he saw a Ford which he knew belonged to Calvin W. Barham parked on the side of the road; that the time was after eleven o'clock at night; that he stopped for the purpose of ascertaining if the driver needed help. The door of the driver's side of

the vehicle was open. Calvin Barham and the plaintiff were standing a few feet in the rear of the Ford. Calvin had a pistol in one hand and was trying to force the plaintiff back in the vehicle. The witness asked Calvin whether he was having car trouble. Calvin replied, "No, female trouble." The witness continued on in the direction of Fowler's Crossroads at a speed of 50-55 miles per hour when Calvin, with the plaintiff in the middle and Dolly Barham on the outside of the front seat, passed him. The witness saw the Ford and observed it until it was at or near Fowler's Crossroads intersection where the wreck occurred. In his opinion the Ford was traveling 90 miles per hour.

The plaintiff rested without introducing the adverse examination of Dolly Barham. The court entered a judgment of involuntary nonsuit as to him. The plaintiff did not appeal. The court denied the motion to dismiss as to the defendant's intestate. The personal representative, over objection, read to the jury the entire adverse examination of Dolly Barham. At the time Dolly Barham was in court and available as a witness. Here quoted is a part of Dolly Barham's adverse examination:

> "She was slapping him in the face. She was jerking and pulling him. She was messing with him in the car and when she started slapping him in the face and pulling him, he didn't do anything. He just kept driving. That wasn't too far before we got to where the wreck happened. That course of conduct on her part kept up until just before he got to the Crossroads before he had the wreck. She kept up that conduct. Just before we got to the Crossroads. It is not over two hundred feet to the Fowler's Crossroads from the point where I say where Calvin had not slowed down, and I said, slow down, horse; and he said, I take care of you, Uncle Dolly. At that time she was fighting at him with her hands. She was high, she wasn't drunk. She was trying to get hold of the keys or something. . . . Whatever she was doing to him, she was doing it right up to the moment he lost control of the car, before we had the wreck. Fighting with the hands, grabbing him, jerking him, slapping him in the face and jerking at the keys."

The defendant called as witnesses a daughter and a son, children of the administratrix and her intestate. These witnesses testified at great length and in much detail as to the intimate relationship existing between the plaintiff and the intestate prior to the accident. Defense counsel asked the daughter this question: "You know the plaintiff in this action — Marion Pearce, do you?" Answer: "Yes, sir, I knew of her, I didn't know her until . . . just knew her

since she started going with my father." Plaintiff's motion to strike was denied. Question: "Do you know where Marion Pearce spent the week before the accident?" She was permitted to answer: "Yes, down at my father's." The son, also as a defendant's witness, was asked this question: "On the week previous to the date of the accident . . . who, if anyone, was living there . . . besides yourself and your father, Calvin W. Barham?" Answer: "Mrs. Pearce." Motion to strike denied. The son testified that he, his father, and the plaintiff spent the night prior to the accident in his father's home. Over objection, the son was permitted to say that the plaintiff slept with his father. The foregoing and much other evidence of like import was offered by the defendants and admitted over plaintiff's objection.

After the defendant had rested, the plaintiff returned to the stand and sought to testify that she did not interfere with Calvin W. Barham's operation of the vehicle before the accident. The defendant objected upon the ground that she was incompetent because of the dead man statute. The court sustained the defendant's objection. "The plaintiff excepts to the sustaining of the objection and to the court's ruling that the plaintiff could not testify as to what took place in the car immediately before the wreck, even after the defendant offered the adverse examination of Dolly Barham."

Plaintiff's counsel asked the plaintiff this question: "Mrs. Pearce, how often, if at all, did you strike Calvin Barham in the car on the evening of February 19, 1964?" "Plaintiff excepts to the sustaining of the objection and to the court's refusal to allow the plaintiff to testify as to her relationship to the accident."

It developed during the hearing that Dolly Barham has a civil action pending against the personal representative of Calvin W. Barham to recover for the injuries which he received in the same accident.

The court submitted issues of negligence, contributory negligence, and damages. The jury answered, finding the defendant's intestate was guilty of negligence and the plaintiff was guilty of contributory negligence. From the judgment dismissing the action, the plaintiff appealed.

Everett, Creech & Hicks by Robinson O. Everett for plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis by F. T. Dupree, Jr., Jerry S. Alvis for defendant appellees.

HIGGINS, J. Three issues were raised by the pleadings: (1) Did the plaintiff suffer injury and damage as a result of the defend-

ant's negligence? (2) Did the plaintiff, by her own negligence, contribute to her injury? (3) What damage, if any, is the plaintiff entitled to recover? Only evidence which had bearing on these issues and tended to aid the jury in finding the proper answers to them should have been admitted at the trial. Rules of evidence furnish the guidelines by which the presiding judge shall determine what shall be admitted to the jury for its consideration in finding the answers to the issues. *Gurganus v. Trust Co.,* 246 N.C. 655, 100 S.E. 2d 81; *DeBruhl v. Highway Commission,* 245 N.C. 139, 95 S.E. 2d 553.

The law recognizes that evidence, when of slight value, may be excluded because the sum total of its effect is likely to be harmful. Stansbury states the rule: "Even relevant evidence may, however, be subject to exclusion where its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great." N. C. Evidence, 2d Ed., § 80, p. 175. "There is a fundamental postulate of evidence that circumstances which are irrelevant to the existence or nonexistence of the disputed facts are not admissible . . . The details of bad and questionable conduct . . . were paraded before the jury . . . The result seems to have carried the jury too far from the critical question involved; that is, the fair and just compensation for the pecuniary injuries resulting from death." *Sanders v. George,* 258 N.C. 776, 129 S.E. 2d 480; *Electric Co. v. Dennis,* 259 N.C. 354, 130 S.E. 2d 547; *Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485.

The court, over objection, permitted the defendant to introduce evidence of the son and daughter which paramounted issues not raised by the pleadings. The harmful effect is obvious. The relevant facts in this case are those which bear on the intestate's negligence, the plaintiff's contributory negligence, and the plaintiff's damages.

By introducing evidence tending to show the intestate forced the plaintiff to re-enter the Ford just before the accident, the defendant contends that evidence of prior associations and relationships became admissible as tending to show the plaintiff was not a captive at the time of the accident. The weakness in the argument is two-fold: (1) There is no allegation and no issue raised that the plaintiff was other than a passenger. (2) Prior conduct disassociated from the operation of the vehicle was not the test by which to determine negligence or contributory negligence in causing the wreck. The plaintiff was married and living with her husband. The intestate and his personal representative were separated. The evidence tended to permit the jury to try the parties rather than the issues raised by the pleadings.

Conceding the defendant was within her rights in cross-examining the plaintiff with respect to her relationships with the intestate on the ground that it tended to impeach her testimony as a witness, nevertheless these were collateral matters, and her answers were conclusive. "Ordinarily the answer of a witness on cross-examination concerning collateral matters for purposes of impeachment is conclusive and may not be contradicted by other evidence." *In Re Gambell,* 244 N.C. 149, 93 S.E. 2d 66; *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277.

The defendant may not contend the evidence of the son and daughter was admissible to contradict the plaintiff on the collateral subject of prior relationships of the parties. The only defense to an action for damages resulting from actionable negligence is the contributory negligence of the injured party which was a participating cause of the accident and the resulting injury.

The plaintiff's counsel contends the court committed error in permitting the defendant to read to the jury the adverse examination of Dolly Barham taken by the plaintiff when she was attempting to find out whether the intestate was Dolly Barham's agent at the time of the accident. The grounds of the objection are: (1) Dolly Barham was no longer a party. (2) The remaining defendant was not present and did not participate in the adverse examination. (3) The plaintiff did not offer any part of the examination. (4) Dolly Barham at the time was present in court and available as a witness.

Conceding, without deciding, the defendant, under the circumstances, had the right to use the adverse examination, thereby presenting to the jury Dolly's version as to the fight going on between the plaintiff and the driver, and her efforts to get the keys from the switch of the speeding automobile, by so doing, she opened the door, giving the plaintiff the right to present her version of the episode to the jury. Having read the adverse examination to the jury, the defendant is estopped to deny its admissibility. "The law that an interested survivor to a personal transaction or communication cannot testify with respect thereto against the dead man's estate is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor . . . In offering the evidence of Howard Carswell and objecting to the evidence of Dennis Greene, the plaintiff sought to pick up the shield after having first used the sword. This the law does not permit." *Carswell v. Greene,* 253 N.C. 266, 116 S.E. 2d 801. The deceased's personal representative testified. She offered the adverse examination of Dolly Barham as to the acts and conduct both of the deceased and of the plaintiff up to and including the accident. The defendant opened the door to the extent the plain-

tiff was entitled to be heard and to give her version of the transaction described by Dolly Barham. G.S. 8-51; *McCurdy v. Ashley,* 259 N.C. 619, 131 S.E. 2d 321; *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 2d 540; *Batten v. Aycock,* 224 N.C. 225, 29 S.E. 2d 739; *Sumner v. Candler,* 92 N.C. 634. "There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication." *Walston v. Coppersmith,* 197 N.C. 407, 149 S.E. 381.

Because of the errors here discussed, we conclude the plaintiff should have a

New trial.

MOORE, J., not sitting.

COLWELL ELECTRIC COMPANY v. KALE-BARNWELL REALTY & CONSTRUCTION CO.

(Filed 6 July, 1966.)

1. Trusts § 13—

Where the grantee in a deed promises, at or before acquiring legal title, to hold it for the benefit of a third person, or declares that he will hold the land in trust for such third person, a valid express trust is created, even though the deed contains no provision with reference to any right of such third person.

2. Trusts §§ 17, 18—

A resulting or a constructive trust may be established by parol evidence which is clear, strong and convincing.

3. Trusts § 14—

If the acts, declarations and assurances of the grantee or the beneficiary in a deed of trust, at or before the transfer of a legal or beneficial title to him, are such as to lead a third party reasonably to believe that the contemplated conveyance will be drafted so as to confer upon him an interest superior to that of the grantee or the *cestui,* and if such third person parts with a thing of value or otherwise sustains a legal detriment, a court of equity will declare a constructive trust for the benefit of such third person.

4. Same—

A constructive trust rises by operation of law when the grantee in a deed or the *cestui* in a deed of trust obtains title or priority of lien in violation of some duty, express or implied, owed to the one who is equitably entitled, and such trust will be declared regardless of the intent of the parties or the absence of actual fraud.

5. Registration § 3—

Recital in a deed of trust that it should constitute a lien junior to the lien of a deed of trust to another person, without sufficiently identifying the deed of trust to such third person, cannot override priority of registration.

6. Trusts § 19—

Where the grantor of lots agrees that the purchase money deed of trust should be junior to a deed of trust to a bank lending money for the construction of houses on the lots, with knowledge that the construction loan could not be obtained unless the lender was given a first lien, and the deed and the deeds of trust are delivered to the office of the registrar of deeds with direction that they be recorded so as to effectuate the agreement, but through inadvertence the purchase money deed of trust is recorded prior to the deed of trust for the construction loan, equity will declare a constructive trust so as to give priority to the deed of trust securing the construction loan.

7. Same; Receivers § 12—

Where the receiver has sold land of the debtor free from lien so that the liens attach to the proceeds of the sale in the receiver's hands, the receiver must give priority of payment to the holder of the lien having priority by reason of a constructive trust declared by equity to accomplish the ends of justice, notwithstanding such lien was recorded subsequent to the registration of another deed of trust on the same property.

MOORE, J., not sitting.

APPEAL by claimants, Carl A. Wicker and wife, Vera Wicker, from *Johnson, J.*, November 1965 Civil Session of ALAMANCE.

This is an action for the appointment of a receiver for the defendant on the ground of insolvency. A receiver was so appointed. Among the assets coming into the hands of the receiver were five lots upon each of which the defendant had commenced and partially completed the construction of a dwelling house. At the time of the appointment of the receiver, there was recorded in the office of the Register of Deeds of Alamance County, as to each such lot, a deed of trust, executed by the defendant, conveying the lot to a trustee to secure the payment of a note, made by the defendant and payable to Carl A. Wicker and Vera Wicker, his wife. There was also then recorded there, as to each of these lots, a deed of trust conveying it to a trustee to secure the payment of a note, made by the defendant and payable to the North Carolina National Bank.

The Wickers and the Bank filed their respective claims with the receiver, each claiming the first lien on each of the respective lots and the uncompleted building thereon. The properties were sold by the receiver free of all liens and the claims, as to liens, were transferred to the proceeds of the receiver's sales. These are not sufficient, in the case of any of the lots, to pay both claims in full. As to each

lot the receiver, in his report to the court, allowed priority to the claim of the Bank over the claim of the Wickers, who filed exceptions to the report.

By consent, the exceptions were heard by the judge, sitting without a jury. The exceptions of the Wickers were overruled, thus affirming the determination by the receiver that the deed of trust given to secure the Bank is entitled to priority over that given to secure the claim of the Wickers. From the judgment so entered, the Wickers now appeal to this Court. Upon this appeal the sole question is whether the claim of the Bank or the claim of the Wickers is entitled to priority in the proceeds of the receiver's sales. The facts are the same as to each of the five lots. Neither the plaintiff, the defendant, the receiver nor any other claimant participated in the appeal to this Court.

The following is a summary of the material facts found by the trial judge and recited in his judgment, the numbering and order of the findings being rearranged by us:

(a) Carl A. Wicker and wife, Vera Wicker, originally owned the lots and sold and conveyed them to the defendant by warranty deeds. As to each lot, 20% of the purchase price was paid in cash to the Wickers and a note for the balance was made to them, this being secured by a deed of trust to W. L. Shoffner, trustee.

(b) Each deed of trust so made to Shoffner by the defendant provided:

"This is a junior lien in favor of a Deed of Trust to E. H. Foley, Trustee for North Carolina National Bank of Burlington, North Carolina."

(c) The same attorney prepared the deeds from the Wickers to the defendant, the notes of the defendant to the Wickers, the deeds of trust securing them and the notes of the defendant to the Bank and the deeds of trust securing it. All of the papers were executed contemporaneously.

(d) Prior to the preparation of these instruments, and at the time of the deliveries thereof, the Wickers knew that each deed of trust securing them was to be subordinated to a deed of trust to secure the Bank, which was to make a construction loan to the defendant for the construction of a house upon the lot so conveyed to the defendant by the Wickers. The Wickers were advised by the defendant that the only means of obtaining from the Bank funds for such construction was for the defendant to give the Bank a first lien upon the property; that is, a lien prior to the lien of the deed of trust to secure the payment to the

Wickers of the balance of the purchase price of the lot. With that understanding, the Wickers executed their deed to each lot to the defendant and received each note and deed of trust from the defendant.

(e) The Bank entered into a binding agreement with the defendant to lend to it money to be used in the construction of improvements upon the land conveyed to the defendant by the Wickers. The money was to be advanced by the Bank in installments as each building progressed and reached certain specified stages. As to each house, the repayment of such loan was to be secured by a first deed of trust upon such house and lot.

(f) The arrangement between the Bank and the defendant was a bona fide agreement to secure the repayment of advances by the Bank which were to be used by the defendant in the construction of houses upon the specific properties described therein; the Bank did, in fact, make bona fide advances with respect to each lot here involved and the defendant executed and delivered the notes and deeds of trust under which the Bank claims.

(g) There was no understanding, agreement or contract of any kind, at any time, between the Bank and the defendant, or between the Bank and the Wickers, or any other claimant, that the Bank would see to the application by the defendant of any funds advanced to it by the Bank.

(h) After the execution of all of the papers, the attorney who prepared them carried all of the deeds and the deeds of trust to the office of the Register of Deeds and handed them to the clerk of such office simultaneously, giving such clerk, as to each lot, instructions to record the deed first, the deed of trust securing the Bank second, and the deed of trust securing the Wickers third.

(i) Contrary to the instructions of the attorney and contrary to the understanding of the respective parties, the personnel of the office of the Register of Deeds, by error, failed to register and record the instruments as so instructed but, as to each lot, recorded the deed first, the deed of trust securing the Wickers second, and the deed of trust securing the Bank third. The recorded instruments and the records of the Register of Deeds' office show that the deed of trust securing the Wickers was filed for registration five minutes prior to the deed of trust securing the Bank.

Upon the foregoing findings, the trial judge concluded, as a matter of law, that as to each lot the deed of trust securing the Bank

constituted a valid lien superior to the lien of the deed of trust securing the Wickers and, consequently, the claim of the Bank was entitled to payment in full out of the proceeds of the sale of the lots by the receiver in preference to any payment upon the claim of the Wickers.

The evidence offered by the Wickers tends to show that these transactions were all closed at a conference in the office of the attorney who drafted the documents, which conference was attended by Mr. Wicker who then received the down payment made by the defendant for the lots. At that time it was explained to Mr. Wicker that he would receive a second deed of trust upon each lot to secure the balance of the purchase price of such lot. The defendant explained to Mr. Wicker that the only way it could handle the property was for the Wickers to take, as security for the balance due them, a second deed of trust; otherwise the defendant could not get from the Bank the loan needed for its construction projects. Since the instruments were recorded, Mr. Wicker has retained in his possession the deeds of trust under which he and Mrs. Wicker now claim.

The Bank offered evidence tending to show that this method of handling the entire transaction was explained to Mr. Wicker by the attorney who drafted the several instruments. This attorney testified that he took the several instruments to the office of the Register of Deeds for registration and delivered them to that office with instructions, as found by the court, concerning the order in which they were to be placed upon the record. While he does not expressly so state, the inference from his testimony is that all of the documents were physically delivered to the office of the Register of Deeds at the same time. This attorney did not supervise or have responsibility for supervising the disbursements of funds advanced by the Bank to the defendant.

In rebuttal, Mr. Wicker testified that Mr. Kale, an officer of the defendant, in negotiating these transactions, stated to Mr. Wicker that the defendant would use the money advanced by the Bank to build a house upon each lot which would be of greater value than the amount of the loan by the Bank. The court, upon objection to this testimony by the Bank, ruled that it would be admissible only with reference to the substance of the claim of the Wickers against the defendant and not with reference to the question of priority as between the claim of the Wickers and the claim of the Bank. Kale did not tell Mr. Wicker which bank would make the loan to the defendant or what the amount thereof would be.

W. R. Dalton, Jr., for claimant appellants.

W. Clary Holt and Sanders & Holt for North Carolina National Bank, appellee.

LAKE, J. When the grantee in a deed, conveying the legal title to land, promises, at or before so acquiring the legal title, to hold it for the benefit of a third person, or declares that he will hold the land in trust for such third person, a valid, express trust is thereby created though the deed contains no provision with reference to any right of such third person. *Avery v. Stewart,* 136 N.C. 426, 48 S.E. 775; *Sykes v. Boone,* 132 N.C. 199, 43 S.E. 645. Such trust may be established by parol evidence which is clear, strong and convincing.

Though there is no such express promise or declaration, if the acts, declarations and assurances of the grantee, at or before the transfer of the legal title to him, are such as to lead a third party reasonably to believe that the contemplated conveyance will be drafted so as to confer upon him a beneficial interest in the property superior to that of the grantee and those actually named in the conveyance as beneficiaries thereof, and if such third person, in reliance upon this representation, parts with a thing of value or otherwise sustains a legal detriment, a court of equity will fasten upon the legal title so conveyed a constructive trust for the benefit of such third person. "A constructive trust * * * is a trust by operation of law which arises contrary to intention and *in invitum,* against one who * * * in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy." 54 Am. Jur., Trusts, § 218. In order for a constructive trust to arise it is not necessary that fraud be shown. *Speight v. Trust Co.,* 209 N.C. 563, 183 S.E. 734. It is sufficient that legal title has been obtained in violation, express or implied, of some duty owed to the one who is equitably entitled. *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188. "A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." Lee, North Carolina Law of Trusts, § 11a. Of necessity, the circumstances out of which such constructive trust arises may be shown by parol evidence.

Here, the evidence, including that of Mr. Wicker, himself, and of Mr. Shoffner, the trustee in the deed of trust securing the note to the Wickers, is abundantly sufficient to support each finding of fact by the trial court and to show that the claim of the Wickers and the claim of the Bank arise out of a unified plan for the acquisition and development of the Wicker properties by the defendant

with the financial assistance of the Bank. The deeds from the Wickers to the defendant, the notes by the defendant to the Wickers, the deeds of trust from the defendant to Shoffner, trustee for the Wickers, and the deeds of trust from the defendant to Foley, trustee for the Bank, were all contemporaneously prepared by the same draftsman. After all the documents were executed, the deeds and deeds of trust were all taken by him to the office of the Register of Deeds for registration there. It was clearly understood and agreed that without construction loans from the Bank to the defendant, the defendant could not and would not purchase the Wicker lots for the agreed price. It was further clearly understood and agreed by the Wickers and Shoffner, trustee, prior to the conveyance of the legal title to the properties to Shoffner, trustee, that the legal title to the land would be conveyed to Shoffner as security for the Wicker notes, but that the beneficial interest of the Wickers in the land would be subordinate to the beneficial interest of the Bank. Language was inserted in the deed of trust to Shoffner, trustee, which was intended to accomplish this purpose. This provision did not sufficiently identify the deed of trust to Foley, trustee for the Bank, to comply with the requirements of *Hardy v. Fryer*, 194 N.C. 420, 139 S.E. 833, the amount of the encumbrance held by the Bank and intended to be given priority not being stated. However, this statement in the deed of trust, under which the Wickers claim, is further evidence of the intent and understanding of the parties at and prior to its execution.

For the purpose of carrying out the contemplated program, including the establishment of a prior lien upon the property in favor of the Bank, Shoffner, the draftsman of the instruments, carried them all to the office of the Register of Deeds together and delivered them to a clerk in that office. Contrary to his instructions to such clerk, the deed of trust to Shoffner, trustee, for each lot was marked by the clerk as having been filed for registration before the deed of trust upon such lot to Foley, trustee for the Bank. If, as is clearly not the case, Shoffner had, with intent to defraud the Bank and to violate the clear agreement and understanding of all the parties, actually filed the deed of trust to him ahead of the deed of trust to Foley and, in drafting the instrument to him, had omitted any reference to the deed of trust securing the Bank, equity would fasten a constructive trust, in favor of the Bank, upon these properties, which trust would prevail over any right of Shoffner and the Wickers. The fact that the reversal in the order of filing of the papers was the result of inadvertence rather than fraud does not prevent the claim of priority for the Wicker note from being directly contrary to the understanding of the parties and contrary to good conscience. Equity will, therefore, raise a constructive trust in favor of

the Bank "to satisfy the demands of justice." 54 Am. Jur., Trusts, § 218.

This is not a situation in which one acquires legal title to property upon which there is an existing but unrecorded encumbrance which is simply noted in the recorded, subsequent conveyance. See: *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E. 2d 769; *Lawson v. Key*, 199 N.C. 664, 155 S.E. 570; *Story v. Slade*, 199 N.C. 596, 155 S.E. 256. It is not merely a matter of notice of the deed of trust under which the Bank claims. Here we have contemporaneously executed papers, parts of a unified plan, an agreement that the one deed of trust is to have priority over the other, and a bona fide but unsuccessful effort to record both documents so as to accomplish that purpose.

Although it is not shown in the record that Mrs. Wicker was present at the time the various papers were executed and delivered to Shoffner for registration, or that she had actual knowledge of the agreement that the Bank's claim was to have priority of lien, she is now claiming the benefit of the notes and deeds of trust given to her husband at the conference at which these documents were all signed and the relative position of the liens was explained. While a husband, as such, is not the agent of his wife, here the husband was handling the transaction, including the delivery of the deed signed by her as one of the grantors. She cannot claim the benefits of the notes received by him as her agent in this transaction and disavow his agency with reference to the agreement as to priority of the liens, without which the transaction would not have been consummated. *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785; *Tomlins v. Cranford*, 227 N.C. 323, 42 S.E. 2d 100.

It is not necessary to consider the question of whether the record shows such a mistake in drafting the deed of trust to Shoffner, trustee, as to justify an order reforming it so as to include a more perfect description of the deed of trust securing the Bank. Nor is it necessary to determine the right of the Bank to have the record in the office of the Register of Deeds corrected with reference to the time of the filing of the respective deeds of trust for registration. The land has been sold and conveyed by the receiver and neither of these matters affects the title of the purchaser from him. The sole question before us relates to the order of distribution of the proceeds now in the hands of the receiver. The judgment of the superior court is in accordance with the principles of equity above stated.

We have examined each of the assignments of error and find no reason therein to disturb the judgment.

Affirmed.

MOORE, J., not sitting.

BRENDA ATWOOD, A MINOR, BY HER NEXT FRIEND JAMES M. HAYES, JR., v. RONNIE SCOTT HOLLAND.

(Filed 6 July, 1966.)

1. Automobiles § 49—

A gratuitous passenger in an automobile is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances.

2. Negligence § 26—

A defendant has the burden of proof on the issue of contributory negligence, and therefore compulsory nonsuit upon the ground of contributory negligence should be allowed only when plaintiff's evidence, considered and taken in the light most favorable to him, together with inferences favorable to him which may be reasonably drawn therefrom, so clearly establishes this defense that no other conclusion can reasonably be drawn.

3. Automobiles § 49— Evidence held to show contributory negligence as matter of law on part of passenger in continuing to ride with intoxicated driver in two-seated sports car with four occupants.

Plaintiff's evidence tending to show that plaintiff, with knowledge that defendant had consumed a large quantity of beer, rode as a passenger in defendant's two-seated sports car with defendant driver and two other passengers, and continued to ride therein from 11:30 p.m. until the collision occurred at about 1:00 a.m. when defendant, traveling at an unlawful and dangerously high speed, lost control of the vehicle, and that the car was being driven in a municipality so that the car made frequent stops at which plaintiff could have alighted, etc., even though defendant drove satisfactorily until shortly before the accident when he got mad with plaintiff and pressed the accelerator to the floorboard on the way to take plaintiff home, *held* sufficient to establish plaintiff's contributory negligence as a matter of law in continuing to ride in the vehicle when she knew defendant's ability to control and operate his automobile was impaired because of the quantity of beer he had consumed and the crowded condition of the vehicle, the impairment of ability to control the vehicle being a proximate cause of the accident and the resulting injury.

MOORE, J., not sitting.

APPEAL by plaintiff from *Lupton, J.*, 11 October 1965 Civil Session of FORSYTH.

ATWOOD *v.* HOLLAND.

Civil action by Brenda Atwood, a minor appearing by her next friend, and a passenger in an automobile owned and driven by defendant, to recover actual damages for personal injuries and punitive damages, allegedly caused by the actionable negligence of defendant in the operation of his automobile. The complaint alleges defendant was negligent, in that he operated his automobile recklessly in violation of G.S. 20-140(a) and (b), at a speed greater than was reasonable in violation of G.S. 20-141(a), at a speed in excess of 35 miles an hour in violation of G.S. 20-141(b), in that he failed to decrease the speed of his automobile upon approaching a curve and hill crest, in violation of G.S. 20-141(c), in failing to keep his automobile under control, to maintain a proper lookout, and to drive upon the right half of the highway, in violation of G.S. 20-146.

Defendant in his answer admitted as true allegations in the amended complaint that Brenda Atwood was a female 17 years of age at the time she was injured, that North Liberty Street was a two-lane street running in a north-south direction, accommodating traffic in both directions, from curb to curb was 42 feet wide, its surface was black asphalt and dry, the weather was clear and it was dark, and denied that he was negligent in the operation of his automobile at the time Brenda Atwood was injured. Defendant in his further answer and defense pleads conditionally contributory negligence on the part of Brenda Atwood in getting into his small sports automobile which had a low roof and bucket seats and was designed to seat two people only, when two passengers and the driver were already in it, which overcrowding in defendant's automobile she knew created an inherent and dangerous condition interfering with defendant's operation of his automobile; and when she knew that defendant had been drinking intoxicating beverages to the extent that the alcoholic beverages affected his operation of his automobile; and that she continued to ride in his automobile while it traveled many miles in the city of Winston-Salem, stopping at many places, which gave her ample opportunity to leave his automobile, but she failed to do so; and these acts of negligence on her part concurred with negligence on his part in proximately causing the wrecking of his automobile and her injuries.

From a judgment of compulsory nonsuit and a dismissal of the action entered at the close of plaintiff's evidence, plaintiff appeals.

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

Deal, Hutchins and Minor by John M. Minor and Richard Tyndall for defendant appellee.

PARKER, C.J. Plaintiff assigns as error the entry of the judgment of compulsory nonsuit and a dismissal of the action entered at the close of plaintiff's evidence.

Defendant states in his brief: "Assume sufficient evidence of negligence to go to the jury. What was the evidence as to contributory negligence?"

Brenda Atwood testified in her behalf in substance, except when quoted, as follows: On 9 February 1964 she was 17 years old. About 9 p.m. on Saturday, 9 February 1964, defendant driving his automobile with a man in it came to where she was living at 106 North Sunset Drive in the city of Winston-Salem, and she left with him in his automobile to join some friends at The Gaslight, where they sell tap beer and pizzas and have a jukebox and dance. The Gaslight is on Fourth Street in Winston-Salem right across from Sears. When they arrived at The Gaslight, she, defendant, and the man with defendant went inside where defendant had a table reserved, and the three of them took a seat at the reserved table. Mary and Nancy Hall, friends of theirs, were seated at a table next to their table. She ordered and drank a small Budweiser beer in a can, and defendant ordered and drank a yard-long beer in a big, long glass. A yard-long beer in a glass is equal to three 12-ounce cans of beer. They danced. She ordered and drank another small Budweiser beer, and did not drink any more after that. Defendant drank three or four more yard-long beers. The man who came to her house with defendant and had been at their table left. Christine Young and a man with her joined them at their table. Christine Young and the man with her were drinking whisky, and Christine Young was drunk. Between 11:00 and 11:30 p.m. she and Christine Young left The Gaslight in defendant's automobile, with defendant driving. Defendant drove his automobile to Mary Hall's place on Academy Street. Mary Hall had company, and they did not go in. Defendant's driving from The Gaslight to Mary Hall's place "was fine, his driving was all right." Bennie Benfield got in defendant's automobile with them on Academy Street, which made four people in the automobile. Defendant then drove his automobile to Fourteenth Street, where defendant and Benfield got out, went upstairs in a house, and got two pints of whisky. Defendant's driving from Academy Street to Fourteenth Street was all right. Defendant drove from Fourteenth Street to Liberty Street, and went up it towards the airport. She told defendant she wanted to go home, because they were getting ready to open the bottles of whisky. At that time they were on Liberty Street at Lowe's Hardware. Defendant stopped his automobile there to turn around. Defendant got mad, accused her of having a

late date at her home, said he would take her home, mashed his gas pedal all the way to the floor, and "took off" back up Liberty Street. She told him to slow down, but he did not until he got almost to the curve on Liberty Street. Defendant went into the curve sliding, and at that time "he was going about 75 or 80, I guess." When defendant started sliding on the right side of the street, she saw the headlights of an approaching automobile, which was right in front of The Ponderosa Pine. Then defendant cut back across the road, and his automobile hit a pole. She was knocked unconscious. Defendant's driving was at a normal rate of speed and fine before he got mad and pushed his gas pedal to the floor. During the trial it was stipulated that the speed limit at the time and place of the wreck was 35 miles an hour.

Defendant was driving his Chevrolet Corvette. Brenda Atwood testified on cross-examination: "It is a small two-seated sports car. In that car there are two bucket seats, one for the driver and one for a passenger, and in between those two seats you have a hump built up on the floor, a console. . . . During the course of that ride all over the city of Winston-Salem on that night, the four of us were in that car all the time together. Christine Young was real drunk; she wasn't flopping over on me; she was leaning against the door; she did not fall over on me. . . . After defense counsel asked me those questions on that prior examination, my attorney Mr. Hall, who is associated with Mr. Hatfield and Mr. Allman, asked me questions. Mr. Hall asked me if Ronnie Holland appeared to be intoxicated when Christine and Holland and I left The Gaslight in his Corvette, and I said yes, that when we danced he'd step on my toes and, you know, would fall against me; that he was almost too tipsy to dance. That was my answer, and that is correct. He acted that way while we were on the dance floor. It was a real small dance floor and a lots of couples. When we got outside he didn't stagger or anything. I am not saying, now, that he was drunk inside but was not drunk outside." She testified on recross-examination: "I was sitting there squeezed in between Benfield on one side, on the passenger's side, and Ronnie Holland on the other side. I had my legs over to one side; I had them on the side Christine was sitting on, on my right leg. My legs and Christine's legs and Benfield's legs were all in one compartment over there."

W. L. Brendle, a police officer in Winston-Salem, about 1:00 a.m. on Sunday, was called to the scene of an accident on Liberty Street. He testified as a witness for plaintiff in substance, except when quoted, as follows: At the scene of the accident he found a 1962 Chevrolet Corvette had skidded into a light pole. He determined

from his investigation that defendant was the owner and driver of the vehicle and that Bennie Benfield, Christine Young, and Brenda Atwood were passengers in his automobile. He testified as follows: "That Corvette is a sports car, specifically designed as a sports car; it has just two seats to it; the seats are bucket seats, each one designed for one person to sit in. The bucket seats in this Corvette are even lower than the bucket seats in the ordinary car; they are low down to the floor. When you sit in those bucket seats in the Corvette, your legs are almost sticking straight out in front of you; they sit low to the floor-board. This is a sports car, and it is designed to be right down to the ground." At the City Hospital he talked to defendant, who was bleeding pretty badly about the mouth, and his legs or ankles were messed up so he could not walk. In talking to defendant at the hospital, he could not tell what his condition was with reference to being intoxicated, though he could smell the odor of some type of alcohol on his breath.

D. T. Poplin, a policeman in the city of Winston-Salem, was working off duty at The Ponderosa Pine. This place closed about 12:15 and he and the owner were inside. The owner said he would pay him at 1:00 a.m. He was sitting on a stool inside The Ponderosa Pine facing Liberty Street, and he heard tires squeal on the street. He looked out the window and observed a car going by the big window facing Liberty Street. When it first came in view it was not completely sideways. Before it went out of his view the headlights were shining straight towards him. It was sliding sideways down the street. He heard the crash. When he heard the tires squeal, he looked and observed defendant's Corvette for a distance of at least 160 to 175 feet. In his opinion the speed of the automobile when he observed it was about 60 or 65 miles an hour. He was the first one to arrive at the scene of the accident. When he arrived Brenda Atwood and Christine Young were lying in the street. Defendant was squatting down on the street nearest the car, and Benfield was up sitting on the sidewalk.

Plaintiff has plenary evidence that defendant was guilty of negligence in the operation of his automobile proximately resulting in serious injuries to Brenda Atwood.

A gratuitous passenger in an automobile is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances. *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787.

This is said in 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 544:

> "The failure of a guest to exercise ordinary care for his own safety may consist of his voluntarily riding in an overcrowded motor vehicle. In a few cases involving an action brought by a guest against the driver or owner of a motor vehicle for injuries sustained in an accident proximately resulting from the overcrowded condition of the vehicle, it was held under the circumstances that the guest was guilty of contributory negligence as a matter of law in riding in such vehicle. Ordinarily, however, the question of the contributory negligence of the guest in such respects has been held to be one for the jury. In some cases, it has been held that the guest was not guilty of contributory negligence in riding in a crowded motor vehicle under the circumstances present."

See also Annotations 104 A.L.R. 314, (a)1; 44 A.L.R. 2d 248, § 3.

In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and defendant must assume the burden of proving his allegation of contributory negligence. G.S. 1-139 and annotations thereon. Therefore, a motion for judgment of compulsory nonsuit upon the ground of contributory negligence should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with inferences favorable to him which may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38, and authorities cited.

Considering plaintiff's evidence alone according to the rule, it clearly establishes these facts: That Brenda Atwood knew of her own knowledge that defendant in The Gaslight drank at least four yard-long glasses of beer, which amounted to twelve 12-ounce cans of beer, and that when she and defendant danced at The Gaslight, defendant stepped on her toes and would fall against her and was almost too tipsy to dance; that she knew of her own knowledge that defendant's automobile was a Chevrolet Corvette, which is a sports car, designed for two persons to ride in, with two bucket seats, low down to the floor, each seat designed for one person to sit in, and when a person sits in a bucket seat, his legs are almost sticking straight out in front of him, and that between the two bucket seats there is a hump built up on the floor, a console; that between 11:00 and 11:30 p.m. she, Christine Young, who was drunk, and defendant left The Gaslight and got in defendant's automobile; that when defendant left The Gaslight and walked to his automobile he did not stagger; that defendant's driving from The Gaslight to Mary Hall's

place on Academy Street was all right; that Bennie Benfield got in the defendant's automobile on Academy Street, which made four persons in defendant's automobile; that she was sitting there squeezed in between Benfield on one side, on the passenger's side, and defendant on the other side; that she had her legs over to one side, she had them on the side Christine Young was sitting on, on her right leg, and that her legs and Christine Young's legs and Benfield's legs were all in one compartment; that knowing defendant's automobile was overcrowded and that a short time before defendant was almost too tipsy to dance she voluntarily continued to remain in defendant's automobile with four people in it while defendant drove his automobile many miles in the city of Winston-Salem; that when defendant was driving on Liberty Street towards the airport she told defendant she wanted to go home, because defendant and Benfield were getting ready to open the two pints of whisky they got on Fourteenth Street; that defendant got mad, accused her of having a late date, stopped his automobile near Lowe's Hardware, turned around, mashed his gas pedal all the way to the floor and "took off" back up Liberty Street; that defendant about 1:00 a.m. went into a curve on Liberty Street going about 75 or 80 miles an hour according to her testimony, and according to Poplin's testimony about 60 or 65 miles an hour, and his automobile started skidding, cut back across the street, and hit a light pole; that defendant's automobile was skidding sideways down the street; that plaintiff received serious injuries proximately resulting from the collision of defendant's automobile with the pole; and that defendant's driving was normal during that night before he got mad and pushed his gas pedal to the floor. The unescapable conclusion to be drawn therefrom is that the overcrowded condition of defendant's automobile and the condition of defendant resulting from the beer he had drunk impaired his ability to control and operate his automobile, which was a proximate cause of his losing control of it and its skidding down the street sideways and crashing into the pole, and that under all of these circumstances plaintiff's voluntarily remaining in his automobile from 11:00 or 11:30 p.m. until the collision occurred about 1:00 a.m. was a failure to use that degree of care that a reasonably prudent person would employ under the same or similar circumstances, and constituted negligence on plaintiff's part, which, concurring with defendant's negligence, contributed as a proximate cause to her injuries. Our decision here is in line with our decisions in *Bank v. Lindsey,* 264 N.C. 585, 142 S.E. 2d 357; *Davis v. Rigsby,*

261 N.C. 684, 136 S.E. 2d 33; *Rice v. Rigsby,* 261 N.C. 687, 136 S.E. 2d 35; *Tew v. Runnels,* 249 N.C. 1, 105 S.E. 2d 108.

The judgment of compulsory nonsuit is

Affirmed.

MOORE, J., not sitting.

IN THE MATTER OF THE WILL OF BLANCHE C. BURTON, DECEASED.

(Filed 6 July, 1966.)

1. Wills § 25—

A decree in a caveat proceeding may be set aside upon the same grounds and under the same procedure as those applicable to judgments generally except insofar as otherwise provided by statute or precluded by the nature of the proceeding, and motion in the cause to set aside the caveat decree presents questions of fact for the determination of the judge and not issues of fact for the determination of a jury.

2. Same—

Beneficiaries under a later will who have no interest in the estate except by virtue of such will may move to set aside the verdict and judgment probating a prior will in solemn form, notwithstanding they were not parties to the caveat proceeding, and when the executor under the prior will, who is the husband of the beneficiary under that will, is given notice and participates in the hearing, the court properly finds that all parties in interest had been notified and were properly before the court.

3. Same— Evidence held to support finding that motion to set aside probate in solemn form was made with due diligence.

A paper writing was probated in solemn form. Thereafter, beneficiaries under a later will, who had no interest in the estate except by virtue of the second paper writing, moved to set aside the verdict and judgment in the caveat proceeding. There was evidence to the effect that the later instrument was in a sealed envelope in the possession of one of the beneficiaries named therein, and that the envelope, still sealed, was delivered to caveator and placed by his attorney in the papers in the caveat proceeding. *Held:* The evidence supports the court's findings that the beneficiaries under the second paper writing had no knowledge of its contents until after the verdict in the caveat proceeding, and that their motion to set aside the verdict and judgment in the caveat proceeding, made upon their discovery of the contents of the second paper writing, was made with reasonable diligence.

4. Wills § 12—

A will probated in solemn form cannot be caveated a second time until and unless the judgment probating the will in solemn form is set aside in the original cause.

5. Same; Wills §§ 8, 25—

Where the probate of a will in solemn form is set aside by the court upon the presentation by movants of a paper writing subsequently executed by testatrix, the effect of the decree setting aside the probate in solemn form is to reinstate the probate in common form, and the caveat filed by the beneficiaries under the second instrument transfers the cause to the Superior Court, and the Superior Court retains jurisdiction to determine the validity or invalidity of the second instrument, G.S. 31-32, notwithstanding the second instrument had not been first probated in common form.

MOORE, J., not sitting.

APPEAL by respondent from *Crissman, J.*, October Civil Session 1965 of DAVIE.

Blanche C. Burton died 24 April 1963. A paper writing dated 21 March 1959, signed by Blanche C. Burton and subscribed by three witnesses, was probated in common form as the will of Blanche C. Burton by the clerk of the Superior Court of Davie County on 10 May 1963. Pursuant to the provisions of said will, P. O. Hargett, the respondent herein, and his wife, Vivian J. Hargett, were the sole beneficiaries in said will.

A caveat signed by C. W. Bland, Sr., who was not an heir of Blanche C. Burton but had acquired the interests of certain heirs, was filed 3 August 1963. The issue of *devisavit vel non* was answered by a jury in favor of the propounders, and the said paper writing was probated in solemn form as the will of Blanche C. Burton by judgment entered at the April Civil Session 1964 of the Superior Court of Davie County.

Before the above caveat proceedings were terminated, C. W. Bland, Sr., the caveator, came into possession of a paper writing in the handwriting of the deceased, Blanche C. Burton, which paper writing was dated 17 September 1959, purporting to devise her real property to Vivian (Hargett), Berrie Lee Bailey, Franklin Bailey, Richard Bailey and Larry Bailey, Berrie, Franklin, Richard and Larry Bailey being sons of Clyde Bailey, who was an heir of Blanche C. Burton, and was made a party to the original caveat proceedings.

These sons were not parties to the caveat proceedings. Their father was then and still is living. There is no evidence tending to show that these sons ever had any knowledge that they were named beneficiaries in the purported will dated 17 September 1959, until after the termination of the caveat proceedings in April 1964.

On 23 October 1964, Berrie Lee Bailey filed what purports to be a caveat to the will of Blanche C. Burton which had been probated in solemn form and filed a motion in the Superior Court that he be

permitted to intervene in the original proceedings and have the validity of the will dated 17 September 1959 determined in the original caveat proceedings. A copy of the will probated in common and solemn form, dated 21 March 1959, and a copy of the purported will dated 17 September 1959, were attached to the caveat and marked Exhibits A and B, respectively.

On 5 August 1965, Berrie Lee Bailey moved through his counsel that the court set aside and vacate the verdict and judgment entered at the April Session 1964 of the Superior Court of Davie County.

The court entered an order allowing Berrie Lee Bailey to intervene in the proceedings and ordered that the motion to set aside the previous verdict and judgment be heard at the beginning of the next session of the Superior Court of Davie County.

At the October Session of said court the matter came on for hearing, the court heard evidence, found the facts and entered an order vacating the verdict and judgment entered at the April Session 1964 of the Superior Court of Davie County, and further ordered the caveat theretofore filed by Berrie Lee Bailey transferred to the Civil Issue Docket for trial. The respondent, P. O. Hargett, who was named executor in the probated will of Blanche C. Burton, appeals, assigning error.

William E. Hall for respondent appellant.
Peter W. Hairston for movant appellee.

DENNY, E.J. The appellant assigns as error finding of fact No. 1, to the effect that all parties in interest hereto have been "properly notified and are properly before this court."

It appears the order entered in the Superior Court at the 2 August Session 1965 of Davie County included the following: "That the parties in this cause be notified of this order, and further, that the following persons who may be interested under the will tendered by the said Berrie Lee Bailey, *viz:* Richard Bailey, Franklin Bailey and Larry Bailey, be notified of the said order and that the matter be placed at the head of the calendar for trial at the next session of the Superior Court of Davie County * * * to determine whether or not the motion to set aside the verdict and judgment heretofore entered in this matter should be allowed."

