NORTH CAROLINA REPORTS

Vol. 268

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1966
FALL TERM, 1966

JOHN M. STRONG

REPORTER

RALEIGH:
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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:

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1 Murphey	"	5	"	13 " "	"	35	"
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2 " "	"	17	"	2 " "	"	47	"
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2 " "	"	22	"	7 " "	"	52	"
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2 " "	"	24	"	1 " Eq.	"	54	"
3 " "	"	25	"	2 " "	"	55	"
4 " "	"	26	"	3 " "	"	56	"
5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	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,
FALL TERM, 1966.

CHIEF JUSTICE:
R. HUNT PARKER.

ASSOCIATE JUSTICES:
WILLIAM H. BOBBITT, I. BEVERLY LAKE,
CARLISLE W. HIGGINS, J. WILL PLESS, JR.,
SUSIE SHARP, JOSEPH BRANCH.[1]

EMERGENCY JUSTICES:
WILLIAM B. RODMAN, JR., EMERY B. DENNY.

ATTORNEY GENERAL:
THOMAS WADE BRUTON.

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

ASSISTANT ATTORNEYS-GENERAL:
CHARLES D. BARHAM, JR.,[2] WILLIAM W. MELVIN,
JAMES F. BULLOCK, BERNARD A. HARRELL,
PARKS H. ICENHOUR GEORGE A. GOODWYN,
ANDREW H. McDANIEL, MILLARD R. RICH, JR.

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

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE
AND
ASSISTANT DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS:
BERT M. MONTAGUE.

SUPREME COURT REPORTER:
JOHN M. STRONG.

CLERK OF THE SUPREME COURT:
ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:
RAYMOND M. TAYLOR.

[1]Sworn in as Associate Justice 29 August 1966 to succeed Honorable Clifton L. Moore who died 12 July 1966.
[2]Resigned 14 October 1966. Succeeded 15 October 1966 by Henry T. Rosser.

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.
HARRY E. CANADAY[1]	Eleventh	Smithfield.
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.
T. D. BRYSON[2]	Thirtieth	Bryson City.

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	Colnjock.

[1]Succeeded William A. Johnson, 1 January 1967.

[2]Succeeded Guy L. Houk, 29 September 1966.

SOLICITORS.

EASTERN DIVISION

Name	*District*	*Address*
HERBERT SMALL	First	Elizabeth City.
ROY R. HOLDFORD, JR.	Second	Wilson.
W. H. S. BURGWYN, JR.	Third	Woodland.
ARCHIE TAYLOR	Fourth	Lillington.
LUTHER HAMILTON, JR.	Fifth	Morehead City.
WALTER T. BRITT	Sixth	Clinton.
WILLIAM G. RANSDELL, JR.	Seventh	Raleigh.
JAMES C. BOWMAN	Eighth	Southport.
DORAN J. BERRY[1]	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.
CHARLES T. KIVETT[2]	Twelfth	Greensboro.
M. G. BOYETTE	Thirteenth	Carthage.
HENRY M. WHITESIDES[3]	Fourteenth	Gastonia.
ELLIOTT M. SCHWARTZ[4]	Fourteenth-A	Charlotte.
ZEB. A. MORRIS	Fifteenth	Concord.
W. HAMPTON CHILDS, JR.	Sixteenth	Lincolnton.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
LEONARD LOWE	Eighteenth	Caroleen.
CLYDE M. ROBERTS[5]	Nineteenth	Marshall.
MARCELLUS BUCHANAN, III[6]	Twentieth	Sylva.
CHARLES M. NEAVES	Twenty-First	Elkin.

[1]Succeeded Lester G. Carter, Jr., 1 January 1967.
[2]Succeeded L. Herbin, Jr., 1 January 1967.
[3]Succeeded Max L. Childers, 1 January 1967.
[4]Succeeded Kenneth R. Downs, 1 January 1967.
[5]Succeeded Robert S. Swain, 1 January 1967.
[6]Succeeded Glenn W. Brown, 1 January 1967.

SUPERIOR COURTS, FALL SESSIONS, 1966.

FIRST DIVISION

First District—Judge Bundy.

Camden—Sept. 26; Dec. 12†.
Chowan—Sept. 12; Nov. 28.
Currituck—Sept. 5; Dec. 5†.
Dare—Oct. 24.
Gates—Oct. 17.
Pasquotank—Sept. 19†; Oct. 10†; Nov. 7†; Nov. 14*.
Perquimans—Oct. 31.

Second District—Judge Hubbard.

Beaufort—Sept. 5†; Sept. 19*; Oct. 17† (2); Nov. 7*; Dec. 5†.
Hyde—Oct. 10; Oct. 31.
Martin—Aug. 8†; Sept. 26*; Nov. 28†; Dec. 12.
Tyrrell—Aug. 22†; Oct. 3.
Washington—Sept. 12; Nov. 14†.

Third District—Judge Mintz.