When the matter came on for hearing at the October Session 1965 of the Superior Court of Davie County, Berrie Lee Bailey, Franklin Bailey, Richard Bailey and Larry Bailey were represented by counsel, and P. O. Hargett, the executor under the probated will of Blanche C. Burton dated 21 March 1959, was represented by

counsel. The witnesses tendered by the movants were examined and cross-examined by the counsel for the respective parties, and the purported will dated 17 September 1959 was introduced in evidence. This hearing involved only the setting aside of the verdict and judgment entered at the April Session 1964 of the Superior Court of Davie County. *In re Will of Cox,* 254 N.C. 90, 118 S.E. 2d 17. At the time the motion was made to set aside the verdict and judgment entered at the April Session 1964, probating the will dated 21 March 1959 in solemn form, no one had any interest in this cause except the executor, P. O. Hargett, and his wife, Vivian J. Hargett, and the movants. There is no contention that Vivian J. Hargett did not know of the pending motion. Moreover, her husband, P. O. Hargett, who is executor under the probated will, which the movants seek to caveat, was represented by counsel at the hearing in August 1965 and at the hearing in October 1965 when the verdict and judgment probating the will in solemn form were set aside.

Under our decisions "'* * * (T)he grounds upon which a decree probating a will may be set aside, except in so far as they may be affected by statute, or the nature of the case, are in general the same as those available against other judgments. * * *

" 'The proceedings for relief must be taken in the court in which the will was probated * * *. The procedure employed in this class of cases follows the rules governing judgments generally in similar cases, except as it may be affected by some special statutory provision, both as to the nature of the application and the time within which it should be made. * * * (N)or should the application be made by filing a caveat, but is ordinarily by motion or its equivalent rather than by petition, though as to this matter necessary showing may be proper. * * *'" *In re Will of Cox, supra.*

In *Cleve v. Adams,* 222 N.C. 211, 22 S.E. 2d 567, this Court said: "The motion made in the original action to set aside the judgment * * * presented questions of fact and not issues of fact. It was for the judge to hear the evidence, find the facts and render judgment thereon. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311, and cases cited."

In our opinion this assignment of error is without merit and is overruled.

The appellant also assigns as error finding of fact No. 6, as follows:

> "6. That the moving parties herein, and especially Berrie Lee Bailey, had no notice of the existence of a paper writing under which they might claim any rights in the estate of the said Blanche C. Burton, deceased, that they had no interest in the prior proceedings before his Honor, Judge Armstrong, and

that they moved with reasonable diligence following notice of the said existence of the said paper writing. That they knew of the proceedings but they would have had no interest in the estate of the said Blanche C. Burton, deceased, except by virtue of the paper writing herein referred to. That they were not parties to the said proceedings and took no part in its conduct."

The appellant contends there is no evidence upon which to base the foregoing finding of fact. We do not concur in this contention. The evidence tends to show that the paper writing dated 17 September 1959 is in the handwriting of Blanche C. Burton, that it was sealed in an envelope by her and delivered to Clarence Bailey some time before her death, with instructions to keep it and not open it until after she passed away; that Clarence Bailey, after his aunt's death, delivered the envelope and its contents to C. W. Bland, Sr., the caveator of the first purported will. Clarence Bailey had conveyed all his right, title and interest in Blanche C. Burton's estate to C. W. Bland, Sr. Bland, after reading the paper writing dated 17 September 1959, asked permission to show it to his lawyer; he was permitted to do so, and his lawyer placed it among the papers in his file in the caveat proceedings, and the beneficiaries under the second purported will never knew the contents of said paper writing until after the pending caveat proceedings had been concluded and judgment entered. In the caveat proceeding filed by C. W. Bland, Sr., these movants had no interest whatever, they were not interested parties within the meaning of our probate laws. They became interested parties only after the paper writing dated 17 September 1959 was discovered and its contents became known to them. This assignment of error is overruled.

When a will is probated in solemn form it cannot be caveated a second time unless or until the verdict and judgment probating the will in solemn form is set aside upon a motion in the original cause, *In re Will of Cox, supra,* thereupon the will, if it was first probated in common form, still stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat. G.S. 31-32; *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488, and cited cases.

G.S. 31-5.1 provides in pertinent part as follows: "A written will, or any part thereof, may be revoked only (1) By a subsequent written will or codicil or other revocationary writing executed in the manner provided herein for the execution of written wills. * * *"

The appellant assigns as error and contends that the court below erred in ruling "that the said paper writing (the one dated 17 September 1959) is in form sufficient to constitute the last will and testament of Blanche C. Burton."

We do not deem it necessary to consider this assignment of error except to say that we express no opinion upon the merits of this controversy. The validity or invalidity of the will dated 17 September 1959 should be determined in a caveat proceeding in the Superior Court. G.S. 31-32; *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; *In re Will of Ellis,* 235 N.C. 27, 69 S.E. 2d 25; *Wells v. Odum,* 205 N.C. 110, 170 S.E. 145; *Etheridge v. Corprew,* 48 N.C. 14.

It is said in Wiggins, North Carolina Wills, etc., Probate, sec. 113, p. 335, *et seq:*

> "A troublesome question which arises out of holding that a will previously admitted to probate must be set aside before the second will can be admitted to probate concerns the procedure to be followed once the first will is set aside. In North Carolina the clerk of the superior court is vested with exclusive original jurisdiction over the probate of wills. The superior court cannot, except upon the issue of *devisavit vel non* duly raised by a caveat, decide whether the instrument offered for probate is the last will of the deceased. If the first will is set aside, it is because there is a finding that the second instrument revoked the first, expressly or by implication. Is such a finding sufficient to constitute probate of the second will, *i.e.,* can the caveators as a part of the probate proceeding offer to probate the second will, or must the second instrument first be offered for probate in the office of the clerk of the superior court? While it has generally been held that a will must first be offered for probate in the office of the clerk of the superior court, since he has exclusive original jurisdiction over the probate of wills, there is authority to the effect that a second will can be offered for probate in solemn form as a part of the caveat proceeding of the first will. Also, it has been held that the superior court could take jurisdiction over the probate of a second will where the caveators, prior to the first will's being set aside, informed the clerk of the superior court of the existence of a will and requested that it be admitted to probate." Citing *In re Marks' Will,* 259 N.C. 326, 130 S.E. 2d 673; *In re Belvin's Will,* 261 N.C. 275, 134 S.E. 2d 225.

In the case of *In re Will of Charles,* 263 N.C. 411, 139 S.E. 2d 588, Higgins, J., speaking for the Court, said: "When a caveat is filed the Superior Court acquires jurisdiction of the whole matter in controversy. (Citations omitted.) Any other script purporting to be the decedent's will should be offered and its validity determined in the caveat proceeding. *In re Will of Belvin,* 261 N.C. 275, 134 S.E. 2d 225; *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488."

The court below having ordered the caveat theretofore filed by Berrie Lee Bailey transferred to the civil issue docket for trial, the judgment entered below is

Affirmed.

MOORE, J., not sitting.

ROBERT EDWARD SAUNDERS v. RUFUS GEORGE WARREN AND RADIG VAULT CORPORATION, INC., A CORPORATION.

(Filed 6 July, 1966.)

1. Automobiles § 42c—

Evidence tending to show that plaintiff's truck was stopped in a position blocking the entire eastbound lane and part of the westbound lane of the highway at a place where a number of vehicles were stalled in snow, and that the view of defendant was obstructed by falling snow and a curve, that the highway from the curve to plaintiff's vehicle was slightly downgrade and covered with ice and snow, and that defendant struck the rear of plaintiff's vehicle, *held* to take the issue of plaintiff's contributory negligence to the jury. G.S. 20-161(A).

2. Trial § 33—

It is the duty of the trial court to explain the law arising on the evidence as to all substantial features of the case, and a mere declaration of the law in general terms and a statement of the contentions of the parties with respect to a particular issue is not sufficient to meet the requirements of G.S. 1-180.

3. Automobiles § 46—

Where the evidence presents the question of plaintiff's contributory negligence in stopping his truck on the highway some 285 feet beyond a curve during a snow, so as to block the lane of travel of motorists going in his direction, and there is evidence that plaintiff's driver had stopped in an emergency to aid motorists in other vehicles stalled in the snow, *held* it is error for the court to fail to charge the jury with respect to the law in regard to contributory negligence and apply the law to the facts adduced by the evidence, and mere statement of the contentions of the parties and the general law is insufficient.

4. Same—

It is error for the court to state defendant's contention that the report of the highway patrolman stated that plaintiff's truck was improperly parked, since whether plaintiff was or was not guilty of contributory negligence by reason of the manner in which he parked his truck is to be determined under the applicable statutory or common law and not by the standards established by the highway patrol or the conclusions reached by the investigating patrolman.

MOORE, J., not sitting.

APPEAL by plaintiff from *Shaw, J.*, 27 September Civil Session of FORSYTH.

Plaintiff instituted this action to recover for personal injuries allegedly caused by defendant Warren's negligent operation of the corporate defendant's 1962 Studebaker truck. It was admitted that Warren was driving the truck as agent of the corporate defendant.

The accident occurred at approximately 5 P.M. on 26 February 1963 on N. C. Highway 66 north of the city of Winston-Salem, North Carolina. At the point of the accident the highway ran generally east and west. The plaintiff was proceeding eastwardly on said highway, a 20-foot paved road with a 3- or 4-foot shoulder on each side and a ditch on the right side going east. It was snowing, the road was covered with snow and was slightly down grade. The plaintiff, driving a flat-bed truck belonging to Piedmont Airlines, his employer, rounded a right curve and saw some 285 feet ahead of him vehicles stalled on the highway. The plaintiff stopped for the purpose of rendering aid to these vehicles and assisted a woman whose car was off on the shoulder of the road and stuck in the snow to get back on the road. He then tried to pull a pickup truck which was stranded on the road with its front wheels off the highway and its rear wheels on the highway. He failed to get this truck back on the highway, but did get it off the highway and on the shoulder of the road. He then returned to his truck, which was stopped diagonally across the road, completely blocking the lane for eastbound traffic, and the left hand lane going east was at least half blocked. The defendant Warren, operating said Studebaker truck, was proceeding eastwardly on said highway. The front end of the Studebaker truck collided with the left rear of plaintiff's stopped truck. The truck of Piedmont Airlines was not damaged by the collision.

The jury answered the issues of negligence and contributory negligence in the affirmative, and judgment was entered accordingly. The plaintiff appeals, assigning error.

White, Crumpler, Powell, Pfefferkorn and Green for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson and Robert Elster for defendants, appellees.

DENNY, E.J. This case was here at the Spring Term 1965. The first trial ended in a judgment as of nonsuit at the close of plaintiff's evidence. On appeal we reversed, holding the evidence was sufficient to require determination by the jury under appropriate instructions on the issues raised by the pleadings. The pleadings raised the issues of negligence, contributory negligence and damages.

The appellant assigns as error the submission of the issue with respect to contributory negligence.

The evidence on the issue of contributory negligence in our opinion is as strong or stronger on the present record than it was on the former. The evidence at the former trial is set out rather fully in the opinion in *Saunders v. Warren,* 264 N.C. 200, 141 S.E. 2d 308. The evidence at the former trial tended to show that at the time of the collision the right wheels of plaintiff's truck were on the right shoulder of the road and the left wheels were two feet on the pavement, "or perhaps a little more," while the defendants' evidence in the trial below was to the effect that at the time of the collision the plaintiff's truck was completely blocking the lane for eastbound travel and the left lane for eastbound travel was at least half blocked.

In the case of *Chandler v. Bottling Co.,* 257 N.C. 245, 125 S.E. 2d 584, the plaintiff's evidence tended to show that the defendants' truck had stopped on the highway to pick up some bottles which it had spilled; that it blocked the major portion of the highway for twenty minutes. The accident occurred about 2:30 P.M. at a curve on the Baux Mountain Road north of Winston-Salem in a rural area. The plaintiff, traveling in the opposite direction, came around the curve at 45 or 50 miles per hour, ran over broken bottles trying to avoid hitting the truck, experienced a blowout, and went off the road, resulting in injuries to the plaintiff. This Court held the evidence was sufficient to make out a *prima facie* case of actionable negligence on the part of the defendant in failing to comply with G.S. 20-161(a), in that defendant failed to leave at least 15 feet of the highway for passage of other vehicles, and failed to display red warning flags at least 200 feet in the front and rear of his vehicle. The Court further said:

> " 'One stopping an automobile on the highway should use ordinary care to prevent a collision with other vehicles operating thereon. A motorist stopping on a pronounced curve should anticipate that a following motorist will have an obstructed view of the highway ahead, * * *' 2A Blashfield: Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 1191, p. 8; *Hunton v. California Portland Cement Co.,* 50 Cal. App. 2d 684, 123 P. 2d 947.
>
> " 'The operator of a standing or parked vehicle which constitutes a source of danger to other users of the highway is generally bound to exercise ordinary or reasonable care to give adequate warning or notice to approaching traffic of the presence of the standing vehicle, and such duty exists irrespective

of the reason for stopping the vehicle on the highway. So the driver of the stopped vehicle must take such precautions as would reasonably be calculated to prevent injury, whether by the use of lights, flags, guards, or other practical means, and failing to give such warning may constitute negligence. * * *' 60 C.J.S., Motor Vehicles, § 325, pp. 779, 780; *Mullis v. Pinnacle Flour & Feed Co.*, 152 S.C. 239, 149 S.E. 329."

See *Pender v. Trucking Co.*, 206 N.C. 266, 173 S.E. 336; *Montford v. Gilbhaar*, 265 N.C. 389, 144 S.E. 2d 31; and *Faison v. Trucking Co.*, 266 N.C. 383, 146 S.E. 2d 450.

This assignment of error is overruled.

The appellant assigns as error some twelve portions of the charge to the jury on the issue of contributory negligence. Substantially all these portions of the charge are in the form of contentions of the parties with respect to this issue and cover some seven pages of the record. The law as well as the evidence bearing on this issue is stated in the form of contentions. The following portions are typical of those assigned as error:

"The defendants also contend that the evidence of Mr. Shore shows that the truck of Piedmont Aviation had been stopped on the highway ten or fifteen minutes and that thereby it became the duty of the plaintiff to comply with the provisions of General Statute 20-161(A) — that is, the statute that I just read to you — and to place flags or flares at least two hundred feet from the truck in each direction so as to give warning to oncoming vehicles warning them that there was a truck parked in the highway.

* * * * *

"The defendants also contend that if section 161(A) does not apply then the plaintiff was required by law to display red flags or flares under the test applying to what a reasonably prudent person would do or would not do under the same or similar circumstances. The defendants contend that the plaintiff had just passed the curve and the road was icy and slick and the plaintiff, for his own protection and for the protection of the public, should have displayed red flags or flares irrespective of any statutory requirements.

* * * * *

"The defendants also contend that the Highway Patrolman noted on his report that this truck was improperly parked; that the Patrolman judged the truck by the standards of the Highway Patrol and concluded, according to said standards, that it was improperly parked.

"The defendants also contend that the plaintiff was a professional truck driver with years of experience and that he should have known to put out flags or flares and to warn traffic when he was going to block the highway with the highway being as icy as it was on that day; and the defendants contend that the plaintiff knew that the visibility would be obstructed by the hard snow which was falling and that under all the circumstances and conditions then and there existing the plaintiff himself was guilty of such contributory negligence as constituted one of the proximate causes of the accident complained of and of any injuries or damages which might have been sustained by the plaintiff."

After stating the contentions of the parties, the court charged:

"I repeat, members of the jury, if you find any of these things and find them by the greater weight of the evidence, and further find that such negligent act or acts of the plaintiff was one of the immediate causes of the collision which combined and concurred with the alleged negligence of the plaintiff (should have been defendant) to produce this collision, then you would answer this second issue in favor of the defendants; that is, YES."

The decisions of this Court are consistently to the effect that G.S. 1-180 imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties with respect to a particular issue is not sufficient to meet the requirements of the statute. The judge must explain and apply the law to the specific facts pertinent to the issue involved. *Ryals v. Contracting Co.*, 219 N.C. 479, 14 S.E. 2d 531; *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484; *State v. Sutton*, 230 N.C. 244, 52 S.E. 2d 921; *Brannon v. Ellis*, 240 N.C. 81, 81 S.E. 2d 196; *Rowe v. Fuquay*, 252 N.C. 769, 114 S.E. 2d 631; *Therrell v. Freeman*, 256 N.C. 552, 124 S.E. 2d 522.

When the judge fails to declare and explain the law and apply it to the evidence bearing on the issue involved, the jurors, unfamiliar with legal standards, are left without benefit of such legal standard or standards necessary to guide them to a right decision on the issue. Ervin, J., in *Lewis v. Watson, supra*, said: "If the mandatory requirements of the statute are not observed, 'there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented.' *Smith v. Kappas, supra* (219 N.C. 850, 15 S.E. 2d 375)."

Moreover, whether or not the plaintiff was negligent by reason of the manner in which he parked the truck he was driving on the highway at the time of the collision involved herein must be determined under the applicable statutory or common law and not by standards established by the Highway Patrol or the conclusion reached by the investigating patrolman.

We regret that is it necessary to prolong this litigation. Even so, in our opinion the plaintiff is entitled to a new trial, and it is so ordered.

We deem it unnecessary to consider the other assignments of error. They may not recur upon another trial.

New trial.

MOORE, J., not sitting.

JENNIFER J. BROWN, BY HER LEGAL GUARDIAN, NEXT FRIEND, ROBERT F. BROWN, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION.

(Filed 6 July, 1966.)

State § 5b—

A county board of education is not liable in tort unless it has waived its immunity as authorized under G.S. 115-53, and therefore, in proceedings under the Tort Claims Act on a claim for injuries sustained by a pupil when she was struck by a school bus operated by a driver who was an employee of the county board of education, the award of damages to plaintiff cannot be sustained in the absence of a finding that the driver's salary was paid from the State Nine Months School Fund, so as to bring the claim under the provisions of G.S. 143-300.1, and when there is no finding in regard to this matter, the cause must be remanded.

MOORE, J., not sitting.

PLESS, J., and RODMAN, E.J., took no part in the consideration and decision of this case.

APPEAL by claimant from *Pless, J.*, Schedule "A", 20 September 1965 Civil Session of MECKLENBURG.

Proceeding instituted before the North Carolina Industrial Commission under the provisions of Article 31, Chapter 143 of the General Statutes of North Carolina, entitled "Tort Claims Against State Departments and Agencies," to recover for personal injuries to Jennifer J. Brown, a 12½-year-old school girl, who was struck

by the right front fender of a school bus, knocked down, and run over by its right front wheel.

From a judgment by the court holding that the facts found by the hearing deputy commissioner and adopted as its own by the Full Commission as to what happened do not constitute actionable negligence on the part of the driver of the school bus, and ordering that Jennifer J. Brown recover nothing from respondent and dismissing the case at the cost of claimant, she appeals.

Welling, Welling & Meek by Charles M. Welling for plaintiff appellant.

Brock Barkley for defendant appellee.

PARKER, C.J. At the hearing before Gene C. Smith, deputy commissioner, claimant and respondent offered evidence. At this hearing the parties entered into the following stipulations:

> "1. That the accident occurred at the intersection of Robin Hood Road and Shady Bluff Drive in Charlotte, North Carolina, on February 5, 1963, at about 8:05 in the morning.
>
> "2. That the vehicle owned by the Mecklenburg County Board of Education was being driven by Michael Chambers Porter, an employee of the Mecklenburg County Board of Education, and that said employee was acting at the time within the scope of his employment."

The hearing deputy commissioner found these material and crucial facts:

> "1. . . . [A]t this intersection both streets are paved, and at the northeast intersection there is a shallow, drain-like gutter, which is concrete, and that the pavement is asphalt; that beyond the drain-like gutter there is a residential yard, which is grassed, and on the occasion complained of the weather was fair, and there were several children waiting at this intersection; that the defendant's driver was able to see the children for some distance up Robin Hood Road, he approached said intersection from the east, traveling in a westerly direction; that the plaintiff herein was standing with her feet on the asphalt section of the highway, and next to her was her sister, who was standing in the drain-like gutter, the plaintiff being on her sister's right.
>
> "2. That as the defendant's driver approached the stop he saw the children, who were divided into two groups, one a group of girls and the other a group of boys, standing at the side of the road; the children were pushing and shoving; as the

defendant's driver approached these groups he slowed the bus and pulled somewhat to the left of the curb, was traveling about two miles per hour, looking over the right front fender, the boys started to pound on the door before the bus stopped, and just before the bus came to a complete stop the driver saw the plaintiff's head disappear under the right front fender, the bus moving approximately five feet after plaintiff's head disappeared under the right front fender.

"3. That the plaintiff herein was struck by the right front fender of the defendant's bus, which knocked her down, and the right front wheel of the bus thereafter rolled over the plaintiff.

* * *

"15. That the plaintiff did not contribute to the damages sustained by any negligence on her part."

(We omit the detailed findings of fact as to claimant's injuries, her admission into Charlotte Memorial Hospital on 5 February 1963, her being placed in and remaining in skeletal traction for three weeks after which she was placed in a plaster cast, her dismissal from the hospital on 5 March 1963, etc.)

Based on his findings of fact the hearing deputy commissioner made these conclusions of law:

"1. That the plaintiff herein sustained bodily injury which was occasioned by the negligence of the defendant driver's operation of a school bus without due caution and without due care in approaching the children gathered at the intersection; that the defendant's driver failed, when he saw the children at the intersection, to exercise that degree of care which applies with peculiar emphasis to the operator of a school bus, and this failure to exercise said caution and care proximately caused the plaintiff's injuries and damages. *Greene v. Board of Education,* 237 N.C. 336.

"2. That the plaintiff herein sustained damages in the amount of $7,500.00 by reason of the negligence of the defendant's driver. G.S. 143-291, *et seq.*

"3. That the plaintiff herein was not guilty of any contributory negligence."

Based on his findings of fact and conclusions of law the hearing deputy commissioner ordered that respondent pay to the duly appointed guardian and next friend of claimant the sum of $7,500.

Respondent appealed to the Full Commission for a review of the award made by the hearing deputy commissioner, alleging in its application for a review that the evidence was insufficient to justify

a finding of fact or conclusion of law that it was negligent; that he found as a fact and concluded as a matter of law that claimant was not contributorily negligent when her evidence established she was contributorily negligent; and that the amount awarded as damages was excessive. The Full Commission held there is ample evidence to support the hearing deputy commissioner's findings of fact, that his conclusions of law based thereon are correct, and the award should be affirmed. Therefore, the Full Commission adopted as its own the hearing deputy commissioner's findings of fact, conclusions of law, and award, and affirmed the order of the hearing deputy commissioner, Chairman Bean dissented as to the amount of damages awarded, being of the opinion they were excessive.

Respondent appealed to the superior court, which was of the opinion that the facts found by the hearing deputy commissioner, and adopted as its own by the Full Commission, do not constitute actionable negligence on the part of the driver of the school bus, and ordered that Jennifer J. Brown recover nothing from respondent, and dismissed the case at the cost of plaintiff.

The Charlotte-Mecklenburg Board of Education "unless it has duly waived immunity from tort liability, as authorized in G.S. 115-53, is not liable in a tort action or proceeding involving a tort except such liability as may be established under our Tort Claims Act. G.S. 143-291 through 143-300.1." *Fields v. Durham City Board of Education*, 251 N.C. 699, 111 S.E. 2d 910.

In *Huff v. Northampton County Board of Education*, 259 N.C. 75, 130 S.E. 2d 26, the Supreme Court speaking by Denny, C.J., said:

> "The General Assembly of North Carolina relieved the State Board of Education from all responsibility in connection with the operation and control of school buses in this State by the enactment of Chapter 1372 of the North Carolina Session Laws of 1955, which Act authorizes county and city boards of education to operate buses for the transportation of pupils enrolled in the public schools of such county or city administrative units. This chapter is now codified as G.S. 115-180, *et seq.*
>
> "A county board of education, 'unless it has duly waived immunity from tort liability, as authorized in G.S. 115-53, is not liable in a tort action or proceeding involving a tort except such liability as may be established under our Tort Claims Act. G.S. 143-291 through 143-300.1. * * *.'" *Fields v. Board of Education*, 251 N.C. 699, 111 S.E. 2d 910.

G.S. 143-300.1 reads in pertinent part:

"(a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged negligent act or omission of the driver of a public school bus or school transportation service vehicle *when the salary of such driver is paid from the State Nine Months School Fund* who is an employee of the county or city administrative unit of which such board is the governing board, and which driver was at the time of such alleged negligent act or omission operating a public school bus or school transportation service vehicle in the course of his employment by such administrative unit or such board. * * * (Emphasis ours.)

* * * * *

"(c) In the event that the Industrial Commission shall make any award of damages against any county or city board of education pursuant to this section, such county or city board shall draw a requisition upon the State Board of Education for the amount required to pay such award. The State Board of Education shall honor such requisition to the extent that it shall then have in its hands, or subject to its control, available funds which have been or shall thereafter be appropriated by the General Assembly for the support of the nine months school term. It shall be the duty of the county or city board of education to apply all funds received by it from the State Board of Education pursuant to such requisition to the payment of such award. Neither the county or city board of education, the county or city administrative unit, nor the tax levying authorities for the county or city administrative unit shall be liable for the payment of any award made pursuant to the provisions of this section in excess of the amount paid upon such requisition by the State Board of Education. * * *."

The parties stipulated at the hearing before hearing deputy commissioner Smith "that the vehicle owned by the Mecklenburg County Board of Education was being driven by Michael Chambers Porter, an employee of the Mecklenburg County Board of Education, and that said employee was acting at the time within the scope of his employment."

There is nothing in the stipulations entered into by the parties, or in the findings of fact, or in the record, to show that Michael Chambers Porter's salary as a school bus driver was paid from the State Nine Months School Fund.

The Full Commission has not found all essential facts necessary

to support its award, or for us to decide correctly the appeal. The judgment of the court below is vacated, and the proceeding is remanded to the court below, which is directed to vacate the judgment of the court below and to remand the proceeding to the Full Commission with a direction that it make a finding of fact as to whether or not Michael Chambers Porter's salary as a school bus driver was paid from the State Nine Months School Fund. See *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 266, 22 S.E. 2d 570, 576.

Judgment vacated and remanded.

MOORE, J., not sitting.

PLESS, J., took no part in the consideration and decision of this case.

RODMAN, E.J., who was sitting on the Bench when this case was argued in place of MOORE, J., who was sick, was relieved of duty at his request before the case was decided, and DENNY, E.J., who is now sitting as a member of the Court in place of JUDGE MOORE, who is still sick, took no part in the consideration and decision of this case.

ALICE B. ANDERSON, ADMINISTRATRIX C. T. A. OF THE ESTATE OF CHARLES R. BIGGS, SR., DECEASED, v. ROBERT G. WEBB, ADMINISTRATOR OF THE ESTATE OF CULLEN DANIEL NICHOLS, DECEASED, AND CULLEN SIMS NICHOLS.

(Filed 6 July, 1966.)

1. Automobiles § 15—

The violation of G.S. 20-146 and G.S. 20-148, requiring the drivers of vehicles proceeding in opposite directions to stay on the right side of the highway in passing, is negligence *per se*, and when an accident results as a proximate cause of the failure of one of the drivers to stay on his right side of the highway, such failure constitutes actionable negligence.

2. Automobiles § 41c—

In an action to recover damages resulting from a head-on collision between a vehicle traveling east and a vehicle traveling west on a highway, evidence that skid marks leading to the vehicle which had been traveling east were seen on the south side of the highway, and that all the debris on the highway was found on the south side thereof, and that the vehicles, locked by the force of the collision, were both on the south side of the highway, permits the reasonable inference that the accident

proximately resulted from the failure of the driver of the vehicle traveling west to stay on his right side of the highway. G.S. 20-146, G.S. 20-148.

MOORE, J., not sitting.

APPEAL by plaintiff from *Bone, E.J.*, November 22, 1965 Regular Civil Session of WILSON.

Action for wrongful death.

Plaintiff's intestate, Charles R. Biggs (aged 47), was killed about 11:30 a.m. on September 15, 1963, at a point east of Sims on U. S. Highway No. 264. He and his wife died when the 1962 Valiant which he was operating collided with a 1963 Chevrolet, owned by defendant Cullen Sims Nichols and being operated by his son, Cullen "Danny" Nichols (aged 16), the intestate of defendant Webb. Plaintiff alleges: Immediately preceding the collision, Biggs was traveling in an easterly direction on No. 264. Nichols, traveling west at an excessive rate of speed and without keeping a proper lookout, lost control of his vehicle, which crossed the center line of the highway, and collided with the Biggs automobile. Danny Nichols also died as a result of the collision.

Defendants filed separate answers. Each denied every allegation of the complaint except those with reference to the residence of the parties and the ownership of the vehicles. Defendant Webb, as administrator of Cullen Daniel Nichols, filed a counterclaim in which he sought to recover damages for the death of his intestate. Neither of the answers nor the counterclaim discloses the direction in which Danny Nichols was traveling. His administrator merely alleges that the collision occurred on Highway No. 264 at a point east of the town of Sims, and that it was proximately caused by the negligence of Biggs, who had operated his automobile at an excessive rate of speed, without keeping a proper lookout, without having it under control, and to his left of the center of the highway.

Plaintiff's evidence tends to show: On Sunday, September 15, 1963, about 8:00 a.m., Mr. and Mrs. Biggs left Greensboro to drive to Wilson in Mr. Biggs' Valiant automobile. Mr. Biggs was in good health. About 11:00 a.m., Danny Nichols, driving defendant Nichols' Chevrolet, left the home of Willard Joyner on Rural Road 1001 in Wilson County to return to his home in Sims. He drove southwardly toward Lamm's Crossroads, where Highways No. 1001 and No. 264 intersect. From there, Sims is approximately three miles west on No. 264. The Valiant and the Chevrolet collided at a point about 1.2 miles east of Sims. There were no eyewitnesses to the collision. Highway Patrolman Charles N. Lee was notified of the wreck at 11:30 a.m.; he arrived at the scene ten minutes later.

It was raining "a good rain," and the road was very wet. At the place of the collision, No. 264 is a two-lane highway which runs east and west. The road is straight; the pavement is 24 feet wide and the south shoulder 6-10 feet wide. East of the scene (distance undisclosed) there is a sharp curve to the north. The speed limit for the area was 60 MPH. Patrolman Lee found both cars on the south side of the road. The Valiant was on the shoulder almost perpendicular to the pavement; its front end faced slightly to the northeast and was about even with the south edge of the pavement. The Chevrolet was headed in an easterly direction with its left wheels on the south edge of the pavement and its right wheels on the shoulder. A mark 10 feet long led from the right front wheel of the Chevrolet back in an easterly direction on the shoulder of the highway. Debris (batteries, pieces of metal, and dirt) was located on the shoulder and on the south edge of the pavement. No other debris was on the highway. The front of the Valiant was smashed; it had penetrated the right side of the Chevrolet which was almost demolished. A wrecker pulled the two vehicles apart.

Patrolman Lee testified that, in the course of his investigation, he made a careful search of the pavement east of the point of impact, and that he found no skid marks. Willard Joyner, from whose house Danny Nichols had departed 20-25 minutes before the collision, testified that he went to the scene in response to a telephone call. He approached the wrecked cars walking from the east. On the south side of the highway, in the lane for eastbound traffic, he saw 100 feet or more of skid marks which led directly to the Nichols Chevrolet. He described these marks as follows:

> "(T)here was just kind of skid marks — a visible continuous skid mark. There was no rubber on the paved surface of the road, but it was somewhat more than water being brushed off. It wasn't any rubber there and it was somewhat more than the water being off. I did not see any rubber there. I am not sure how wide those marks that I saw were. I just saw visible marks. . . . I don't know if they were parallel tracks. I do know that I saw no rubber on the surface of the road."

At the conclusion of plaintiff's evidence, defendants' motion of nonsuit was overruled. Defendants then offered evidence which tended to show only that Danny Nichols was an attractive, healthy, industrious boy of good habits, and that he had been driving an automobile approximately 5½ months at the time of the accident.

At the close of all the evidence, defendants renewed their motion for judgment of nonsuit, and plaintiff moved the court to nonsuit the counterclaim. The judge allowed both motions, and plaintiff appealed.

Hoyle, Boone, Dees & Johnson by J. Sam Johnson, Jr., for plaintiff appellant.

Gardner, Connor & Lee; Lucas, Rand, Rose & Morris by J. M. Reece for defendant appellees.

SHARP, J. Considering the evidence in the light most favorable to plaintiff — as we are required to do in passing upon a motion for nonsuit, 4 Strong, N. C. Index, Trial § 21 (1961) — it is sufficient to establish that plaintiff's intestate Biggs was operating the Valiant in an easterly direction; that defendant's intestate Danny Nichols was driving west in the Chevrolet; and that Nichols, traveling to his left of the center of the highway, collided with the Biggs automobile in its lane of travel.

Plaintiff's theory of this case is that Danny Nichols, operating his vehicle at a speed greater than was reasonable and prudent considering the rain and wet pavement, lost control of his car on a sharp curve to his right and skidded 100 feet into the Biggs automobile on the south side of the road. The only evidence with reference to this curve is found in the testimony of the patrolman, who said: "The condition of the road to the east of this collision is a sharp curve. The curve goes to the north." The record, therefore, fails to disclose the distance from the curve to the point of collision. For this reason, defendant-appellee argues that plaintiff may not suggest that the curve had any relation to the accident. He further argues that the skidding of an automobile is not in itself evidence of negligence, *Hardee v. York*, 262 N.C. 237, 136 S.E. 2d 528; *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251, and that there is no evidence that Danny Nichols, prior to skidding, was guilty of negligence which would have caused his car to skid. The flaw in this argument is that the skid marks, which the witness Joyner described, began on the *south* side of the highway in the Biggs' lane of travel. Thus, at the time Nichols began to skid, his vehicle was already upon the left half of the highway. The distance of the curve from the point of collision would not appear to be material, for it was Danny Nichols' duty to drive on his right half of the roadway at all times — on the straightway and, *a fortiori,* in a curve.

G.S. 20-146, except in certain situations not applicable here, provides that, "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway. . . ." G.S. 20-148 requires the drivers of vehicles proceeding in opposite directions to "pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible." A violation of either of these statutes is negligence *per se,* and, when the proximate cause of injury, constitutes actionable

negligence. *McGinnis v. Robinson,* 258 N.C. 264, 128 S.E. 2d 608; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Grimes v. Coach Co.,* 203 N.C. 605, 166 S.E. 599.

When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a *prima facie* case of actionable negligence. *Spiegelman v. Birch,* 204 Va. 96, 129 S.E. 2d 119; *Evansville Container Corp. v. McDonald,* 132 F. 2d 80 (6th Cir.); *Brown v. Head,* 158 So. 2d 442 (La. App.); *Miller v. Mullenix,* 227 Md. 229, 176 A. 2d 203. The defendant, of course, may rebut the inference arising from such evidence by showing that he was on the wrong side of the road from a cause other than his own negligence.

True, this case is a repetitious example of a collision in which there were no survivors and to which there were no eye witnesses, but this situation does not change the rule of law. Plaintiff, having made out a *prima facie* case of actionable negligence against defendant's intestate, was entitled to have the jury pass upon the evidence. The judgment of nonsuit is

Reversed.

MOORE, J., not sitting.

PEOPLES BANK & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF GEORGE SPRITE BARBEE, JR., v. LONNIE GLENN SNOWDEN.

(Filed 6 July, 1966.)

1. Automobiles § 41a—

Negligence is not presumed from the mere fact of an accident, and the doctrine of *res ipsa loquitur* does not apply upon proof that the driver of a vehicle lost control and ran off the highway, but when there is some evidence, physical, direct, or a combination of both, sufficient to permit a fair inference that the loss of control of the vehicle was due to negligence, the evidence should be submitted to the jury.

2. Same— Physical facts at scene, together with other evidence, held sufficient to be submitted to the jury on the issue of whether driver's loss of control was due to negligence.

The evidence tended to show that the driver of the vehicle in which plaintiff's intestate was riding lost control of the vehicle, resulting in the accident causing death. The evidence tended to show that the accident occurred at a place where a four-lane highway narrowed into a two-lane

highway, that defendant's vehicle left tire marks on the shoulder to its right as though defendant had continued straight as the pavement narrowed to his left, and the physical facts at the scene tended to show that the vehicle was traveling at a high rate of speed. There was testimony that defendant stated after the accident that he became confused when he came to the narrowing of the road. *Held:* The evidence is sufficient to permit the inference that defendant lost control of the vehicle because of his speed and his failure to maintain a proper lookout, and judgment of involuntary nonsuit was erroneously entered.

MOORE, J., not sitting.

APPEAL by plaintiff from *Mintz, J.*, November 1965 Civil Session of PASQUOTANK.

Action for wrongful death.

It was established by stipulation that plaintiff's intestate, George Sprite Barbee, Jr. (Barbee), died instantly as a result of injuries sustained in the automobile accident in suit. Plaintiff alleges that the fatal upset was proximately caused by defendant's negligence in that he operated his vehicle at an excessive speed, without keeping it under proper control, and without keeping proper lookout. Plaintiff's evidence tended to show these facts:

On November 21, 1964, at about 2:15 a.m., Barbee was riding as a passenger in defendant's 1965 Ford automobile which he was driving in a southerly direction on U. S. Highway No. 17. Approximately two miles south of Elizabeth City, No. 17 changes from a four-lane to a two-lane highway. At this point there is a highway sign which says "Resume Safe Speed." The area immediately north of this sign is a 45 MPH speed zone. Defendant told Barbee's aunt, with whom intestate lived, that when "he came to the narrowing of the road it confused him, he became confused, and the car went off the road." The physical evidence at this spot was described by the investigating patrolman: One line of tire tracks appeared on the shoulder of the road just as the pavement began to narrow into two lanes, indicating that the driver had continued straight ahead while the pavement receded to the left. These tire markings were visible for a distance of 148 feet on the shoulder. They then swerved to the left and went southeastwardly across the pavement for 100 feet as two heavy black skid marks. It was "as if the car skidded and was beginning to turn sideways." (There were no skid marks on the pavement *north* of the place where the tire marks first appeared on the shoulder.) After crossing the east shoulder of the highway, the tracks went on for 227 feet, over two ditches, and finally plowing through and scattering a pile of concrete building blocks which had been stacked at a construction site. From the point where the tire marks first left the pavement to the place where defendant's Ford

came to rest on its top, the officer found a line of marks, debris, and "holes and scrapes" which measured 525 feet. The front of the automobile was pointing away from the pavement; the left door was open. Defendant was lying to the right rear of the automobile, 89 feet from the east edge of the pavement. Barbee's dead body was discovered off to the right of the vehicle.

On the night of the accident the weather was clear and cold. The asphalt pavement was smooth and dry. There were no eyewitnesses to the mishap, but a resident of the area, Mr. Wilbur Jordan, heard the noise of the accident. He testified that as he was preparing for bed he heard a series of metallic "bumping noises outside." The first noise appeared to be in his front yard. As it passed on, the bumping was "every now and then." There was one big noise. Mr. Jordan neither saw nor heard any other traffic until he got to the scene three or four minutes later. Robert Duhadaway, a motorist, traveling south on No. 17, stopped when he observed the lights of defendant's overturned car and saw a man running toward it. Mr. Duhadaway had entered No. 17 three-fourths of a mile north of the accident and had observed no traffic on the highway.

Prior to the accident defendant was in good health, not subject to fainting spells or blackouts. He had purchased his automobile new approximately six weeks before the accident; it was in excellent mechanical condition. The sales agency which had sold defendant the automobile bought it after the accident for salvage. Thereafter, the garage used certain parts from it, including the steering gear and "everything in the braking system except the right front wheel." Three of the tires were undamaged; the fourth had in it a clean cut four inches long. "It was not a blowout type puncture; it was a sharp object cut."

At the conclusion of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed, and plaintiff appealed.

LeRoy, Wells & Shaw by Dewey W. Wells and L. P. Hornthal, Jr., for plaintiff appellant.

Aydlett & White by Gerald F. White and Frank B. Aycock, Jr., for defendant appellee.

SHARP, J. This appeal involves only the question whether plaintiff's evidence was sufficient to take the case to the jury on the issue of defendant's actionable negligence. It presents once again this frequently recurring situation to which there are no eyewitnesses: An automobile leaves the highway, upsets or collides with some object, and thereby causes personal injury or death. The doctrine of *res ipsa loquitur* is not applicable to such cases, for negligence is

not presumed from the mere fact that a vehicle veers off the highway. *Crisp v. Medlin,* 264 N.C. 314, 141 S.E. 2d 609; *Yates v. Chappell,* 263 N.C. 461, 139 S.E. 2d 728. Nevertheless, the physical facts can sometimes tell, more convincingly than could a witness, what occurred prior to the accident. " 'Evidence of actionable negligence need not be direct and positive. Circumstantial evidence is sufficient, either alone or in combination with direct evidence.' " *Randall v. Rogers,* 262 N.C. 544, 549, 138 S.E. 2d 248, 251. As Higgins, J., said in *Lane v. Dorney,* 252 N.C. 90, 92, 113 S.E. 2d 33, 34: "As a prerequisite to the presumption of driver responsibility, some evidence, physical, direct, or a combination of both, should be offered that other probable causes were absent, leaving the fair inference the accident resulted from the driver's negligence."

In *Lane v. Dorney, supra,* the driver of the automobile (Dorney) was going down hill on a long sweeping curve to the left. He failed to make the curve, ran off the road to the right over an embankment, and jumped a stream. The vehicle landed on its top and was completely demolished. The evidence disclosed that Dorney was "perfectly well." His vehicle was in good mechanical condition. The traveled portion of the highway was hard-surfaced, 18 feet wide, with dirt shoulders 3 feet wide. The surface was dry and free of defects. No other travelers were using the highway at the time and place of the accident. There was no evidence of a blowout. In reversing the trial court's judgment of nonsuit, this Court held that the plaintiff's evidence "tended to remove other possible contingencies, leaving the permissible inference that . . . (Dorney) was careless in the discharge of his duties to his passengers by failing to see the curve which he should have seen, or by failing to have his vehicle under such control as would enable him to keep it on the road. Failure in either particular would constitute negligence." *Id.* at 95, 113 S.E. 2d at 36-37. *Accord, Yates v. Chappell, supra; Randall v. Rogers, supra.*

The decision in *Lane v. Dorney, supra,* and the cases in line with it, control the decision here. The road was dry and free from defects. There was no other traffic on the highway at the time of the accident. Defendant's 1965 Ford, purchased new five to six weeks prior to the accident, was in good mechanical condition. After the accident, the steering mechanism and the brakes were found not to be defective; an examination of the tires negated a blowout. The defendant was in good health and was not subject to blackouts or fainting spells. The area immediately north of the place where defendant's automobile left the pavement is a 45 MPH speed zone. In addition to this evidence, plaintiff offered defendant's own admission that he was driving the automobile and also his explanation that

"when he came to the narrowing of the road it confused him, he became confused, and the car went off the road."

From the foregoing evidence, it is inferable that defendant, as he approached the narrowing of the road, failed to maintain a proper lookout and to keep his car under control; that he was driving at an excessive rate of speed when he ran off of the pavement; and that such conduct was a proximate cause of Barbee's death. *Drumwright v. Wood,* 266 N.C. 198, 146 S.E. 2d 1. As in *Lane v. Dorney, supra* at 94, 113 S.E. 2d at 36, plaintiff's evidence in the case at hand — viewed, as it must now be, in the light most favorable to plaintiff — "tends to remove everything that might have influenced the movement of the car, causing it to leave the road, save and except the hands of the man at the wheel."

Defendant relies upon the case of *Crisp v. Medlin, supra.* This case, however, is distinguishable from the case at bar. In *Crisp,* the plaintiff, *inter alia,* failed to offer sufficient evidence to warrant a finding that defendant's intestate was driving the automobile at the time of the fatal wreck.

The judgment of involuntary nonsuit was erroneously entered and is

Reversed.

MOORE, J., not sitting.

BEVERLYN J. WHITLEY v. RUTH N. RICHARDSON.

(Filed 6 July, 1966.)

Appeal and Error § 40—

The verdict of the jury will not be upset for technical error which could not have affected the result of the trial.

MOORE, J., not sitting.

APPEAL by plaintiff from *Houk, J.,* September 20, 1965 Schedule B Civil Session of MECKLENBURG.

Plaintiff instituted this action on February 24, 1965, to recover for property damage and personal injuries allegedly sustained about 4:00 p.m. on January 28, 1965, when defendant's automobile collided with the left rear side of plaintiff's Rambler station wagon in an intersection. On the trial, plaintiff's evidence tended to show:

Immediately after the accident, she had no reason to believe that she had been injured. That night, however, she developed double vision and a severe headache which continued until February 4th. Previously she had been subject to migraine headaches. After the accident her neck and shoulders became painful. About the middle of March, she began experiencing severe low back pain. The diagnosis was a sprain of the neck and lower back. In the opinion of her physician, these sprains could have been caused by the automobile accident in January. He prescribed a brace, bedboard, analgesics, muscle relaxants, and weight reduction. In his opinion, she has a permanent injury, which will require further treatment, but which he could not evaluate "in percentages." In July 1965, plaintiff's physician referred her to Dr. H. W. Tracy, an orthopedist. Upon examination, he found that she had the ordinary range of motion in her neck and demonstrated no tenderness. For a woman of her build and proportions, she also had normal and adequate range of motion in her back. Her reflexes were regular, and there was no evidence of any nerve root injury. In Dr. Tracy's opinion, she had no "permanent residual disability with reference to her back." Plaintiff had gained about 30 pounds "over the past few months," a condition which, he said, could have been "a predisposing or aggravating factor with respect to strain on the back." The only recommendation which the orthopedist made was that plaintiff continue with the weight-loss program.

Defendant's evidence tended to show that plaintiff had not been hurt in the accident; that in July she was able to bend over in her garden sufficiently to pick vegetables; and that, with considerable agility, she had climbed upon a picnic table in her backyard.

The jury answered the issue of negligence in favor of plaintiff, awarded plaintiff $200.00 for damage to her automobile and nothing for personal injuries. From judgment entered upon the verdict, plaintiff appealed.

B. F. Wellons and Brock Barkley for plaintiff appellant.
Carpenter, Webb & Golding for defendant appellee.

PER CURIAM. Plaintiff assigns as error certain portions of his Honor's charge with reference to damages and to his failure to restrain defendant's counsel from reading to the jury certain portions of the complaint. Conceding without deciding that these rulings were technically erroneous, yet it is implausible that they affected the verdict. Defendant has not seriously contested plaintiff's allegation that the collision in question was proximately caused by defendant's negligence. The real controversy was whether plaintiff had suffered

any personal injuries in the accident, and the case was relatively uncomplicated. With reference to the issue presented, it would have been difficult to confuse the jurors. They decided that plaintiff should be paid for the damage done to her automobile in the collision, but that she had suffered no damage to her person. The jury is the arbiter of the facts. Its verdict will not be upset for technical error which could not have affected the result of the trial. 1 Strong, N. C. Index, Appeal and Error § 40 (1957).

No error.

MOORE, J., not sitting.

STATE v. LARRY WAYNE SMITH.

(Filed 6 July, 1966.)

1. Indictment and Warrant § 9; Burglary § 2.1—

An indictment charging that defendant broke and entered "a certain building occupied by one Chatham County Board of Education, a Government corporation" is fatally defective in failing to identify the premises with sufficient certainty to enable defendant to prepare his defense and afford him protection from another prosecution for the same incident.

2. Criminal Law § 131—

Where a valid sentence is made to begin at the expiration of a sentence vacated on appeal, a revised commitment for the valid sentence must be dated and be effective as of the date of the original commitment in order to give defendant credit for the time theretofore served.

MOORE, J., not sitting.

APPEAL by defendant from *Bickett, J.*, Regular February 1966 Session, CHATHAM Superior Court.

In Case No. 3478 the defendant was charged in a bill of indictment with breaking and entering "a certain building occupied by one Chatham County Board of Education" and in a second count with the larceny of a Hi Fi record player belonging to Chatham County Board of Education. He entered a plea of guilty "to the felony of breaking and entering, and to the misdemeanor of larceny of a Hi Fi record player" and the court pronounced judgment that he be confined in the State's prison for a term of not less than six nor more than ten years.

In Case No. 3549, the defendant was charged with a violation

of G.S. 14-69.1 of falsely reporting that a bomb was then located in the Henry Siler School building, *et cetera.* He plead guilty to this charge and the judgment pronounced was that he be confined in the common jail of Chatham County for a term of eighteen months, assigned to work under the supervision of the State Prison System. This sentence to begin at the expiration of the sentence imposed in Case No. 3478, *et cetera.* The defendant appealed both judgments.

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

L. T. Dart, Jr., counsel for appellant.

PER CURIAM. The charge in 3478 that the defendant broke and entered "a certain building occupied by one Chatham County Board of Education, a Government corporation," *et cetera,* is fatally defective in that it fails to identify the premises with sufficient certainty to enable the defendant to prepare his defense and offer him protection from another prosecution for the same incident. It appears from the brief that he actually entered the Henry Siler School in Siler City but under the general description of ownership in the bill, it could have as well been any other school building or other property owned by the Chatham County Board of Education. For this reason, the bill is hereby quashed as to the first count and the judgment vacated without prejudice to the right of the solicitor to send a proper bill. No judgment having been pronounced on the second count of larceny, a misdemeanor, the cause is remanded for that purpose.

Inasmuch as the valid judgment of eighteen months pronounced in 3549 was made to begin at the expiration of the sentence imposed in Case No. 3478, it is hereby ordered that a revised commitment be issued by the Clerk of Superior Court of Chatham County, dated on the date of the original commitment, and effective upon that date, to be substituted for the commitments heretofore issued. The effect will be that the defendant will receive credit upon the new commitment for the time heretofore served upon the invalid commitment issued in Case No. 3478.

As to Case No. 3478 with respect to first count
Judgment vacated.
As to Case No. 3478 with respect to second count
Remanded.
As to Case No. 3549
Modified and affirmed.

MOORE, J., not sitting.

WORD AND PHRASE INDEX

Abandoned Highway—Section, of becomes neighborhood public road, *Highway Comm. v. Phillips*, 369.

Abettor—See Criminal Law § 9.

Abortion—*S. v. Brooks*, 427.

Abstract Question — Declaratory Judgment Act does not authorize adjudication of, see Declaratory Judgment Act.

Acceptance of Verdict—Court must accept sensible verdict and cannot require jury to redeliberate, *S. v. Rhinehart*, 470.

Access—Deprivation of access to public highway constitutes a taking, see Eminent Domain.

Accomplice—Charge on duty to scrutinize testimony of, *S. v. Smith*, 659.

"Act of God"—Bailee may be liable for failure to take appropriate steps after goods had been damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Actions — Whether Compensation Act precludes action at common law see Master and Servant § 86; actions under Declaratory Judgment Act see Declaratory Judgment Act; distinction between action on contract and in tort, *Jenkins v. Winecoff*, 639.

Admiralty—Filing of petition in admiralty seeking limitation of liability is not motion precluding default judgment, *Potts v. Howser*, 484.

Animals—Necessity of keeping dog under restraint, *Sink v. Moore*, 344.

Advertisement—For sale of land by municipality, *Bagwell v. Brevard*, 604.

Agency—See Principal and Agent.

Aider and Abettor—See Criminal Law § 9.

Alimony—See Divorce and Alimony.

Allegata—Proof without allegation is unavailing, *Vending Co. v. Turner*, 576.

Amendment—To pleadings, see Pleadings § 25.

Amercement—Of sheriff, *Produce Co. v. Stanley*, 608.

"Annoy"—Court need not define, *S. v. Godwin*, 216.

Appeal and Error—In criminal cases see Criminal Law; appeal from order of Utilities Commission see Utilities Commission; review of order under Post Conviction Hearing is by *certiorari*, *In re McBride*, 93; appeal from inferior court to Superior Court see Courts § 6; cognizance of want of jurisdiction will be taken *ex mero motu*, *Jenkins v. Winecoff*, 639; Supreme Court will not determine constitutional question when matter was not adjudicated in lower court, *Hobbs v. Moore County*, 665; exceptions and assignments of error, *Trust Co. v. Henry*, 253; *Dilday v. Board of Education*, 438; *Nationwide Homes v. Trust Co.*, 528; *In re Wallace*, 204; case on appeal, *Vending Co. v. Turner*, 576; evidence must be set out in narrative form, *Trust Co. v. Henry*, 253; motion for diminution of record, *Pendergraft v. Harris*, 396; assignments of error not brought forward in brief abandoned, *Long v. Thompson*, 310; *Hobbs v. Moore County*, 665; harmless and prejudicial error, *Randleman v. Hinshaw*, 136; *Whitley v. Richardson*, 753; *Miller v. Lucas*, 1; *In re Will of Lynn*, 234, *Vending Co. v. Turner*, 576; *In re Will of Jones*, 48; *Hammond v. Bullard*, 570; where it does not appear that discretionary matter was determined as matter of discretion, cause will be remanded, *Sayland v. Sayland*, 376; review of motion to strike, *Marine Corp. v. Futrell*, 194; review of findings, *Nationwide Homes v. Trust Co.*, 528; *Little v. Stevens*,

328; review of injunction proceedings, *Dilday v. Board of Education*, 438; review of judgments on motions to nonsuit, *Thames v. Teer Co.*, 565; *Ins. Co. v. Storage Co.*, 679; law of the case, *Conference v. Piner*, 74; *Brewer v. Garner*, 219; *Bank v. Wells*, 276; *Schafer v. R. R.*, 419.

Appearance—*Ward v. Mfg. Co.*, 131.

Appointment — Statute providing for election and appointment of boards of education, *Hobbs v. Moore County*, 665.

Apportionment of Federal Estate Taxes —Of nonresident testator, *Bank v. Wells*, 276.

Argument — Of counsel, *Callicutt v. Smith*, 252.

Arising Out of Course of Employment —Causal relation between employment and accident within purview of Compensation Act see Master and Servant.

Arrest of Judgment—For want of jurisdiction, *S. v. Covington*, 292.

Assault—With intent to commit rape see Rape.

Assignment—Of lease see Landlord and Tenant.

Assignments of Error—Exceptions and assignments of error not set out in the brief deemed abandoned see Appeal and Error § 38, Criminal Law § 159; appeal is an exception to the judgment see Appeal and Error § 21; assignment of error must disclose within itself questions sought to be presented, see Appeal and Error § 19.

Attorney and Client—Counsel has no duty to advise client against entering plea of guilty, *S. v. Hodge*, 238; argument of counsel, *Callicutt v. Smith*, 252; waiver of counsel, *S. v. Davis*, 429; defendant may waive preliminary hearing without benefit of counsel, *S. v. Cason*, 316; power of court to order mistrial for illness of attorney, *S. v. Battle*, 513.

Attractive Nuisance—Evidence held insufficient to show negligence on part of owner of land proximately causing drowning of three-year old child in privy, *Walker v. Sprinkle*, 626.

Automobiles—Measure of damages for personal injury see Damages; automobile insurance see Insurance; accident at grade crossing see Railroads § 6; accident on road under construction see Highways § 7; transfer of title, *Shearin v. Indemnity Co.*, 505; operation of automobiles and law of the road, *Miller v. Lucas*, 1; *Griffin v. Ward*, 296; *Anderson v. Webb*, 745; *Snell v. Rock Co.*, 613; *Sink v. Moore*, 344; defects in vehicles, *Miller v. Lucas*, 1; striking children on highway, *Waycaster v. Sparks*, 87; action for negligent injury, *Streater v. Marks*, 32; *Pearce v. Barham*, 707; *Allen v. Sharp*, 99; *King v. Bonardi*, 221; *Trust Co. v. Snowden*, 749; *Anderson v. Webb*, 745; *Cline v. Atwood*, 182; *Apel v. Coach Co.*, 25; *Branch v. Gurley*, 44; *Snell v. Rock Co.*, 613; *Waycaster v. Sparks*, 87; *Sink v. Moore*, 344; *Jones v. Johnson*, 656; sufficiency of evidence of identity of driver, *King v. Bonardi*, 221; *Barefoot v. Holmes*, 242; defective door latch, *McGee v. Cox*, 314; nonsuit for contributory negligence, *Pardue v. Ins. Co.*, 82; *Griffin v. Ward*, 296; *Brewer v. Garner*, 219; *Snell v. Rock Co.*, 613; sufficiency of evidence of concurring negligence, *Cline v. Atwood*, 182; sufficiency of evidence of contributory negligence for jury, *Saunders v. Warren*, 735; contributory negligence of passenger, *King v. Bonardi*, 221; *Butler v. Wood*, 250; *Atwood v. Holland*, 722; family purpose *doctrine*, *Altman v. Sanders*, 158; manslaughter, *S. v. Bridgers*, 121; drunken driving, *S. v. Cummings*, 300; *S. v. Hall*, 90; unlawful taking of auto, *S. v. Covington*, 292.

Back Injury — Proof that injury resulted from accident, *Miller v. Lucas*, 1.

Bailment—*Ins. Co. v. Storage Co.*, 679.

Bales of Skins—Liability of bailee for raccoon skins damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Banks and Banking—Donee is entitled to introduce inventory of deceased's safe deposit box to establish gift *inter vivos*, *Fesmire v. Bank*, 589; paying of check drawn by unauthorized agent, *Nationwide Homes v. Trust Co.*, 528.

Best and Secondary Evidence—Insurer may establish right to subrogation without necessity of introducing policy in evidence, *Ins. Co. v. Storage Co.*, 679.

Bicycle — Collision with automobile, *Sink v. Moore*, 344.

Bill of Discovery—*Potts v. Howser*, 484; *Vaughan v. Broadfoot*, 691.

Bill of Particulars—Cannot supply essential averment of the indictment, see Indictment and Warrant.

Billboards—Ordinance proscribing display of indecent pictures within public view, *S. v. Furio*, 353.

Bills and Notes—Consideration, *Montague v. Womble*, 360; right to credit on note under collateral contract, *Vending Co. v. Turner*, 576.

Board of Education—Schools must be integrated, *Dilday v. Board of Education*, 438; statute providing for election and appointment of boards of education, *Hobbs v. Moore County*, 665; liability under Tort Claims Act for injury to pupil by school bus, *Brown v. Board of Education*, 740.

Boats and Boating—Judgment by default in actions for damages arising out of boat collision, *Potts v. Howser*, 484.

Bodily Disfigurement—Award of damages for, does not preclude damages for loss of kidney, *Cates v. Construction Co.*, 560.

Bond Order—Expenditure of proceeds of bonds in conformity with bond referendum see Taxation § 12.

Boundaries—Junior and senior deeds, *Coley v. Tel. Co.*, 701; processioning proceeding, *Coley v. Tel. Co.*, 701; *LeFevers v. Lenoir*, 79.

Breathalyzer — Breathalyzer test held competent, *S. v. Cummings*, 300.

Brief—Exceptions and assignments of error not set out in the brief deemed abandoned see Appeal and Error § 38; Criminal Law § 159.

Brokers—Liability of insurance broker for breach of contract to maintain insurance see Insurance § 8; right of broker to retain earnest money, *Jenkins v. Winecoff*, 639.

Building Permit—See Municipal Corporations § 25.

Burden of Proof—In caveat proceedings see Wills; in processioning proceedings see Boundaries; in negligent actions see Negligence § 21; of proving that conveyance was fraudulent as to creditors in action to set aside deed of trust as being fraudulent, *Supply Corp. v. Scott*, 145; is upon carrier to prove justification of rate increase, *Utilities Commission v. R. R.*, 317; *res ipsa loquitur* does not affect burden of proof, *Bowling v. Oxford*, 552; *prima facie* case does not alter burden of proof, *Ins. Co. v. Storage Co.*, 679.

Burden on Interstate Commerce—Allocation of income of multi-state corporation for purposes of income tax, *Oil Corp. v. Clayton*, 15.

Burglary and Unlawful Breakings, *S. v. Smith*, 755; *S. v. Battle*, 513; *S. v. Stinson*, 661.

Cancellation and Rescission of Instruments—*Hammond v. Bullard*, 570.

Carnal Knowledge of Female—See Rape.

Carriers—Rates, see Utilities Commission.

Causal Relation—Between employment and accident within purview of Compensation Act see Master and Servant.

Caveat—See Wills.

Certificate of Public Convenience and Necessity—See Utilities Commission.

Certificate of Stock—Transfer of, *Fesmire v. Bank*, 589.

Certificate of Title—Transfer of title to automobile see Automobiles § 4.

Certiorari—Review of order under Post Conviction Hearing is by *certiorari*, *In re McBride*, 93.

Cestui Que Trust—Is not necessary party to action to set aside deed of trust as fraudulent, *Supply Corp. v. Scott*, 145.

Charge—See Instructions.

Chart—Introduction of chart computing life expectancy in arguing quantum of damages held error, *Callicutt v. Smith*, 252.

Check—Forgery of, see Forgery; check for initial payment under parol contract to convey is without consideration when no property rights are conveyed, *Montague v. Womble*, 360; liability of bank in paying check drawn by unauthorized agent, *Nationwide Homes v. Trust Co.*, 528.

Children — Contributory negligence of children see Negligence § 16; negligence in striking child on highway see Automobiles § 34, 41m; evidence held insufficient to show negligence on part of owner of land proximately causing drowning of three-year old child in privy, *Walker v. Sprinkle*, 626; contributing to delinquency of minor, *S. v. Whitted*, 129.

Church—See Religious Societies and Corporations.

Circumstantial Evidence—Of identity of driver see Automobiles §§ 41p, 72; that car was to its left of center of road, *Anderson v. Webb*, 745; physical facts held to show that loss of control of vehicle was due to negligence, *Trust Co. v. Snowden*, 749; of guilt of conspiracy and burglary, *S. v. Battle*, 513.

Civil Rights Act—Public schools must be integrated, *Dilday v. Board of Education*, 438.

Claim and Delivery—Writ may be issued only in pending civil action, *In re Wallace*, 204.

Clerks of Court—Jury trial is required on appeal from clerk's order determining controverted issue of fact, *In re Wallace*, 204; jurisdiction to enter consent judgment see Judgments.

Co-Conspirator—Charge on duty to scrutinize testimony of, *S. v. Smith*, 659.

Commerce Clause—Allocation of income of multi-state corporation for purpose of income tax, *Oil Corp. v. Clayton*, 15.

Common Law—Whether Compensation Act precludes action at common law see Master and Servant § 86.

Communications—Application for certificate for operation of mobile radio service, *Utilities Comm. v. Telegraph Co.*, 257; communications and transactions with decedent see Evidence § 11.

Compensation Act—See Master and Servant.

Complaint—See Pleadings.

Compulsory Insurance—Where insurance is not required by Financial Responsibility Act, requirement of notice to insurer is enforceable, *Clemmons v. Ins. Co.*, 495.

Concessionaire—Agreement that note should be credited with amounts received by payee from concession, *Vending Co. v. Turner*, 576.

Conclusiveness of Judgment—See Judgment § 29.

Concurring Negligence—Complaint held to state concurring negligence of defendants, *Streater v. Marks*, 32; negligence of defendant creating sudden emergency held sole proximate cause of accident insulating negligence of

other defendant in acting in emergency, *Cline v. Atwood*, 182; negligence continuing to moment of impact is not insulated by negligence of another, *Cox v. Gallamore*, 537.

Condemnation—See Eminent Domain.

Condition and Use of Land and Premises—Liability of owner or proprietor to invitee or licensee see Negligence.

Confessions—See Criminal Law § 71.

Conflict of Laws—See Courts § 20.

Congregation—Of church, see Religious Societies and Corporations.

Conjunctive—Charge held not to require jury to find contributory negligence conjunctively on each aspect pleaded, *Long v. Thompson*, 310.

Consent Judgment—See Judgments.

Consideration—Check for initial payment under parol contract to convey is without consideration when no property rights are conveyed. *Montague v. Womble*, 360.

Consolidation and Severance of Indictments—See Criminal Law § 87.

Conspiracy—*S. v. Battle*, 513.

Conspirator—Charge on duty to scrutinize testimony of co-conspirator, *S. v. Smith*, 659.

Constitutional Law — Construction of statute in regard to constitutionality see Statutes § 4; supremacy of Federal Constitution, *Dilday v. Board of Education*, 438; person entitled to raise constitutional questions, *Angell v. Raleigh*, 387; *Hobbs v. Moore County*, 665; judicial powers, *Ins. Co. v. Bynum*, 289; equal protection and enforcement of laws, *Hobbs v. Moore County*, 665; religious liberty, *S. v. Bullard*, 599; person has no vested right in statute of distribution, *Johnson v. Blackwelder*, 209; due process, *Randleman v. Hinshaw*, 136; *In re Wallace*, 204; necessity for indictment, *McClure v. State*, 212; *S. v. Hodge*, 238; right to counsel, *S. v. Davis*, 429; cruel and unusual punishment, *S. v. Davis*, 126.

Construction — of Statute — See Statutes; of Contracts, *Carson v. National Co.*, 229.

Contentions—Charge on contentions of parties see Criminal Law § 112.

Contingent Remainder — Limitation over held contingent and not vested, *Lawson v. Lawson*, 643.

Continuance — Of temporary restraining order see Injunctions; of trial see *S. v. Stinson*, 661.

Contracts—Of employment, see Master and Servant; insurance contracts and contracts to insure see Insurance; justice of peace has exclusive original jurisdiction of action *ex contractu* where sum demanded does not exceed $200, *Jenkins v. Winecoff*, 639; general rules of construction, *Carson v. National Co.*, 229.

Contractor — Difference between employee and independent contractor see Master and Servant § 3; injury to subcontractor, *Thames v. Teer Co.*, 565.

Contribution—Where plaintiff sues both tort-feasors neither may file cross-action against the other, *Streater v. Marks*, 32; adjudication of contributory negligence in action by one driver against other would not preclude one driver from thereafter maintaining action against the other for contribution if passenger recovers judgment only against the one, *Streater v. Marks*, 32; right of insurer to contribution may not be based on subrogation, *Ins. Co. v. Bynum*, 289.

Contributory Negligence — See Negligence; in operating motor vehicles see Automobiles.

Convicts—Damage to prison property by, *S. v. Childress*, 85.

Corporations—Transfer of Stock, *Fesmire v. Bank*, 589.

Counsel—Has no duty to advise client against entering plea of guilty, *S. v. Hodge*, 238; waiver of counsel, *S. v. Davis*, 429; defendant may waive preliminary hearing without benefit of counsel, *S. v. Cason*, 316; argument of counsel, *Callicutt v. Smith*, 252; power of court to order mistrial for illness of counsel, *S. v. Battle*, 513.

Counties—Respective duties of county commissioners and boards of education, *Dilday v. Board of Education*, 438; liability under Tort Claims Act for injury to pupil by school bus, *Brown v. Board of Education*, 740.

County Civil Court—Appeal from inferior court to Superior Court see Courts § 7.

Course of Employment—Causal relation between employment and accident within purview of Compensation Act see Master and Servant.

Courts—Jurisdiction of Superior Court, *Bryant v. Dougherty*, 545; *Jenkins v. Winecoff*, 639; appeals to Superior Court from clerk, *In re Wallace*, 204; *Potts v. Howser*, 484; appeals to Superior Court from inferior courts, *Pendergraft v. Harris*, 396; jurisdiction of judge after order of another judge, *S. v. Mayo*, 415; *Vending Co. v. Turner*, 576; jurisdiction of justices of the peace, *Jenkins v. Winecoff*, 639; conflict of laws, *Bank v. Wells*, 276; *Little v. Stevens*, 328; *Thames v. Teer Co.*, 565; jurisdiction of court over ecclesiastical matters, *Conference v. Piner*, 74; unlawful taking of automobile is misdemeanor within exclusive original jurisdiction of inferior court, *S. v. Covington*, 292; court may remove *habeas corpus* proceeding to county in which action for divorce and custody of children is pending, *In re Macon*, 248; motion for continuance is addressed to discretion of court, *S. v. Stinson*, 661; jury will not be allowed to impeach their own verdict, *Selph v. Selph*, 635; discretionary power of court to set aside verdict see Trial § 48; court must accept sensible verdict and cannot require jury to redeliberate, *S. v. Rhinehart*, 470; power of court to order mistrial for illness of attorney, *S. v. Battle*, 513; review of award of Industrial Commission see Master and Servant § 94; whether Compensation Act precludes action at common law see Master and Servant § 86; trial by court under agreement of the parties see Trial § 57.

Crane—Injury to workman when other end of girder, raised by crane, came in contact with power line, *Lewis v. Barnhill*, 457.

Creditors—Judgment creditors may enjoin foreclosure of deed of trust, *Heating Co. v. Blackburn*, 155.

Criminal Law—Elements of and prosecutions for particular offenses see particular titles of crime; criminal statute or ordinance must be definite, *S. v. Furio*, 353; aiders and abettors, *S. v. Childress*, 85; degree of crime, *S. v. Covington*, 292; on appeal to Superior, stipulation that defendant was found guilty in recorder's court and appealed to Superior Court confers jurisdiction on Superior Court, *S. v. Hall*, 90; plea of guilty, *In re McBride*, 93; *McClure v. State*, 212; *S. v. Hodge*, 238; plea of former jeopardy, *S. v. Battle*, 513; facts in issue and relevant to issue, *S. v. Godwin*, 216; record at former trial, *S. v. Stallings*, 405; circumstantial evidence, *S. v. Cummings*, 300; expert opinion evidence, *S. v. Bridgers*, 121; *S. v. Brooks*, 427; Breathalyzer test, *S. v. Cummings*, 300; identity of defendant, *S. v. Stallings*, 405; telephone conversations, *S. v. Godwin*, 216; confessions, *S. v. Stafford*, 201; *S. v. Conyers*, 618; best and secondary evidence, *S. v. Stallings*, 405; time of trial and continuance, *S. v. Stinson*, 661; motion of defendant for separate trial, *S. v. Battle*, 513; nonsuit, *S. v. Bridgers*, 121; *S. v. Emanuel*, 663; *S. v. Battle*, 513; withdrawal of count from jury, *S. v. Rhinehart*, 470; instructions, *S. v. Hall*, 90; *S. v. Bridgers*, 121; *S. v. Godwin*, 216; *S. v. Matthews*, 244; *S. v. Smith*, 659;

S. v. Pike, 312; sufficiency and effect of verdict, *S. v. Rhinehart*, 470; arrest of judgment, *S. v. Covington*, 292; setting aside verdict, *S. v. Battle*, 513; *S. v. Bridgers*, 121; judgment or sentence, *S. v. Thompson*, 653; length of sentence, *S. v. Rhinehart*, 470; *S. v. Thompson*, 653; *S. v. Smith*, 755; concurrent or cumulative sentence, *S. v. Doggett*, 648; suspended sentence, *S. v. Rhinehart*, 470; *S. v. Thompson*, 653; *S. v. Covington*, 292; appeals in criminal cases, *S. v. Hodge*, 238; *S. v. Covington*, 292; *S. v. Rhinehart*, 470; *S. v. King*, 631; *S. v. Thompson*, 653; *S. v. Battle*, 513; *S. v. Stafford*, 201; *S. v. Covington*, 292; *S. v. Smith*, 659; *S. v. Hall*, 90; *S. v. Brooks*, 427; *S. v. Stallings*, 405; *S. v. Upchurch*, 417; post conviction hearing, *In re McBride*, 93; *McClure v. State*, 212.

Cross-Action—Where plaintiff sues both tort-feasors neither may file cross-action against the other, *Streater v. Marks*, 32.

Cross-Examination—Party is bound by cross-examination as to collateral matters, *Pearce v. Barham*, 707.

Crossing—Accident at grade crossing see Railroads § 6.

Cruel and Unusual Punishment — See Constitutional Law § 36.

Culpable Negligence—In operation of automobile see Automobiles § 59.

Customer—Liability of owner or proprietor to customer see Negligence.

Damages—Motion to set aside verdict for inadequacy of award see Trial § 52; for personal injury, *King v. Britt*, 594; special damages, *Long v. Thompson*, 310; punitive damages, *Cook v. Lanier*, 166; evidence held insufficient to show ruptured disc resulted from injury in suit, *Miller v. Lucas*, 1; evidence held sufficient for recovery of damages for mental pain and suffering, *King v. Britt*, 594; instructions on issue of damages, *Callicutt v. Smith*, 252.

Dams—Damage resulting from break of municipal dam, *Bowling v. Oxford*, 552.

Dance School—Fall of dance pupil on waxed floor, *Hedrick v. Tigniere*, 62.

Death—Action for wrongful death, *Horney v. Pool Co.*, 521.

Declaratory Judgment Act—*Angell v. Raleigh*, 387; *Hubbard v. Josey*, 651.

Decedent—Communications and transactions with see Evidence § 11.

Deeds—Ascertainment of boundaries see Boundaries; registration and priority see Registration; action to set aside deed for mental incapacity, *Hammond v. Bullard*, 570; parol trust see Trusts; conveyance of property by municipality, *Bagwell v. Brevard*, 604.

Deed of Separation—See Husband and Wife § 11.

Deed of Trust—Action to set aside as fraudulent, *Supply Corp. v. Scott*, 145.

Default Judgment—See Judgments.

Demurrer—See Pleadings.

Descent and Distribution—Fact that intestate became mentally incompetent prior to change in statute of distribution does not affect distribution under amended statute. *Johnson v. Blackwelder*, 209.

Diminution of Record — Motion for, *Pendergraft v. Harris*, 396.

Directed Verdict—Motion for properly denied, *S. v. Stinson*, 661.

Disability—Award of damages for bodily disfigurement does not preclude damages for loss of kidney, *Cates v. Construction Co.*, 560.

Discharge of Employee — See Master and Servant § 10.

Discovery—See Bill of Discovery.

Discretion of Court — Discretionary power of court to set aside verdict see Trial § 48; Criminal Law § 126; motion to amend is addressed to, see Pleadings § 24; motion for continuance is addressed to, *S. v. Stinson*, 661; review of discretionary orders see Appeal and Error § 46.

Discrimination—Public schools must be integrated, *Dilday v. Board of Education*, 438.

Disfigurement—Award of damages for bodily disfigurement does not preclude damages for loss of kidney, *Cates v. Construction Co.*, 560.

Disjunctive—Charge held not to require jury to find contributory negligence conjunctively on each aspect pleaded, *Long v. Thompson*, 310.

Distribution—See Descent and Distribution.

Distributor—Where purchaser is not sure whether payment is due distributor or supplier he may have both joined, *Filter Co. v. Robb*, 583.

Divorce and Alimony—Alimony without divorce, *Sayland v. Sayland*, 378; modification of decrees for alimony, *Sayland v. Sayland*, 378; custody of children of marriage, *In re Macon*, 248.

Doctrine of Iden Sonans—*S. v. Stallings*, 405.

Doctrine of Res Ipsa Loquitur—Does not apply to fall of a dance pupil, *Hedrick v. Tigniere*, 62; while negligence is not presumed from mere fact of injury, where there is evidence that loss of control of vehicle is result of negligence issue is for jury, *King v. Bonardi*, 221; *Trust Co. v. Snowden*, 749; does not affect burden of proof, *Bowling v. Oxford*, 552.

Doctrine of Sudden Emergency—*Cline v. Atwood*, 182; *Butler v. Wood*, 250; *Sink v. Moore*, 344.

Domestic Animals—Permitting dog to run at large, *Sink v. Moore*, 344.

Dominant Highway—See Automobiles.

Door—Liability of owner for injury to passenger resulting from defect in latch, *McGee v. Cox*, 314.

Double Office Holding—Statute held not invalid as providing for double office holding, *Hobbs v. Moore County*, 655.

Dower—Right of widow under Intestate Succession Act see Descent and Distribution.

Driver — Circumstantial evidence of identity of, see Automobiles §§ 41p, 72.

Drunken Driving — Operating automobile while drunk see Automobiles §§ 66 *et seq.*

Duces Tecum—*Vaughan v. Broadfoot*, 691.

Due Process—Notice and opportunity to be heard are required by due process, *Randleman v. Hinshaw*, 136.

Earthen Dam—Damage resulting from break of municipal dam, *Bowling v. Oxford*, 552.

Easement—Laying of water main or sewer line in right of way is additional burden upon the fee, *Randleman v. Hinshaw*, 136.

Ecclesiastical Controversy—See Religious Societies and Corporations.

Education—See Schools.

Ejectment — *Housing Authority v. Thorpe*, 431; *LeFevers v. Lenoir*, 79.

Election—Statute providing for election and appointment of boards of education, *Hobbs v. Moore County*, 665.

Electricity—Injury to workman when other end of girder, raised by crane, came in contact with power line, *Lewis v. Barnhill*, 457.

Embezzlement—Quashal of indictment for embezzlement does not preclude another judge from passing upon sufficiency of later indictment, *S. v. Mayo*, 415.

Emergency—*Cline v. Atwood*, 182; *Butler v. Wood*, 250; *Sink v. Moore*, 344.

Eminent Domain—Acts constituting a "taking," *Randleman v. Hinshaw*, 136; *Highway Comm. v. Phillips*, 369; proceedings to take land and assess compensation, *Randleman v. Hinshaw*, 136; *Redevelopment Comm. v. Hagins*, 622; actions to recover damages, *LeFevers v. Lenoir*, 79.

Employer and Employees—See Master and Servant.

Entireties—Estate by, see Husband and Wife § 15.

Equal Protection—Provisions for election of members of board of education held not to offend Equal Protection Clause, *Hobbs v. Moore County*, 665.

Escape—*S. v. Revis*, 255; *S. v. Doggett*, 648.

Estate by Entireties—See Husband and Wife § 15.

Estate Taxes—Apportionment of Federal estate taxes of nonresident testator, *Bank v. Wells*, 276.

Evidence—In criminal prosecutions see Criminal Law; in particular actions and prosecutions see titles of particular actions and crimes; competency of witnesses see Witnesses; harmless and prejudicial error in the admission or exclusion of evidence see Appeal and Error § 41; withdrawal of evidence from consideration of jury see Trial § 16; expression of opinion by court in charge see Trial §§ 35, 37, in criminal prosecutions see Criminal Law § 108; rulings on evidence are not *res judicata* upon subsequent trial, *Vending Co. v. Turner*, 576; parol evidence may not vary term of negotiable instrument, *Vending Co. v. Turner*, 576; transactions or communications with decedent, *Fesmire v. Bank*, 589; *Pearce v. Barham*, 707; relevancy of evidence, *Vending Co. v. Turner*, 576; *Pearce v. Barham*, 707; similar facts and transactions, *Miller v. Lucas*, 1; competency of pleadings, *Supply Co. v. Scott*, 145; X-rays, *Branch v. Gurley*, 44; testimony as to mental competency, *Hammond v. Bullard*, 570; medical expert testimony, *Apel v. Coach Co.*, 25; party may not impeach his own testimony, *Cline v. Atwood*, 182; cross-examination, *Pearce v. Barham*, 707; evidence should be set out in record in narrative form, *Trust Co. v. Henry*, 253.

Examination of Adverse Party — See Bill of Discovery.

Execution—Sheriff must return execution within 60 days, *Produce Co. v. Stanley*, 608.

Exceptions — Exceptions and assignments of error not set out in the brief deemed abandoned see Appeal and Error § 38, Criminal Law § 159; appeal is exception to the judgment, see Appeal and Error § 21.

Executors and Administrators—Validity and construction of wills see Wills; only personal representative may maintain action for wrongful death, *Horney v. Pool Co.*, 521; communications and transactions with decedent see Evidence § 11; donee is entitled to introduce inventory of deceased's safe deposit box to establish gift *inter vivos*, *Fesmire v. Bank*, 589.

Ex Mero Motu—Supreme Court will take cognizance of want of jurisdiction *ex mero motu*, *Jenkins v. Winecoff*, 639.

Expert Testimony—Competency of medical expert testimony see Evidence §§ 44, 51; Criminal Law § 53.

Express Warranty—See Sales.

Expression of Opinion—By court in charge, see Trial §§ 35, 37; in criminal prosecutions see Criminal Law § 108.

Extra-judicial Confession — See Criminal Law § 71.

Facts—Finding of, see Finding of Facts.

Federal Estate Taxes—Apportionment of, of nonresident testator, *Bank v. Wells*, 276.

Federal Government — U. S. Constitution is supreme, *Dilday v. Board of Education*, 438.

Felony—Whether larceny is felony or misdemeanor see Larceny §§ 9, 10; whether forgery is felony or misdemeanor see Forgery § 2; whether escape is felony or misdemeanor see Escape; unlawful taking of automobile is misdemeanor within exclusive original jurisdiction of inferior court, *S. v. Covington*, 292.

Female—Indecent telephone calls to female, *S. v. Godwin*, 216; assault on female with intent to commit rape see Rape.

Finding of Facts—Review of findings and judgment on findings see Appeal and Error § 49; court must find facts in regard to voluntariness of confession, *S. v. Conyers*, 618.

Flooding — Bailee may be liable for failure to take appropriate steps after goods had been damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Foreclosure — Enjoining foreclosure, *Heating Co. v. Blackburn*, 155.

Forehead—Recovery of damages for permanent loss of mobility of, *King v. Britt*, 594.

Foreign Corporation—Allocation of income of multi-state corporation for purpose of income tax, *Oil Corp. v. Clayton*, 15.

Foreseeability — *Walker v. Sprinkle*, 626.

Forgery—*S. v. Davis*, 126; liability of bank paying forged check, *Nationwide Homes v. Trust Co.*, 528.

Frauds, Statute of — *Montague v. Womble*, 360.

Fraudulent Conveyances—*Supply Co. v. Scott*, 145.

Freedom of Religion — Possession of peyote and marijuana cannot be justified on religious grounds, *S. v. Bullard*, 599.

Freight Charges—Request for increase in rates, *Utilities Comm. v. R. R.*, 317.

Garage Liability Policy—*Shearin v. Indemnity Co.*, 505.

Garnishment—*Ward v. Mfg. Co.*, 131.

General Statutes—Table of statutes construed see Page 849; construction of statutes see Statutes.

Gifts—*Inter vivos*, *Fesmire v. Bank*, 589.

Governmental Function—Of municipal corporations see Municipal Corporations.

Grade Crossing—Accident at, see Railroads § 6.

Guaranty—*Marine Corp. v. Futrell*, 194.

Guilty—Plea of, see Criminal Law § 23.

Habeas Corpus—To obtain custody of minor, *In re Macon*, 248.

"Harass"—Court need not define, *S. v. Godwin*, 216.

Harmless and Prejudicial Error — In the admission or exclusion of evidence see Appeal and Error § 41; in instructions see Appeal and Error § 42; new trial will not be awarded for mere technical error, *Whitley v. Richardson*, 753.

Health—Ordinary privy cannot be held as matter of law to violate regulations, *Walker v. Sprinkle*, 626.

Highways—Use of highway and law of the road see Automobiles; injury to person on highway under construction, *Thomas v. Teer Co.*, 565; abandoned highway constitutes neigh-

borhood public road, *Highway Comm. v. Phillips*, 369.

Homicide—Manslaughter in operation of automobile see Automobiles § 59; self-defense, *S. v. Miller*, 409; sufficiency of evidence and nonsuit, *S. v. Miller*, 409.

Hurricane—Bailee may be liable for failure to take appropriate steps after goods had been damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Husband and Wife—Deed of separation, *Sayland v. Sayland*, 378; estates by entireties, *Duplin County v. Jones*, 68.

Hypothetical Questions—Competency of medical expert testimony see Evidence §§ 44, 51.

Ice—From water leaking from municipal water works, *Mosseller v. Asheville*, 104.

Iden Sonans—*S. v. Stallings*, 405.

Identity of Driver—Circumstantial evidence of, see Automobiles §§ 41p, 72.

Income Tax—See Taxation.

Indecent Pictures—Ordinance proscribing display of within public view, *S. v. Furio*, 353.

Indecent Telephone Calls—To female, *S. v. Godwin*, 216.

Indefinite—Vague and indefinite ordinance, *S. v. Furio*, 353; meaning to statute held ascertainable by construction and not void for vagueness, *Hobbs v. Moore County*, 665.

Indemnity—*Lewis v. Barnhill*, 457.

Independent Contractor—Difference between employee and independent contractor see Master and Servant § 3.

Indictment and Warrant—Necessity for indictment see Constitutional Law § 28; indictment for particular offenses see particular titles of crimes; preliminary proceedings, *S. v. Cason*, 316; charge of crime, *S. v. Stallings*, 405; *S. v. Mayo*, 514; *S. v. Smith* 755; quashal, *S. v. Furio*, 353; *S. v. Mayo*, 415.

Industrial Commission—See Master and Servant.

Infants — Contributory negligence of minor see Negligence § 16; negligence in striking child on highway see Automobiles §§ 34, 41m; evidence held insufficient to show negligence on part of owner of land proximately causing drowning of three-year old child in privy, *Walker v. Sprinkle*, 626; contributing to delinquency of minor, *S. v. Whitted*, 129.

Inferior Court—Appeal from to Superior Court see Courts § 6; in criminal cases see Criminal Law § 18.

Inherently Dangerous Tool—*Hollenbeck v. Fasteners Co.*, 401.

Injunction—Enjoining forclosure, *Heating Co. v. Blackburn*, 155; appeal from injunction order, *Dilday v. Board of Education*, 438; enjoining enforcement of ordinance, *Angell v. Raleigh*, 387; continuance of temporary orders, *Heating Co. v. Blackburn*, 155.

Insane Persons—Action to set aside deed for mental incapacity, *Hammond v. Bullard*, 570; opinion evidence as to mental capacity, *Hammond v. Bullard*, 570.

Instructions—In particular actions and prosecutions see particular titles of actions and crimes; statement of evidence and application of law thereto see Trial § 33; Criminal Law § 107; expression of opinion by court on evidence see Trial § 35; charge on contentions of parties see Criminal Law § 112; harmless and prejudicial error in instructions see Appeal and Error § 42; Criminal Law § 161.

Insulating Negligence—Complaint held not to allege negligence of one defendant which insulated negligence of the other, *Streater v. Marks*, 32; negligence continuing to moment of

impact is not insulated by negligence of another, *Cox v. Gallamore*, 538; negligence of defendant creating sudden emergency held sole proximate cause of accident insulating negligence of other defendant in acting in emergency, *Cline v. Atwood*, 182.

Insurance— Agreement to maintain insurance, *Wiles v. Mullinax*, 392; insurance against uninsured vehicle, *Rice v. Ins. Co.*, 421; payment and subrogation, *Indemnity Co. v. Barnhardt*, 302; *Ins. Co. v. Bynum*, 289; *Ins. Co. v. Storage Co.*, 679; vehicles insured, *Shearin v. Indemnity Co.*, 505; notice to insurer, *Clemmons v. Ins. Co.*, 495; defense of action by insurer does not waive noncoverage, *Shearin v. Indemnity Co.*, 505; right of injured party against insured, *Young v. Ins. Co.*, 339.

Integration—Public Schools must be integrated, *Dilday v. Board of Education*, 438.

Intent—As element of assault with intent to commit rape see Rape.

Intersection—See Automobiles.

Intervening Negligence—Complaint held not to allege negligence of one defendant which insulated negligence of the other, *Streater v. Marks*, 32; negligence continuing to moment of impact is not insulated by negligence of another, *Cox v. Gallamore*, 538.

Inter Vivos Gift—*Fesmire v. Bank*, 598.

Interstate Succession Act—See Descent and Distribution.

Intoxicating Liquor—Operating automobile while under influence of, see Automobiles § 66 *et seq.*

Intoxication — Breathalyzer test held competent, *S. v. Cummings*, 300.

Invitee—Liability of owner or proprietor to invitee see Negligence.

Issues—Raised by the pleadings see Pleadings § 29; in automobile accident cases see Automobiles § 46.1.

Joint Tort-Feasors—Where plaintiff sues both tort-feasors neither may file cross-action against the other, *Streater v. Marks*, 32; adjudication of contributory negligence in action by one driver against other would not preclude one driver from thereafter maintaining action for contribution against the other if passenger recovers judgment only against the one, *Streater v. Marks*, 32; right of insurer to contribution may not be based on subrogation, *Ins. Co. v. Bynum*, 289.

Judges—Trial by court under agreement of the parties see Trial § 57; court must accept sensible verdict and cannot require jury to redeliberate, *S. v. Rhinehart*, 470; power of court to order mistrial for illness of attorney, *S. v. Battle*, 513; motion for continuance is addressed to discretion of court, *S. v. Stinson*, 661; rulings on evidence are not *res judicata* upon subsequent trial, *Vending Co. v. Turner*, 576; quashal of indictment does not preclude another judge from passing on validity of subsequent indictment, *S. v. Mayo*, 415.

Judgment Creditor—May enjoin foreclosure of deed of trust, *Heating Co. v. Blackburn*, 155.