Carteret—Aug. 22†(a)(2); Oct. 17†; Nov. 7; Nov. 28†(a).
Craven—Sept. 5(2); Oct. 3†(2); Oct. 31† (a); Nov. 14; Nov. 28†(2).
Pamlico—Sept. 19(a); Oct. 24.
Pitt—Aug. 22(2); Sept. 19†(2); Oct. 10 (a); Oct. 24†(a); Oct. 31(a); Nov. 21; Dec. 12.

Fourth District—Judge Parker.

Duplin—Aug. 29; Oct. 3†(a); Oct. 10; Nov. 7*; Dec. 5†(2).
Jones—Sept. 26(a); Oct. 31†; Nov. 28.
Onslow—July 18(a); Sept. 26(2); Oct. 17 †(a)(2); Nov. 14†(2); Dec. 5(a).
Sampson—Aug. 8(2); Sept. 5†(2); Oct. 17*; Oct. 24†; Nov. 28(a); Dec. 12†(a).

Fifth District—Judge Fountain.

New Hanover—Aug. 8*(2); Aug. 22†(2); Sept. 12†(2); Oct. 3*(2)(a); Oct. 17†(2); Oct. 31*(2); Nov. 14†(3); Dec. 5*(2).
Pender—Sept. 5†; Sept. 26; Oct. 3†; Nov. 14(a).

Sixth District—Judge Cowper.

Bertie—Sept. 19; Nov. 21(2).
Halifax—Aug. 15(2); Oct. 3†(2); Oct. 24*; Dec. 12.
Hertford—July 25(a); Oct. 17; Dec. 5†.
Northampton—Aug. 8; Oct. 31(2).

Seventh District—Judge Cohoon.

Edgecombe—Aug. 15*; Sept. 5†(a); Oct. 3*(a); Oct. 31†(2); Nov. 14*.
Nash—Aug. 22*; Sept. 12†(2); Oct. 10* (a); Oct. 17†(2); Nov. 21*(a)(2); Dec. 12†.
Wilson—July 18*; Aug. 29*(2); Sept. 26† (2); Oct. 17*(a)(2); Nov. 21†(2); Dec. 5*.

Eighth District—Judge Peel.

Greene—Oct. 10†; Oct. 17*(a); Dec. 5.
Lenoir—Aug. 8†(a)(2); Aug. 22*; Sept. 5(a); Sept. 12†(2); Oct. 17†; Oct. 24*(2); Nov. 14†(a); Nov. 28†; Dec. 12.
(a)(2).
Wayne—Aug. 8*(2); Aug. 29†(2); Sept. 26†(2); Oct. 24†(a); Nov. 7*(2); Dec. 5† (a)(2).

SECOND DIVISION

Ninth District—Judge Johnson.

Franklin—Sept. 19†(2); Oct. 17*; Nov. 28†.
Granville—July 18; Oct. 10†(a); Nov. 14 (2).
Person—Sept. 12; Oct. 3†(a)(2); Oct. 31; Dec. 5†.
Vance—Oct. 3*; Nov. 7†; Dec. 12†.
Warren—Sept. 5*; Oct. 24†.

Tenth District—Wake.
Schedule "A"—Judge Braswell.

July 11*(2); July 25(a); Aug. 8†(a)(2); Aug. *22(a)(2); Sept. 5†(2); Sept. 19†(2); Oct. 3*(2); Oct. 17†(a); Oct. 24*(2); Nov. 7*(2); Nov. 21†(2); Dec. 5†(2).

Schedule "B"—Judge Mallard.

July 11†(2); Aug. 1*(a)(2); Aug. 15(a) (2); Aug. 22†(2); Sept. 5*(2); Sept. 12(2) (a); Sept. 19*(2); Oct. 3†(2); Oct. 10(2) (a); Oct. 24†(2); Nov. 7†(2); Nov. 14(2) (a); Nov. 21*(2); Dec. 5*(2); Dec. 12(a).

Eleventh District—Judge Hall.

Harnett—Aug. 15†(2); Aug. 29*; Sept. 12†(a)(2); Oct. 10†(2); Oct. 31†(a); Nov. 14*(a)(2); Dec. 12†(a).
Johnston—Aug. 22(a); Aug. 29†(a); Sept. 26†(2); Oct. 17†(a); Oct. 24; Nov. 7† (2); Dec. 5(2).
Lee—Aug. 1*; Aug. 8†; Sept. 12; Sept. 19†; Oct. 10†(a); Oct. 31*; Nov. 28†.

Twelfth District—Judge Bailey.

Cumberland—Aug. 15*; Aug. 29*(2); Aug. 29†(a)(2); Sept. 12†(2); Sept. 26*(2); Sept. 26†(a)(2); Oct. 10†; Oct. 17*(a)(2); Oct. 24†(2); Nov. 7*(2); Nov. 7†(a)(2); Nov. 28†(2); Nov. 28*(a)(2); Dec. 12*.
Hoke—Aug. 22; Nov. 21.

Thirteenth District—Judge Carr.

Bladen—Aug. 22; Oct. 17*(a); Nov. 14†.
Brunswick—Aug. 29†; Sept. 19; Oct. 24†; Dec. 5†(2).
Columbus—Sept. 5*(2); Sept. 26†(2); Oct. 10*; Oct. 31†(2); Nov. 21*(2); Dec. 12 †(a).