Judgments—Assignments of error to judgment see Appeal and Error § 21; modification of judgment in trial court, *Young v. Ins. Co.*, 339; judgments by default, *Potts v. Howser*, 484; *Freeman v. Food Systems*, 56; erroneous judgments, *Young v. Ins. Co.*, 339; consent judgment, *Young v. Ins. Co.*, 339; parties concluded, *Streater v. Marks*, 32; matters concluded, *Shearin v. Indemnity Co.*, 505; return of execution on, *Produce Co. v. Stanley*, 608; activation of suspended sentence or judgment see Criminal Law § 136; arrest of judgment for want of jurisdiction, *S. v. Covington*, 292; quashal of indictment for embezzlement does not preclude another judge from passing upon sufficiency of later indictment,

S. v. Mayo, 415; prior to amendment, it was mandatory that sentence for escape commence at expiration of term or terms defendant was serving at time of escape, *S. v. Doggett*, 648.

Judicial Power — Whether statute should be amended is legislative and not judicial function, *Ins. Co. v. Bynum*, 289.

Junior Deed—Corner may not be established by call in junior conveyance, *Coley v. Telephone Co.*, 701.

Jurisdiction—Of courts in general see Courts; over ecclesiastical matters see Religious Societies and Corporations.

Jury—Jury trial is required on appeal from clerk's order determining controverted issue of fact, *In re Wallace*, 204; court must accept sensible verdict and cannot require jury to redeliberate, *S. v. Rhinehart*, 470; jury will not be allowed to impeach their own verdict, *Selph v. Selph*, 635; trial by court under agreement of the parties, see Trial § 57; juror is not employee of county within purview of Compensation Act, *Hicks v. Guilford County*, 364.

Judicial Admissions—Admissions in answer of facts alleged in complaint establishes those facts without necessity of introducing pleading in evidence, *Ins. Co. v. Storage Co.*, 679.

Justice of Peace—Has exclusive original jurisdiction of action *ex contractu* where sum demanded does not exceed $200, *Jenkins v. Winecoff*, 639.

Kidney—Award of damages for bodily disfigurement does not preclude damages for loss of kidney, *Cates v. Construction Co.*, 560.

Landlord and Tenant—Assignment and subletting, *Carson v. National Co.*, 229; expiration of term and extensions, *Carson v. National Co.*, 229; *Housing Authority v. Thorpe*, 431.

Larceny—*S. v. Stinson*, 661; *S. v. Brown*, 189; *S. v. Davis*, 126; *S. v. Williams*, 424; receiving stolen goods see Receiving Stolen Goods.

Latch—Liability of owner for injury to passenger resulting from defect in latch, *McGee v. Cox*, 314.

Law of the Case—See Appeal and Error § 60.

Lawn Chair—Fall of customer in store while trying to sit in lawn chair, *Sellers v. Vereen*, 307.

Lease—See Landlord and Tenant.

Legislative Power — Whether statute should be amended is legislative and not judicial function, *Ins. Co. v. Bynum*, 289.

Liability Insurance — Automobile liability insurance see Insurance.

Licensee—Liability of owner or proprietor to licensee see Negligence.

Lien—For taxes, see Taxation.

Life Expectancy—Introduction of chart computing life expectancy in arguing quantum of damages held error, *Callicutt v. Smith*, 252.

Like Facts and Transactions—Evidence of, see Evidence § 16.

Limitation of Actions — Absence and nonresidence, *Little v. Stevens*, 328.

Limitation Over—Held contingent and not vested, *Lawson v. Lawson*, 643.

Limited Access Highway—Deprivation of access to public highway constitutes a taking, *Highway Comm. v. Phillips*, 369.

Loss of Wages—Allegations held sufficient for award of damages for loss of time and wages from personal injury, *Long v. Thompson*, 310.

Magistrates—Justice of peace has exclusive original jurisdiction of action *ex contractu* where sum demanded does not exceed $200, *Jenkins v. Winecoff*, 639.

Malicious Prosecution—*Cook v. Lanier*, 166.

Malpractice — Compensation Act does not preclude employee from suing for malpractice, *Bryant v. Dougherty*, 545.

Manslaughter—In operation of automobile see Automobiles § 59.

Marijuana — Possession of cannot be justified on religious grounds, *S. v. Bullard*, 599.

Master and Servant — Distinction between employee and independent contractor, *Lewis v. Barnhill*, 457; duration of employment and wrongful discharge, *Freeman v. Food Systems*, 56; Workmen's Compensation Act, *Hicks v. Guilford County*, 364; *Bryant v. Dougherty*, 545; *Cates v. Construction Co.*, 560; *Bryan v. Church*, 111; *Altman v. Sanders*, 158; *Lewis v. Barnhill*, 457; *Horney v. Pool Co.*, 521.

Medical Expert—Competency of medical expert testimony see Evidence §§ 44, 51; Criminal Law § 53.

Mental Capacity—To execute will see Wills; action to set aside deed for mental incapacity, *Hammond v. Bullard*, 570; opinion evidence as to mental capacity, *Hammond v. Bullard*, 570.

Mental Pain—Recovery of damages for, *King v. Britt*, 594.

Minor—Contributory negligence of minor see Negligence § 16; negligence in striking child on highway see Automobiles §§ 34, 41m; evidence held insufficient to show negligence on part of owner of land proximately causing drowning of three-year old child in privy, *Walker v. Sprinkle*, 626; contributing to delinquency of minor, *S. v. Whitted*, 129.

Minister—Injury to minister while moving stove in parsonage, *Bryan v. Church*, 111.

Misdemeanor — Whether larceny is felony or misdemeanor see Larceny §§ 9, 10; whether forgery is felony or misdemeanor see Forgery § 2; whether escape is felony or misdemeanor see Escape.

Misjoinder—Demurrer for misjoinder of parties and causes see Pleadings § 18.

Misstatement of Contentions — Charge on contentions of parties see Criminal Law § 112.

Mistrial—Power of court to order mistrial for illness of attorney, *S. v. Battle*, 513; discretionary power of court to order mistrial see Trial § 48.

Mobile Radio Service—Application for certificate for operation of mobile radio service, *Utilities Comm. v. Telegraph Co.*, 257.

Modification of Judgment—Of consent judgment, *Young v. Insurance Co.*, 339.

"Molest"—Court need not define, *S. v. Godwin*, 216.

Moot Question—Declaratory Judgment Act does not authorize adjudication of, see Declaratory Judgment Act.

Morals—Ordinance relating to, see Municipal Corporations § 27.

Mortgages and Deeds of Trust—*Cestui* is not necessary party to action to set aside deed of trust as fraudulent, *Supply Corp. v. Scott*, 145; priority of lien may be declared under doctrine of constructive trust regardless of registration, *Electric Co. v. Construction Co.*, 714; payment is defense to foreclosure, *Heating Co. v. Blackburn*, 155.

Motion Pictures—Ordinances proscribing display of indecent pictures within view of public, *S. v. Furio*, 353.

Motions—To strike see Pleadings § 34; to amend see Pleadings § 24; for continuance, *S. v. Stinson*, 661; for directed verdict properly denied, *S.*

v. Stinson, 661; for diminution of record, *Pendergraft v. Harris*, 396; motions within purview of G.S. 1-125 for purpose of extending time to plead, *Potts v. Howser*, 484.

Motor Vehicles—See Automobiles.

Motor Vehicle Safety and Financial Responsibility Act—Where insurance is not required by Financial Responsibility Act, requirement of notice to insurer is enforceable, *Clemmons v. Ins. Co.*, 495.

Multi-State Corporation—Allocation of income of multi-state corporation for purpose of income tax, *Oil Corp. v. Clayton*, 15.

Municipal Corporations—Condemnation by, see Eminent Domain; powers of municipal corporation, *S. v. Furio*, 353; *Bagwell v. Brevard*, 604; *Mosseller v. Asheville*, 104; *Bowling v. Oxford*, 552; injury from defect in streets, sidewalks, or water systems, *Mosseller v. Asheville*, 104; *Bowling v. Oxford*, 552; sale of property by municipality, *Bagwell v. Brevard*, 604; zoning ordinances and building permits, *Carver v. Board of Adjustment*, 40; public morals and welfare, *S. v. Furio*, 353.

Name—Doctrine of *Iden Sonans*, *S. v. Stallings*, 405.

Narcotics—Operating automobile while under the influence of, see Automobiles §§ 66 *et seq.*; possession of narcotics may not be justified on ground of religious beliefs, *S. v. Bullard*, 599.

Negligence—In the operation of automobiles see Automobiles; action for wrongful death see Death; liability of municipal corporation for negligent injuries see Municipal Corporations; right to contribution between tort feasors see Torts; liability under Tort Claims Act for injury to pupil by school bus, *Brown v. Board of Education*, 740; "act of God," *Ins. Co. v. Storage Co.*, 679; proximate cause, *Snell v. Rock Co.*, 613; *Ins. Co. v. Storage Co.*, 679; concurring and intervening negligence, *Cox v. Gallamore*, 537; contributory negligence, *Griffin v. Ward*, 296; *Lewis v. Barnhill*, 457; sudden emergency, *Cline v. Atwood*, 182; *Sink v. Moore*, 344; contributory negligence of minors, *Hedrick v. Tigniere*, 62; presumptions and burden of proof, *Hedrick v. Tigniere*, 62; *King v. Bonardi*, 221; *Ashe v. Builders Co.*, 384; *Lewis v. Barnhill*, 457; sufficiency of evidence on issue of negligence in general, *Hedrick v. Tigniere*, 62; *Ashe v. Builders Co.*, 384; *Lewis v. Barnhill*, 457; *res ipsa loquitur*, *Hollenbeck v. Fasteners Co.*, 401; *Bowling v. Oxford*, 552; sufficiency of evidence to require submission of issue of contributory negligence, *Butler v. Wood*, 250; nonsuit for contributory negligence, *Hedrick v. Tigniere*, 62; *Waycaster v. Sparks*, 87; *Lewis v. Barnhill*, 457; *Cox v. Gallamore*, 537; *Thames v. Teer Co.*, 566; *Atwood v. Holland*, 722; *Snell v. Rock Co.*, 613; instructions in negligence actions, *Long v. Thompson*, 310; *Lewis v. Barnhill*, 457; injuries to children from dangerous conditions, *Walker v. Sprinkle*, 626; liability for injury to invitee, *Hedrick v. Tigniere*, 62; *Sellers v. Vercen*, 307; injuries to licensee, *Thames v. Teer Co.*, 565; measure of damages for personal injury see Damages.

Negotiable Instruments—See Bills and Notes.

Negroes—Public schools must be integrated. *Dilday v. Board of Education*, 438.

Neighborhood Public Road—Section of abandoned highway becomes neighborhood public road, *Highway Comm. v. Phillips*, 369.

Nonexpert Witness—Testimony of identity of vehicle held shorthand statement of fact. *S. v. Bridges*, 121.

Nonresident—Apportionment of Federal estate taxes of nonresident testator, *Bank v. Wells*, 276.

Nonsuit — Sufficiency of evidence for nonsuit in particular prosecutions see

particular titles of crimes; sufficiency of evidence to overrule in general, see Trial § 22; nonsuit for variance see Trial § 26; consideration of evidence on motion to nonsuit see Trial § 21, Criminal Law § 99 *et seq.*; sufficiency of evidence to overrule nonsuit in negligent acts see Negligence § 24; nonsuit for contributory negligence see Negligence § 26; review of judgment on motion to nonsuit see Appeal and Error § 51; is inapposite under Declaratory Judgment Act, *Hubbard v. Josey*, 651.

Notice—Registration as notice see Registration; publication of notice of levy upon garnishee, *Ward v. Mfg. Co.*, 131; notice and opportunity to be heard are required by due process, *Randleman v. Hinshaw*, 136.

Obscene Pictures—Ordinance proscribing display of within public view, *S. v. Furio*, 353.

Opinion — Expression of opinion by court in charge see Trial §§ 35, 37; in criminal prosecutions see Criminal Law § 108.

Opinion Evidence—Testimony of identity of vehicle held shorthand statement of fact, *S. v. Bridges*, 121; opinion evidence as to mental capacity, *Hammond v. Bullard*, 570; expert opinion evidence see Evidence § 42, *et seq.*

Opportunity to be Heard—Notice and opportunity to be heard are required by due process, *Randleman v. Hinshaw*, 136.

Ordinances—Enjoining enforcement of municipal ordinance, *Angell v. Raleigh*, 387; construction and operation of ordinances see Municipal Corporations § 24, *et seq.*

Outhouse—Evidence held insufficient to show negligence on part of owner of land proximately causing drowning of three-year old child in privy, *Walker v. Sprinkle*, 626.

Parking—See Automobiles.

Parking Lot—Whether injury to employee on employer's parking lot arises out of employment, *Altman v. Sanders*, 158.

Parol Evidence—May not vary term of negotiable instrument, *Vending Co. v. Turner*, 576.

Parole—Fact that defendant is on parole does not preclude appeal, *S. v. Rhinehart*, 470.

Parsonage—Injury to minister while moving stove in parsonage, *Bryan v. Church*, 111.

Partial Disability—Award of damages for bodily disfigurement does not preclude damages for loss of kidney, *Cates v. Construction Co.*, 560.

Partial New Trial—Trial court may order partial new trial, *Branch v. Gurley*, 44.

Parties — Parties concluded by judgment see Judgments § 29; demurrer for misjoinder of parties and causes see Pleadings § 18; *cestui* is not necessary party to action to set aside deed of trust as fraudulent, *Supply Corp. v. Scott*, 145; parties plaintiff, *Bowling v. Oxford*, 552; *Filter Co. v. Robb*, 583; *Ins. Co. v. Storage Co.*, 679.

Passenger—In automobile, see Automobiles.

Payment — Whether note secured by deed of trust was paid by insurance fund, *Heating Co. v. Blackburn*, 155; payment of note under provisions of collateral contract, *Vending Co. v. Turner*, 576.

Pedestrian—Injury from fall on street while walking see Municipal Corporations; injury to by automobile see Automobiles.

Penalty—Of amercement, *Produce Co. v. Stanley*, 608.

Perjury—*S. v. King*, 631.

Permanent Scar—Recovery of damages for, *King v. Britt*, 594.

Personal Injury—Allegations held sufficient for award of damages for loss of time and wages for personal injury, *Long v. Thompson*, 310; measure of damages for personal injuries, *King v. Britt*, 594.

Personal Property—Malicious damage to, *S. v. Childress*, 85.

Personal Property Tax—See Taxation.

Peyote—Possession of peyote and marijuana cannot be justified on religious grounds, *S. v. Bullard*, 599.

Physical Facts — Circumstantial evidence as to why car was to its left of center of road, *Anderson v. Webb*, 745; physical facts held to show that loss of control of vehicle was due to negligence, *Trust Co. v. Snowden*, 749.

Physicians and Surgeons—Competency of medical expert testimony see Evidence §§ 44, 51; malpractice, *Bryant v. Dougherty*, 545.

Pictures — Ordinance proscribing display of indecent pictures within public view, *S. v. Furio*, 353.

Plea of Guilty—See Criminal Law § 23.

Pleadings—In particular actions see particular titles of actions; of damages, see Damages § 10; punitive damages need not be pleaded *eo nomine*, *Cook v. Lanier*, 166; allegations held sufficient for award of damages for loss of time and wages for personal injury, *Long v. Thompson*, 310; motion within purview of G.S. 1-125 for purpose of extending time to plead, *Potts v. Howser*, 484; counterclaims and cross-actions, *Streater v. Marks*, 32; *Lewis v. Barnhill*, 457; cause of action may not be alleged in reply, *Furniture Co. v. Bentwood Co.*, 119; demurrer, *Streater v. Marks*, 32; *Filter Co. v. Robb*, 583; *Conference v. Piner*, 74; *Walker v. Sprinkle*, 626; amendment of pleading, *Vending Co. v. Turner*, 576; *Furniture Co. v. Bentwood Co.*, 119; variance, *Vending Co. v. Turner*, 576; issues raised by pleadings and necessity for proof, *In re Wallace*, 204; *Ins. Co. v. Storage Co.*, 679; motions to strike, *Marine Corp. v. Futrell*, 194.

Police Power—See Municipal Corporations § 24 *et seq.*

Ponds—Damage resulting from break of municipal dam, *Bowling v. Oxford*, 552.

Possession — Presumption from recent possession of stolen goods, *S. v. Emanuel*, 663.

Post Conviction Hearing—See Criminal Law § 173.

Power Tool — Inherently dangerous, *Hollenbeck v. Fasteners Co.*, 401.

Power Line—Injury to workman when other end of girder, raised by crane, came in contact with power line, *Lewis v. Barnhill*, 457.

Power of Appointment—*Trust Co. v. Hunt*, 173.

Prayer for Judgment—Upon motion for judgment sequent to prayer for judgment, court is not bound by technical rules of evidence nor by procedure for activation of suspended sentence, *S. v. Thompson*, 653.

Preliminary Hearing—Defendant may waive preliminary hearing without benefit of counsel, *S. v. Cason*, 316.

Presumptions—No presumption of negligence from mere fact of injury, see Negligence §§ 21, 41a; *res ipsa loquitur* creates no presumption of negligence, *Bowling v. Oxford*, 552; while negligence is not presumed from mere fact of injury, where there is evidence that loss of control of vehicle is result of negligence issue is for jury, *King v. Bonardi*, 221; *Trust Co. v. Snowden*, 749; presumption that 13 year old child is incapable of contributory negligence, *Hedrick v. Tigniere*, 62; from recent possession of stolen goods, *S. v. Emanuel*, 663;

presumption of regularity of acts of public officer held rebutted, *S. v. Upchurch*, 417.

Prima Facie Case—Merely takes issue to jury, *Cook v. Lanier*, 166; does not alter burden of proof, *Ins. Co. v. Storage Co.*, 679.

Principal and Agent—Liability of owner for negligent operation of vehicle by driver see Automobiles; scope of authority, *Lewis v. Barnhill*, 457; principal is not immune to suit at common law even though agent is immune when cause is precluded by Compensation Act, *Altman v. Sanders*, 158; where purchaser is not sure whether payment is due distributor or supplier, he may have both joined, *Filter Co. v. Robb*, 583; liability of bank in paying check drawn by unauthorized agent, *Nationwide Homes v. Trust Co.*, 528.

Prison—Damage to prison property by convicts, *S. v. Childress*, 85.

Privy—Evidence held insufficient to show negligence on part of owner of land proximately causing drowning of three-year old child in privy, *Walker v. Sprinkle*, 626.

Probable Cause — Want of probable cause see Malicious Prosecution.

Probata—Proof without allegation is unavailing, *Vending Co. v. Turner*, 576.

Probate of Wills—See Wills.

Process—Subpoena *duces tecum*, *Vaughan v. Broadfoot*, 691; service by publication and attachment, *Ward v. Mfg. Co.*, 131.

Processioning Proceedings—See Boundaries.

"Promotion Money" — Agreement that note should be credited with amounts received by payee from concession, *Vending Co. v. Turner*, 576.

Property — Malicious destruction of property, *S. v. Childress*, 85.

Property Tax—See Taxation.

Proprietary Function — Of municipal corporations see Municipal Corporations.

Proprietor—Liability of owner or proprietor to invitee and licensee see Negligence.

Prospective Damages—See Damages.

Proviso—Construction of statutory proviso, *Little v. Stevens*, 328.

Proximate Cause—See Negligence § 7; negligence of defendant creating sudden emergency held sole proximate cause of accident insulating negligence of other defendant in acting in emergency, *Cline v. Atwood*, 182; negligence continuing to moment of impact is not insulated by negligence of another, *Cox v. Gallamore*, 537.

Public Convenience and Necessity—Certificate of, see Utilities Comm.

Public Morals—Ordinance relating to, see Municipal Corporations § 27.

Public Officer — Presumption of regularity of acts of public officer held rebutted, *S. v. Upchurch*, 417; statute providing for election and appointment of boards of education, *Hobbs v. Moore County*, 665.

Public Schools—See Schools.

Public Service Corporation—See Utilities Commission.

Publication—Of notice of levy upon garnishee, *Ward v. Mfg. Co.*, 131.

"Puffing of His Wares"—*Hollenbeck v. Fasteners Co.*, 401.

Punitive Damages—Need not be pleaded *eo nomine*, *Cook v. Lanier*, 166.

Punishment—Cruel and unusual see Constitutional Law § 36; whether larceny is felony or misdemeanor see Larceny §§ 9, 10; forgery is felony, *S. v. Davis*, 126; upon motion for judgment sequent to prayer for judgment, court is not bound by technical

rules of evidence nor by procedure for activation of suspended sentence, *S. v. Thompson*, 653; defendant must be given credit for time served, *S. v. Smith*, 755.

Purchaser — Where purchaser is not sure whether payment is due distributor or supplier, he may have both joined, *Filter Co. v. Robb*, 583.

Quashal—Of indictment see Indictment and Warrant.

Raccoon Skins—Liability of bailee for raccoon skins damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Races—Public schools must be integrated, *Dilday v. Board of Education*, 438.

Radio Service—Application for certificate for operation of mobile radio service, *Utilities Comm. v. Telegraph Co.*, 257.

Railroads—Rates, *Utilities Comm. v. R. R.*, 317; crossing accidents, *Cox v. Gallamore*, 537.

Rape—Assault with intent to commit rape, *McClure v. State*, 212; *S. v. Moose*, 97; *S. v. Lucas*, 304.

"Reasonable Subsistence"—See Divorce and Alimony § 16.

Receivers—Priority as result of constructive trust, *Electric Co. v. Construction Co.*, 714.

Receiving Stolen Goods — *S. v. Matthews*, 244; *S. v. Emanuel*, 663.

Recent Possession—Presumptions from, *S. v. Emanuel*, 663.

Record—Evidence should be set out in record in narrative form, *Trust Co. v. Henry*, 253; motion for diminution of record, *Pendergraft v. Harris*, 396.

Recorder's Court—Appeals from inferior court to Superior Court in criminal prosecutions see Criminal Law § 18.

Registration—Priority of lien may be declared under doctrine of constructive trust regardless of registration, *Electric Co. v. Construction Co.*, 714; rights under unregistered instrument, *Beasley v. Wilson*, 95.

Religious Liberty—Possession of peyote and marijuana cannot be justified on religious grounds, *S. v. Bullard*, 599.

Religious Societies and Corporations—Control of property, *Conference v. Piner*, 74; *Church v. Amos*, 412.

Remainder—Limitation over held contingent and not vested, *Lawson v. Lawson*, 643.

Remand—Where it cannot be determined whether court acted as matter of discretion or matter of law, cause will be remanded, *Sayland v. Sayland*, 378.

Removal—Court may remove *habeas corpus* proceeding to county in which action for divorce and custody of children is pending, *In re Macon*, 248.

Replevin—See Claim and Delivery.

Reply—Cause of action may not be alleged in reply, *Furniture Co. v. Bentwood Co.*, 119.

Res Ipsa Loquitur—Does not apply to fall of a dance pupil, *Hedrick v. Tigniere*, 62; does not apply to richochet of power tool, *Hollenbeck v. Fasteners Co.*, 401; does not affect burden of proof, *Bowling v. Oxford*, 552.

Res Judicata—See Judgments; rulings on evidence are not *res judicata* upon subsequent trial, *Vending Co. v. Turner*, 576.

Reservoir — Damage resulting from break of municipal dam, *Bowling v. Oxford*, 552.

Resulting Trust—See Trusts § 13.

Right of Way—Laying of water main or sewer line in right of way is additional burden upon the fee, *Randleman v. Hinshaw*, 136.

Road Contractor—Injury to subcontractor, *Thames v. Teer Co.*, 565.

Ruptured Disc—Proof that injury resulted from accident, *Miller v. Lucas*, 1.

Safe Deposit Box—Donee is entitled to introduce inventory of deceased's safe deposit box to establish gift *inter vivos*, *Fesmire v. Bank*, 589.

Sales—Payment of purchase price and transfer of title, *Shearin v. Indemnity Co.*, 505; express warranties, *Hollenbeck v. Fasteners Co.*, 401; right to credit for failure of material to meet specifications, *Filter Co. v. Robb*, 583; injury from defect, *Hollenbeck v. Fasteners*, 401.

Sanity—Opinion evidence as to mental capacity, *Hammond v. Bullard*, 570.

Scar—Recovery of damages for, *King v. Britt*, 594.

School Buses — Liability under Tort Claims Act for injury to pupil by school bus, *Brown v. Board of Education*, 740.

Schools — Changing school districts, *Hobbs v. Moore County*, 665; duties and appointment of members of boards of education, *Dilday v. Board of Education*, 438; *Hobbs v. Moore County*, 665; allocation of proceeds of bonds or taxes, *Hobbs v. Moore County*, 665; *Dilday v. Board of Education*, 438; school sites, *Hobbs v. Moore County*, 665.

Searches and Seizures—Necessity for search warrant and waiver, *S. v. Williams*, 424; requisites and validity of search warrant, *S. v. Upchurch*, 417; *S. v. Bullard*, 599.

Segregation—Public Schools must be integrated, *Dilday v. Board of Education*, 438.

Self-Defense—Instruction in homicide prosecution see Homicide § 27.

Self-Incrimination — Breathalyzer test held competent, *S. v. Cummings*, 300.

Senior Deed—Corner may not be established by call in junior conveyance, *Coley v. Telephone Co.*, 701.

Sentence—Whether larceny is felony or misdemeanor see Larceny §§ 9, 10; whether forgery is felony or misdemeanor see Forgery § 2; activation of suspended sentence or judgment, see Criminal Law § 136; review of judgment on motion to nonsuit see Criminal Law § 168; where indictment fails to refer to previous conviction for escape, it will not support sentence for felony, *S. v. Revis*, 255; prior to amendment, it was mandatory that sentence for escape commence at expiration of term or terms defendant was serving at time of escape, *S. v. Doggett*, 648; upon motion for judgment sequent to prayer for judgment, court is not bound by technical rules of evidence nor by procedure for activation of suspended sentence, *S. v. Thompson*, 653; defendant must be given credit for time served, *S. v. Smith*, 755.

Separation Agreement—See Husband and Wife § 11.

Servient Highway—See Automobiles.

Setting Aside Verdict — Discretionary power of court in, see Trial § 48; Criminal Law § 126.

Severance of Indictments — Consolidation and severance of indictments see Criminal Law § 87.

Sewer Line—Laying of sewer line in right of way is additional burden upon the fee, *Randleman v. Hinshaw*, 136.

Sheet Rock—Injury to housewife from slabs falling against her during renovation of kitchen, *Ashe v. Builders Co.*, 384.

Sheriffs—Amercement of, *Produce Co. v. Stanley*, 608.

"Shorthand" Statement of Fact—Testimony of identity of vehicle held shorthand statement of fact, *S. v. Bridgers*, 121.

Sidewalks — Liability of municipality for injury from defect, see Municipal Corporations.

Skins—Liability of bailee for raccoon skins damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Sovereign Immunity—Liability of municipality for tort, see Municipal Corporations; liability under Tort Claims Act for injury to pupil by school bus, *Brown v. Board of Education*, 740.

Special Damages — Allegations held sufficient for award of damages for loss of time and wages for personal injury, *Long v. Thompson*, 310.

Speedway—Agreement that note should be credited with amounts received by payee from concession, *Vending Co. v. Turner*, 576.

State—What law governs transitory action see Courts § 20; what law controls apportionment of Federal estate taxes of nonresident testator, *Bank v. Wells*, 276; liability under Tort Claims Act, *Brown v. Board of Education*, 740.

Statement of Contentions—Charge on contentions of parties see Criminal Law § 112.

Statute of Distribution—See Descent and Distribution.

Statute of Frauds—See Frauds, Statute of.

Statute of Limitations—See Limitation of Actions.

Statutes—Whether Statute should be amended is legislative and not judicial function, *Ins. Co. v. Bynum*, 289; local act affecting school district, *Hobbs v. Moore County*, 665; form and construction, *Hobbs v. Moore County*, 665; construction in regard to constitutionality, *Randleman v. Hinshaw*, 136; *Hobbs v. Moore County*, 665; general rules of construction, *Little v. Stevens*, 328; *Hobbs v. Moore County*, 665; construction of provisos, *Little v. Stevens*, 328; construction of amendments, *Cates v. Construction Co.*, 560; later local act will be construed as exception to prior general statute, *Hobbs v. Moore County*, 665.

Steel Joist—Injury to workman when other end of girder, raised by crane, came in contact with power line, *Lewis v. Barnhill*, 457.

Stipulations—See Trial § 6.

Stock Certificate—Transfer of, *Fesmire v. Bank*, 589.

Storage—Liability of bailee for raccoon skins damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Store Proprietor—Liability of owner or proprietor to invitee see Negligence.

Storm—Bailee may be liable for failure to take appropriate steps after goods had been damaged in storage, *Ins. Co. v. Storage Co.*, 679.

Stove—Injury to minister while moving stove in parsonage, *Bryan v. Church*, 111.

Streets—Liability of municipality for injury from defect see Municipal Corporations.

Subletting—See Landlord and Tenant.

Subornation—Of perjury, *S. v. King*, 631.

Subpoena *Duces Tecum*—*Vaughan v. Broadfoot*, 691.

Subrogation—Right of insurer paying loss to subrogation see Insurance §§ 53, 96.1; right of insurer to contribution may not be based on subrogation, *Ins. Co. v. Bynum*, 289.

Sudden Emergency—*Cline v. Atwood*, 182; *Butler v. Wood*, 250; *Sink v. Moore*, 344.

Summary Ejectment — *Housing Authority v. Thorpe*, 431.

Superior Court—Appeals from inferior court to Superior Court see Courts § 6; in criminal prosecutions see Criminal Law § 18; justice of peace has exclusive original jurisdiction of

action *ex contractu* where sum demanded does not exceed $200, *Jenkins v. Winecoff*, 639; whether Compensation Act precludes action at common law see Master and Servant § 86; rulings on evidence are not *res judicata* upon subsequent trial, *Vending Co. v. Turner*, 576.

Supplier—Where purchaser is not sure whether payment is due distributor or supplier he may have both joined, *Filter Co. v. Robb*, 583.

Suspended Sentence—Imposition of see Criminal Law § 135; activation of see Criminal Law § 136; upon motion for judgment sequent to prayer for judgment, court is not bound by technical rules of evidence nor by procedure for activation of suspended sentence, *S. v. Thompson*, 653.

Switching Charges — Request for increase in rates for, *Utilities Comm. v. R. R.*, 317.

"Taking" — Deprivation of access to public highway constitutes a taking, *Highway Comm. v. Phillips*, 369.

Tape Recordings—Of telephone conversations held competent when properly identified, *S. v. Godwin*, 216.

Taxation — Apportionment of Federal estate taxes of nonresident testator, *Bank v. Wells*, 276; application of proceeds of bonds or taxes, *Dilday v. Board of Education*, 438; *Hobbs v. Moore County*, 665; taxpayer is entitled to minimize taxes by any legal means, *Oil Corp. v. Clayton*, 15; income tax of foreign corporations, *Oil Corp. v. Clayton*, 15; tax liens, *Duplin County v. Jones*, 68; review of assessment and procedure to recover, *Oil Corp. v. Clayton*, 15.

Telephone Companies—Application for certificate for operation of mobile radio service, *Utilities Comm. v. Telegraph Co.*, 257; indecent calls to female, *S. v. Godwin*, 216.

Temporary Restraining Order — Continuance of, see Injunctions.

Testamentary Capacity—See Wills.

Tort Claims Act—Liability under for injury to pupil by school bus, *Brown v. Board of Education*, 740.

Tort-Feasors—Where plaintiff sues both tort-feasors, neither may file cross-action against the other, *Streater v. Marks*, 32; adjudication of contributory negligence in action by one driver against other would not preclude one driver from thereafter maintaining action against the other for contribution if passenger recovers judgment only against the one, *Streater v. Marks*, 32; right of insurer to contribution may not be based on subrogation, *Ins. Co. v. Bynum*, 289.

Torts—Liability of municipality for, see Municipal Corporations; right to contribution, *Streater v. Marks*, 32; *Ins. Co. v. Bynum*, 289.

Trailer—Negligence in attachment of, *Miller v. Lucas*, 1.

Transactions — Communications and transactions with decedent see Evidence § 11.

Transitory Action—What law governs, see Courts § 20.

Trial—Of particular actions and prosecutions see particular title of actions and crimes; hearing before Utilities Commission see Utilities Commission; stipulations, *Highway Comm. v. Phillips*, 369; *Nationwide Homes v. Trust Co.*, 528; argument of counsel, *Callicutt v. Smith*, 252; motions to strike, *S. v. Battle*, 513; withdrawal of evidence, *Apel v. Coach Co.*, 25; motion to nonsuit, *Supply Co. v. Scott*, 145; *Bowling v. Oxford*, 552; *Ins. Co. v. Storage Co.*, 679; *Waycaster v. Sparks*, 87; *King v. Bonardi*, 221; *Miller v. Lucas*, 1; *Lewis v. Barnhill*, 457; *Jones v. Johnson*, 656; *Clemmons v. Ins. Co.*, 495; *Cook v. Lanier*, 166; *Ins. Co. v. Storage Co.*, 679; instructions, *Miller v. Lucas*, 1; *King v. Britt*, 594; *Saunders v. Warren*, 735; *Lewis v. Barnhill*, 457; *Vending*

Co. v. Turner, 576; *Dove v. Cain*, 645; *Pardue v. Ins. Co.*, 82; verdict, *Nicholson v. Dean*, 375; *Selph v. Selph*, 635; setting aside verdict, *Branch v. Gurley*, 44; *Selph v. Selph*, 635; *Callicutt v. Smith*, 252; trial by court, *Young v. Ins. Co.*, 339; *Nationwide Homes v. Trust Co.*, 528.

Trusts—Distribution of corpus, *Trust Co. v. Hunt*, 173; resulting and constructive trusts, *Beasley v. Wilson*, 95; *Electric Co. v. Construction Co.*, 714.

Under Undue Influence—Caveat of will for, see Wills.

Undisclosed Agent — Where purchaser is not sure whether payment is due distributor or supplier, he may have both joined, *Filter Co. v. Robb*, 583.

Uninsured Vehicle Clause—See Insurance § 47.1.

Unitary Business—Whether corporation and its subsidiaries are engaged in unitary business for purpose of imposition of income tax, *Oil Corp. v. Clayton*, 15.

United States—U. S. Constitution is supreme, *Dilday v. Board of Education*, 438.

Utilities Commission — Jurisdiction in general, *Utilities Comm. v. Tel. Co.*, 257; *Utilities Comm. v. R. R.*, 317.

Vague—Vague and indefinite ordinance, *S. v. Furio*, 353; meaning to statute held ascertainable by construction and not void for vagueness, *Hobbs v. Moore County*, 665.

Variance—Nonsuit for, see Trial § 26; proof without allegation is unavailing, *Vending Co. v. Turner*, 576.

Vendor and Purchaser—Check for initial payment under parol contract to convey is without consideration when no property rights are conveyed, *Montague v. Womble*, 360.

Venue — Court may remove *habeas corpus* proceeding to county in which action for divorce and custody of children is pending, *In re Macon*, 248.

Verdict—Discretionary power of court to set aside verdict see Trial § 48; motion to set aside see Trial § 52; court must accept sensible verdict and cannot require jury to redeliberate, *S. v. Rhinehart*, 470; motion for directed verdict properly denied, *S. v. Stinson*, 661; form and sufficiency of, see Criminal Law § 117; Trial § 42; issues and verdict in automobile accident cases see Automobiles § 46.1.

Vested Remainder — Limitation over held contingent and not vested, *Lawson v. Lawson*, 643.

Vicious Propensity—Permitting dog to run at large, *Sink v. Moore*, 344.

Voluntary Confession — See Criminal Law § 71.

Waiver—Of search warrant, *S. v. Williams*, 424; of counsel, *S. v. Brooks*, 427; nature and elements of waiver, *Clemmons v. Ins. Co.*, 495.

Waiver of Preliminary Hearing—Defendant may waive preliminary hearing without benefit of counsel, *S. v. Cason*, 316.

Want of Probable Cause—See Malicious Prosecution.

Warehouses and Warehousemen — Liability as bailee see Bailment.

Warrant — See Indictment and Warrant; search warrant see Searches and Seizures.

Warranty—See Sales.

Water Main—Laying of water main in right of way is additional burden upon the fee, *Randleman v. Hinshaw*, 136.

Water System—Liability of municipality for damage from defect see Municipal Corporations.

Waters and Water Courses — Dams, *Bowling v. Oxford*, 552.

Waxed Floor—Fall of dance pupil on waxed floor, *Hedrick v. Tigniere*, 62.

Whiskey—Operating automobile while under the influence of see Automobiles § 66 *et seq.*

Widow—Rights under Intestate Succession Act see Descent and Distribution.

Wills—Probate in common form, *In re Will of Burton*, 729; caveat, *In re Will of Jones*, 48; *In re Will of Burton*, 729; *In re Will of Lynn*, 234; determination of whether estate was vested or contingent, *Lawson v. Lawson*, 643; devises with power of disposition, *Trust Co. v. Hunt*, 173; inheritance taxes, *Bank v. Wells*, 276.

Withdrawal of Evidence—From consideration of jury see Trial § 16.

Witnesses—Competency of medical expert testimony see Evidence §§ 44, 51; Criminal Law § 53; testimony of expert in regard to X-ray photographs see Evidence § 22; testimony of identity of vehicle held shorthand statement of fact, *S. v. Bridgers*, 121; party may not impeach his own witness, *Cline v. Atwood*, 182; charge on duty to scrutinize testimony of coconspirator, *S. v. Smith*, 659; party is bound by cross-examination as to material matters, *Pearce v. Barham*, 707; subornation of perjury, *S. v. King*, 631.

Workmen's Compensation Act — See Master and Servant.

Wrongful Death—Action for wrongful death see Death.

Wrongful Discharge of Employee—See Master and Servant § 10.

X-Ray Photographs—Testimony of expert in regard thereto see Evidence § 22.

Zoning Ordinance—*Craver v. Board of Adjustment*, 40.

ANALYTICAL INDEX

ABORTION.

§ 3. Causing Miscarriage of or Injury to Pregnant Woman.

In a prosecution for abortion, it is competent for a medical expert to testify that the described treatment of a pregnant woman might cause an abortion. *S. v. Brooks*, 427.

ACTIONS.

§ 8. Distinction Between Action on Contract and in Tort.

An action by a vendor against his broker to recover a sum paid to the broker by the purchaser as earnest money and which the broker retained after the purchaser defaulted upon his written contract to purchase arises out of contract, since the right of the broker to retain the funds depends upon the brokerage contract. *Jenkins v. Winecoff*, 639.

ADMIRALTY.

Filing of petition seeking limitation of liability is not a motion precluding default judgment. *Potts v. Howser*, 484.

ANIMALS.

§ 3. Liability of Owner for Permitting Domestic Animals to Run at Large.

In the absence of municipal ordinance, the owner of a dog is not required to keep him under restraint unless the animal is vicious or a menace to the public health, G.S. 106-381, and testimony that a dog on several occasions fought with other dogs in the neighborhood and that he frequently dashed into the street to bark at and pursue vehicles, is not evidence of a vicious propensity within the meaning of the statute, nor is it sufficient to invoke the common law rule imposing liability upon the owner for injuries inflicted by a dangerous, vicious, mischievous, or ferocious animal when the owner knows or should know of the animal's vicious propensity. *Sink v. Moore*, 344.

The exclusion of testimony that the dog in question had a bad reputation as an ill-tempered dog is not error when it appears that the testimony was based entirely upon the witness's observations of the dog and not on the dog's reputation in the community. *Ibid.*

APPEAL AND ERROR.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court will take cognizance *ex mero motu* of want of jurisdiction in the lower court. *Jenkins v. Winecoff*, 639.

§ 6. Moot Questions and Advisory Opinions.

The Supreme Court on appeal from judgment sustaining the validity of the statute attacked will not determine questions not adjudicated in the court below and which are not necessary to the determination of the correctness of the judgment appealed from. *Hobbs v. Moore County*, 665.

APPEAL AND ERROR—*Continued.*

§ 19. Form of and Necessity for Exceptions and Assignments of Error in General.

In the absence of any assignment of error the judgment will be sustained unless error appears on the face of the record proper or unless the issues are insufficient to support the judgment entered. *Trust Co. v. Henry*, 253.

An exception which appears for the first time in an assignment of error is ineffectual. *Dilday v. Board of Education*, 438.

An assignment of error must disclose the questions sought to be presented without the necessity of going beyond the assignment itself. *Nationwide Homes v. Trust Co.*, 528.

§ 21. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

An appeal and assignment of error to the judgment presents whether error of law appears on the face of the record. *In re Wallace*, 204.

An appeal is in itself an exception to the judgment and raises the question whether the facts support the judgment. *Dilday v. Board of Education*, 438.

§ 31. Settlement of Case on Appeal.

It is not error for the trial court to strike from the record the charge of the court in a prior trial of the action which ended in a mistrial for inability of the jury to agree upon a verdict. *Vending Co. v. Turner*, 576.

§ 34. Form and Requisites of Transcript.

Where the evidence is set out in the record entirely in question and answer form, the appeal will be dismissed in the absence of error appearing on the face of the record proper. *Trust Co. v. Henry*, 253.

§ 36. Correction and Diminution of Record.

A motion for diminution of the record will not be allowed when nothing contained in the suggested addenda affects the basis of decision. *Pendergraft v. Harris*, 396.

§ 38. The Brief.

Assignments of error not brought forward in the brief are deemed abandoned. *Long v. Thompson*, 310; *Hobbs v. Moore County*, 665.

§ 40. Harmless and Prejudicial Error in General.

The rule that a new trial will not be granted when there is no reasonable probability that the result would be materially affected does not apply when appellant is not seeking a new trial, but is seeking to set aside a final judgment for deprivation of her constitutional right to notice and an opportunity to be heard. *Randleman v. Hinshaw*, 136.

The verdict of the jury will not be upset for technical error which could not have affected the result of the trial. *Whitley v. Richardson*, 753.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Testimony that one tort-feasor stated that the other tort-feasor attached the trailer causing the accident to his automobile and that as it was attached "he did not get out of the automobile" is not prejudicial to the other tort-feasor when such other tort-feasor introduces evidence that its dealer hitched the trailer to the car. *Miller v. Lucas*, 1.

APPEAL AND ERROR—*Continued.*

The court's refusal to admit in evidence a document tending to corroborate a witness of the adverse party, and competent solely for the purpose of corroborating the testimony of the witness, cannot be prejudicial. *In re Will of Lynn*, 234.

Where the transcript of the adverse examination taken by defendant is not contained in the record, the exclusion of the transcript from the evidence will not be held for error, since it cannot be determined whether defendant was prejudiced by the exclusion of the evidence. *Vending Co. v. Turner*, 576.

§ 42. Harmless and Prejudicial Error in Instructions.

When the charge read contextually presents the law of the case to the jury in such manner as to leave no reason to believe the jury could have been misled, an exception thereto will not be sustained. *In re Will of Jones*, 48.

A technical inaccuracy in the court's charge to the jury will not be held for prejudicial error when it is apparent from the charge, construed contextually, that the jury could not have been misled. *Hammond v. Bullard*, 570.

§ 46. Review of Discretionary Matters.

Where it cannot be ascertained from the record whether the court denied motion for modification of a decree for alimony in the exercise of the court's discretion or whether the court denied the motion because of a misapprehension of the applicable law, the judgment will be vacated and the cause remanded. *Sayland v. Sayland*, 376.

§ 47. Review of Orders Relating to Pleadings.

Where, in the state of the record, plaintiff will not be prejudiced by retention of matters, motion to strike should be denied. *Marine Corp. v. Futrell*, 194.

§ 49. Review of Findings or of Judgments on Findings.

Findings of fact by the trial court which are supported by competent evidence are conclusive on appeal. *Nationwide Homes v. Trust Co.*, 528.

Where there are no exceptions to the findings of fact, the findings are conclusive on appeal. *Ibid.*

A finding of fact by the court relating to a matter not supported by allegation in the pleading is feckless. *Little v. Stevens*, 328.

§ 50. Review of Injunction Proceedings.

On appeal from the dissolution of a temporary restraining order, the Supreme Court may review the findings of fact as well as the conclusions of law, and to that end may find the facts necessary for a determination of whether the lower court erred in dissolving the temporary order. *Dilday v. Board of Education*, 438.

§ 51. Review of Judgments on Motions to Nonsuit.

Upon appeal from denial of motion to nonsuit in a negligence case, the appellate court is required to examine only so much of plaintiff's evidence as is favorable to him and to determine whether, so considered, the evidence is sufficient in law to permit the jury to find that plaintiff was injured by defendant's actionable negligence and, if so, whether plaintiff's own evidence establishes his contributory negligence as sole reasonable inference. *Thames v. Teer Co.*, 565.

APPEAL AND ERROR—*Continued.*

On appeal from compulsory nonsuit, any incompetent evidence admitted at the trial must be considered in passing upon the sufficiency of the evidence, since, if the incompetent evidence had been excluded, plaintiff might have introduced competent evidence upon the point. *Ins. Co. v. Storage Co.*, 679.

§ 60. Law of the Case and Subsequent Proceedings.

Decision on appeal that demurrer for misjoinder of parties and causes should be sustained does not constrain the granting of a demurrer to the complaint in a subsequent action deleting one of the causes of action stated in the original complaint. *Conference v. Piner*, 74.

Decision to the effect that the evidence is sufficient to be submitted to the jury on an issue is the law of the case unless the evidence at the second trial is materially different from that introduced at the former. *Brewer v. Garner*, 219.

Decision on appeal that testatrix had exercised a valid power of appointment by will is conclusive on the parties, and none of them may contend in a subsequent action that no power of appointment existed in the testatrix. *Bank v. Wells*, 276.

Decision on appeal that the evidence justified a peremptory instruction upon an issue relates to the evidence of record upon the appeal and is not controlling upon the subsequent trial if there is a material difference in the evidence. *Schafer v. R. R.*, 419.

APPEARANCE.

§ 2. Effect of Appearance.

Since the enactment of G.S. 1-134.1, motion to dismiss for want of jurisdiction does not waive defendants' objections upon procedural grounds. *Ward v. Mfg. Co.*, 131.

AUTOMOBILES.

§ 4. Title and Transfer of Title.

Prior to 1961, a purchaser of a motor vehicle might acquire title notwithstanding failure of his vendor to deliver vendor's certificate of title, or vendee's failure to apply for a new certificate. *Shearin v. Indemnity Co.*, 505.

§ 6. Safety Statutes and Ordinances in General.

Statutory requirements of trailers and their couplings are designed to prevent injury, and the violation of the requirements is negligence *per se*. *Miller v. Lucas*, 1.

§ 7. Attention to Road, Look-Out and Due Care in General.

Every motorist is required to exercise reasonable care to avoid injury to persons or property of another, and the failure to exercise such care which proximately causes injury is actionable. *Miller v. Lucas*, 1.

§ 9. Stopping, Parking, Signals and Lights.

The requirement of G.S. 20-154 that the driver of a vehicle should not stop without first seeing that he can do so in safety and must give a signal of his intention when the operators of other cars might be affected does not apply to a stop made necessary by the exigencies of traffic, as when a driver, with his windows up because of rain, is following a line of cars meeting on-

AUTOMOBILES—*Continued.*

coming traffic and is forced to stop because of the stopping of prior traffic. *Griffin v. Ward*, 296.

A driver of a vehicle in a line of traffic is charged with notice that the operator of each car is affected by the one in front of it, and he must maintain such distance, keep such a lookout, and operate at such speed under the prevailing conditions so that he can control his car under ordinarily foreseeable developments. *Griffin v. Ward*, 296.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

The violation of G.S. 20-146 and G.S. 20-148, requiring the drivers of vehicles proceeding in opposite directions to stay on the right side of the highway in passing, is negligence *per se*, and when an accident results as a proximate cause of the failure of one of the drivers to stay on his right side of the highway, such failure constitutes actionable negligence. *Anderson v. Webb*, 745.

§ 17. Intersections.

The act of a driver in entering an intersection so closely in front of an automobile plainly visible to him approaching along the intersecting four-lane highway, that the driver of the car does not have sufficient time in the exercise of reasonable care to avoid a collision, constitutes a violation of G.S. 20-140(a) and G.S. 20-140(b), and is negligence *per se*. *Snell v. Rock Co.*, 613.

§ 19. Sudden Emergencies.

A person without fault in bringing on a sudden emergency is not held to the wisest choice of conduct, but only to that course of action which a reasonably prudent man, similarly situated, would have selected. *Cline v. Atwood*, 182; *Sink v. Moore*, 344.

§ 21. Defects in Vehicles.

G.S. 20-123(b), specifying the safety requirements of trailers and their couplings is intended and designed to prevent injury to persons and property on the highways, and the violation of the statutory requirements is negligence *per se*. *Miller v. Lucas*, 1.

§ 34. Children On or Near Highway.

The presence of small children at or near the edge of a highway is, itself, a danger signal to an approaching motorist, requiring the use of that degree of care which would be exercised by a reasonably prudent man in such circumstances. *Waycaster v. Sparks*, 87.

§ 35. Pleadings in Auto Accident Cases.

In this action by passenger against drivers of cars involved in head-on collision, the complaint is held to state a cause of action against each driver as a joint tort-feasor, and neither defendant was entitled to file a cross-action for contribution against the other. *Streater v. Marks*, 32.

§ 37. Relevancy and Competency of Evidence in Auto Accident Cases in General.

In an action by a passenger against the personal representative of the deceased driver to recover for injuries sustained when the driver lost control of the vehicle and ran off the road, testimony of witnesses tending to show that plaintiff, a married woman living with her husband, had been guilty of immoral sexual relations with the driver, *held* irrelevant to the issue of con-

AUTOMOBILES—*Continued.*

tributory negligence, and cannot be held competent as tending to show that plaintiff was not a captive in the car when there is no allegation and no issue raised that plaintiff was other than a passenger. *Pearce v. Barham*, 707.

§ 41a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence that defendant driver of a tractor trailer stopped his vehicle in front of plaintiff's house and called to plaintiff for route information, that plaintiff came to the left side of the vehicle with his back to the front thereof and talked with defendant driver, that plaintiff heard another vehicle approaching from the opposite direction, that plaintiff placed his feet on the fender of the truck and was pulling himself into the truck when the automobile, driven to the left of its center of the highway, struck plaintiff, *held* insufficient to be submitted to the jury on the issue of defendant driver's negligence, since defendant driver was not under duty to foresee that another motorist would recklessly drive his car on the wrong side of the road when ample space on his right was available. *Allen v. Sharp*, 99.

Negligence is not presumed from the mere fact of an accident, and evidence that the vehicle being driven by defendant left the road on a straight stretch of highway is alone insufficient to raise an inference of negligence, but is sufficient for that purpose in combination with evidence tending to show that the vehicle was being driven in a careless and reckless manner and at unlawful and excessive speed at the time. *King v. Bonardi*, 221.

Evidence that vehicle ran off road because of excessive speed and reckless driving takes issue of negligence to jury. *Ibid.*

Negligence is not presumed from the mere fact of an accident, and the doctrine of *res ipsa loquitur* does not apply upon proof that the driver of a vehicle lost control and ran off the highway, but when there is some evidence, physical, direct, or a combination of both, sufficient to permit a fair inference that the loss of control of the vehicle was due to negligence, the evidence should be submitted to the jury. *Trust Co. v. Snowden*, 749.

Physical facts at scene, together with other evidence, held sufficient to be submitted to the jury on the issue of whether driver's loss of control was due to negligence. *Ibid.*

The physical facts at the scene held to permit the inference that defendant was to his left of the center of the highway in passing a vehicle traveling in the opposite direction. *Anderson v. Webb*, 745.

§ 41c. Sufficiency of Evidence of Negligence in Failing to Stay on Right Side of Road and in Passing Vehicles Traveling in Opposite Direction.

Even conceding that driver was exceeding reasonable speed, such act could not constitute a proximate cause of collision with car approaching on wrong side of road. *Cline v. Atwood*, 182.

In an action to recover damages resulting from a head-on collision between a vehicle traveling east and a vehicle traveling west on a highway, evidence that skid marks leading to the vehicle which had been traveling east were seen on the south side of the highway, and that all the debris on the highway was found on the south side thereof, and that the vehicles, locked by the force of the collision, were both on the south side of the highway, permits the reasonable inference that the accident proximately resulted from the failure of the driver of the vehicle traveling west to stay on his right side of the highway. *Anderson v. Webb*, 745.

AUTOMOBILES—*Continued.*

§ 41f. Following too Closely and Hitting Preceding Vehicle.

Evidence tending to show that defendant's bus was traveling some 50 miles per hour on a highway covered with ice and snow, that plaintiff observed the bus for a distance of some 449 feet in his rear view mirror, that plaintiff pulled as far to the right as the snow bank, thrown up by a highway scraper, would permit, and that the bus struck the rear of plaintiff's vehicle, resulting in damage to the vehicle and personal injury to plaintiff, *held* sufficient to be submitted to the jury on the issue of negligence, and defendant's motions to nonsuit and to set aside the verdict as being contrary to the greater weight of the evidence on that issue were properly denied. *Apel v. Coach Co.*, 25.

§ 41g. Sufficiency of Evidence of Negligence in Entering Intersection.

In this action by a passenger, evidence tending to show that a motorist driving on a dominant street, with knowledge that stop signs had been erected on the servient street, approached the intersection at a speed within the legal maximum, that he was faced with oncoming traffic and was under the necessity of watching for turns by such traffic, and that after his vehicle had traversed two-thirds of the way through the intersection it was struck on its right by a motorist entering the intersection from the servient street without stopping, *held* properly submitted to the jury on the issue of the negligence of the motorist entering the intersection from the servient street, but insufficient to be submitted to the jury on the issue of negligence of the driver along the dominant highway. *Branch v. Gurley*, 44.

Evidence held for jury on issue of negligence in entering intersection with dominant highway in path of car approaching from right. *Snell v. Rock Co.*, 613.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children on Highway.

Evidence *held* sufficient to be submitted to the jury on the issue of defendant motorist's negligence in striking a seven year old child on the highway. *Waycaster v. Sparks*, 87.

Evidence *held* insufficient to be submitted to jury on issue of negligence of owner of small dog in permitting the animal to run at large, or the negligence of motorist in failing to anticipate that 14 year old boy on bicycle would be so distracted by the barking and pursuing dog that he would ride through intersection into side of car. *Sink v. Moore*, 344.

Evidence favorable to plaintiff which permits the inferences that defendant saw or should have seen small children near the edge of the highway, but that defendant did not reduce speed nor blow her horn or apply her brakes until after she saw plaintiff's intestate, a six year old boy, run into the highway, and that the car skidded about 150 feet before it struck the child, inflicting fatal injury, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Jones v. Johnson*, 656.

§ 41p. Sufficiency of Evidence of Identity of Driver.

The identity of the driver of a vehicle at the time of the accident may be established by circumstantial evidence, either alone or in combination with direct evidence. *King v. Bonardi*, 221.

Evidence tending to show that defendant drove up to a filling station and removed the keys from the ignition, intestate remaining in the vehicle, that defendant returned to the car and got in on the driver's side and drove off in a big hurry, and that the accident in suit occurred a few minutes there-

AUTOMOBILES—*Continued.*

after, is sufficient to support an inference that defendant was operating the vehicle at the time of the accident. *Ibid.*

Evidence that defendant was seen driving the vehicle in question shortly before the vehicle left the highway because of reckless driving and excessive speed, and that shortly after the wreck defendant was aided out of the driver's seat, *held* sufficient to be submitted to the jury on the issue of the identity of defendant as the driver at the time of the accident. *Barefoot v. Holmes*, 242.

§ 41r. Sufficiency of Evidence of Negligence in Operating Defective Vehicle or Improperly Attached Trailer.

Evidence held sufficient for jury on issue of negligence of driver of car in failing to exercise reasonable care to see that trailer was properly attached and on issue of negligence of trailer rental service in failing to properly attach trailer. *Miller v. Lucas*, 1.

Evidence that the owner had knowledge of the defective condition of the right door latch, that he had warned several passengers not to lean against the door, that he failed to warn plaintiff passenger, and that the door came open on a left turn and plaintiff, who was leaning on the door a little, fell out to his injury, *held* sufficient to be submitted to the jury on the issue of negligence. *McGee v. Cox*, 314.

§ 42d. Nonsuit for Contributory Negligence in Hitting Preceding or Parked Vehicle.

Evidence tending to show that plaintiff struck a vehicle parked on a one-way street in a no-parking zone at a point where overhanging branches tended to obscure its presence, that the vehicle was without lights, flares or other warning of its presence, and that the collision occurred on a rainy and foggy night, *held* not to disclose contributory negligence as a matter of law on the part of plaintiff. *Pardue v. Ins. Co.*, 82.

Evidence tending to show that plaintiff's vehicle was the fifth vehicle in a line of cars in a rain, that the cars were meeting oncoming traffic precluding a left turn, that the lead car stopped, awaiting opportunity to turn left, that defendant, driving the fourth car, brought his vehicle safely to a stop, and that plaintiff's vehicle struck the rear of defendant's vehicle, *held* to disclose contributory negligence as a matter of law. *Griffin v. Ward*, 296.

§ 42f. Nonsuit for Contributory Negligence in Failing to Keep Vehicle on Right Side of Road.

Plaintiff's evidence to the effect that he was traveling at a lawful speed on his side of the highway, that he saw defendant's car approaching about 18 inches to its left of the center line, that plaintiff at no time crossed the center line, and that the collision occurred in plaintiff's proper lane of travel, *held* not to disclose contributory negligence as a matter of law on the part of plaintiff. *Brewer v. Garner*, 219.

§ 42g. Nonsuit for Contributory Negligence in Entering Intersection.

Evidence held insufficient to show contributory negligence as matter of law on part of motorist on four lane highway in failing to see in time to avoid collision that motorist, approaching from opposite direction, would turn left, traverse median cross-over and cross highway immediately in front of plaintiff's car. *Snell v. Rock Co.*, 613.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

In this action by passenger, evidence of driver of car in which plaintiff was riding that he may have been traveling at excessive speed and, in emergency,

AUTOMOBILES—*Continued.*

turned left to avoid head-on collision, *held* insufficient to show that such speed and act of turning left was a proximate cause of collision, the act of the driver of the other vehicle in suddenly driving to his left side of the highway when some 100 feet distant being the sole proximate cause. *Cline v. Atwood*, 182.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

Evidence tending to show that plaintiff's truck was stopped in a position blocking the entire eastbound lane and part of the westbound lane of the highway at a place where a number of vehicles were stalled in snow, and that the view of defendant was obstructed by falling snow and a curve, that the highway from the curve to plaintiff's vehicle was slightly downgrade and covered with ice and snow, and that defendant struck the rear of plaintiff's vehicle, *held* to take the issue of plaintiff's contributory negligence to the jury. *Saunders v. Warren*, 735.

§ 46. Instructions in Automobile Accident Cases.

An instruction to answer the issue of negligence in the affirmative if the jury were satisfied by the greater weight of the evidence that defendant was negligent as the court had defined that term or had violated the safety statutes read to the jury, without instructing the jury in any part of the charge as to what facts were necessary to be found by the jury to constitute negligence on defendant's part, must be held for prejudicial error in failing to apply the law to the factual situations presented by the evidence. *Miller v. Lucas*, 1.

Instruction failing to apply law to facts in evidence is insufficient. *Saunders v. Warren*, 735. Submission of facts in charge unsupported by evidence is error. *Dove v. Cain*, 645. It is error for court to state contention that statement of investigating patrolman established that vehicle was unlawfully parked. *Saunders v. Warren*, 735.

§ 46.1. Issues and Verdict in Automobile Accident Cases.

The refusal of the court to submit a separate issue as to whether defendant was the operator of the vehicle at the time of the accident will not be held for error when the court instructs the jury to the effect that in order to answer the issue of negligence in the affirmative they must find by the greater weight of the evidence that defendant was driving the vehicle at the time of the accident, the burden of proof being upon plaintiff. *King v. Bonardi*, 221.

Where, in a passenger's action against the other driver involved in the collision, the personal representative of plaintiff's driver is joined as an additional defendant, and the additional defendant's cross-action for contribution is based upon identical allegations with respect to the original defendant's alleged negligence, and the court instructs the jury that a negative answer to the first issue as to the original defendant's negligence would terminate the case, *held*, a negative finding by the jury on the first issue adjudicates that the intestate of the additional defendant was not injured by the negligence of the original defendant, and the verdict supports judgment that there should be no recovery on the cross-action notwithstanding the absence of an answer to that specific issue. *Nicholson v. Dean*, 375.

§ 49. Contributory Negligence of Passenger.

Defendants' evidence that shortly before the accident in suit plaintiff's

AUTOMOBILES—*Continued.*

intestate who was a passenger in plaintiff's car, was intoxicated is not to be considered on the question of intestate's contributory negligence, since defendants' evidence in this respect tends to show another and different state of facts from that of plaintiff. *King v. Bonardi*, 221.

Evidence held for jury on question of contributory negligence of passenger in grabbing steering wheel in emergency. *Butler v. Wood*, 250.

A gratuitous passenger in an automobile is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances. *Atwood v. Holland*, 722.

Evidence held to show contributory negligence as matter of law on part of passenger in continuing to ride with intoxicated driver in two-seated sports car with four occupants. *Ibid.*

§ 55. Family Purpose Doctrine.

The husband of one employee may be sued at common law under the family purpose doctrine for injuries inflicted by his wife upon his wife's fellow employee, even though as between the employees suit at common law is precluded by the Workmen's Compensation Act. *Altman v. Sanders*, 158.

§ 59. Sufficiency of Evidence and Nonsuit in Assault and Homicide Prosecutions.

Evidence in this case *held* amply sufficient to sustain verdict of defendant's guilt of manslaughter resulting from culpable negligence in the operation of an automobile. *S. v. Bridgers*, 121.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions for Drunken Driving.

Circumstantial evidence tending to show that defendant's vehicle was the one involved in a collision with another car, that a trail of water was followed from the collision to defendant's car which was stalled with its radiator damaged and the motor hot, that defendant was then intoxicated and admitted that he had been driving, is sufficient to be submitted to the jury on the question of whether defendant was also intoxicated at the time of the collision. *S. v. Cummings*, 300.

§ 74. Instructions in Prosecutions for Drunken Driving.

A casual reference to narcotics by the court in its charge in a prosecution of defendant for operating his motor vehicle on a highway while under the influence of intoxicating liquor will not be held for prejudicial error when it is apparent from the record that the jury could not have been confused thereby. *S. v. Hall*, 90.

§ 85. Unlawful Taking of Automobile.

The unlawful taking of an automobile in violation of G.S. 20-105 is a misdemeanor, and in those instances in which inferior courts are given exclusive original jurisdiction of misdemeanors in a county named in the proviso to G.S. 7-64, the Superior Court is without original jurisdiction of the offense, and when the prosecution for the offense originates by indictment in the Superior Court its judgment is a nullity. *S. v. Covington*, 292.

BAILMENT.

§ 1. Nature and Requisites of the Relationship.

Warehousemen accepting property for cold storage under contract providing for the payment by the owner of monthly fees for such service, are bailees for hire. *Ins. Co. v. Storage Co.*, 679.

BAILMENT—*Continued.*

§ 3. Liabilities of Bailee to Bailor.

Bailees for hire are not insurers of the property entrusted to their possession, but are under duty to exercise ordinary care to protect the property against loss, damage or destruction, and the duty to return the property in as good condition as it was when received by them, and are liable for negligence proximately causing loss, damage or destruction of the property. *Ins. Co. v. Storage Co.*, 679.

Evidence held for jury on issue of bailees' negligence in failing to take steps to mitigate damage resulting from act of God. *Ibid.*

BANKS AND BANKING.

§ 10. Paying Checks of Depositor.

Where the relationship of debtor and creditor is created between a bank and a person by the deposit of funds in the bank in the name of such person, the bank has the burden of proving its defense of the discharge of the debt, and when the bank pays out funds on checks signed by an agent of the depositor it must show that the agent had authority from the depositor to draw the funds from the account or that the creditor is estopped or otherwise barred from asserting the agent's lack of authority. *Nationwide Homes v. Trust Co.*, 528.

If checks drawn by an agent of the depositor are not forgeries G.S. 53-52 has no application; if the checks are forgeries, the defense of the statute is not available to the bank when the depositor gives notice to the bank within the time provided by the statute. *Ibid.*

Notice to bank that agent was without authority to open account in principal's name is sufficient notice under the statute, and thereafter bank may not assert that principal did not give due notice of forgery. *Ibid.*

BILL OF DISCOVERY.

§ 3. Examination of Adverse Party to Obtain Evidence.

After the entry of judgment by default and inquiry, defendant is not entitled, prior to the inquiry, to an order requiring plaintiff to submit to an examination by a medical expert to obtain evidence as to the extent of plaintiff's injuries. *Potts v. Howser*, 484.

While a subpoena *duces tecum* and a bill of discovery are in some respects analogous, G. S. 8-89 and G.S. 8-90 do not supercede the subpoena *duces tecum*, and the affidavit required for discovery is not required for a subpoena *duces tecum*. *Vaughan v. Broadfoot*, 691.

BILLS AND NOTES.

§ 4. Consideration.

Check for initial payment under parol contract to convey is without consideration when no property rights are conveyed. *Montague v. Womble*, 360.

§ 17. Defenses and Competency of Parol Evidence.

In an action on a note, the maker's allegation that the note should be credited under agreement of the parties with sums received by the payee from distributors for the exclusive use of their products in the operation of the payee's concession at designated speedways in which the maker was a stockholder, *held* evidence relating to such "promotion money" received by the payee in connection with its operations at another speedway not specified in

the allegations is properly excluded as not being supported by allegation. *Vending Co. v. Turner*, 576.

Contention of the maker of a note that under the terms of the contract he was entitled to a credit for the amount the payee could have collected from a distributor for the exclusive use of its merchandise in the operation of the payee's concession at a speedway, *held* untenable when the evidence discloses that the payee received no such "promotion money" but relinquished it, and there is neither allegation nor proof that the payee promised to exact from its suppliers "promotion money" or that the payee received any direct benefit as the result of foregoing the opportunity to exact the payment of the "promotion money." *Ibid.*

The maker may not contradict the terms of his written note by parol testimony that he would not be called upon to pay in accordance with its terms. *Ibid.*

BOUNDARIES.

§ 5. Junior and Senior Deeds.

A description contained in a junior conveyance cannot be used to locate the lines called for in a senior conveyance. *Coley v. Tel. Co.*, 701.

A petitioner in processioning proceedings is not entitled to offer in evidence documents and testimony tending to establish his corner as a corner in a prior deed to contiguous land when there is no evidence of any conveyance to or from the grantee in the prior deed, and thus the prior deed is not established as constituting a link in respondent's chain of title, and the location of the crucial corner in the description in the prior deed is not established by competent evidence. *Ibid.*

§ 7. Nature and Essentials of Processioning Proceeding.

The sole purpose of a processioning proceeding is to establish the true location of a disputed boundary line; what constitutes the line is a matter of law, where it is is a matter of fact. *Coley v. Tel. Co.*, 701.

The burden of proof rests upon petitioner in a processioning proceeding to establish the true location of the disputed boundary line, and if petitioner is unable to show by the greater weight of evidence the location of the line at a point more favorable to him, the jury should answer the issue in accord with the contention of defendants. *Ibid.*

§ 9. Sufficiency of Description and Admissibility of Evidence Aliunde.

Plaintiff's deed described her land by course and distance with reference to the corners of adjacent lots. *Held:* The boundaries may not be established by the running of a course and distance from an iron stake, even though she points out the stake and testifies that it had been there as long as she could remember when she also testifies that no one had pointed out the corner and that she did not know its location of her own knowledge. *LeFevers v. Lenoir*, 79.

BROKERS.

§ 6. Right to Commissions.

The vendor instituted this action against his broker to recover $200 representing the balance of "earnest money" paid to the broker by the purchaser, the purchaser having later defaulted upon his written contract to purchase the property. *Held:* The right of the broker to retain the sum depends

BROKERS—*Continued.*

upon the contract between the vendor and the broker, and therefore arises out of contract and is within the exclusive jurisdiction of a justice of the peace. *Jenkins v. Winecoff*, 639.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 2.1. Indictment.

An indictment charging that defendant broke and entered "a certain building occupied by one Chatham County Board of Education, a Government corporation" is fatally defective in failing to identify the premises with sufficient certainty to enable defendant to prepare his defense and afford him protection from another prosecution for the same incident. *S. v. Smith*, 755.

§ 4. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendants' guilt held sufficient to be submitted to the jury. *S. v. Battle*, 513.

Evidence of defendant's guilt held sufficient to be submitted to jury. *S. v. Stinson*, 661.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 3. Cancellation for Mental Incapacity and Undue Influence.

The rule that a grantor may not himself bring an action attacking his deed for mental incapacity when he fails to show any change in his mental condition subsequent to the execution of the deed, has no application when the action is brought in the grantor's name by her duly appointed next friend, and the evidence, though conflicting, is sufficient to be submitted to the jury on the question of the grantor's mental incapacity at the time of the execution of the deed and at the trial, and further, that the deed was procured by fraud or undue influence. *Hammond v. Bullard*, 570.

CLAIM AND DELIVERY.

§ 1. Nature and Scope of Remedy.

A writ of claim and delivery may be issued only in a pending civil action. *In re Wallace*, 204.

CLERKS OF COURT.

§ 1. Jurisdiction of Clerk in General.

Where an issue of fact is joined before the clerk, the clerk must transfer the proceeding to the Superior Court for trial. *In re Wallace*, 204.

CONSPIRACY.

§ 6. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of defendants' guilt held sufficient to be submitted to the jury. *S. v. Battle*, 513.

CONSTITUTIONAL LAW.

§ 1. Supremacy of Federal Constitution.

The Constitution of the United States takes precedence over the Constitution of North Carolina, and, for all practical purposes, the Federal Consti-

CONSTITUTIONAL LAW—*Continued.*

tution means what the Supreme Court of the United States says it means. *Dilday v. Board of Education*, 438.

§ 4. Persons Entitled to Raise Constitutional Questions.

The constitutionality of a statute or ordinance may not be questioned by parties whose rights are not invaded or threatened. *Angell v. Raleigh*, 387; *Hobbs v. Moore County*, 665.

§ 10. Judicial Powers.

Whether a statute should be amended to enlarge its scope relates to a legislative and not a judicial function. *Ins. Co. v. Bynum*, 289.

§ 20. Equal Protection, Application and Enforcement of Laws.

A statute requiring that one member of a newly constituted board of education should be appointed from each of the five districts theretofore established by law and that two other members of the board of education should be appointed from the county at large, and that such members should serve until their successors, subject to the same geographical limitations, are elected and qualified, the election of all such members to be by vote of the county as a whole, does not offend the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. *Hobbs v. Moore County*, 665.

§ 22. Religious Liberty.

The constitutional guarantees of religious liberty relate to religious beliefs but do not extend to practices, even though such practices are engaged in pursuant to religious beliefs, when such acts are proscribed by statutes enacted in the interest of the public safety, morals, peace or order. *S. v. Bullard*, 599.

§ 23. Vested Rights.

A person is charged with knowledge that the statutes of distribution are subject to change by the General Assembly. *Johnson v. Blackwelder*, 209.

§ 24. Requisites of Due Process.

Notice and an opportunity to be heard are a fundamental requirement of due process, and while service of original process constitutes notice of subsequent regular proceedings in the trial court at term, such service cannot constitute notice of a final order entered by the clerk prior to the time allowed for filing answer. *Randleman v. Hinshaw*, 136.

Where the pleadings raise an issue of fact respecting property in controversy, such issue of fact must be tried by a jury unless a jury trial is waived. *In re Wallace*, 204.

§ 28. Necessity for and Sufficiency of Indictment.

There can be no adjudication of guilt of a felony unless the defendant is put to trial upon an indictment duly found by a grand jury. *McClure v. State*, 212.

Record held to disclose voluntary waiver of indictment which waiver embraces return of indictment also. *S. v. Hodge*, 238.

§ 32. Right to Counsel.

It is not required for the validity of a written waiver of counsel that a defendant should have had court-appointed counsel to advise him in regard to making such waiver. *S. v. Davis*, 429.

CONSTITUTIONAL LAW—*Continued.*

§ 36. Cruel and Unusual Punishment.

Imprisonment within the limits fixed by statute cannot be considered cruel and unusual in a constitutional sense. *S. v. Davis*, 126.

CONTRACTS.

§ 12. General Rules of Construction.

The courts may not under the guise of construction rewrite contracts executed by litigants. *Carson v. National Co.*, 229.

CORPORATIONS.

§ 17. Transfer of Stocks.

Delivery of a stock certificate endorsed in blank is constructive delivery of the shares which it represents, and possession of such certificate establishes *prima facie* the fact of delivery. *Fesmire v. Bank*, 589.

COURTS.

§ 3. Jurisdiction of Superior Court in General.

The Superior Court is a court of general jurisdiction and has jurisdiction of all actions for personal injury due to negligence except insofar as it has been deprived of such jurisdiction by statute. *Bryant v. Dougherty*, 545.

The Superior Court has no original jurisdiction of actions *ex contractu* when the sum demanded does not exceed $200. *Jenkins v. Winecoff*, 639.

§ 6. Appeals to Superior Court from Clerk.

Petitioner sought to recover a sum of money, petitioner claiming that at the sale by the administrator c. t. a. she had purchased both the real estate and personal property on the premises of the decedent, and that the money had been taken from her and placed in the hands of the clerk for determination of ownership. Respondent denied the allegation that the sum of money was part of the personal property purchased by petitioner. The clerk ordered that the money be turned over to the administrator c. t. a. of the estate, and petitioner appealed. *Held:* The pleadings raise an issue of fact for the determination of the jury, and it was error for the court to affirm the order of the clerk without a jury trial. *In re Wallace*, 204.

Upon appeal to the Superior Court from orders of the clerk relating to motions for judgment by default and inquiry, to strike allegations from a pleading and for the joinder of an additional party defendant, the jurisdiction of the Superior Court is not derivative, and the Superior Court has jurisdiction to determine the motions *de novo*, since the clerk is but a part of the Superior Court. *Potts v. Howser*, 484.

§ 7. Appeals and Transfers of Causes from Inferior Courts to Superior Court.

Where the judge of a county civil court allows 90 days for the service of statement of case on appeal to the Superior Court, G.S. 7-378(1), and appellee fails to serve statement of case on appeal within the time allowed, the appeal should be dismissed on motion in the Superior Court, notwithstanding that statement of case on appeal was filed prior to the making of appellants' motion to dismiss. *Pendergraft v. Harris*, 396.

If G.S. 1-287.1 relates to dismissal of an appeal from a county civil court to the Superior Court, it can apply only to a motion to dismiss addressed to the county civil court. *Ibid.*

COURTS—*Continued.*

§ 9. Jurisdiction of Court After Judgment or Orders of Another Superior Court Judge.

The quashal of a bill of indictment charging embezzlement of a specified sum between certain dates does not preclude another Superior Court judge from considering the sufficiency of subsequent indictments setting forth separate acts of embezzlement alleged to have been committed by defendant between the same dates and also a prior date in a total amount in excess of that charged in the first indictment. *S. v. Mayo*, 415.

Rulings of the court in regard to the admissibility of evidence prior to order of mistrial for the inability of the jury to agree upon a verdict are in no way binding upon the court upon subsequent trial. *Vending Co. v. Turner*, 576.

§ 17. Justices of the Peace.

A justice of the peace has exclusive original jurisdiction of an action *ex contractu* when the sum demanded does not exceed $200. *Jenkins v. Winecoff*, 639.

§ 20. What Law Controls — Law of This and Other States.

Where the will of a nonresident disposes of property situate in this State, the apportionment of the federal estate taxes among the beneficiaries is to be determined by the law of testator's domicile. *Bank v. Wells*, 276.

Action on transitory cause is barred in this State when at the time of the institution of the action it is barred in the state in which it arose. *Little v. Stevens*, 328.

In an action instituted in this State to recover for negligent injury occurring in another state, liability must be determined according to the substantive law of such other state, of which our courts must take notice. *Thames v. Teer Co.*, 565.

CRIMINAL LAW.

§ 1. Nature and Elements of Crime in General.

A criminal statute or ordinance must be sufficiently definite to apprize a citizen of common intelligence with reasonable precision what acts are forbidden or required, and if it fails to do so it may be void for uncertainty, vagueness or indefiniteness. *S. v. Furio*, 353.

§ 9. Aiders and Abettors.

Parties who act in concert in maliciously destroying property of a value in excess of $10.00 are guilty as principals, and punishment in excess of the limits prescribed by G.S. 14-127 may be imposed notwithstanding the damage done by a single defendant may not exceed $10.00. *S. v. Childress*, 85.

§ 16. Jurisdiction — Degree of Crime.

The unlawful taking of an automobile in violation of G.S. 20-105 is a misdemeanor, and in those instances in which inferior courts are given exclusive original jurisdiction of misdemeanors in a county named in the proviso to G.S. 7-64, the Superior Court is without original jurisdiction of the offense and when the prosecution for the offense originates by indictment in the Superior Court its judgment is a nullity. *S. v. Covington*, 292.

§ 18. Jurisdiction on Appeals to Superior Court.

Where the record contains a stipulation that defendant was found guilty

CRIMINAL LAW—*Continued.*

in a recorder's court and appealed to the Superior Court from the judgment pronounced, the appeal is not subject to dismissal for failure of the record to show the verdict, judgment or appeal entries in the recorder's court. *S. v. Hall*, 90.

§ 23. Plea of Guilty.

The evidence at this post-conviction hearing *is held* to amply support the findings of the court that defendant had voluntarily, and after being advised of his rights, entered a plea of guilty, and that he was in no way coerced to enter the plea. *In re McBride*, 93.

In a prosecution under an indictment charging defendant with carnal knowledge of a female virgin between 12 and 16 years of age, G.S. 14-26, the court may not accept a plea of guilty of assault on a female with intent to commit rape, G.S. 14-22, since there is no indictment to support the sentence upon the plea of guilty. *McClure v. State*, 212.

Counsel has no duty to advise a client against entering a plea of guilty solely for the purpose of delaying the date of judgment. *S. v. Hodge*, 238.

§ 26. Plea of Former Jeopardy.

Order of mistrial will not support plea of former jeopardy in subsequent prosecution. *S. v. Battle*, 513.

§ 33. Facts in Issue and Relevant to Issue.

In a prosecution for making indecent telephone calls to a female, testimony that defendant frequently followed the car of the prosecuting witness and would cut in front of her so close as to constitute harassment is competent for the purpose of showing intent and atttiude of defendant toward the prosecuting witness. *S. v. Godwin*, 216.

§ 40. Evidence and Record at Former Trial or Proceedings.

In a prosecution for escape, certified copies of the record of the Superior Court showing defendant's conviction and sentence, or a commitment issued under the hand and official seal of the clerk of the Superior Court, is admissible for the purpose of showing that defendant was in lawful custody at the time of the alleged escape. *S. v. Stallings*, 405.

§ 41. Circumstantial Evidence in General.

Circumstantial evidence, which is evidence of facts from which other matters may be fairly and sensibly deduced, is competent and is highly satisfactory in matters of gravest moment. *S. v. Cummings*, 300.

§ 50. Expert and Opinion Evidence in General.

Where a witness identifies by color and make the automobile which defendant was driving when it passed the witness, and the color and make of the vehicle at the scene of the wreck which the witness saw one minute thereafter, it will not be held for error that the witness was permitted to give his opinion that the vehicles were the same, the testimony being a "shorthand" statement of fact. *S. v. Bridgers*, 121.

§ 53. Medical Expert Testimony.

In a prosecution for abortion, it is competent for a medical expert to testify that the described treatment of a pregnant woman might cause an abortion. *S. v. Brooks*, 427.

CRIMINAL LAW—*Continued.*

§ 55. Breath and Blood Tests.

The results of a Breathalyzer test are properly admitted in evidence upon a showing that the defendant voluntarily submitted to the test and that the test was made in compliance with G.S. 20-139.1. *S. v. Cummings*, 300.

§ 65.1. Evidence of Identity by Name.

The evidence considered in the light most favorable to the State *is held* to support a finding that the person indicted under the name of "Jackie Emmitt Stallings" is the same person referred to in the commitment as "Jack Stallings." *S. v. Stallings*, 405.

§ 67. Testimony of Telephone Conversations.

Tape recordings of telephone conversations between defendant and the prosecuting witness made by a tape recorder attached to the telephone by a police officer at the instance of the prosecuting witness are competent in evidence when the prosecuting witness identifies the voices and states that the tapes were a fair and accurate representation of the conversations, and admission of such testimony does not violate the wiretapping statute. *S. v. Godwin*, 216.

§ 71. Confessions.

Evidence held to support finding that confession offered in evidence was freely and voluntarily made. *S. v. Stafford*, 201.

Upon challenge of the competency of a confession, it is the duty of the trial court upon the *voir dire* to hear the evidence and to find facts sufficient to enable the reviewing court to determine whether the confession was voluntary, the court's findings which are supported by evidence being conclusive but its conclusion of law from the facts found being reviewable. *S. v. Conyers*, 618.

Where officers testify upon the *voir dire* to the effect that defendant confessed orally and did so voluntarily, that a writing was prepared in accordance with the oral confession and read to him, and that defendant freely and voluntarily signed it, but defendant denies making any oral confession, testifies the writing was not read to him and that he was induced to sign it by certain promises, *held* it is incumbent upon the trial judge to find the facts with respect to the conflicting contentions, and the court's finding merely that defendant's statements were voluntary is insufficient predicate to enable the reviewing court to determine the matter, and requires remand for new trial. *Ibid.*

§ 76. Best and Secondary Evidence.

It is incompetent for the superintendent of a State Prison to testify that the commitment under which defendant was held was for a felony; even so, upon motion to nonsuit, such testimony must be considered, and when such testimony, together with other evidence, discloses that defendant escaped while serving a sentence imposed by a named Superior Court for a felony, denial of nonsuit is proper. *S. v. Stallings*, 405.

§ 86. Time of Trial and Continuance.

A motion for a continuance is directed to the sound discretion of the trial court, and no abuse of discretion is disclosed by the fact that the motion was made upon defendant's contention that two of his relatives were then under charge for criminal offenses and that the publicity incident thereto would prevent a fair trial. *S. v. Stinson*, 661.

CRIMINAL LAW—*Continued.*

§ 87. Consolidation and Severance of Counts for Trial.

Where defendants are jointly indicted, their motion for a separate trial is addressed to the sound discretion of the trial court, to be determined in each particular case on the basis of possible prejudice in a joint trial. *S. v. Battle*, 513.

Defendants were jointly indicted for conspiracy to break and enter and with breaking and entering pursuant to the conspiracy. *Held:* The court's denial of defendants' motions for a separate trial was not error, the motions being addressed to the sound discretion of the trial court. *Ibid.*

§ 99. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit and motion for a directed verdict, the evidence must be interpreted in the light most favorable to the State, giving the State the benefit of all reasonable inferences favorable to it. *S. v. Bridgers*, 121.

Exculpatory statements offered in evidence by the State are properly considered on motion for nonsuit. *S. v. Emanuel*, 663.

§ 101. Sufficiency of Evidence to Overrule Nonsuit in General.

Circumstantial evidence of each defendant's guilt *held* sufficient to be submitted to the jury in this case. *S. v. Battle*, 513.

§ 103. Withdrawal of a Count or Degree of Crime from Jury.

The dismissal by the court of a count in the indictment will be treated as a verdict of not guilty on that count. *S. v. Rhinehart*, 470.

§ 107. Statement of Evidence and Application of Law Thereto.

The failure of the court to define the terms "presumption of innocence" "burden of proof," "*quantum*" and "reasonable doubt" will not be held for error in the absence of a special request. *S. v. Hall*, 90.

Where the State introduces eyewitness' testimony of the reckless and culpable negligent operation of a motor vehicle by defendant and the wreck of the vehicle causing the death of a passenger, together with corroborative circumstantial evidence that the vehicle seen a few moments prior to the accident being operated in a reckless manner was the same vehicle as that found at the scene of the wreck, it will not be held for error that the court failed to charge with reference to the nature of circumstantial evidence and the weight to be given it. *S. v. Bridgers*, 121.

The words "annoy," "molest," and "harass" have a well understood meaning to the average person and it is not required that the court define the words in the absence of a special request. *S. v. Godwin*, 216.

Exception to the charge on the ground that the court failed to apply the law to the evidence in the case *held* untenable. *S. v. Matthews*, 244.

§ 111. Charge on Credibility of Witnesses.

Where, in a prosecution for conspiracy, the State's witnesses include only one of the conspirators, a correct charge as to the duty of the jury to scrutinize the testimony of an accomplice could not be misleading for failure of the court to identify the accomplice, and even if the jury should have interpreted the instruction as applying also to another witness, it would not have been prejudicial to defendant. *S. v. Smith*, 659.

§ 112. Charge on Contentions of Parties.

The court, in setting forth the contentions, stated, without basis in the evidence, that a State's witness had testified that he had met defendant in

CRIMINAL LAW—*Continued.*

a prison camp. *Held:* Defendant could not have effectively controverted the misstatement without going upon the stand and, in view of the facts of this case, the statement, even in the absence of request for correction, must be held sufficiently prejudicial to require a new trial. *S. v. Pike*, 312.

§ 118. Sufficiency and Effect of Verdict.

The verdict and judgment in a criminal action should be clear and free from ambiguity or uncertainty. *S. v. Rhinehart*, 470.

Where prosecutions of two defendants are consolidated for trial, the jury's verdict of guilty, in response to interrogation as to whether the jury found the defendants or either of them guilty or not guilty, is ambiguous in failing to make clear whether the jury found both defendants guilty or only one of them. *Ibid.*

A verdict of not guilty as to one charge but guilty in regard thereto of aiding and abetting, is not ambiguous, and is a verdict of not guilty, the words "guilty of aiding and abetting" are not a part of the legal verdict and must be treated as surplusage. In such instance the court must accept the verdict of not guilty and may not require the jury to re-deliberate. *Ibid.*

Where the jury returns a verdict of not guilty upon one count but adds the surplusage of guilty of aiding and abetting therein, and a verdict of guilty upon a second count, and the jury is erroneously required to re-deliberate in regard to its verdict on the first count, and then returns a verdict of guilty on the first count without any reference to the second count, its action cannot be construed as an acquittal upon the second count, since under such circumstances the rule that a verdict which fails to refer to a count amounts to an acquittal upon such count is not applicable. *Ibid.*

§ 120. Unanimity of Verdict, Polling Jury and Acceptance of Verdict.

A defendant has a substantial right in a verdict, and while a verdict is not complete until accepted by the court for record, the court does not have an unrestrained discretion in accepting or rejecting a verdict, and must accept a verdict which is complete and sensible. *S. v. Rhinehart*, 470.

§ 121. Arrest of Judgment.

The legal effect of arrest of judgment for a fatal defect of jurisdiction is to vacate the verdict and judgment, but defendants can thereafter be tried in a court having jurisdiction over the offense. *S. v. Covington*, 292.

§ 122. Discretionary Power of Trial Court to Set Aside Verdict and Order Mistrial.

In this prosecution of defendants for conspiracy to break and enter and with breaking and entering pursuant to the conspiracy, the court withdrew a juror and ordered a mistrial for the incapacitating illness of the sole attorney of one of the defendants during the course of the trial. *Held:* The order of mistrial for the illness of the attorney in the prosecution for less than a capital felony was within the discretionary power of the trial court, and the order of mistrial will not support a plea of former jeopardy in the subsequent prosecution of defendants. *S. v. Battle*, 513.

§ 126. Setting Aside Verdict as Being Contrary to Weight of Evidence.

A motion to set aside the verdict on the ground that it is contrary to the weight of the evidence is addressed to the discretion of the trial court, and the denial of the motion is not reviewable on appeal. *S. v. Bridgers*, 121.

CRIMINAL LAW—*Continued.*

§ 127. Form and Requisites of Judgment or Sentence in General.

After a conviction or plea, the court has the power to pronounce judgment and place it into immediate execution, or to pronounce judgment and suspend or stay its execution, or to continue prayer for judgment; where no conditions are imposed, the court has the power to continue prayer for judgment with or without defendant's consent. *S. v. Thompson*, 653.

§ 131. Severity and Length of Sentence.

Where the judgment and sentence are set aside and the cause remanded for proper sentence, defendant will be given credit for time served with full credit for any good time he has earned while serving the sentence. *S. v. Rhinehart*, 470.

In a hearing to determine what punishment should be imposed upon defendant, the court is not confined to evidence relating to the offense charged, but, within reasonable limits, may consider any other facts calculated to enable the court to act wisely in fixing judgment. *S. v. Thompson*, 653.

Where a valid sentence is made to begin at the expiration of a sentence vacated on appeal, a revised commitment for the valid sentence must be dated and be effective as of the date of the original commitment in order to give defendant credit for the time theretofore served. *S. v. Smith*, 755.

§ 133. Concurrent and Cumulative Sentences.

Where sentence for escape is suspended, and defendant is later convicted of an unrelated offense, the execution of the suspended sentence must begin by mandate of G.S. 148-45, *prior to the 1965 amendment*, at the expiration of the sentence defendant was serving at the time of escape, notwithstanding direction of the judgment that it should begin at the expiration of the sentence for the unrelated offense. *S. v. Doggett*, 648.

§ 135. Suspended Sentences and Judgments.

While the trial court has discretionary power to suspend sentence in criminal cases upon reasonable conditions, a condition of suspension that defendant abandoned his appeal entered by him in another prosecution is an unlawful limitation upon his right to appeal and is void, and the judgment of suspension in the second prosecution will be stricken and the cause remanded for resentencing in that prosecution. *S. v. Rhinehart*, 470.

The court has the power to pronounce judgment for immediate execution, or pronounce judgment and stay or suspend its execution, or to continue prayer for judgment. *S. v. Thompson*, 653.

§ 136. Revocation of Suspension of Sentence or Judgment.

Where the court finds upon competent evidence that defendant had wilfully violated the conditions upon which sentence in a criminal prosecution had been suspended, the court's order activating this suspended sentence must be affirmed, notwithstanding that judgment against such defendant in a prosecution relating to the same matters constituting the basis for the activation of the suspended sentence is arrested for want of jurisdiction. *S. v. Covington*, 292.

Active sentence was imposed upon defendant's plea of guilty on indictments consolidated for judgment, and as to other consolidated indictments prayer for judgment was continued. *Held:* Upon prayer for judgment it is proper for the court to consider defendant's prison record while serving the active sentence in determining proper sentence upon the prayer for judgment. *S. v. Thompson*, 653.

CRIMINAL LAW—*Continued.*

The requirements of G.S. 15-200.2 that the solicitor serve upon defendant a bill of particulars relates to the execution of a suspended sentence and has no application to entry of judgment upon motion of the solicitor when prayer for judgment had been continued. *Ibid.*

§ 139. Nature and Grounds of Appellate Jurisdiction in Criminal Cases in General.

A plea of guilty to a valid information charging a felony presents for review only whether the facts charged constitute an offense punishable under the laws and constitution. *S. v. Hodge*, 238.

Where the record proper discloses that defendant was tried for a misdemeanor upon indictment originating in the Superior Court in an instance in which an inferior court has exclusive original jurisdiction, the fatal lack of jurisdiction appears on the face of the record, and the Supreme Court will take notice thereof *ex mero motu* and arrest the judgment. *S. v. Covington*, 292.

§ 143. Right of Defendant to Appeal.

In this jurisdiction, a defendant has the unlimited right of appeal from a conviction in a criminal case, and this right is a substantial right which may not be denied or circumscribed. *S. v. Rhinehart*, 470.

The fact that a defendant is on parole at the time of his application for *certiorari* does not affect his right to review by the Supreme Court, since conditions of parole are a restraint upon his liberty not shared by the public generally. *Ibid.*

§ 147. Case on Appeal.

Where the solicitor does not serve any countercase or exceptions to defendant's statement of case on appeal, defendant's statement becomes the case on appeal. *S. v. Rhinehart*, 470.

§ 152. Form and Requisites of Transcript.

The testimony of witnesses should be set out in narrative form in the record. *S. v. King*, 631.

§ 154. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error not supported by an exception in the record will not be considered on appeal. *S. v. Thompson*, 653.

§ 155. Objections, Exceptions and Assignments of Error to Evidence and Motions to Strike.

Where answer of witness is unresponsive, objection without motion to strike or limit the answer is ordinarily ineffective. *S. v. Battle*, 513.

§ 159. The Brief.

Exceptions not set out in the brief and in support of which no argument or authority is stated are deemed abandoned. *S. v. Stafford*, 201; *S. v. Covington*, 292; *S. v. Smith*, 659.

§ 161. Harmless and Prejudicial Error in Instructions.

Where the charge, read contextually, presents the law fairly and clearly to the jury, an exception thereto will not be sustained, even though some of the excerpts standing alone, might be regarded as erroneous, it being apparent that no prejudice resulted to defendant. *S. v. Hall*, 90.

CRIMINAL LAW—*Continued.*

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where, in a prosecution for abortion, a witness is permitted to testify that subsequent to the time in question she took a number of girls to defendant to get the same operation, the refusal of the court to grant defendant's demand that the witness name the girls so that defendant could deny that such girls had come to her, cannot be prejudicial when defendant had testified that she did not know prosecutrix and that prosecutrix had never been to defendant's house prior to defendant's arrest, since such denial is sufficient to cover any visit by the prosecutrix prior to defendant's arrest, either alone or with another person. *S. v. Brooks*, 427.

§ 168. Review of Judgments on Motions to Nonsuit.

In reviewing denial of motion to nonsuit, incompetent evidence admitted at the trial must be considered. *S. v. Stallings*, 405.

The fact that evidence obtained by an illegal search warrant was admitted in evidence does not warrant the Supreme Court in granting defendant's motion for judgment as of nonsuit, since had the evidence obtained under the search warrant been suppressed, the State might have introduced other evidence tending to support the charge. *S. v. Upchurch*, 417.

§ 173. Post Conviction Hearing.

No appeal lies from an order entered in a post-conviction hearing denying defendant a new trial, but a purported appeal may be treated as a petition for writ of *certiorari;* even so, the petition for *certiorari* must be denied in the absence of a showing of merit. *In re McBride*, 93.

Where it appears upon a post conviction hearing that defendant was sentenced upon his plea of guilty to an offense not included in the charge, so that the sentence entered upon the plea of guilty is not supported by the indictment, the order of the lower court denying petitioner any relief under the Post Conviction Hearing Act must be vacated as a nullity. *McClure v. State*, 212.

DAMAGES.

§ 3. Damages for Personal Injury.

Damages for personal injury negligently inflicted should include reasonable satisfaction for actual physical and mental suffering, past, present and prospective, naturally resulting to plaintiff from the injury, but the award of prospective damages should be limited to the present cash value or present worth of such damages. *King v. Britt*, 594.

§ 5. Special Damages.

Where the complaint alleges that, as a result of the collision, plaintiff suffered personal injuries requiring hospitalization and treatment by a physician for a long period of time, it is not error for the court to admit evidence that as a result of her injuries plaintiff lost certain time from her employment and, consequently, lost certain wages she otherwise would have earned. *Long v. Thompson*, 310.

§ 10. Punitive Damages.

While punitive damages need not be pleaded *eo nomine*, it is required for the recovery of punitive damages that plaintiff allege facts tending to establish actual malice, or oppression, or gross and wilful wrong or negligence, or a reckless and wanton disregard of plaintiff's rights. Allegation that there

DAMAGES—*Continued.*

was wanton and wilful misconduct on the part of defendants states a mere conclusion of the pleader and cannot supply allegation of the predicate facts supporting this conclusion. *Cook v. Lanier*, 166.

§ 14. Burden of Proof and Sufficiency of Evidence of Damages.

Evidence tending to show that plaintiff was jarred and her body swayed to the right in the accident in suit, that immediately after the accident plaintiff suffered pain in her lower back, but that plaintiff thereafter returned to work although she continued to have pain in her back, improving and worsening during treatment by physicians, that later the condition became worse, and that almost eight months after the accident she was operated on for a ruptured disc, without evidence that the ruptured disc could or might have been caused by the injury received in the collision, *is held* insufficient predicate for the award of damages for the ruptured disc or the operation. *Miller v. Lucas*, 1.

Allegation and proof tending to show that in the accident in suit plaintiff suffered a laceration of her forehead requiring six or eight stitches to suture, that the injury severed a nerve in her forehead causing permanent loss of mobility of her forehead and leaving a permanent scar, is sufficient basis for the award of damages for mental suffering, notwithstanding the absence of direct testimony that plaintiff suffered any mental pain or embarrassment or humiliation because of the injury, and in such instance it is prejudicial error for the court to fail to instruct the jury in regard to damages for such mental pain and suffering. *King v. Britt*, 594.

§ 15. Instructions on Issue of Damages.

The court's instruction on the issue of damages held in conformity with the rule laid down in *Ledford v. Lumber Co.*, 183 N.C. 614, and not subject to exception. *Callicutt v. Smith*, 252.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

The right of action for wrongful death is purely statutory and the statute confers the right of action solely upon the personal representative to recover only in those instances in which the decedent, had he lived, would have been entitled to maintain an action for damages. *Horney v. Pool Co.*, 521.

The personal representative of a deceased employee may not maintain an action for wrongful death against a fellow employee of the deceased even though the deceased left no dependents entitled to recover under the Compensation Act. *Ibid.*

DECLARATORY JUDGMENT ACT.

§ 1. Nature and Grounds of Remedy.

The Uniform Declaratory Judgment Act does not authorize the adjudication of mere abstract or theoretical questions or require the courts to give advisory opinions when there is no actual existing controversy between the parties affecting their rights, status or other legal relations. *Angell v. Raleigh*, 387.

Citizens and taxpayers of a municipality may not maintain a proceeding under the Declaratory Judgment Act to determine the validity of an ordinance authorizing municipal authorities to grant licenses for the installation and operation of a community antenna television system or "cablevision" when no

DECLARATORY JUDGMENT ACT—*Continued.*

license has been issued by the city under the ordinance and therefore no wrong inflicted or financial loss incurred by plaintiffs. *Ibid.*

§ 2. Proceedings.

Where, in proceedings under the Declaratory Judgment Act, the complaint and answer present an existing controversy between the parties as to their conflicting claims in a strip of land lying between their respective lots, the action is justiciable under the Declaratory Judgment Act and should be determined by judgment declaring the respective rights of the parties, and nonsuit is inapposite. *Hubbard v. Josey*, 651.

DESCENT AND DISTRIBUTION.

§ 1. Nature of Descent and Distribution in General.

The fact that a decedent became mentally incompetent to make a will prior to the effective date of the Interstate Succession Act and died after its effective date, does not affect the rule that his estate must be distributed in accordance with the laws in effect at the time of his death, and the contention that he was satisfied with the law of distribution at the time he became mentally incompetent but that he would not have been satisfied after the change in the law and would have made a will had he then been competent to do so, relates to matters wholly within the realm of speculation and is untenable. *Johnson v. Blackwelder*, 209.

§ 3.1. Share of Widow.

Under the provisions of G.S. 29-14 the widow is entitled to the net estate if the intestate is not survived by a child, children, or lineal descendant of a deceased child or children, or by a parent. *Johnson v. Blackwelder*, 209.

DIVORCE AND ALIMONY.

§ 16. Alimony Without Divorce.

Alimony under G.S. 50-16 is "a reasonable subsistence," which must be measured by the needs of the wife and by the ability of the husband to pay, and the duty to pay alimony may not be avoided merely because it has become burdensome or because the husband has remarried and voluntarily assumed additional obligations, or the fact that the wife has property or means of her own; nevertheless, the earnings and means of the wife are matters to be considered, and the statute does not contemplate that the husband should make payments which tend only to increase the estate of the estranged wife. *Sayland v. Sayland*, 378.

The amount of alimony to be paid the wife under G.S. 50-16 rests in the sound discretion of the trial court, and its order will not be disturbed in the absence of abuse of discretion. *Ibid.*

§ 19. Modification of Decrees for Alimony.

Where the court adopts provisions of a deed of separation and decrees that the husband make payments of alimony in accordance therewith, the provisions for alimony are under order of the court, which order may be modified for change of conditions. *Sayland v. Sayland*, 378.

A decree for payment of alimony under G. S. 50-16 may not be modified except for a change of condition. However, any considerable change in the health or financial condition of the parties will warrant an application for

DIVORCE AND ALIMONY—*Continued.*

modification of the decree, including termination of the award absolutely. *Ibid.*

§ 22. Jurisdiction to Award Custody and Support.

In a *habeas corpus* proceeding instituted by the father to determine the right to custody of his minor son, the order of the court removing the proceeding on motion to a county in which the mother, subsequent to the service of the writ but before the hearing, had instituted an action for alimony without divorce and for the custody of the child, will not be disturbed. *In re Macon*, 248.

EJECTMENT.

§ 1. Nature and Scope of Summary Ejectment.

Where a tenant holds over after the termination of the term without right, the tenant becomes a trespasser, and the landlord may bring summary ejectment to oust the tenant and to recover damages for the wrongful retention of the property and for costs of the action. *Housing Authority v. Thorpe*, 431.

§ 7. Presumptions and Burden of Proof.

The burden is upon the party claiming land under a deed to fit the description in the deed to the land claimed. *LeFevers v. Lenoir*, 79.

EMINENT DOMAIN.

§ 2. Acts Constituting a "Taking."

The laying by a city of a water main or sewer line in the right of way of a State highway is an additional burden upon the fee, and the owner of the fee is entitled to just compensation for the additional easement, less benefits to his property resulting from construction of the proposed improvements. *Randleman v. Hinshaw*, 136.

The cutting off of access to a public road constitutes a "taking". *Highway Comm. v. Phillips*, 369.

§ 6. Evidence of Value.

Where a landowner's access to a public highway over a section of abandoned highway is cut-off by the construction of a limited access highway across a portion of their land, leaving no access from the property to a public highway, the deprivation of access affects the value of the property and the landowner is entitled to introduce evidence of such deprivation of access as an element of damages. *Highway Comm. v. Phillips*, 369.

In proceedings to assess compensation for a taking under the power of eminent domain, the parties are entitled to introduce evidence of all elements affecting the value of the property taken without allegation of specific elements of damage, and therefore the landowners, even in the absence of specific allegation, are entitled to introduce evidence of damage to their remaining lands resulting from the diversion of surface waters as a result of the use to which the land taken is put. *Ibid.*

§ 7a. Proceedings to Take Land and Assess Compensation.

The constitutional requirements of notice and an opportunity to be heard apply to condemnation proceedings. *Randleman v. Hinshaw*, 136.

In a special proceeding by a municipality to condemn an interest in land, the summons together with a copy of the petition must be served at

EMINENT DOMAIN—*Continued.*

least ten days prior to the hearing upon all persons whose interests are to be affected, G.S. 14-12, and the court must hear proof and allegations of the respective parties and order the appointment of appraisers only in the event no sufficient cause is shown against granting the petition, G.S. 40-16, and ten days' notice of the meeting of the commissioners must be given to the land owner, G.S. 40-17. The statutes do not contemplate a mere perfunctory proceeding but are designed to give the land owner notice and an opportunity to be heard. *Ibid.*

Approval of report of appraiser prior to time land owner was required to file answer is void. *Ibid.*

Testimony of respondent to the effect that she had on separate occasions talked to two of petitioner's agents in regard to selling the land and that she had refused to admit court appointed appraisers on the property because she maintained the property was not for sale, *held* sufficient to show that petitioner had made an attempt in good faith to purchase respondent's land before instituting condemnation proceedings. *Redevelopment Comm. v. Hagins*, 622.

§ 11. Actions to Recover Compensation or Damages.

In an action to recover compensation for property taken by a municipality for a public use, the burden is on plaintiff to prove the location of that part of her land which she asserted had been taken, and when she fails to establish that the land taken was within the boundaries of the land owned by her, nonsuit should be entered. *LeFevers v. Lenoir*, 79.

ESCAPE.

§ 1. Elements of and Prosecutions for Escape.

Where the indictment for escape nowhere refers to a previous conviction of defendant for escape, it will not support a sentence for the felony. *S. v. Revis*, 255.

Certified copy of court record is competent to show that defendant was serving sentence for felony at time of escape, but superintendent of State prison may not testify as to commitment; indictment need not allege name of felony for which defendant was imprisoned at time of escape. *S. v. Stallings*, 405.

Under G.S. 148-45, prior to the 1965 amendment, it was mandatory that a sentence for escape commence upon the completion of any and all sentences under which defendant was confined at the time of the escape, and therefore when prayer for judgment is continued upon conviction of defendant for escape and defendant is later convicted of a third unrelated offense providing that sentence should begin upon completion of the sentence for the original offense, the later execution of the sentence for escape must also commence at the completion of the sentence for the first conviction, so that the sentence for escape and the sentence for the third offense must run concurrently, notwithstanding provision of the sentence for escape that it should commence at the expiration of the sentence for the third offense. *S. v. Doggett*, 648.

EVIDENCE.

§ 11. Transactions or Communications with Decedent.

In an action to establish a gift *inter vivos* of a certificate for shares of stock endorsed in blank and found after donor's death in his safe deposit box, it is competent for plaintiff to testify that she had access to the safe de-

posit box at the time the endorsed stock certificate came into her hands, and that for a long period prior to donor's death she had been keeping her own valuable papers in the safe deposit box, the testimony not being of a personal transaction between plaintiff and decedent but being testimony concerning independent facts. *Fesmire v. Bank*, 589.

In this action by a passenger against the personal representative of the deceased driver to recover for injuries sustained when the driver lost control of the vehicle and ran off the road, defendant offered in evidence the adverse examination of another passenger, taken by plaintiff but not introduced in evidence by plaintiff, tending to show that plaintiff, immediately prior to the accident, was slapping the driver, fighting with him, and attempting to grab the ignition key. *Held:* Even conceding the adverse examination was relevant as bearing upon defendant's contention of contributory negligence, by introducing the examination defendant opened the door to the extent that plaintiff was entitled to be heard and to give her version of the matter. *Pearce v. Barham*, 707.

§ 15. Relevancy and Competency of Evidence in General.

The court correctly excludes evidence pertaining to a matter not supported by any allegation in the pleadings. *Vending Co. v. Turner*, 576.

The test of the relevancy of evidence is whether it has a bearing on the issues joined by the pleadings and tends to aid the jury in finding the proper answer to them. *Pearce v. Barham*, 707.

Evidence of tenuous relevancy should be excluded when it has no direct bearing upon the issues and is of little probative force in aiding in the ascertainment of the crucial facts, but has great likelihood of playing upon the passions and prejudices of the jury. *Ibid.*

§ 16. Similar Facts and Transactions.

Whether evidence of the existence of a condition or state of facts at one time is competent to prove the existence of such condition or state of facts at a prior time depends upon the length of time intervening and whether, in view of the nature of the subject matter and circumstances, the condition would not ordinarily exist at the time referred to by the evidence unless it had also existed at the prior time in question. *Miller v. Lucas*, 1.

§ 20. Competency of Allegations in Pleadings.

Where plaintiff in an action to set aside a deed of trust as fraudulent to creditors alleges that the deed of trust was voluntary in the sense of being without consideration, and defendants do not object to the admission in evidence of an excerpt from their answer admitting that the instrument was voluntary, without the introduction of other allegations in the answer disclosing that defendants were using the word "voluntary" in the sense of being without compulsion, and defendants do not amend, the excerpt from the answer is properly admitted as an unqualified admission that the deed of trust was voluntary in the technical sense. *Supply Co. v. Scott*, 145.

§ 22. Photographs, X-Rays and Maps.

Testimony by experts that X-ray photographs of defendant were made respectively by the witness or under the witness' direction or supervision, properly authenticates the X-ray photographs, and it is not error to permit the witnesses to use them in illustrating their testimony. *Branch v. Gurley*, 44.

EVIDENCE—*Continued.*

§ 37. Testimony as to Sanity and Mental Capacity.

The admission of testimony of witnesses to the effect that in their opinion the grantor did not have sufficient mental capacity to understand what she was doing and the nature and consequences of her act when she executed the deed will not be held for error for failure of the witnesses to state what opportunity they had had to observe grantor when each of the witnesses testifies that he had had close personal association with the grantor for a period of years up to the time of the execution of the instrument. *Hammond v. Bullard*, 570.

§ 44. Medical Expert Testimony.

It is competent for a medical expert to express his opinion as to the cause of a physical condition based upon proper hypothetical question assuming facts supported by evidence. *Apel v. Coach Co.*, 25.

§ 51. Examination of Experts.

The admission in evidence of a categorical affirmative by plaintiff's expert that the injuries which the evidence tended to show plaintiff suffered in the accident caused the fecal incontinence from traumatic neurosis experienced by plaintiff after the accident, *held* not error, it appearing that defendant brought out the testimony on cross-examination of the witness and that defendant's expert was permitted to testify that in his opinion the accident could not have caused the condition. *Apel v. Coach Co.*, 25.

§ 54. Rule that Party is Bound by Testimony of Own Witness.

Where plaintiff introduces in evidence a part of the adverse examination of his adversary he makes his adversary his witness, and while plaintiff retains the right to contradict his adversary by the testimony of other witnesses, plaintiff is not allowed to impeach his adversary by attacking his credibility. *Cline v. Atwood*, 182.

§ 58. Cross-Examination.

Where defendant cross-examines plaintiff with respect to her immoral relationship with intestate for the purpose of impeaching her testimony as a witness, defendant is bound by her answers in regard to this collateral matter, and may not offer testimony of other witnesses to contradict plaintiff in regard thereto. *Pearce v. Barham*, 707.

EXECUTION.

§ 3. Issuance and Return of Execution.

An execution must be returned to the place from which it originated, with such endorsements as the law requires, within 60 days after its issuance. *Produce Co. v. Stanley*, 608.

FORGERY.

§ 2. Prosecution and Punishment.

Contention that the punishment for the forgery of a check in a sum less than $200, G.S. 14-119, G.S. 14-120, by analogy to G.S. 14-72, should be limited to that for a misdemeanor, *held* untenable, since it is not so denominated in the statute. *S. v. Davis*, 126.

FRAUDS, STATUTE OF.

§ 6b. Contracts to Convey.

An oral contract for the purchase and sale of realty is void in all its parts under the statute of frauds and cannot constitute consideration for a check for part payment given by the purchaser without any notation thereon concerning the agreement. *Montague v. Womble*, 360.

FRAUDULENT CONVEYANCES.

§ 3. Actions to Set Aside Conveyances and Transfers as Fraudulent.

In an action by a judgment creditor against the judgment debtors and the trustee to set aside as a fraudulent preference the deed of trust executed by the judgment creditors to secure a note payable to bearer unknown to the judgment creditor, the *cestui que trust* is not a necessary party. *Supply Co. v. Scott*, 145.

In an action to set aside a deed of trust as being fraudulent to plaintiff creditor, the burden is on plaintiff to prove that the instrument, even though voluntary, was executed with actual fraudulent intent or that the creditors did not retain property sufficient to pay their then existing debts. *Ibid.*

Evidence tending to show that defendant creditors did not list for taxation in one county real or personal property then sufficient to pay plaintiff's claim is alone insufficient to show that the creditors did not retain property sufficient to pay their then existing debts, but where plaintiff introduces in evidence the admission in defendants' answer that the deed of trust was voluntary there is sufficient evidence tending to show an intent to delay, hinder, and defraud creditors to carry the case to the jury. *Supply Corp. v. Scott*, 146.

GARNISHMENT.

§ 1. Nature and Grounds of Remedy.

In order for a debt to be subject to garnishment, the garnishee must have such residence or agency within this State as to render it amenable to the process of our courts, and the party against whom garnishment is laid must have the right to sue the garnishee in this State, and it must appear that the *situs* of the debt is in this State. *Ward v. Mfg. Co.*, 131.

GIFTS.

§ 1. Gifts Inter Vivos.

The burden is on the party claiming a gift *inter vivos* to show the intent of the donor to give her the gift so as to divest himself immediately of all right, title and control therein; and the delivery, actual or constructive, of the chose to the donee. *Fesmire v. Bank*, 589.

The fact that the donor, after a completed gift *inter vivos*, retains physical access to the gift, or obtains possession solely for the purpose of safekeeping for the benefit of the donee, does not defeat the gift. *Ibid.*

Evidence tending to show that intestate endorsed the certificate for certain shares of stock in blank and delivered it to plaintiff, that plaintiff put the certificate in an envelope with another chose, admittedly hers, and placed the envelope in intestate's safe deposit box to which she had the key, with testimony of intestate's brother that intestate stated he had given the stock to plaintiff, *held* sufficient to establish a gift *inter vivos*, entitling plaintiff to possession of the certificate against intestate's personal representative. *Ibid.*

In this action to establish a gift *inter vivos* as against the personal representative of the alleged donor, it was competent for plaintiff to introduce in

GIFTS—*Continued.*

evidence the inventory, made by an officer of the bank, of the donor's safe deposit box in order to show that the certificate of stock claimed as the gift had been endorsed in blank by intestate and had been physically separated from other unendorsed certificates by being enclosed in an envelope on which was typed the name of plaintiff and in which another document of value, admitted to be her property, was also enclosed. *Ibid.*

GUARANTY.

Whether guarantor was bound when creditor took new notes for debt after guaranty had been revoked, *quære? Marine Corp. v. Futrell,* 194.

HABEAS CORPUS.

§ 3. To Obtain Custody of Minor.

In a *habeas corpus* proceeding instituted by the father to determine the right to custody of his minor son, the order of the court removing the proceeding on motion to a county in which the mother, subsequent to the service of the writ but before the hearing, had instituted an action for alimony without divorce and for the custody of the child, will not be disturbed. *In re Macon,* 248.

HEALTH.

§ 3. Health Ordinances and Regulations.

In the absence of specific allegation, it cannot be held as a matter of law that an ordinary outhouse or privy was not constructed in conformity with G.S. 130-160 and in conformity to rules and regulations promulgated by the State Board of Health. *Walker v. Sprinkle,* 626.

HIGHWAYS.

§ 7. Injuries to Persons on Highways Under Construction.

In an action by an employee of a subcontractor against the main contractor for injuries alleged to have been caused by the negligence of an employee of the main contractor in the construction of a highway not open to the public, the common law of negligence governs rather than public highway travel statutes. *Thames v. Teer Co.,* 565.

Evidence held for jury in this action by employee of subcontractor against main contractor for negligent injury. *Ibid.*

§ 11. Neighborhood Public Roads.

A section of an abandoned highway which remains open and in general use as a means of ingress and egress from contiguous property to a State highway is a neighborhood public road, G.S. 136-67, and a stipulation that the landowners' access to a public highway was solely by such abandoned highway is not a stipulation that their property did not abut a public road. *Highway Comm. v. Phillips,* 369.

HOMICIDE.

§ 9. Self-Defense and Defense of Habitation.

Reasonable apprehension of future injury is an essential prerequisite to the right to take life in defense of one's habitation. *S. v. Miller,* 409.

HOMICIDE—*Continued.*

§ 20. Sufficiency of Evidence and Nonsuit.

Whether defendant shot in defense of home and whether he used excessive force held jury questions on evidence. *S. v. Miller*, 409.

§ 27. Instructions in Homicide Prosecutions.

Where there is evidence that defendant fired the fatal shot in defense of his habitation against a trespasser, a charge on defendant's right to kill in self-defense without an instruction on the law relating to defendant's right to defend his habitation from invasion by an intruder, must be held for prejudicial error. *S. v. Miller*, 409.

HUSBAND AND WIFE.

§ 11. Construction and Operation of Deeds of Separation.

Deed of separation incorporated into decree of Court becomes an order of the court and is subject to modification by the court. *Sayland v. Sayland*, 378.

§ 15. Nature and Incidents of Estates by Entireties.

An estate by the entireties is owned by both the husband and wife as one person and not by them as separate persons. *Duplin County v. Jones*, 68.

INDEMNITY.

§ 2. Construction and Operation of Indemnity Contracts.

An agreement to indemnify the lessor of equipment from liability in the operation of the equipment while in the possession or under the control of the lessee cannot cover an injury inflicted while the equipment is in the exclusive control and custody of lessor's employee. *Lewis v. Barnhill*, 457.

§ 3. Actions on Indemnity Contracts.

In an action by an employee against a third person tort-feasor, it is not error for the court to exclude from evidence a contract purporting to be an agreement of the employer to indemnify defendants against loss in the premises. *Lewis v. Barnhill*, 457.

INDICTMENT AND WARRANT.

§ 1. Preliminary Proceedings.

The waiver of preliminary hearing by a defendant without benefit of counsel cannot amount to a deprivation of defendant's constitutional rights when no plea is entered upon such preliminary hearing. *S. v. Cason*, 316.

§ 7. Nature, Requisites and Sufficiency of Indictment and Warrant in General.

There can be no adjudication of guilt of a felony unless the defendant is put to trial upon an indictment duly found by a grand jury; and the court may not accept a plea of guilty of an offense not charged when it is not a less degree of the offense charged. *McClure v. State*, 212.

Waiver of indictment see *S. v. Hodge*, 238.

§ 9. Charge of Crime.

If an averment in an indictment or warrant is not necessary in charging the offense, it may be treated as surplusage. *S. v. Stallings*, 405.

INDICTMENT AND WARRANT—*Continued.*

A defect in the bill of indictment may not be cured by a bill of particulars. *S. v. Mayo*, 514.

An indictment charging that defendant broke and entered "a certain building occupied by one Chatham County Board of Education, a Government corporation" is fatally defective in failing to identify the premises with sufficient certainty to enable defendant to prepare his defense and afford him protection from another prosecution for the same incident. *S. v. Smith*, 755.

§ 15. Grounds for Quashal.

Where the ordinance under which defendant is charged is void for indefiniteness, the warrant is properly quashed. *S. v. Furio*, 353.

An indictment may be quashed for want of jurisdiction, irregularity in selection of the grand jury, or for defect in the bill of indictment. *S. v. Mayo*, 415.

The fact that a bill of indictment charging several acts of embezzlement is quashed does not require the quashal of later bills charging separately acts of embezzlement of defendant during the same period. *Ibid.*

INFANTS.

§ 7. Contributing to Delinquency of Minor.

Where the warrant charges defendant with using a minor to assist her in the sale of illicit liquor, but the evidence shows only that the minor was used to carry nontaxpaid liquor from a neighboring shed to defendant's house, without any finding that defendant sold illicit liquor on the occasion in question, is insufficient to support the particular offense charged in the warrant, and judgment of nonsuit should have been entered. *S. v. Whitted*, 129.

INJUNCTIONS.

§ 5. *Enjoining* Enforcement of Statute or Ordinance.

Citizens and taxpayers may not enjoin enforcement of ordinance when no present right or property is invaded or threatened. *Angell v. Raleigh*, 387.

§ 13. Continuance and Dissolution of Temporary Orders.

Where plaintiffs' allegations are sufficient to make out its primary equity, the temporary restraining order issued in the cause should not be dissolved upon affidavits prior to the filing of answer, but the order should be continued for determination of the controversy upon the merits. *Heating Co. v. Blackburn*, 155.

INSURANCE.

§ 8. Agreements to Procure or Maintain Insurance.

An insurance agent or broker undertaking to provide coverage against a designated risk is under duty to exercise reasonable care to obtain the insurance or, if he is unable to do so, to give the proposed insured timely notice so that the proposed insured may obtain coverage elsewhere, and failure to perform this duty may render him liable to the proposed insured for loss within the amount of the proposed policy on the grounds of breach of contract or for negligent default in the performance of duty imposed by the contract. *Wiles v. Mullinax*, 392.

Evidence favorable to plaintiff tending to show that for a period of seven years defendant brokers provided plaintiff with continuous workmen's compensation coverage in accordance with their undertaking, that plaintiff paid

INSURANCE—*Continued.*

the premiums or arranged for their payment when she was billed, that on the renewal date in question defendants made unsuccessful efforts to place the insurance successively with two insurers, but that, when they refused to accept the risk, defendants permitted the coverage to expire without notice to plaintiff, and that as a result plaintiff became liable for a claim within the proposed coverage, *held* sufficient to be submitted to the jury on the question of defendants' liability. *Ibid.*

§ 47.1. Insurance Against Uninsured Vehicles.

In an action on the uninsured vehicle clause in a collision policy, allegations in the complaint that the vehicle causing the injury was an uninsured vehicle as defined in the policy, and conditional assertion in the reply that if, in fact, such vehicle was insured, the insurance was void because of the insolvency of the insurer, *held* not an admission that the vehicle causing the loss was covered by a liability policy, and therefore motion for judgment on the pleadings in favor of defendant was correctly denied. *Rice v. Ins. Co.*, 421.

In an action on the uninsured vehicle clause in a collision policy, evidence that the vehicle causing the loss was insured in another state, where it was registered and licensed, by an insurer there authorized to write the insurance, and that subsequent to the collision the insurer was placed in receivership because of its insolvency, and that a claim was filed with the insurer's receiver, *held* insufficient to support the court's conclusion that the vehicle causing the injury was an uninsured motor vehicle within the definition of the collision policy. *Ibid.*

§ 53. Auto Liability Insurance — Payment of Damage and Subrogation.

Allegations that the owner of a damaged car released his interest in the car to a finance company, that the finance company paid the deductible portion of the policy of collision insurance, and that the owner's insurer then paid the finance company the remainder of the damages, *held* insufficient to show a right in the finance company and the insurer to sue the alleged tort-feasor under the doctrine of subrogation, since the right of the insurer to subrogation must be based upon a payment by it to insured, and the finance company was not an insurer under the policy and there was no allegation of any loss payable clause to it, or allegation that the insured's claim had been assigned to either the finance company or the insurer. *Indemnity Co. v. Barnhardt*, 302.

Right of subrogation does not entitle insurer to sue other tort-feasor for contribution. *Ins. Co. v. Bynum*, 289.

§ 54. Vehicles Insured Under Liability Policies.

A garage liability policy covers any automobile owned by or in charge of the named insured and used in operations necessary or incidental to insured's business by a person operating the vehicle with the permission of insured. *Shearin v. Indemnity Co.*, 505.

Evidence held to show that prospective purchaser was not operating vehicle in question with permission of dealer within coverage of garage liability policy. *Ibid.*

§ 60. Notice to Insurer of Accident or Suit.

In regard to an owner's liability policy providing insurance in addition to that required by the Motor Vehicle Safety and Financial Responsibility Act, as distinguished from an operator's liability policy required by that Act, G.S. 20-279.21, the provisions of the policy in regard to notice of claim or suit by an injured party are valid and enforceable, and the injured party who

INSURANCE—*Continued.*

obtains judgment against the insured can have no greater rights against insurer than those of insured. *Clemmons v. Ins. Co.*, 495.

Stipulation in a policy providing liability insurance in addition to that required by the Safety and Financial Responsibility Act, that insured should forward to insurer any demand, notice, summons or other process received by him or his representative is not ambiguous and is a reasonable and valid stipulation, and unless insured or his judgment creditor can show compliance with this requirement, insurer is relieved of liability in the absence of waiver or estoppel. *Ibid.*

Evidence held insufficient to show waiver by insurer of notice of suit against insured. *Ibid.*

§ 63. Defense of Action Brought by Injured Party Against Insured.

Defense by insurer of an action brought by the injured third party against insured does not waive insurer's defense of noncoverage when insurer requires insured to sign an agreement preserving to insured the right to assert the defense of noncoverage. *Shearin v. Indemnity Co.*, 505.

§ 65. Rights of Injured Party Against Insurer.

Consent judgment was entered settling all matters of controversy arising out of a collision. Thereafter, upon unverified motion and without evidence by affidavit or otherwise that the consent judgment failed to express the true intent of the parties, the judgment was modified as "erroneous," without notice to plaintiff's insurer, by inserting a statement that the judgment was without prejudice to defendant's alleged counterclaim. *Held:* Defendant, after recovery of judgment on his counterclaim, may not maintain an action against plaintiff's liability insurer. *Young v. Ins. Co.*, 339.

§ 96.1. Property Damage Insurance — Payment and Subrogation.

An insurer paying to insured a loss under the obligations of its policy for property damaged by the tortious act of another is subrogated to the rights of the insured against the tort-feasor to the extent of the loss paid by insurer. *Ins. Co. v. Storage Co.*, 679.

Insurer may establish its right to maintain its action as subrogee of the insured by the introduction in evidence of its cancelled check issued to insured in payment of the loss and the receipt signed by insured stating that it was in full satisfaction of claims under the designated policy and subrogating insurer to any rights of insured against third parties causing the damage, and objection to such evidence on the ground that the policy itself was not offered in evidence by insurer is untenable. *Ibid.*

JUDGMENTS.

§ 6. Modification and Correction of Judgment in Trial Court.

The clerk may modify a consent judgment to make the record speak the truth, but he may not modify it as "erroneous" to insert a provision therein not agreed upon by the parties at the time of the entry of the judgment. *Young v. Ins. Co.*, 339.

§ 13. Judgments by Default in General.

In an action for damages arising out of a boat collision on a lake, defendant's filing of a petition in admiralty seeking a limitation of liability (46 U.S.C.A., Ch. 8, § 183 *et seq.*) is not a motion within the purview of G.S. 1-125, and does not preclude the clerk from entering a judgment by default and in-

quiry under G.S. 1-212 for failure of defendant to answer or demur within the time limited. In this case the petition in admiralty for limitation of liability and for order restraining further proceedings in the State court was denied, and petitioner's appeal therefrom was not perfected. *Potts v. Howser*, 484.

Motion for extension of time in which to demur or plead is not a motion required by statute to be made prior to the filing of answer within the purview of G.S. 1-125, and upon denying such motion the clerk is authorized to enter judgment by default for failure of defendant to demur or answer within the time limited, G.S. 1-212. *Ibid.*

§ 14. Jurisdiction to Enter Default Judgments.

Where, in an action for wrongful discharge, it appears that plaintiff employee left the municipality of his residence and moved to the municipality in which he was to be employed, losses sustained by the employee in selling his house and his expense in moving back to his home town after the wrongful termination of his employment are not capable of ascertainment by computation, and a judgment by default final in favor of the employee in a sum including such losses is beyond the jurisdiction of the clerk to enter, and such judgment is properly set aside on motion in the cause. *Freeman v. Food Systems*, 56.

§ 15. Form and Effect of Default Judgments.

After judgment by default and inquiry has been entered, defendant is not entitled to move for the joinder of an additional party for contribution or, prior to the inquiry, for the adverse examination of defendant relating to the extent of his injuries. *Potts v. Howser*, 484.

§ 20. Erroneous Judgments.

The sole remedy to correct an erroneous judgment is by appeal. *Young v. Ins. Co.*, 339.

§ 22. Attack of Default Judgments.

A judgment by default final which is beyond the statutory authority of the clerk to enter, will be vacated on motion in the cause. *Freeman v. Food Systems*, 56.

Where the allegations are sufficient to state a cause of action for breach of contract entitling plaintiff to recover in some amount at the time of the institution of the action, judgment by default final is properly set aside when the amount due is not subject to computation, but plaintiff's action should not be dismissed. *Ibid.*

§ 25. Attack and Setting Aside of Consent Judgments.

While the clerk may modify a consent judgment to correct a mutual mistake or mistake by the court in entering the judgment so as to make the record speak the truth, the clerk may not alter the judgment on the ground that it was erroneous, since the remedy to correct an erroneous judgment is by appeal. *Young v. Ins. Co.*, 339.

§ 29. Conclusiveness of Judgment — Parties Concluded.

Parties to an action who are not adversaries and who do not have an opportunity to litigate their differences *inter se* are not precluded by the judgment from thereafter litigating their rights *inter se*. *Streater v. Marks*, 32.

JUDGMENTS—*Continued.*

§ 33. Conclusiveness of Judgment — Judgments of Nonsuit.

A judgment of involuntary nonsuit on the ground of the insufficiency of the evidence offered at that trial does not bar a subsequent action unless the evidence at the subsequent trial is substantially identical with that offered in the first. *Shearin v. Indemnity Co.*, 505.

LANDLORD AND TENANT.

§ 8. Assignment and Subletting.

Where the lessee "assigns" the lease for only a part of the unexpired term, the transaction is not an assignment of the lease but a subletting, and the relationship of landlord and tenant continues to exist between the lessor and lessee. *Carson v. National Co.*, 229.

§ 10. Expiration of Term, Notice, Renewals and Extensions.

Provisions in a lease authorizing lessor to terminate the lease and repossess the property upon the appointment of a receiver for lessee or an adjudication that lessee is a bankrupt are not contrary to public policy and are valid, and the right of lessor to repossess the property may not be defeated by the fact that lessee sublets the property to a solvent sub-lessee. *Carson v. National Co.*, 229.

Where a lease gives either party the right to terminate the lease by written notice 15 days prior to the last day of the term, apt notice by the landlord in accordance with the provisions of the lease terminates the term, and it is not required that the landlord give the tenant any reason for the termination of the lease or that the landlord hold any hearing upon the matter. *Housing Authority v. Thorpe*, 431.

LARCENY.

§ 7. Sufficiency of Evidence and Nonsuit and Directed Verdict.

In this prosecution for breaking and larceny, the evidence is held sufficient to be submitted to the jury, and therefore the denial of defendant's motion for a directed verdict was not error. *S. v. Stinson*, 661.

§§ 8, 9. Instructions and Verdict.

Where the indictment charges the larceny of property many times the value of $200 and the evidence amply supports the charge, and there is no evidence to the contrary, it is not necessary for the court to instruct the jury that the burden is on the State to prove the value of the property exceeded $200 in order to render a verdict of guilty of a felony, and it is not required that the jury find that its value was in excess of $200 in order to support sentence. *S. v. Brown*, 189.

§ 10. Judgment and Sentence.

Plea of guilty to the larceny of a sum less than $200 does not support sentence of ten years' imprisonment, and the imposition of such sentence must be vacated. *S. v. Davis*, 126.

Indictments for larceny which do not aver that the property was taken from any storehouse and do not aver that the value of the property taken exceeds $200, charge misdemeanors only, and sentences of not less than three nor more than five years must be vacated and the cause remanded for proper sentence. *S. v. Williams*, 424.

LIMITATION OF ACTIONS.

§ 10. Absence and Nonresidence.

The effect of the 1955 amendment to G.S. 1-21 is to bar all actions by nonresidents on a transitory cause of action arising in another state when such action is barred in the state in which it arose at the time of institution of action here, since the language of the amendment and the history of the statute disclose the legislative intent that the amendment should constitute a limitation and should not be restricted to the mere tolling of the statute by reason of nonresidence. *Little v. Stevens*, 328.

§ 16. Procedure to Set Up Defense of Statute.

When the date the cause of action accrued appears in the complaint and the statute of limitations barring the action is pleaded, defendant's plea in bar must be allowed when plaintiff fails to allege by reply any facts which would avoid the plea in bar by bringing the action within a particular exception or saving provision of the statute. *Little v. Stevens*, 328.

MALICIOUS PROSECUTION.

§ 1. Nature and Essentials of Cause of Action.

To make out a case of malicious prosecution, the plaintiff must allege and prove that the defendant instituted, or procured, or participated in, a criminal prosecution against him maliciously, without probable cause, which ended in failure. *Cook v. Lanier*, 166.

§ 4. Want of Probable Cause.

In an action for malicious prosecution, probable cause does not depend upon the guilt or innocence of the person accused but upon whether defendant had reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense of which he is charged. *Cook v. Lanier*, 166.

§ 5. Malice.

In an action for malicious prosecution, malice may be inferred from want of probable cause. *Cook v. Lanier*, 166.

§ 6. Termination of Prosecution.

The dismissal of a criminal proceeding by reason of the failure of the complainant to appear and prosecute is a sufficient termination thereof to support an action for malicious prosecution based thereon. *Cook v. Lanier*, 166.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence that plaintiff gave defendant a paper writing in the form of a check for merchandise delivered, with the understanding that it would not be presented for payment but was to constitute a mere memorandum of the debt, that plaintiff thereafter sent defendant principal a cashier's check for the amount of the debt, which was endorsed by the principal and duly paid, and that thereafter the principal requested the agent to swear out a warrant against the plaintiff for issuing a worthless check, that the agent did so and that the prosecution was dismissed for failure of the complainant to appear and prosecute, *held* sufficient to make out a *prima facie* case of malicious prosecution in an action against the principal and against the agent for the recovery of compensatory damages. *Cook v. Lanier*, 166.

MASTER AND SERVANT.

§ 3. Distinction Between Employee and Independent Contractor.

Evidence held to support finding that lessor of crane was an independent contractor. *Lewis v. Barnhill*, 457.

§ 10. Duration of Employment and Wrongful Discharge.

If an employer wrongfully discharges an employee before the expiration of the term fixed in the contract, the employee's recovery is not limited to the salary due at the time the action is commenced. *Freeman v. Food Systems*, 56.

§ 45. Nature and Construction of Compensation Act in General.

The rule that the Workmen's Compensation Act must be liberally construed does not apply to the determination of the question of whether the relationship of the claimant to the person from whom compensation is claimed was one to which the Act applied. *Hicks v. Guilford County*, 364.

The Workmen's Compensation Act provides compensation to an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury is caused by negligence attributable to the employer, but the Act also deprives an employee of certain rights which he had under the common law, and imposes limitations and restrictions as well as benefits. *Ibid.*

The relationship of employee and employer within the purview of the Compensation Act is jurisdictional. *Bryant v. Dougherty*, 545.

The Workmen's Compensation Act must be liberally construed and the benefits therein provided to workmen should not be denied by a strict, narrow and technical construction, the philosophy of the Act being that the wear and tear of the workman, as well as the machinery, should be charged to the industry. *Cates v. Construction Co.*, 560.

§ 47. "Employees" Within Purview of Compensation Act.

A claimant under the Compensation Act must prove as a jurisdictional basis that the employer-employee relationship existed. *Hicks v. Guilford County*, 364.

A claimant under the Compensation Act must be an employee or be engaged in an employment under an appointment or contract of hire or apprenticeship, express or implied, and the coverage of the act extends to those whose employment is under the compulsion of legal process, but it is necessary that a claimant be an employee within the definition of the Act as a jurisdictional requirement. *Ibid.*

§ 49. Employees of State and Political Subdivisions.

A juror is not an employee of the county, and the Compensation Act does not apply to an injury sustained by a juror in the course of his or her service as such. *Hicks v. Guilford County*, 364.

§ 53. Injuries Compensable in General.

In order for an employee to be entitled to recover compensation under the North Carolina Workmen's Compensation Act he must show that he sustained personal injury by accident and that his injury arose in the course of his employment and that the injury arose out of his employment. *Bryan v. Church*, 111.

§ 54. Causal Relation Between Employment and Injury in General.

There must be a causal relation between the injury and the employment in order for the injury to arise out of the employment. *Bryan v. Church*, 111.

MASTER AND SERVANT—*Continued.*

Injury to pastor suffered while he was helping to move his stove from parsonage held not to have arisen out of his employment as pastor, even though he was moving prior to termination of employment as courtesy to congregation so that parsonage could be repaired. *Ibid.*

§§ 71, 72. Compensation for Loss of Specific Members and for Disfigurement.

Compensation for bodily disfigurement does not preclude compensation for loss of kidney. *Cates v. Construction Co.*, 560.

§ 82. Nature and Extent of Jurisdiction of Industrial Commission in General.

The Industrial Commission is not a court of general jurisdiction and has no jurisdiction of an action for malpractice against a physician or surgeon who is not employed full time by the employer but is merely selected by the employer to treat the employee for injuries received in the course of his employment, even though as against the employer and its insurance carrier the employee's right to recover for such aggravation of his injury is limited to the benefits provided by the Act. *Bryant v. Dougherty*, 545.

§ 86. Common Law Right of Action Against Third Person Tort-Feasor.

If one employee inflicts a negligent injury on another employee, both being in the course of the employment, the remedy to recover for such injury is under the Workmen's Compensation Act, and the injured employee may not maintain an action at common law, notwithstanding the negligent act may not be imputable to the employer at common law. *Altman v. Sanders*, 158.

The allegations and findings were to the effect that the employer furnished a parking lot for his employees, that plaintiff employee, after parking her car and while walking to the plant to report for work, was struck by a vehicle operated by another employee who was then backing into a parking space preparatory to reporting for work. *Held:* The accident arose in the course of the employment, precluding an action at common law by the one employee against the other. *Ibid.*

Compensation Act does not preclude one employee from suing the principal of another employee when dual agency exists. *Ibid.*

Neither an independent contractor nor an employee of the independent contractor is immune to suit at common law for injury negligently inflicted upon an employee of the main contractor. *Lewis v. Barnhill*, 457.

In the employee's action against a third person tort-feasor there is no prejudice to defendant in striking from the complaint the allegation that plaintiff had received compensation payments under the Workmen's Compensation Act when the court reduces the verdict by any amount to which the employer is entitled to receive by way of subrogation. *Ibid.*

The refusal to permit defendants to amend the answer to assert that they were conducting the business of plaintiff's employer is not error when there is allegation and evidence to sustain a finding that one of defendants was an independent contractor and the other defendant an employee of the independent contractor and not an employee of plaintiff's employer. *Ibid.*

The personal representative of a deceased employee may not maintain an action for wrongful death of the employee against a fellow employee and the employer for negligent injury causing death inflicted by the fellow employee while both employees were acting in the coures of their employment. *Horney v. Pool Co.*, 521.

MASTER AND SERVANT—*Continued.*

The fact that an employee, fatally injured by the negligence of a fellow employee in the course of their employment, leaves no one either wholly or partially dependent upon him, so that under G.S. 97-40, as then in effect, no one could claim compensation under the Workmen's Compensation Act, does not entitle the personal representative of the employee to maintain an action for wrongful death. *Ibid.*

The North Carolina Workmen's Compensation Act does not deprive an employee of a right to maintain an action at common law for malpractice against the physician or surgeon selected by the employer to treat his injuries received in the course of his employment when the physician is not a full time employee of the employer. *Bryant v. Dougherty*, 545.

§ 93. Review in Superior Court.

Whether an accident arose out of the employment is a mixed question of law and fact. *Bryan v. Church*, 111.

The findings and conclusion of the Industrial Commission with respect to the existence of the jurisdictional status of the employer-employee relationship are not conclusive but are reviewable by the courts on appeal. *Hicks v. Guilford County*, 364.

§ 94. Judgment of Superior Court and Appeals to Supreme Court.

Where the employer's exceptions to some of the predicate findings of the Industrial Commission must be sustained for lack of any competent evidence to support them, it is not necessary to pass on an assignment of error to the Commission's conclusions of law on the findings, and the judgment of the Superior Court affirming the award must be reversed and the cause remanded to the Industrial Commission. *Bryan v. Church*, 111.

MORTGAGES AND DEEDS OF TRUST.

§ 19. Right to Foreclose and Defenses.

Payment of a note secured by a deed of trust extinguishes the right of the trustee to foreclose the instrument. *Heating Co. v. Blackburn*, 155.

Allegations to the effect that the building on the property subject to the deed of trust had been destroyed and that the trustee had received the proceeds of insurance policies exceeding the amount of the note secured, are sufficient to state a cause of action to restrain foreclosure of the deed of trust, and the dissolution of the temporary restraining order issued in the cause prior to the filing of answer is error; the temporary restraining order should be continued to the hearing for the determination of the controversy upon the merits. *Ibid.*

MORTGAGES.

§ 20. Parties Who May Enjoin Foreclosure.

A judgment creditor, as well as a junior mortgagee, is entitled to enjoin foreclosure of a prior deed of trust when there is a *bona fide* controversy as to whether the note secured by the prior deed of trust had been paid and the power of the trustee to sell thereby divested. *Heating Co. v. Blackburn*, 155.

MUNICIPAL CORPORATIONS.

§ 4. Powers of Municipal Corporations in General.

A municipal corporation is a creature of the State and has only those

MUNICIPAL CORPORATIONS—*Continued.*

governmental powers granted to it by the Legislature, expressly or by necessary implication. *S. v. Furio*, 353.

All acts of a municipality beyond the scope of the powers granted to it are void. *Bagwell v. Brevard*, 604.

§ 5. Distinction Between Governmental and Private Powers.

The operation of a waterworks system is a proprietary function of a municipality and it is held to the same liability for injury therefrom as a privately owned water company would be. *Mosseller v. Asheville*, 104.

The operation of a water works system, including a reservoir and dam, is a proprietary function of a municipality. *Bowling v. Oxford*, 552.

§ 12. Injuries From Defects and Obstructions in Streets or Sidewalks.

The burden of proof is upon a pedestrian seeking to recover from a municipality for a fall on a street to introduce evidence which, considered in the light most favorable to her, is sufficient to show negligence on the part of the city and that such negligence was a proximate cause of the fall and injury. *Mosseller v. Asheville*, 104.

In order to recover from a city for injury resulting from a defect in a city street or a defect in the city's water system, plaintiff must show that the city had actual notice of the defect or that the defect had existed for such a length of time that the city should have discovered it in the exercise of reasonable inspection, and that it failed to remedy such defect in a reasonable time after such notice. *Ibid.*

A municipality is under duty to exercise reasonable care to maintain a reasonable and continuing supervision over its streets, and the city is held to have knowledge of a defect which such inspection would have disclosed. *Ibid.*

Evidence tending to show that a water main under the end of a dead-end street leaked for a period of two weeks and that a small volume of water from such leak flowed down the gutter of such street for one block to the intersecting street, is insufficient to charge the city with constructive notice of the defect. *Ibid.*

Plaintiff slipped on ice formed in gutter from water from small leak in water main at head of street. *Held:* Injury could not have been reasonably foreseen from deferring for a few days repair of the main, and nonsuit was proper. *Ibid.*

§ 15. Injuries From Water and Sewer Systems.

Plaintiff slipped on ice formed in gutter from water flowing from small leak in water main at head of street. *Held:* Injury could not have been reasonably foreseen from deferring repair of main for a few days, and nonsuit was proper. *Mosseller v. Asheville*, 104.

Evidence of negligence of city in maintenance of reservoir dam held sufficient for jury in action for damages resulting from break in dam. *Bowling v. Oxford*, 552.

§ 17. Sale of Property by Municipality.

An advertisement for the sale of municipal property on a date less than 30 days after the first publication of the notice cannot relate back to a prior publication of notice, even though the prior notice related to substantially the same land, when the prior notice stipulates a different date for the sale and contains material differences in the terms of payment, as well as a discrepancy in the quantity of land to be sold and whether the land would be offered for sale as a whole or in separate tracts, and therefore the purported sale on the

MUNICIPAL CORPORATIONS—*Continued.*

date specified in the second advertisement is a nullity. *Bagwell v. Brevard*, 604.

Even in regard to the sale of land which a municipality has the power to sell, the sale must be made in conformity with G.S. 160-59, and if the publication of the notice fails to comply in substance with the requirements of the statute, the sale is a nullity. *Ibid.*

§ 24. Nature and Extent of Municipal Police Power in General.

A municipal corporation has no inherent police powers. *S. v. Furio*, 353.

A municipal corporation has no power to extend the application of an ordinance to territory outside its corporate limits in the absence of a grant of such power by the General Assembly. *Ibid.*

A municipal ordinance prohibiting the construction and maintenance along any street or highway of any sign, billboard, motion picture screen or other structure upon which is depicted any nude or semi-nude pictures or words which are vulgar, indecent or offensive to the public morals, does not purport to prohibit such act outside of its territorial limits. *Ibid.*

§ 25. Zoning Ordinances and Building Permits.

An application for a special permit invokes the discretion of the Zoning Board, while an application for a permit as a matter of right under the zoning regulations usually involves controverted questions of fact ordinarily to be found by the Board from sworn testimony. *Craver v. Board of Adjustment*, 40.

Where the applicant for a special permit files an unverified petition and, without being sworn, explains in detail the circumstances upon which he bases his application and makes no request that those opposing his application be sworn, he may not thereafter complain that those objecting to the special permit were heard by unverified petition containing statements not under oath and were not present for cross-examination. *Ibid.*

An applicant for a special permit may not contend that the provision of the zoning ordinance for the granting or denying of special permits is too vague and indefinite to be followed, since if such provision is void for indefiniteness the municipal board is without authority to issue the permit and petitioners are subject to the terms of the ordinance prohibiting the use requested. *Ibid.*

A special permit is not a legal right but is a concession in exceptional cases which a zoning board, in the exercise of its discretion, may grant or refuse, subject to court review. *Ibid.*

§ 26. Review of Orders of Boards of Adjustment.

Where the record discloses that full discussions took place before the Zoning Board upon petitioner's application for a special permit, that applicant was not denied opportunity to present any and all facts pertinent to the inquiry, and that the Board in its discretion denied the application and considered all new information in applicant's request for a rehearing before denying same, applicant's contention that the record before the Board was not sufficiently comprehensive to permit the Superior Court on appeal to determine whether the Board had acted arbitrarily or had committed errors of law in denying the permit, is untenable. *Craver v. Board of Adjustment*, 40.

§ 27. Regulations Relating to Public Morals and Welfare.

An ordinance proscribing the display of obscene pictures or words in such

MUNICIPAL CORPORATIONS—*Continued.*

manner as to be visible to the general public using the streets or highways does not relate to the public safety but to the public morals. *S. v. Furio*, 353.

An ordinance proscribing the display of obscene pictures or words in such manner as to be visible to the general public using the streets or highways undertakes to forbid acts not forbidden or permitted by G.S. 14-189, G.S. 14-189.1, and G.S. 14-189.2, and the General Statutes do not preempt the field so as to preclude municipal action in this respect. *Ibid.*

§ 34. Enforcement, Validity and Attack of Ordinances.

In a prosecution of defendant for violation of a municipal ordinance by maintaining a motion picture screen upon which was projected pictures of nude and semi-nude men and women in such manner as to be visible to the general public along a street or highway, a warrant charging that defendant did the proscribed act within the city limits or within one mile thereof or within designated townships, *is held* insufficient to charge a violation of the ordinance, there being no showing that the ordinance was intended to apply beyond the territorial limits of the city, and the commission of the proscribed act outside of the municipal limits not being an offense under the ordinance. *S. v. Furio*, 353.

A municipal ordinance making it unlawful to construct or maintain along any street or highway in such manner as to be visible to the general public any sign, screen, or other structure depicting nude or semi-nude pictures of men and women *held* void for indefiniteness. *Ibid.*

§ 40. Claims and Actions Against Municipalities.

The filing of a claim with a city before suit is not necessary when the action is brought for damages for a tort committed by the city in the exercise of a proprietary activity. *Bowling v. Oxford*, 552.

NARCOTICS.

§ 1. Elements of Offenses Relating to Narcotics.

Defendant's contention that peyote and marijuana are not narcotic drugs within the purview of the statute is untenable, since the statute specifically includes peyote and marijuana within its definitions. G.S. 90-87(1); G.S. 90-87(9). Further, in this case, there was expert testimony that peyote and marijuana are narcotic drugs. *S. v. Bullard*, 599.

The possession of peyote and marijuana in violation of statute cannot be justified under the guise that they were used by defendant in the exercise of his religious beliefs. *Ibid.*

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

While a person may not be held liable for damages resulting from an "act of God" when there is no fault or negligence on his part, he may be held liable for his own negligence which concurs with an "act of God" in producing the damage. *Ins. Co. v. Storage Co.*, 679.

§ 7. Proximate Cause.

What is the proximate cause of an injury is ordinarily a question for the jury to be determined as a fact from the attendant circumstances, and conflicting infrences of causation arising from the evidence carry the case to the jury. *Snell v. Rock Co.*, 613; *Ins. Co. v. Storage Co.*, 679.

NEGLIGENCE—*Continued.*

§ 8. Concurring and Intervening Negligence.

Negligence of one party cannot insulate the negligence of another unless the negligence of such other is a superseding cause which alone results in the injury; this it cannot do if the primary negligence continues up to the moment of impact. *Cox v. Gallamore*, 537.

§ 11. Contributory Negligence.

Contributory negligence bars recovery if it contributes to the injuries as a proximate cause. *Griffin v. Ward*, 296.

One engaged in work requiring his concentration upon a particular area, thus preventing him from maintaining a lookout, may not be held contributorily negligent as a matter of law in assuming that another worker performing another aspect of the same job will perform his own assignment in a reasonably careful manner so as not to increase the danger. *Lewis v. Barnhill*, 457.

§ 14. Sudden Emergency.

A person without fault in creating an emergency may not be held to the wisest choice of conduct, but only for his failure to take those measures which a reasonably prudent man, faced with like emergency, would have taken. *Cline v. Atwood*, 182; *Sink v. Moore*, 344.

§ 16. Contributory Negligence of Minors.

A thirteen year old child is rebuttably presumed incapable of contributory negligence. *Hedrick v. Tigniere*, 62.

§ 20. Pleadings.

Complaint held to state cause of action against each defendant as joint tort-feasor, and neither was entitled to file cross-action against the other for contribution. *Streater v. Marks*, 32.

§ 21. Presumptions and Burden of Proof.

Since a thirteen year old child is rebuttably presumed incapable of contributory negligence, the burden is on plaintiff to rebut the presumption. *Hedrick v. Tigniere*, 62.

There is no presumption of negligence from the mere fact of an accident and injury. *King v. Bonardi*, 221.

The burden of proof on the issue of contributory negligence is upon defendant. *Ibid.*

Negligence is not presumed from the mere fact of injury, and plaintiff must show a failure on the part of defendant to exercise care in the performance of some legal duty which defendant owed plaintiff under the circumstances, and that such negligence proximately caused the injury, the sufficiency of the evidence to require its submission of the issue being a question of law. *Ashe v. Builders Co.*, 384.

While the burden rests upon plaintiff on the issue of negligence, there is no presumption of negligence or of the absence of negligence. *Lewis v. Barnhill*, 457.

§ 21a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Nonsuit is properly entered in a negligence action if plaintiff's evidence, interpreted in the light most favorable to him, is insufficient to support a find-

ing of negligence by defendant which is a proximate cause of plaintiff's injury. *Hedrick v. Tigniere*, 62.

In passing upon the sufficiency of the evidence to be submitted to the jury on the issue of negligence, only that evidence supported by allegation need be considered. *Ashe v. Builders Co.*, 384.

Evidence *held* insufficient to be submitted to jury in action by housewife injured by fall of sheetrock slabs placed against wall at slight angle during renovation of kitchen. *Ibid.*

Evidence held for jury on issue of negligence of crane operator in permitting steel joist to come in contact with high voltage wire while employee of main contractor was engaged in placing other end of joist on girder. *Lewis v. Barnhill*, 457.

§ 24b. Res Ipsa Loquitur.

The doctrine does not apply to an injury received by a workman from a power tool in the workman's possession and control. *Hollenbeck v. Fasteners*, 401.

When applicable, the rule of *res ipsa loquitur* does not relieve plaintiff from the burden of proving negligence and creates no presumption of negligence, but merely makes proof of the facts invoking the doctrine sufficient to establish a *prima facie* case so as to place upon defendant the burden of going forward with evidence to explain the occurrence. *Bowling v. Oxford*, 552.

§ 25. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence.

Evidence bearing on the issue of contributory negligence must be considered in the light most favorable to defendant in determining the sufficiency of the evidence to require the submission of that issue to the jury. *Butler v. Wood*, 250.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit may not be entered on the ground of contributory negligence of a thirteen year old child. *Hedrick v. Tigniere*, 62.

Nonsuit may not be granted upon the basis of contributory negligence of a child seven years old. *Waycaster v. Sparks*, 87.

Nonsuit on the ground of contributory negligence may be allowed only when plaintiff's own evidence establishes this defense so clearly that no other conclusion can reasonably be drawn therefrom. *Lewis v. Barnhill*, 457; *Cox v. Gallamore*, 537; *Thames v. Teer Co.*, 566; *Atwood v. Holland*, 722.

Evidence held not to show contributory negligence as a matter of law on part of workman placing one end of steel joist on girder in failing to see that other end of joist was raised against transmission line by crane operator. *Lewis v. Barnhill*, 457.

Nonsuit for contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to her, so clearly establishes this defense that no other reasonable inference can be drawn therefrom. *Snell v. Rock Co.*, 613.

§ 28. Instructions in Negligence Actions.

An instruction to the effect that defendant contended that plaintiff was contributorily negligent in certain respects "or some of them" and that defendant contended that such negligence solely and proximately caused the collision and not any negligence on defendant's part, *held* not to require a finding of contributory negligence conjunctively on each aspect asserted by

NEGLIGENCE—*Continued.*

defendant, and not subject to exception on this ground. *Long v. Thompson*, 310.

While the burden rests upon plaintiff upon the issue of negligence, there is no presumption that the defendant was negligent or that he was not negligent, and an instruction to this effect is not prejudicial error. *Lewis v. Barnhill*, 457.

§ 36. Injuries to Children From Dangerous Conditions on Lands.

An ordinary outhouse or privy is not an attractive nuisance or an inherently dangerous instrumentality. *Walker v. Sprinkle*, 626.

In order for a person in control of premises to be held liable for injury to a trespassing child of tender years, it must be shown that he maintained a condition dangerous to children on the premises and knew, or should have known, that children were in the habit of playing on the premises and would likely be exposed to the hazards of the dangerous condition maintained by him on said premises and were likely to be injured thereby. *Ibid.*

The person in control of premises is not an insurer of the safety of children trespassing, and may not be held liable merely because the premises may appeal to the youthful fancies of children, but is a prerequisite of such liability that it be shown that he failed to take precautions reasonably sufficient to prevent trespass by children, and it is not required that he take precaution against every conceivable danger to which an irrepressible spirit of adventure may lead a child. *Ibid.*

In action to recover for death of small child drowned in privy pit, evidence held insufficient to show negligence in maintenance and condition of privy. *Ibid.*

§ 37a. Definition of "Invitee."

A duly enrolled, tuition paying pupil of a dance school is an invitee of the proprietors while upon their premises for the purpose of attending and participating in the activities of the class in which he is enrolled. *Hedrick v. Tigniere*, 62.

§ 37b. Duties and Liabilities of Proprietor to Invitees in General.

The proprietor of a dance school is not an insurer of the safety of his pupils, but owes them the duty to use ordinary care to maintain the premises in a condition reasonably safe for the contemplated use and the duty to warn pupils against dangers which are known or should be known to the proprietor and which are not readily apparent upon such observation as the pupils may reasonably be expected to employ. *Hedrick v. Tigniere*, 62.

What constitutes a reasonably safe condition of premises depends upon the uses which the proprietor invites his business guests to make of them and those which he should reasonably anticipate they will make, and also upon the known or reasonably foreseeable characteristics of the invitees. *Ibid.*

The proprietor of a business establishment is not required to take precautions for his invitees' safety such as will make it impractical for him to operate his business or such as will destroy the attractiveness of his establishment for those who normally patronize such establishments. *Ibid.*

The waxing and polishing of the floor of a dance studio is not negligence *per se*. *Ibid.*

A proprietor is not under duty to warn an invitee of risks which are obvious. *Sellers v. Vereen*, 307.

A proprietor owes an invitee the legal duty to maintain the aisles and passageways of its place of business in such condition as a reasonably care-

NEGLIGENCE—*Continued.*

ful and prudent person would deem sufficient to protect patrons from danger while exercising ordinary care for their own safety. *Ibid.*

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

The doctrine of *res ipsa loquitur* does not apply to the fall of a dance pupil upon the floor. *Hedrick v. Tigniere*, 62.

Evidence tending to show that an experienced 13 year old dance pupil slipped and fell to her injury while performing a routine dance step with which she was familiar, that several other pupils had executed the step without mishap in the same area, without evidence that there was any spot or concentration of wax or other substance left undisturbed at the place where plaintiff fell, *held* insufficient to be submitted to the jury on the issue of the proprietors' negligence. *Ibid.*

Evidence tending to show that plaintiff customer, in attempting to sit in a light lawn chair in the aisle of defendant's store, placed her hands on the arms of the chair and was pressing down on the arms preparatory to sitting in the chair when it slipped from under her, causing personal injury, *held* insufficient to be submitted to the jury on the issue of negligence. *Sellers v. Vereen*, 307.

§ 38. Injuries to Licensees.

The rule that the person in exclusive control of the premises owes a licensee only the duty not to inflict wilful or wanton injury applies when the injury results from the condition of the premises, and does not apply when the injury is the result of active negligence on the part of the person in control, as where the injury results from a collision of vehicles caused by negligence, in which instance the proprietor owes the duty of due care to a licensee whose presence is known. *Thames v. Teer Co.*, 565.

PARTIES.

§ 2. Parties Plaintiff.

The trustee in a deed of trust upon the land is not a necessary party to an action by the owner of the land to recover for damages to the land. *Bowling v. Oxford*, 552.

The failure of defendant to demur is a waiver of his right to insist that another party should have been joined as a necessary additional party plaintiff. *Ibid.*

Where defendant is liable to one of two parties in the alternative, so that if he is liable to one he is not liable to the other, and defendant is not sure to which of the parties liability obtains, he is entitled to join both as plaintiffs. *Filter Co. v. Robb*, 583.

An insurer who has paid insured the entire loss properly brings action in its own name against third person tort-feasors allegedly causing the loss. *Ins. Co. v. Storage Co.*, 679.

PERJURY.

§ 2. Nature and Essentials of Subornation of Perjury.

The fact that defendant, charged with procuring perjured testimony by a witness at his former trial, obtains a nonsuit on appeal in such former trial, is no defense in the prosecution against him for subornation of perjury, since such judgment of nonsuit in no way establishes the truth of the testimony of the witness at the former trial. *S. v. King*, 631.

PERJURY—*Continued.*

§ 5. Sufficiency of Evidence and Nonsuit.

In a prosecution for perjury or subornation of perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or one witness and corroborating circumstances. *S. v. King*, 631.

The fact that the statement of the alleged suborned witness that he had given false testimony at the former trial at the instance of the accused is corroborated by the testimony of three witnesses that the alleged suborned witness made statements to the effect that he had been suborned by the defendant, *held* not to constitute testimony of adminicular circumstances tending to show the falsity of the oath of the suborned witness, and therefore nonsuit should have been entered. *Ibid.*

PHYSICIANS AND SURGEONS.

§ 11. Nature and Extent of Liability for Malpractice.

The North Carolina Workmen's Compensation Act does not deprive an employee of a right to maintain an action at common law for malpractice against the physician or surgeon selected by the employer to treat his injuries received in the course of his employment when the physician is not a full time employee of the employer. *Bryant v. Dougherty*, 545.

PLEADINGS.

§ 8. Counterclaims and Cross-Actions.

Where plaintiff elects to sue both joint tort-feasors, neither is entitled to file a cross-action against the other for contribution. *Streater v. Marks*, 32.

In action by employee against third person tort-feasor, defendant is not entitled to file cross-action against employer on employer's contract to indemnify. *Lewis v. Barnhill*, 457.

§ 10. Office of and Necessity for Reply.

A cause of action may not be alleged in a reply, even by amendment. *Furniture Co. v. Bentwood Co.*, 119.

§ 12. Office and Effect of Demurrer.

Upon demurrer for failure of the complaint to state a cause of action, the complaint is to be liberally construed and every reasonable intendment and presumption must be made in plaintiff's favor. *Streater v. Marks*, 32.

A demurrer admits the allegations of the pleading to which it is directed solely for the purposes of the demurrer, and therefore the act of the court in sustaining a demurrer filed by an additional party, joined at the instance of the original defendant, would not preclude the additional party from thereafter instituting action against the original defendant asserting that the amount sued for by plaintiff was due by the original defendant to the additional party rather than to the plaintiff. *Filter Co. v. Robb*, 583.

§ 18. Demurrer for Misjoinder of Parties and Causes.

Decision on appeal that demurrer for misjoinder of parties and causes should be sustained does not constrain the granting of a demurrer to the complaint in a subsequent action deleting one of the causes of action stated in the original complaint. *Conference v. Piner*, 74.

A complaint purporting to state two separate causes of action by separate plaintiffs against the same defendants, but which fails to state a justiciable cause of action on behalf of one of the plaintiffs, so that it alleges but a

PLEADINGS—*Continued.*

single justiciable action, is not subject to demurrer for misjoinder of parties and causes of action. *Ibid.*

In action for purchase price, purchaser, who is not sure whether plaintiff was undisclosed principal or distributor, is entitled to have distributor joined as an additional party plaintiff in order to adjudicate respective rights of parties, and demurrer of distributor for misjoinder of parties and causes should be overruled. *Filter Co. v. Robb*, 583.

§ 21.1. Judgment on Demurrer and Effect Thereof.

Upon sustaining a demurrer to the complaint for its failure to state a cause of action, the court should not dismiss the action until plaintiff has had an opportunity to amend. *Walker v. Sprinkle*, 626.

§ 24. Motions to Be Allowed to Amend.

A motion to be allowed to amend at the trial is of necessity addressed to the discretion of the court and its ruling denying the amendment is not reviewable in the absence of a clear showing of abuse of discretion, and the contention of movant that he was taken by surprise by the court's intimation that, in view of the pleadings, it would not permit the introduction of evidence on a particular aspect, does not tend to show abuse of discretion by the court in denying the motion. *Vending Co. v. Turner*, 576.

§ 25. Scope of Amendment to Pleadings.

Both under common law and by statute, G.S. 1-163, the Superior Court has discretionary power to permit an amendment to the pleadings, and the extent of a permissible amendment must be left in a large degree to the court's discretion, and the court may allow an amendment introducing a new cause of action provided the facts constituting such new cause arise out of or are connected with the transaction on which the original pleading is based. *Furniture Co. v. Bentwood Co.*, 119.

After joinder of additional party and filing of answer, allowance of amendment to complaint to allege discovery that additional party had purchased original defendant's assets and assumed its liabilities *held* within discretionary power of trial court. *Ibid.*

A cause of action must be alleged in the complaint and may not be alleged in the reply, and therefore when plaintiff requests an amendment setting up a new cause of action plaintiff should be directed to recast the complaint rather than be permitted to amend his reply. *Ibid.*

§ 28. Variance.

Proof without allegation is unavailing. *Vending Co. v. Turner*, 576.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

An issue of fact arises whenever a material fact, which is one which constitutes a part of plaintiff's cause of action or defendant's defense, is maintained by one party and controverted by the other. *In re Wallace*, 204.

Admissions in the answer of facts alleged in the complaint are judicial admissions conclusively establishing the admitted facts for all purposes connected with the trial without the necessity of introducing the admitted facts in evidence. *Ins. Co. v. Storage Co.*, 679.

§ 34. Motions to Strike.

A motion to strike an entire defense is tantamount to a demurrer, and upon such motion the pleader must be given the benefit of every reasonable intendment in his favor. *Marine Corp. v. Futrell*, 194.

PLEADINGS—*Continued.*

Where two paragraphs of an answer state but a single defense, both paragraphs must be considered in determining the correctness of a judgment sustaining a demurrer and granting a motion to strike, even though the lower court grants the demurrer and motion to strike in regard to one of the paragraphs and denies them as to the other. *Ibid.*

PRINCIPAL AND AGENT.

§ 5. Scope of Authority.

The authority of a construction superintendent to place an order for rental equipment does not, as a matter of law, carry with it implied authority on the part of the superintendent to enter into an indemnity contract on behalf of his employer. *Lewis v. Barnhill*, 457.

§ 7. Undisclosed Agency.

Where the principal discloses the agency and sues on the contract for the balance of the purchase price, the purchaser, as between himself and the principal, is liable only to the principal, and the agent is neither a necessary nor a proper party, but an adjudication of agency as between the principal and the purchaser would not be binding on the alleged agent if the asserted agent is not a party to the action. *Filter Co. v. Robb*, 583.

PROCESS.

§ 5.1. Subpoena Duces Tecum.

A subpoena *duces tecum* is the process by which a court, in its inherent power, requires any person who can be a witness to produce at the trial, documents, papers, or chattels material to the issue. *Vaughan v. Broadfoot*, 691.

A subpoena *duces tecum* must describe the document or other items which the witness is required to bring with him to the trial with such definiteness that the witness can identify them without prolonged or extensive search, and will not lie to permit a party to conduct a mere "fishing expedition." *Ibid.*

The relevancy and materiality of documents required by a subpoena *duces tecum* may be tested by a motion to quash, vacate, or modify the subpoena. *Ibid.*

In an action by investment dealers to recover commissions due under contract for procuring capital investments by designated persons in a proposed corporate venture, a subpoena *duces tecum* issued by the clerk requiring a corporate officer to bring into court at the trial the corporation's stock book and any and all agreements between the corporation and any persons and entities relating to investments in the corporation, and "all preliminary and final feasibility studies," prognostications, and estimates by consulting engineers of cost of the proposed venture, etc., *held* properly quashed upon motion, since all of the documents requested are not material to the issue and most of the documents desired were not specified. *Ibid.*

§ 9. Service by Publication and Attachment.

Where notice of the levy is served upon the garnishee promptly and publication of the notice is timely made in a newspaper, the fact that the affidavit of the printer is not made within the time prescribed is not sufficient to justify defendant's motion to dismiss. *Ward v. Mfg. Co.*, 131.

Findings that the garnishee was a domesticated corporation, that it owed a debt, evidenced by a note, to a foreign corporation, that the note was assignable to the stockholders of the foreign corporation, that the foreign cor-

PROCESS—*Continued.*

poration owed a debt to plaintiff, that plaintiff, in his suit against the foreign corporation, duly garnished the debt and by amendment had the individual stockholders of the foreign corporation made parties, warrant the court in denying defendants' motion to dismiss for want of jurisdiction. *Ibid.*

PROPERTY.

§ 4. Malicious Destruction of Property.

Evidence identifying each defendant as a member of a group which acted in concert in breaking window panes at a prison camp and in damaging specified personal property in an amount greatly in excess of $10.00 is sufficient to be submitted to the jury on the question of each defendant's guilt as an aider and abettor, and justifies a sentence in excess of the limits prescribed by G.S. 14-127, notwithstanding damage committed by a single defendant may not have exceeded $10.00 in value, and notwithstanding that some of defendants were charged with malicious injury to real property while others were charged with malicious injury to personal property. *S. v. Childress*, 85.

RAILROADS.

§ 6. Crossing Accidents — Injuries to Passengers in Automobiles.

A passenger in an automobile cannot be held contributorily negligent as a matter of law in failing to warn the driver of the approach of a train at a railroad grade crossing when the approach of the train is obscured by buildings and obstructions, the track across the highway is not visible until immediately upon it, and the paint on the railroad crossing sign has been allowed to fade so that its warning is not easily distinguishable. *Cox v. Gallamore*, 537.

The failure of the State Highway Commission to require the installation of gates, alarm signal, or other safety devices at a grade crossing does not relieve the railroad from its common law duty to give users of the highway adequate warning of the existence of the grade crossing. *Ibid.*

While a railroad crossing is, in itself, a warning of danger to a driver who knows of it or who, by keeping a reasonable lookout in his direction of travel, should discover its existence in time to stop his vehicle before entering the path of an approaching train, such driver is not required to assume that he will come upon an unknown, unmarked railroad crossing which is not discoverable by a reasonable lookout. *Ibid.*

Even though a railroad crossing has signs posted which are adequate to give a traveler on the highway notice of the presence of the railroad crossing, it is also the duty of the railroad to give timely warning of the approach of its train to the crossing by the blowing of the whistle or horn, by ringing the bell, or by some other device reasonably calculated to attract the attention of those approaching the crossing upon the highway. *Ibid.*

The duty of the engineer of a train approaching an obstructed highway crossing to give reasonable and timely warning of the approach of the train to the crossing is the same whether the obstructions are erected by the railroad or by some other person. *Ibid.*

The driver of an automobile who knows or, by the exercise of a reasonable lookout in the direction of travel, should know that he is approaching a railroad crossing, is not relieved of his duty to look before entering upon the crossing merely because he has heard no signal of an approaching train, and he is under duty to his passenger to reduce his speed so that he can stop

RAILROADS—*Continued.*

the vehicle, if necessary, in order to avoid a collision with an approaching train, the train having the right of way at the crossing. *Ibid.*

Evidence held sufficient to be submitted to the jury on issue of concurring negligence of driver and railroad in causing death of passenger in crossing accident. *Ibid.*

RAPE.

§ 12. Elements of Offense of Carnal Knowledge of Female Between Ages of 12 and 16 Years.

Assault with intent to commit rape and carnal knowledge of female are different offenses and one is not less degree of other. *McClure v. State*, 212.

§ 17. Elements of Assault With Intent to Commit Rape.

Offense of carnal knowledge of female child between ages of 12 and 16 years and offense of assault with intent to commit rape are separate offenses and the one is not a less degree of the other. *McClure v. State*, 212.

The intent constituting an essential element of the crime of assault on a female with intent to commit rape is the intent of the male to satisfy his passion on the person of the woman at all events, against her will and notwithstanding any resistance she may make. *S. v. Moose*, 97.

In a prosecution for assault on a female under the age of consent, it is not required that defendant intend to force sexual relations notwithstanding any resistance the child might make and there is no requirement of force, an intent on the part of defendant to commit rape being sufficient. *S. v. Lucas*, 304.

§ 18. Prosecutions for Assault With Intent to Commit Rape.

A charge that the intent constituting an essential element of the offense of assault with intent to commit rape is the intent of the male to satisfy his passion on the person of prosecutrix without her consent and against her will, is insufficient. *S. v. Moose*, 97.

Evidence tending to show that defendant, a 48 year old male, took off his pants so as to expose his private parts and got on top of a female child five years of age, and that her vagina was considerably bruised, *is held* sufficient to sustain a conviction of assault on a female with intent to commit rape. *S. v. Lucas*, 304.

RECEIVERS.

§ 12. Priorities.

Where the receiver has sold land of the debtor free from lien so that the liens attach to the proceeds of the sale in the receiver's hands, the receiver must give priority of payment to the holder of the lien having priority by reason of a constructive trust declared by equity to accomplish the ends of justice, notwithstanding such lien was recorded subsequent to the registration of another deed of trust on the same property. *Electric Co. v. Construction Co.*, 714.

RECEIVING STOLEN GOODS.

§ 2. Indictment.

The indictment in this prosecution for receiving stolen goods with knowledge at the time that they had been stolen *held* sufficient and valid. *S. v. Matthews*, 244.

RECEIVING STOLEN GOODS—*Continued.*

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence held for jury on charge of receiving stolen goods with knowledge they had been stolen. *S. v. Matthews*, 244.

Where, in a prosecution of defendant for receiving stolen goods with knowledge that they had been stolen, the only evidence against the defendant is testimony that stolen goods were found on this defendant's premises shortly after they had been stolen, testimony of a codefendant tending to implicate defendant having been admitted solely against such codefendant, nonsuit should have been allowed. *S. v. Emanuel*, 663.

§ 6. Instructions.

The judge's charge in this prosecution for receiving stolen goods with knowledge that they had been stolen *is held* without prejudicial error. *S. v. Matthews*, 244.

REGISTRATION.

§ 3. Registration as Notice.

Recital in a deed of trust that it should constitute a lien junior to the lien of a deed of trust to another person, without sufficiently identifying the deed of trust to such third person, cannot override priority of registration. *Electric Co. v. Construction Co.*, 714.

But equity, by declaring a resulting trust in favor of the holder of the later registered instrument, may override priortiy of registration as between the parties. *Ibid.*

§ 6. Rights Under Unregistered Instruments.

An unregistered contract to convey is not enforceable against a grantee of the owner, even though the grantee had knowledge of the existence of such contract at the time of his purchase. *Beasley v. Wilson*, 95.

RELIGIOUS SOCIETIES AND CORPORATIONS.

§ 3. Actions.

The courts have no jurisdiction of purely ecclesiastical controversies and will adjudicate such matters only to the extent necessary to determine property rights which are affected by the dispute. *Conference v. Piner*, 74.

A complaint alleging a cause of action by a faction of a congregation of a church to have such faction declared the true congregation and entitled to the sole control of the physical property of the church, and a cause of action by a governing body of the denomination to have the church declared a member of its organization and subject to its discipline, *held* to state a single cause of action relating to the right to use and control the church property and is not subject to demurrer for misjoinder of parties and causes, since the allegations relating to doctrinal matters and church discipline pertain to ecclesiastical matters which are not justiciable. *Ibid.*

Where there is serious controversy as to which of two factions of a church congregation is entitled to the use and control of the church property, the Superior Court correctly enjoins the dissipation or expenditure of church funds until the hearing on the merits, but the determination that one of the claimants was the chief officer of the church is not necessary in issuing the injunction, and such provision will be vacated on appeal. The Supreme Court, in the exercise of its supervisory power, may modify the order by directing that the tangible personal property be delivered to the clerk of the Superior Court pending the final hearnig. *Church v. Amos*, 412.

SALES.

§ 3. Payment of Purchase Price and Transfer of Title.

Whether title passes to the purchaser upon part payment of the purchase price depends upon the agreement between the parties as to whether title should then pass or whether title should not pass until the performance of some condition. *Shearin v. Indemnity Co.*, 505.

§ 5. Express Warranties.

A seller is bound by an express warranty when, and only when, it is made to induce a sale and does induce such sale. *Hollenbeck v. Fasteners Co.*, 401.

A tool used to force a steel bolt into concrete by means of a powder charge is necessarily and inherently dangerous and can be safe only when used with great care and caution, and a salesman's statement that the tool was "safe" is merely an expression of opinion in the "puffing of his wares," and cannot constitute an express warranty. *Ibid.*

§ 12. Remedies of Purchaser in General.

Where it is admitted that the purchaser is entitled to some sum for authorized changes necessarily made by him to make the equipment purchased conform to the specifications, the purchaser is entitled to a credit therefor against his total liability on the contract. *Filter Co. v. Robb*, 583.

When purchaser is entitled to credit on purchase price for expenses incurred in making equipment conform to specifications, but is not sure whether distributor was seller or mere undisclosed agent of supplier, the purchaser is entitled to have both the distributor and the supplier made parties to adjudicate question of agency. *Ibid.*

§ 16. Actions by Purchaser or User for Personal Injuries.

Plaintiff contended that the salesman did not warn him of the possibility of a ricochet in using a tool to force a steel bolt into concrete or metal by the use of a powder charge. The evidence disclosed that plaintiff had used a like tool several thousands of times and that he had used the tool in question for a year or so prior to his injury from a richocheting bolt, and that the shield of the tool carried a printed statement warning of the possibility of a ricochet. *Held:* Plaintiff cannot recover on the theory of negligence of the salesman in failing to give warning. *Hollenbeck v. Fasteners Co.*, 401.

The doctrine of *res ipsa loquitur* does not apply to an injury sustained by a workman while using a tool to force bolts into concrete or metal by a powder charge placed into the barrel of the tool when it appears that plaintiff had used the tool for a number of years and therefore had knowledge superior to defendant's salesman in regard to the use or condition of the tool. *Ibid.*

SCHOOLS.

§ 1. Maintenance and Operation of Schools in General.

An adequate system of public education is the basis of a viable democratic government. *Dilday v. Board of Education*, 438.

§ 3. Establishment, Enlargement and Consolidation of School Districts.

An administrative unit is not a school district within the purview of the constitutional proscription against the passage of local acts, and Ch. 1051, Session Laws of 1965, is susceptible to definite interpretation and is valid. *Hobbs v. Moore County*, 665.

SCHOOLS—*Continued.*

§ 4. Duties and Authority of Boards of Education in General; Appointment and Election.

It is the duty of the county board of education to determine, in the first instance, what repairs, remodeling, or enlarging and construction of school houses are required, and the courts may not interfere with its discretionary determination of these questions in the absence of manifest abuse of discretion or a disregard of law, G.S. 115-35, G.S. 115-29; it is the duty of the board of county commissioners to determine what proposals presented to it by resolution of the county board of education are necessary and possible, but having determined this question and having provided funds, the jurisdiction of the county commissioners ends and the authority to execute the plans is in the board of education. *Dilday v. Board of Education*, 438.

County boards of education with the approval of the county commissioners have authority to transfer or reallocate funds from one project to another within the general purpose of a bond resolution and referendum, but in order to do so the board of education must, by resolution, request such reallocation and apprise the county commissioners of the conditions necessitating the transfer, and the board of county commissioners must make an investigation and record their findings upon their official minutes, and authorize or reject the proposed reallocation; when the county commissioners make only a verbal approval of the reallocation, the expenditure of funds for the revised plans should be enjoined until the statutory requirements are complied with. *Ibid.*

A county board of education or a board of county commissioners is without power to provide their constitutents with racially segregated schools; even though the effect of Title VI of the Civil Rights Act of 1964 is merely to deprive a segregated school of Federal aid, Title IV of the Act authorizes the Attorney General, upon complaint, to enforce integration by legal proceedings. *Ibid.*

Chapter 1051 of the Session Laws of 1965, providing for the holding of an election in a designated county to determine whether school administrative units in the county should be merged, for the appointment and election of members of the county board of education if the merger was approved, and whether the county commissioners should be authorized to levy a county-wide school supplemental tax not to exceed an annual rate of 30 cents per 100 dollars of assessed property valuation, *held* susceptible to definite interpretation and therefore not void for ambiguity or indefiniteness. *Hobbs v. Moore County*, 665.

§ 7. Taxation, Bonds and Allocation of Proceeds.

Ch. 1051, Session Laws of 1965, providing for election on question of levy of county-wide school supplemental tax *held* valid, and question of unauthorized use of funds was not presented for determination. *Hobbs v. Moore County*, 665.

Reallocation of funds held for project within general purpose for which bonds were issued and is upheld. *Dilday v. Board of Education*, 438.

§ 9. School Sites.

Provisions of a statute giving school authorities permissive power to acquire a school site up to 75 acres by gift, purchase or condemnation will not be held void as being in violation of G.S. 115-125 in an action by plaintiffs who do not assert that any property owned by them, or any member of the class they purport to represent, is about to be condemned or indeed, that any property is to be condemned under the statute. Further, the statute at-

SCHOOLS—*Continued.*

tacked was a special statute enacted after the general statute proscribing the condemnation of a site in excess of 30 acres. *Hobbs v. Moore County*, 665.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant and Waiver.

Where the evidence supports the court's findings that defendant freely and voluntarily and without any coercion or duress consented to a search of his house without a warrant, the evidence supports the conclusion that defendant waived the search warrant, rendering competent the evidence obtained by such search, and defendant's contention that he consented to the search because of intimidation resulting from the number of officers descending upon and surrounding his home in the middle of the night, is feckless. *S. v. Williams*, 424.

§ 2. Requisites and Validity of Search Warrant.

Where an officer issuing a search warrant testifies that she merely witnessed the signature of the officer signing the affidavit, without requiring the officer to sign the affidavit under oath and without examining him in regard thereto, the record overcomes the presumption that the requirements of the statute have been observed, G.S. 15-27, and evidence obtained by such warrant is erroneously admitted. *S. v. Upchurch*, 417.

While averments in the affidavit for a search warrant need not be competent under the strict rules of evidence, they must disclose justifiable and probable cause to believe that a search will reveal the presence of the particular object sought. *S. v. Bullard*, 599.

Affidavit of an officer that he had reasonable grounds to believe that defendant possessed a quantity of peyote, that a person known to him to be reliable had stated that he had in the immediate past seen peyote at defendant's address, and that the informant had delivered to the affiant peyote, obtained from the address and identified by a chemist, *held* to justify the issuance of a search warrant, and to render competent in evidence peyote and marijuana obtained by a search of defendant's premises. *Ibid.*

SHERIFFS.

§ 4. Liabilities to Individuals.

Where it is stipulated or proven that a sheriff failed to return execution of a judgment to the court issuing it within the 60 days required by statute, the party aggrieved is entitled to judgment *nisi* against the sheriff as a matter of course, G.S. 162-14, G.S. 162-15, and amercement of the sheriff should be entered at the next succeeding term after the judgment *nisi* unless the sheriff shows to the court sufficient cause to vacate the judgment, the amercement being a penalty imposed upon the sheriff as a punishment for his failure to discharge a duty imposed by statute. *Produce Co. v. Stanley*, 608.

Findings that plaintiff's attorney failed to give the sheriff information with reference to the whereabouts of the judgment debtor or his property, that the sheriff's territory was extensive and his staff small, and that the sheriff, within the time allowed, had made diligent effort to locate defendant but was unable to do so, *held* insufficient to show cause why the judgment *nisi* against the sheriff for failure to return execution within the statutory time should not be made final. *Ibid.*

The courts have no "dispensing power" to relieve a sheriff of the penalty imposed by G.S. 162-14. *Ibid.*

STATE.

§ 5b. Employees of the State Within Purview of Tort Claims Act.

A county board of education is not liable in tort unless it has waived its immunity as authorized under G.S. 115-53, and therefore, in proceedings under the Tort Claims Act on a claim for injuries sustained by a pupil when she was struck by a school bus operated by a driver who was an employee of the county board of education, the award of damages to plaintiff cannot be sustained in the absence of a finding that the driver's salary was paid from the State Nine Months School Fund, so as to bring the claim under the provisions of G.S. 143-300.1, and when there is no finding in regard to this matter, the cause must be remanded. *Brown v. Board of Education*, 740.

STATUTES.

§ 2. Constitutional Prohibition Against Enactment of Local Statutes Relating to Designated Subjects.

A school administrative unit is not a school district within the meaning of Art. II, § 29 of the North Carolina Constitution, and an Act providing for the merger of two or more school administrative units in a county upon the assent of the county commissioners, and the approval of the merger by a majority of the voters participating in the election, does not violate this section of the Constitution. *Hobbs v. Moore County*, 665.

§ 3. Form and Contents; Vague and Contradictory Statutes.

A statute which is so loosely and obscurely drawn as to be incapable of enforcement is void; but a statute is presumed to have meaning and will be upheld if its meaning is ascertainable with reasonable certainty by proper construction. *Hobbs v. Moore County*, 665.

§ 4. Construction in Regard to Constitutionality.

If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional or involving serious doubt as to constitutionality, the former interpretation will be adopted. *Randleman v. Hinshaw*, 136; *Hobbs v. Moore County*, 665.

A statute will not be declared unconstitutional unless it is clearly so. *Hobbs v. Moore County*, 635.

A statute may be constitutional in part and unconstitutional in part, and if the unconstitutional provisions are separate and the statute, with such sections omitted, constitutes a complete statute capable of being executed in accordance with the apparent legislative intent, the invalid part may be rejected and the valid part may stand. *Ibid.*

§ 5. General Rules of Construction.

A construction which will result in undesirable consequences will be rejected when the act is susceptible of another construction which will avoid such undesirable consequences, since it will be assumed that the Legislature intended the latter construction. *Little v. Stevens*, 328; *Hobbs v. Moore County*, 665.

In ascertaining the intent of the General Assembly, the terms of a statute will be construed in the light of related statutes then existing, which must be deemed to have been known to, and considered by, the General Assembly. *Hobbs v. Moore County*, 665.

§ 6. Construction of Provisos.

A proviso of a statute must be constructed to effect the legislative intent

STATUTES—*Continued.*

and will not be restricted by construction to the subject matter of the main statute when the legislative intent is apparent that it should be given general effect as an independent act. *Little v. Stevens*, 328.

§ 7. Construction of Amendments.

A clarifying amendment will not be held to preclude recovery for an element of compensation under the former statute when the former statute by reasonable construction provides for the recovery of such element of damage, and the amendment merely restates the legislative purpose so as to prevent the benefit from being denied by a narrow or strict construction. *Cates v. Construction Co.*, 560.

§ 11. Repeal and Revival.

Where there is a conflict between a general statute and a subsequently enacted local statute, the local act prevails in the area where it is intended to apply. *Hobbs v. Moore County*, 665.

TAXATION.

§ 12. Application of Proceeds of Bonds or Taxes.

Where a bond resolution and referendum relating to the consolidation of three high schools attended exclusively by white pupils is approved by the voters prior to the enactment of the Civil Rights Act of 1964, 42 U.S.C.A., § 2000c *et seq.*, the county board of education and board of county commissioners have authority to take funds allocated for the improvement of Negro high schools in the district and add them to the allocation for the consolidated high school so as to constitute the consolidated school one for all of the high school pupils of the district, and thus integrate the high school in conformity with Federal requirements, the reallocation being for a project within the general purpose for which the bonds were authorized. *Dilday v. Board of Education*, 438.

Where there is no evidence to support any finding of intent by the school authorities to use the proceeds of a bond issue for purposes not authorized by the bond order, the question is not presented for determination. *Hobbs v. Moore County*, 665.

§ 23. Incidence of Taxes and Construction of Taxing Statutes in General.

A taxpayer is entitled to minimize its taxes by any means which the law permits, and such tax avoidance is not tax evasion. *Oil Corp. v. Clayton*, 15.

§ 28b. Computation of Income Tax of Foreign Corporation.

The Commerce Clause of the Federal Constitution permits a state to tax only that part of the net income of a multistate corporation which is attributable to earnings within the state. *Oil Corp. v. Clayton*, 15.

Where a corporation doing business in this State and other states has controlling interest in subsidiaries carrying on like business wholly outside this State, each subsidiary operating as a separate entity with separate records, *held* dividends received by the parent corporation from such foreign subsidiaries are not subject to apportionment for income tax by this State. *Ibid.*

Dividend income from foreign subsidiaries received by a multistate corporation domesticated here may not be prorated for income taxation here even though the foreign subsidiaries are engaged in business similar to that of

TAXATION—*Continued.*

the domesticated parent unless such income from the subsidiaries is attributable to business activities within this jurisdiction or the activities of the corporations are so interrelated as to make it impossible to identify with reasonable certainty the various sources of the parent company's total earnings so that the parent corporation and its subsidiaries are engaged in a "unitary business." *Ibid.*

§ 32. Tax Liens on Realty and Persons Liable.

Recital in a deed that the land is subject to prior encumbrances, including taxes, in a specified amount, cannot fasten upon the land an encumbrance not already upon it nor remove it from existing encumbrances not included in the stipulated amount, and, whatever may be its effect as between grantor and grantee, it cannot enlarge or diminish the lien for taxes existing at the time of the conveyance. *Duplin County v. Jones*, 68.

Where land held by the entireties is listed for taxation by the husband in his name alone as owner such land is not subject to a lien for taxes assessed against personal property listed by the husband at the same time in his own name, some of which personalty is owned by him and some by his wife individually, and no lien for personal taxes attaches to the land, G.S. 105-301(a), G.S. 105-304(a), G.S. 105-340(a), and the county may not foreclose the tax lien for personal taxes against the grantee of the land. *Ibid.*

§ 36. Review of Assessment and Procedure to Recover Tax Paid.

A taxpayer asserting that an additional assessment of income tax is illegal because assessed upon income from its subsidiaries in no way derived from its operations within the State, may pay the additional assessment under protest and sue for its recovery under G.S. 105-267, and the contention that the sole remedy is under G.S. 105-134(6)(g) by appeal to the Tax Review Board before it may have the Superior Court determine the legality of the assessment, is untenable. *Oil Corp. v. Clayton*, 15.

TELEPHONE COMPANIES.

§ 5. Indecent Calls to a Female.

In a prosecution for making indecent telephone calls to a female, testimony that defendant frequently followed the car of the prosecuting witness and would cut in front of her so close as to constitute harassment is competent for the purpose of showing intent and attitude of defendant toward the prosecuting witness. *S. v. Godwin*, 216.

TORTS.

§ 4. Right to Sue or File Cross-Action for Contribution.

Where a passenger in an automobile states a cause of action against each driver involved in the collision in suit, neither defendant is entitled to file a cross-action against the other for contribution, but if plaintiff recovers judgment against only one, he may thereafter sue the other for contribution. *Streater v. Marks*, 32.

The right of one joint tort-feasor to compel contribution from another is purely statutory. *Ins. Co. v. Bynum*, 289.

G.S. 1-240 gives joint tort-feasors and joint judgment debtors the right to contribution, but this statutory right relates to contribution and does not include subrogation. *Ibid.*

A passenger in a car recovered judgment in a suit against the insurer of

TORTS—*Continued.*

the driver for injuries received in a collision. Insurer paid the judgment and sued the driver of the other car upon allegations that such other driver was guilty of concurring negligence causing the collision. *Held:* Plaintiff insurer's rights arise by contract of subrogation under its policy and not upon the right of contribution by a joint tort-feasor who has paid the judgment, and insurer may not maintain an action against the driver of the other car under G.S. 1-240. *Ibid.*

TRIAL.

§ 6. Stipulations.

Where the trial court states as a conclusion of fact a matter not supported by the facts stipulated and states such conclusions as a stipulation of the parties, the parties are not bound thereby. *Highway Comm. v. Phillips*, 369.

A stipulation of the parties amounts to a judicial admission, binding upon the parties. *Nationwide Homes v. Trust Co.*, 528.

§ 11. Argument and Conduct of Counsel.

While counsel is allowed wide latitude in the argument to the jury, the refusal to permit counsel to present a chart with computations to substantiate the argument as to the injured person's life expectancy and the *quantum* of damages, which chart amounted to an exhibit not introduced in evidence, is not error. *Callicutt v. Smith*, 252.

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

Where answer of witness is unresponsive, objection without motion to strike or limit the answer is ordinarily ineffective. *S. v. Battle*, 513.

§ 16. Withdrawal of Evidence.

Where the court immediately sustains a motion to strike an answer of a witness and cautions the jury not to consider it, it will be assumed that the jury heeded the caution and that any prejudicial effect was thus removed. *Apel v. Coach Co.*, 25.

§ 21. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, the evidence offered by plaintiff is to be considered as true and all reasonable inferences favorable to plaintiff are to be drawn therefrom. *Supply Co. v. Scott*, 145; *Bowling v. Oxford*, 552; *Ins. Co. v. Storage Co.*, 679.

On motion to nonsuit, the evidence favorable to plaintiff must be accepted as true and considered in the light most favorable to plaintiff, disregarding all evidence in conflict therewith, including any contradictions in plaintiff's evidence. *Waycaster v. Sparks*, 87; *King v. Bonardi*, 221; *Lewis v. Barnhill*, 457; *Cox v. Gallamore*, 537.

So much of defendant's evidence which is favorable to plaintiff and tends to clarify and explain plaintiff's evidence and is not inconsistent therewith is properly considered on motion to nonsuit. *Miller v. Lucas*, 1; *Lewis v. Barnhill*, 457.

Discrepancies in plaintiff's evidence do not warrant nonsuit. *King v. Bonardi*, 221; *Jones v. Johnson*, 656.

Sufficiency of the evidence to overrule nonsuit must be considered in the context of plaintiff's allegations. *Clemmons v. Ins. Co.*, 495.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

If diverse inferences can be drawn from the evidence, some favorable to plaintiff and others to defendant, the cause should be submitted to the jury. *Jones v. Johnson*, 656.

§ 23. Sufficiency of Evidence to Overrule Nonsuit — Prima Facie Case.

A *prima facie* showing takes the case to the jury but does not compel a recovery, it being for the jury to determine whether or not the crucial and necessary facts have been established. *Cook v. Lanier*, 166; *Ins. Co. v. Storage Co.*, 679.

§ 26. Nonsuit for Variance.

Nonsuit for variance may not be granted on the ground that one of plaintiff's witnesses testified to a material circumstance at variance with plaintiff's allegations when plaintiff's own testimony is consonant with the allegations, since conflicts in plaintiff's evidence must be resolved in his favor. *Lewis v. Barnhill*, 456.

Allegation that plaintiff was standing on a ladder placed so that his back was to the source of danger, with testimony that the ladder was facing in the opposite direction, cannot justify nonsuit for variance when plaintiff's testimony tends to show that in the performance of his work, requiring concentration upon a particular area, his back was to the source of the danger. Variance as to which direction the ladder was facing is not material under the evidence. *Ibid.*

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

It is the duty of the trial court to explain the law arising on the evidence as to all substantial features of the case adduced by the evidence, and the mere declaration of the law in general terms and the statement of the contentions of the parties is not sufficient. *Miller v. Lucas*, 1; *King v. Britt*, 594; *Saunders v. Warren*, 735.

A charge is not subject to the objection that the court failed to explain the law on a particular aspect of the case when the charge, considered contextually and in connection with an immediately prior instruction upon a related aspect, adequately states the evidence to the extent necessary to explain the application of the law upon the aspect in question. *Lewis v. Barnhill*, 457.

When the court, in its summarization, correctly recites the essential features of the evidence and the contentions of the parties, it is the duty of counsel to call to the court's attention any minor inaccuracies. *Ibid.*

Where defendant's own testimony is to the effect that he signed a note later filled in by the payee, who brought suit thereon, defendant may not object to reference in the charge to pertinent provisions of the Negotiable Instruments Law. *Vending Co. v. Turner*, 576.

Appellant may not object that the court failed to declare and explain the law arising on evidence which had been correctly withdrawn from the consideration of the jury. *Ibid.*

It is prejudicial error for the court to submit for the consideration of the jury facts material to the issue which are not supported by evidence. *Dove v. Cain*, 645.

§ 37. Instructions — Statement of Contentions.

In an action against plaintiff's insurer upon an uninsured motorist's endorsement, statement by the court of plaintiff's contention that plaintiff had exhausted her remedies against the tort-feasor without satisfaction and that

TRIAL—*Continued.*

if she did not recover of defendant insurer she would be "out in the cold," must be held for prejudicial error, such contention being impertinent to the issues. *Pardue v. Ins. Co.*, 82.

§ 42. Form and Sufficiency of Verdict.

A verdict should be liberally construed in the light of the pleadings, evidence and charge of the court, and when, so construed, it supports the judgment, the judgment will not be disturbed. *Nicholson v. Dean*, 375.

§ 46. Impeaching the Verdict.

After the verdict has been rendered and received by the court, and the jury has been discharged, jurors will not be allowed to attack or overthrow it, nor will evidence from them be received for this purpose. *Selph v. Selph*, 635.

§ 48. Power of Trial Court to Set Aside Verdict in General.

The trial court has the discretionary power to set aside the verdict on the issue of damages and order a new trial confined to this issue alone. *Branch v. Gurley*, 44.

The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion. *Selph v. Selph*, 635. But he may not set aside a sensible verdict on the ground of testimony of jurors impeaching their verdict, even though his order recites that he acted in his discretion. *Ibid.*

§ 52. Setting Aside Verdict for Inadequate or Excessive Award.

A motion to set aside the verdict for inadequacy of award is addressed to the sound discretion of the trial court, and the denial of the motion will not be disturbed in the absence of a showing of abuse. *Callicutt v. Smith*, 252.

§ 57. Trial by the Court — Findings and Judgment.

Where the parties waive jury trial and consent that the court find the facts, the parties transfer to the court the function of weighing the evidence, and the court's findings are conclusive if supported by competent evidence. *Young v. Ins. Co.*, 339.

In a trial by the court under agreement of the parties, mere entry of appeal without the filing of any exception to the judgment or to the refusal of the court to find facts as requested until the service of statement on appeal, does not meet the requirements of G.S. 1-186. *Nationwide Homes v. Trust Co.*, 528.

TRUSTS.

§ 10. Duration and Termination of Trusts.

Where a trust provides that it should continue until the issue of the life tenant shall severally obtain the age of 21 years, whereupon the property then constituting each of such issue's share should be distributed to him or her, each child is entitled to his share upon obtaining the age of 21 years. *Trust Co. v. Hunt*, 173.

§ 13. Creation of Resulting Trusts.

The evidence tended to show that land held by the entireties was parti-

tioned after the divorce of the parties, and that the wife promised orally and in writing to convey her part to a child of the marriage when he became 21 years of age. The evidence further tended to show that the son, in reliance on the promise, spent time and money improving the property. *Held:* Since the promise to convey was made after legal title had already vested in the wife, such promise cannot constitute the basis of a resulting trust, but at most constitutes a contract to convey. *Beasley v. Wilson*, 95.

Where the grantee in a deed promises, at or before acquiring legal title, to hold it for the benefit of a third person, or declares that he will hold the land in trust for such third person, a valid express trust is created, even though the deed contains no provision with reference to any right of such third person. *Electric Co. v. Construction Co.*, 714.

§ 14. Creation of Constructive Trusts.

If the acts, declarations and assurances of the grantee or the beneficiary in a deed of trust, at or before the transfer of a legal or beneficial title to him, are such as to lead a third party reasonably to believe that the contemplated conveyance will be drafted so as to confer upon him an interest superior to that of the grantee or the *cestui*, and if such third person parts with a thing of value or otherwise sustains a legal detriment, a court of equity will declare a constructive trust for the benefit of such third person. *Electric Co. v. Construction Co.*, 714.

A constructive trust rises by operation of law when the grantee in a deed or the *cestui* in a deed of trust obtains title or priority of lien in violation of some duty, express or implied, owed to the one who is equitably entitled, and such trust will be declared regardless of the intent of the parties or the absence of actual fraud. *Ibid.*

§ 19. Actions to Establish Resulting and Constructive Trusts.

A resulting or a constructive trust may be established by parol evidence which is clear, strong and convincing. *Electric Co. v. Construction Co.*, 714.

Where the grantor of lots agrees that the purchase money deed of trust should be junior to a deed of trust to a bank lending money for the construction of houses on the lots, with knowledge that the construction loan could not be obtained unless the lender was given a first lien, and the deed and the deeds of trust are delivered to the office of the registrar of deeds with direction that they be recorded so as to effectuate the agreement, but through inadvertence the purchase money deed of trust is recorded prior to the deed of trust for the construction loan, equity will declare a constructive trust so as to give priority to the deed of trust securing the construction loan. *Ibid.*

UTILITIES COMMISSION.

§ 1. Nature and Functions of Commission in General.

The Utilities Commission has no jurisdiction to entertain an application for a certificate of public convenience and necessity by an applicant which is not a public utility as defined by G.S. 62-3(23), and its issuance of such certificate would be a nullity and could not constitute a basis for a further order conferring upon the applicant a right which may be granted only to a public utility. *Utilities Comm. v. Tel. Co.*, 257.

The Utilities Commission has jurisdiction to entertain an application for a certificate of public convenience and necessity to operate a mobile radio service, notwithstanding the proposed service would be limited to a particular territory and the number of customers within such territory which its

facilities would be capable of serving is limited, since the applicant would hold himself out as willing to serve all within the territory who apply up to the capacity of his facilities, and therefore offers a service to the "public" for the transmission of messages and communications by a recognized means as a public utility within the purview of G.S. 62-3(23). *Ibid.*

The requirement that the Utilities Commission apply the rules of evidence applicable in civil actions insofar as practicable, G.S. 62-60, G.S. 62-65(a), does not preclude the Commission from making findings based upon facts arising between the conclusion of the hearing and the entry of order when such facts are shown by exhibits otherwise competent, provided the adverse party has adequate notice that such exhibits have been filed, and while the adverse party is entitled to demand thereupon that the hearing be reopened in order to permit it to controvert such additional evidence, its failure to do so constitutes a waiver of this right. *Ibid.*

The General Assembly has delegated to the Utilities Commission its authority to fix or approve rates of public service corporations, and the fixing of such rates is a function of the Utilities Commission and not the courts. *Utilities Comm. v. R. R.*, 317.

§ 6. Jurisdiction and Hearings in Regard to Rates.

The burden is upon the carriers asking for increase in rates to prove justification for the increase and that the proposed rate is just and reasonable. *Utilities Comm. v. R. R.*, 317.

Where petitions fail to show that the requested uniform increase in switching charges was just and reasonable, the Commission properly denies the requested increase. *Ibid.*

§ 7. Hearings and Orders in Respect to Franchises and Services.

A finding that a proposed service would be a convenience to the public is not sufficient on this aspect as a basis for the issuance of a certificate of public convenience and necessity without a further finding that there is a public need for the proposed service in the area. *Utilities Comm. v. Tel. Co.*, 257.

Application for duplicating service of mobile radio communication should be denied if utility already serving area is ready, willing and able to provide service. *Ibid.*

The burden is upon an applicant to show that there is a public convenience and need for its proposed service. *Ibid.*

Statutes authorizing the Utilities Commission to require a public utility to interconnect its facilities with those of a competitor must be strictly construed. *Ibid.*

§ 9. Appeal and Review.

The Supreme Court may affirm the judgment of the Superior Court reversing a decision of the Utilities Commission and remanding the cause to the Commission if the judgment of the Superior Court is correct on any one of the grounds enumerated by the statute and specifically set forth in the notice of appeal from the Commission, and it is not necessary that the Supreme Court concur in the ruling by the Superior Court upon every ground set forth in the order. *Utilities Comm. v. Tel. Co.*, 257.

G.S. 62-79(a) and G.S. 62-60 must be construed together, and where one member of the Utilities Commission writes the decision of the Commission refusing an application for a certificate of public convenience and necessity, and two other members of the Commission concur therein on the ground that the Commission had no jurisdiction to determine the application, the decision

UTILITIES COMMISSION—*Continued.*

is a decision and order of the Commission, and it is error for the Superior Court on appeal to sustain exception to the findings and conclusions on the ground that they were not those of a majority of the Commission. *Ibid.*

Findings by the Commission that an applicant for a certificate of public convenience and necessity is capable and able to provide the proposed service and that the proposed service would be of convenience to the public are conclusive when supported by competent, material and substantial evidence in view of the entire record. *Ibid.*

An order of the Utilities Commission is *prima facie* correct. *Utilities Comm. v. R. R.*, 317 .

The courts may review an order of the Utilities Commission only to the extent of determining whether the Commission acted reasonably and legally within the exercise of its delegated authority, whether the Commission's findings are supported by evidence, whether the proceedings before the Commission met the requirements of due process, and whether the Commission has acted arbitrarily, unreasonably, or its order was confiscatory. *Ibid.*

The findings of the Utilities Commission are conclusive when supported by competent evidence, notwithstanding the evidence might support a contrary finding. *Ibid.*

WAIVER.

§ 2. Nature and Elements of Waiver.

Waiver is an intentional surrender of an existing right or privilege on the part of a party having knowledge of such right or privilege. *Clemmons v. Ins. Co.*, 495.

WATERS AND WATER COURSES.

§ 4. Dams.

One who constructs and maintains a dam to impound waters into a reservoir is not an insurer against damage by the breaking of the dam and the escape of such water, but is liable for damages resulting from the breaking of the dam only if he is negligent in the original construction or subsequent maintenance of the dam. *Bowling v. Oxford*, 552.

Evidence of negligence in maintenance of dam held sufficient for jury in action for damages resulting from break in dam. *Ibid.*

WILLS.

§ 8. Proof of Will and Probate in Common Form.

Where a probated will in solemn form is set aside upon motion of the beneficiaries under a later paper writing, the probate in common form is reinstated and may be attacked by caveat which transfers the cause to the Superior Court for determination of the validity of the second paper writing, even though it had not been probated in common form. *In re Will of Burton*, 729.

§ 12. Nature and Jurisdiction of Caveat Proceedings.

A will probated in solemn form cannot be caveated a second time until and unless the judgment probating the will in solemn form is set aside in the original cause. *In re Will of Burton*, 729.

Where the probate of a will in solemn form is set aside by the court upon the presentation by movants of a paper writing subsequently executed

WILLS—*Continued.*

by testatrix, the effect of the decree setting aside the probate in solemn form is to reinstate the probate in common form, and the caveat filed by the beneficiaries under the second instrument transfers the cause to the Superior Court, and the Superior Court retains jurisdiction to determine the validity or invalidity of the second instrument, G.S. 31-32, notwithstanding the second instrument had not been first probated in common form. *Ibid.*

§ 18. Competency and Relevancy of Evidence in Caveat Proceedings.

The fact that questions asked a witness in regard to the mental capacity of testator refer to the time testator disposed of his property "by will" rather than referring to the time testator executed the paper writing probated in common form, while inexact, does not warrant a new trial when it appears that no prejudice resulted therefrom. *In re Will of Jones*, 48.

The striking of unresponsive answers of caveator to the effect that testator did not know anything about the making or signing of the paper writing caveated, made in response to interrogatories relating to the mental capacity of testator at the time of the execution of the paper writing, *held* not error. *Ibid.*

It is not necessary for counsel to compress into a single question every element of approved factual tests of testamentary capacity, or lack of it, nor is it required that a witness include all of these elements in response, and general answers of witnesses to the effect that in their opinion testator was of sound mind or knew what he was doing with his property are competent. *Ibid.*

A testamentary instrument executed by testator a short time prior to the execution of the paper writing caveated is properly admitted in evidence on the question of testamentary capacity, the two instruments being substantially identical except that in the second instrument testator substituted a bequest to a beneficiary in lieu of property which testator had sold in the interim. *Ibid.*

§ 20. Undue Influence.

Evidence in this case *held* insufficient to raise the issue of undue influence in the execution of the paper writing caveated, and the evidence failed to show that there was any fiduciary relationship between testatrix and the persons alleged to have exerted undue influence. *In re Will of Lynn*, 234.

§ 22. Instructions Generally in Caveat Proceedings.

A charge stating conjunctively the tests of testamentary capacity in placing the burden of proof on caveator will not be held for prejudicial error when the court immediately and consistently thereafter instructs the jury to answer the issue in the negative if caveator had established by the greater weight of the evidence the lack of any single element of mental capacity, it appearing that the jury could not have been misled. *In re Will of Jones*, 48.

§ 25. Validity and Attack of Judgment in Caveat Proceedings.

The beneficiaries under a later will may move to set aside the probate of a prior will in solemn form, and when they were not parties to the prior caveat and had no knowledge of the contents of the will under which they claim, their motion made upon the discovery of the contents of the second will is made with due diligence. *In re Will of Burton*, 729. When the probate in solemn form is set aside, the probate in common form still stands, and the cause is before the court for determination of the validity or invalidity of the second paper writing. *Ibid.*

WILLS—*Continued.*

§ 34. Determination of Whether Estate is Vested or Contingent.

The will in suit devised the property in question to one of testator's children for life and at her death to her children with limitation over, in the event she should die without children, to her brothers and sisters. The life tenant died without issue. *Held:* The limitation over to the life tenant's brothers and sisters was contingent and did not vest until the life tenant died without issue, and therefore only her brothers and sisters living at her death could answer the roll, and children of brothers who predeceased the life tenant have no interest in the land. *Lawson v. Lawson*, 643.

§ 39. Devises With Power of Disposition.

A power of appointment is general when there is no restriction imposed upon the donee as to the amounts or persons he may appoint; a power of appointment is special when there is any limitation on the donee as to those who may be appointed. *Trust Co. v. Hunt*, 173.

The intent to exercise the power of disposition may be either express or implied, or supplied by statute. *Ibid.*

G.S. 31-43 applies to the exercise of general powers of disposition and not to the exercise of special powers. *Ibid.*

General devise is not exercise of special power of appointment unless intent to do so appears, expressly or impliedly from the will. *Ibid.*

§ 57. General and Specific Devises and Bequests.

A devise or bequest of all of testator's real or personal property, or both, is general. *Trust Co. v. Hunt*, 173.

§ 70. Funds Out of Which Inheritance Taxes Should Be Paid.

26 U.S.C.A. 2207 is merely an enabling act to aid executors and administrators in protecting probate estates passing through their hands, and the statute does not violate the Tenth Amendment to the Federal Constitution, and liability of beneficiaries for federal estate taxes is to be determined by state law. *Bank v. Wells*, 276.

Where the will of a nonresident disposes of property situate in this State, the apportionment of the federal estate taxes among the beneficiaries is to be determined by the law of testator's domicile, and liability of the resident beneficiary for his proportionate share of the tax in accordance with its laws may be enforced under 26 U.S.C.A. § 2207, notwithstanding that a decree of the court of the domicile with respect to apportionment would not be binding on the resident beneficiary when the foreign court has obtained no jurisdiction over him. *Ibid.*

Where property situate in this State is devised by a nonresident testatrix in the execution of the general power of disposition, and such property is included in her net estate in computing the federal estate tax, and the will contains no express direction regarding the burden with respect to the payment of such tax, the devisee is chargeable with his pro rata share of the federal estate taxes. This result follows under the laws of the State of Nevada of which testatrix was a resident and in which the greater part of the estate is located, and would follow under our doctrine of equitable contribution for tax liability. *Ibid.*

Where a nonresident executor has paid the federal estate taxes on the entire net estate and has sent his annual account and report to a resident beneficiary, such resident beneficiary is liable for interest on his pro rata part of the federal estate taxes and interest from the dates the executor pays

the tax and interest, and not only from the date the executor made formal demand on the beneficiary for payment. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

1-21. Effect of 1955 amendment is to bar all actions by nonresidents when action is barred in state in which it arose, *Little v. Stevens*, 328.

1-53; 153-64. Filing of claim with city is not necessary action for tort committed by city in exercise of proprietary activity. *Bowling v. Oxford*, 552.

1-125; 1-212. Neither motion for extension of time in which to demur nor petition in admiralty seeking limitation of liability, precludes judgment by default. *Potts v. Howser*, 484.

1-134.1. Motion to dismiss for want of jurisdiction does not waive procedural objections. *Ward v. Mfg. Co.*, 131.

1-568 *et seq.* After entry of default judgment, defendant is not entitled to joinder of additional party for contribution nor to adverse examination of plaintiff. *Potts v. Howser*, 484.

1-163. Court may allow amendment introducing cause of action when it arises out of or is connected with the transaction on which the original pleading is based. *Furniture Co. v. Bentwood Co.*, 119.

1-168. Nonsuit will not be granted for immaterial variance. *Lewis v. Barnhill*, 457.

1-172. Where pleadings raise issue of fact, such issue must be tried by jury unless jury trial is waived or reference ordered. *In re Wallace*, 204.

1-174. Where issue of fact is joined before the clerk, clerk must transfer proceeding to Superior Court for trial. *In re Wallace*, 204.

1-180. Court must charge law arising on evidence as to all substantial features adduced by evidence. *Miller v. Lucas*, 1; *King v. Britt*, 594; *Saunders v. Warren*, 735.
Charge, construed contextually, held to state adequately the evidence to the extent necessary to explain the law. *S. v. Matthews*, 244; *Lewis v. Barnhill*, 457.

1-184. Where pleadings raise issue of fact, such issue must be tried by jury unless jury trial is waived or reference ordered. *In re Wallace*, 204.

1-186. On appeal from judgment entered in trial by the court under agreement of the parties, appellant must not only enter appeal but must file exception to the judgment or to the refusal of the court to find facts as requested. *Nationwide Homes v. Trust Co.*, 529.

1-209; 1-211. Judgment by default final may not be entered for loss sustained by employee in selling house and his expenses in moving back to his home town after wrongful discharge. *Freeman v. Food Systems*, 56.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

1-240. Insurance company may not enforce contribution on subrogated claim. *Ins. Co. v. Bynum*, 289.

1-278.1. If applicable to appeal from county court, it can apply only to motion to dismiss addressed to the county court. *Pendergraft v. Harris*, 396.

1-282. Where solicitor does not serve countercase or exceptions to defendant's statement of case on appeal, defendant's statement becomes case on appeal. *S. v. Rhinehart*, 470.

7-63; 7-121. Justice of peace has exclusive jurisdiction of cause *ex contractu* when sum demanded is not in excess of $200. *Jenkins v. Winecoff*, 639.

7-378(1). Failure to serve statement of case on appeal within the time allowed warrants dismissal, even though motion for dismissal is not made until after statement of case has been filed. *Pendergraft v. Harris*, 396.

8-4. Law of the state in which transitory cause of action arose controls substantive rights. *Thames v. Teer Co.*, 565.

8-51. Does not preclude testimony presenting independent facts. *Fesmire v. Bank*, 589.
Introduction by opposing party of evidence of transaction between plaintiff and decedent opens door to plaintiff's testimony in regard thereto. *Pearce v. Barham*, 707.

8-89; 8-90. Subpoena *duces tecum* and bill of discovery are separate remedies, and subpoena *duces tecum* will not lie for "fishing expedition." *Vaughan v. Broadfoot*, 691.

14-22; 14-26. Carnal knowledge of female child between 12 and 16 and assault with intent to commit rape are distinct offenses, and if prosecution charges carnal knowledge, the court may not accept plea of guilty to assault on female with intent to commit rape. *McClure v. State*, 212.

14-72. Larceny of sum less than $200 may not be punished as a felony. *S. v. Davis*, 126.

14-119; 14-120. Forgery of check in sum less than $200 is a felony. *S. v. Davis*, 126.

14-127. Where defendants act in concert in malicious destruction of property of value in excess of $10, sentence in excess of limits prescribed by statute may be imposed, notwithstanding that damage done by single defendant may not exceed $10. *S. v. Childress*, 85.

14-155; 14-373; 15-27. Tape recordings of telephone conversations, properly identified, are competent in evidence. *S. v. Godwin*, 216.

14-189; 14-189.1; 14-189.2; 160-200(6)(7). General Statutes do not preempt the field so as to preclude municipal ordinance proscribing display of obscene pictures or words. *S. v. Furio*, 353.

15-27. Officer issuing search warrant should not merely witness signature of officer signing affidavit but should examine him in regard thereto. *S. v. Upchurch*, 417.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

15-140.1. Record held to disclose that defendants had ample time to decide whether to waive indictment. *S. v. Hodge*, 238.

15-180. A condition of suspension that defendant abandon his appeal in another prosecution is unlawful limitation upon defendant's right to appeal. *S. v. Rhinehart*, 470.

15-200.2. Relates to execution of suspended sentence and has no application to entry of judgment upon motion of solicitor when prayer for judgment had been continued. *S. v. Thompson*, 653.

20-105; 7-64. Superior Court is without original jurisdiction of offense of unlawful taking of automobile in county named in the proviso to G.S. 7-64. *S. v. Covington*, 292.

20-123(b). Violation of, is negligence *per se*. *Miller v. Lucas*, 1.

20-139.1. Breathalyzer test held properly admitted in evidence. *S. v. Cummings*, 300.

20-140. Every motorist is required to exercise reasonable care to avoid injury. *Miller v. Lucas*, 1.

20-140(a); 20-140(b). Violation of statute is negligence *per se*. *Snell v. Rock Co.*, 613.

20-146; 20-148. Failure of motorist to stay on right side of road in passing vehicle traveling in opposite direction is negligence *per se*. *Anderson v. Webb*, 745.

20-154. Does not apply to stop necessary by exigencies of traffic. *Griffin v. Ward*, 296.

20-161(A). Stopping truck so as to block entire lane of travel takes issue of negligence to jury, even though truck was stopped while driver aided other motorists stuck in snow. *Saunders v. Warren*, 735.

20-278.21. Provisions in policy in regard to notice of claim or suit are valid and enforceable in regard to policy not required by Motor Vehicle Safety and Financial Responsibility Act. *Clemmons v. Insurance Co.*, 495.

28-173; 97-10.1; 97-40. Fact that fatally injured employee leaves no one entitled to file claim under Compensation Act does not authorize his personal representative to enter common law suit against fellow employee. *Horney v. Pool Co.*, 521.

29-14. Widow is entitled to net estate of intestate who is not survived by issue or by parent. *Johnson v. Blackwelder*, 209.

31-32. Where probate in solemn form is set aside upon presentation of later executed paper writing, Superior Court obtains jurisdiction to determine validity of second paper writing even though it had not been probated in common form. *In re Will of Burton*, 729.

31-43. Applies to exercise of general powers of disposition and not the exercise of special powers. *Trust Co. v. Hunt*, 173.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

39-17. Failure to list property in one county sufficient to pay plaintiff's claim tends to show intent to hinder creditors when conveyance by debtor is voluntary. *Supply Corp. v. Scott*, 145.

40-12; 40-16; 40-17. Where clerk appoints appraisers who file a report prior to time defendant was required to answer, final judgment without notice to defendant is void. *Randleman v. Hinshaw*, 136.

42-32. Where tenant holds over after termination of term, landlord may bring summary ejectment and recover damages for wrongful retention of the property and cost of the action. *Housing Authority v. Thorpe*, 431.

50-16. Amount of alimony to be paid wife rests in sound discretion of trial court but "reasonable subsistence" must be measured by the needs of the wife and by the ability of the husband to pay. *Sayland v. Sayland*, 378. Allowance of alimony may be modified for any considerable change in the health or financial condition of the parties. *Ibid.*

53-52. Where depositor has no notice that agent had opened account in its name, depositor is not charged with notice upon receipt of cancelled checks by agent, and notice by depositor immediately upon discovery of vouchers is given in apt time. *Nationwide Homes v. Trust Co.*, 528.

62-3(23); 62-110. Utilities Commission has jurisdiction to entertain an application for franchise to operate mobile radio service. *Utilities Comm. v. Telegraph Co.*, 257.

62-44. Statute cannot be construed to compel telephone company to interconnect its system with mobile radio serving identical area. *Utilities Comm. v. Telegraph Co.*, 257.

62-60; 62-65(a). Utilities Commission may make findings based upon facts arising after conclusion of hearing but before entry of order. *Utilities Comm. v. Telegraph Co.*, 257.

62-75. The burden is upon applicant to show there is a public convenience and need for its proposed service. *Utilities Comm. v. Telegraph Co.*, 257.
The burden is upon carriers to justify their request for increase in rates. *Utilities Comm. v. R. R.*, 317.

62-94(b)(c). Supreme Court may affirm judgment of Superior Court remanding cause to Utilities Commission if judgment of Superior Court is correct on any one of grounds. *Utiltties Comm. v. Telegraph Co.*, 257.

90-87(1); 90-87(9). Peyote and marijuana are narcotic drugs within purview of statute and possession thereof may not be justified on religious grounds. *S. v. Bullard*, 599.

97-2(2). Juror is not an employee of the county within the purview of Compensation Act. *Hicks v. Guilford County*, 364.

97-9. Neither independent contractor nor employee of independent contractor is immune to suit at common law for injuries negligently inflicted upon employee of the main contractor. *Lewis v. Barnhill*, 457.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

97-10.1; 97-10.2; 97-26; 97.9. Compensation Act does not deprive employee of right to maintain action for malpractice against physician selected by employer. *Bryant v. Dougherty*, 545.

97-10.2(e). In employee's action against third person tort-feasor, there is no prejudice to defendant in striking from the answer allegation that plaintiff had received compensation payments when the court reduces the verdict by any amount to which the employer is entitled to receive by way of subrogation. *Lewis v. Barnhill*, 458.

97-26. Industrial Commission has no jurisdiction of action by employee against physician for malpractice. *Bryant v. Dougherty*, 545.

97-31(22). Compensation for bodily disfigurement does not preclude compensation for loss of kidney. *Cates v. Construction Co.*, 560.

105-134(2). Whether foreign corporation and its subsidiaries are engaged in "unitary business" for purpose of assessing income for income taxes. *Oil Corp. v. Clayton*, 15.

105-272(7). Taxes cannot attach to land of person other than taxpayer liable. *Duplin County v. Jones*, 68.

105-276; 105-134(6)(g). Taxpayer has alternate remedy of paying tax under protest and suing for its recovery or of appealing to Tax Review Board. *Oil Corp. v. Clayton*, 15.

105-301(a); 105-304(a); 105-340(a); 105-414. Land held by entireties is not subject to lien for taxes assessed against husband alone. *Duplin County v. Jones*, 68.

106-381. Owner of dog is not required to keep him under restraint unless the animal is vicious or a menace to the public. *Sink v. Moore*, 344.

115-29; 115-35. County board of education determines what repair, remodeling and construction funds are required, and board of county commissioners determines what proposals presented to it by the board of education are reasonable and possible. *Dilday v. Board of Education*, 438.

115-53; 143-300.1. County board of education does not waive immunity in tort arising from operation of school bus unless salary of driver is paid from Nine Months School Fund. *Brown v. Board of Education*, 740.

115-76(1). Fact that board of county commissioners approves reallocation of school funds prior to public hearing is not fatal when the board again approves the reallocation subsequent to the public hearing. *Dilday v. Board of Education*, 438.

115-125. Statute giving permissive power to school authorities to acquire school site of 75 acres may not be questioned by persons whose rights are not affected thereby. *Hobbs v. Moore County*, 665.

130-160. It cannot be held as matter of law that ordinary privy was not constructed in conformity with regulations. *Walker v. Sprinkle*, 626.

136-20. Failure of Highway Commission to require installation of safety devices at grade crossing does not relieve railroad of common law duty to give adequate warning to motorists. *Cox v. Gallamore*, 537.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

136-67. Section of abandoned highway remains open as a neighborhood public road. *Highway Comm. v. Phillips*, 369.

148-45, prior to 1965 amendment. Makes it mandatory that sentence for escape begin at expiration of sentence defendant was then serving. *S. v. Doggett*, 648.

160-1. Municipality has only these powers granted by the Legislature. *S. v. Furio*, 353.

160-59. Tardy advertisement for sale of municipal lands may not relate back to prior timely advertisement where there is discrepancy in quantity of land to be sold and the terms and the date. *Bagwell v. Brevard*, 604.

160-178. Special permit is not a legal right but a concession which zoning board may grant. *Craver v. Board of Adjustment*, 40.

162-14; 162-15. Judgment creditor is entitled to amercement of sheriff for failure of sheriff to return execution within 60 days. *Produce Co. v. Stanley*, 608.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

I, § 17. Notice and an opportunity to be heard are fundamental requirements of due process. *Randleman v. Hinshaw*, 136.
There can be no adjudication of guilt of a felony unless defendant is put to trial upon indictment. *McClure v. State*, 212.

I, § 19. Where pleadings raise issue of fact, such issue must be tried by jury unless jury trial is waived or reference ordered. *In re Wallace*, 204.

II, § 29. School administrative unit is not school district within purview of this section. *Hobbs v. Moore County*, 665.

IV, § 13. Where pleadings raise issue of fact, such issue must be tried by jury unless jury trial is waived or reference ordered. *In re Wallace*, 204.

IV, § 27. Justice of peace has exclusive jurisdiction of cause *ex contractu* when sum demanded is not in excess of $200. *Jenkins v. Winecoff*, 639.

XIV, § 7. Statute providing that members of newly constituted board of education be appointed from members of existing boards of education and designated administrative units does not offend this provision, since it does not contemplate that officer, upon accepting new office should not relinquish the first. *Hobbs v. Moore County*, 665.

CONSTITUTION OF UNITED STATES, SECTIONS OF, CONSTRUED.

Fourteenth Amendment. Notice and an opportunity to be heard are fundamental requirements of due process. *Randleman v. Hinshaw*, 136.
There can be no adjudication of guilt of a felony unless defendant is put to trial upon indictment. *McClure v. State*, 212.