Fourteenth District—Judge McKinnon.

Durham—July 11*(2); July 18†(a); July 25*; Aug. 29*(2); Aug. 29†(a)(2); Sept. 12†(2); Sept. 12*(a)(2); Sept. 26†(a)(2); Oct. 3*(2); Oct. 17†(2); Oct. 31*(2); Nov. 14*(2); Dec. 5†(a)(2).

Fifteenth District—Judge Hobgood.

Alamance—July 18†(a); Aug. 1†; Aug. 15*(2); Sept. 12†(2); Oct. 17*(2); Nov. 14 †(2); Dec. 5*.
Chatham—Aug. 29†; Sept. 5; Oct. 31† (2); Nov. 28.
Orange—Aug. 8*; Sept. 26†(2); Nov. 14† (a)(2); Dec. 12.

Sixteenth District—Judge Bickett.

Robeson—July 11(a)(2); Aug. 15*; Aug. 29†; Sept. 5*(2); Sept. 19†(2); Oct. 10† (2); Oct. 24*(2); Nov. 14†(2); Nov. 28*.
Scotland—July 25†; Aug. 22; Oct. 3; Nov. 7†; Dec. 5.

THIRD DIVISION

Seventeenth District—Judge Crissman.
Caswell—Oct. 31(a); Dec. 5†.
Rockingham—July 25†(a)(2); Aug. 22* (2); Sept. 19†(2); Oct. 17(a)(2); Oct. 31†; Nov. 21†(2); Dec. 12*.
Stokes—Oct. 3; Oct. 10(a).
Surry—Aug. 8*(2); Sept. 5†(2); Oct. 10 †(2); Nov. 7*(2); Dec. 5(a).

Eighteenth District.
Schedule "A"—Judge Armstrong.
Greensboro Division—July 11*(2); Aug. 29*(2); Sept. 12†(3); Oct. 3*(2); Oct. 17†; Nov. 21*(2); Dec. 12.
High Point Division—Aug. 22†; Oct. 24†; Nov. 7†(2); Dec. 5†.
Schedule "B"—Judge McConnell.
Greensboro Division—July 11*; Aug. 29* (2); Sept. 12*(2); Oct. 3†(2); Oct. 17*(2); Nov. 14; Nov. 21†(2); Dec. 5*(2).
High Point Division—July 18*; Sept. 26*; Oct. 31*.
Schedule "C"—Judge to be Assigned.
Greensboro Division—July 11†(2); Aug. 1; Aug. 15*; Aug. 29†(2); Sept. 26†(2); Oct. 10; Oct. 31*(2); Oct. 31†(2); Nov. 28*.
High Point Division—Sept. 12†(2); Dec. 12*.

Nineteenth District—Judge Johnston.
Cabarrus—Aug. 22*; Aug. 29†; Sept. 12† (a); Oct. 10(2); Nov. 7†(2)(a); Dec. 12†.
Montgomery—July 11; Aug. 15†; Oct. 3.
Randolph—July 25†(a)(3); Sept. 5*; Sept. 19†(a)(3); Oct. 24†(2); Nov. 7†(2); Nov. 28*; Dec. 5†(a)(2).
Rowan—July 18†(a); Sept. 12(2); Sept. 26†; Oct. 24†(a)(2); Nov. 28†(a); Dec. 5*.

Twentieth District—Judge McLaughlin.
Anson—Sept. 19*; Sept. 26†; Nov. 21†.
Moore—Aug. 15*(a); Sept. 5†(2); Nov. 14.
Richmond—July 18†; July 25*; Aug. 29 †(a); Oct. 3†; Oct. 10*; Nov. 7†(a); Dec. 5†(2).
Stanly—July 11; Oct. 17†; Nov. 28.
Union—Aug. 22†(a); Aug. 29; Oct. 31(2).

Twenty-First District—Forsyth.
Schedule "A"—Judge Gambill.
July 11†(2); July 25(a)(2); Aug. 22; Aug. 29†; Sept. 5(3); Sept. 26†(2); Oct. 17; Oct. 24†(2); Nov. 7†(2); Nov. 21(2); Dec. 5(2).
Schedule "B"—Judge Gwyn.
July 25†(a)(2); Aug. 8(2); Aug. 22†(2); Sept. 5†(3); Sept. 19(a); Sept. 26†(2); Oct. 10†(2); Oct. 10(a)(2); Oct. 31(2); Nov. 14 †(3); Nov. 14(a); Dec. 5†(2); Dec. 12(a).

Twenty-Second District—Judge Shaw.
Alexander—Sept. 26.
Davidson—July 18†(a)(2); Aug. 22; Sept. 12†(2); Sept. 26(a); Oct. 10†; Oct. 24†(a); Nov. 7†; Nov. 14(2); Dec. 5†(a); Dec. 12†.
Davie—Aug. 1; Oct. 3†; Nov. 7(a).
Iredell—Aug. 29; Sept. 5†; Oct. 17†(a); Oct. 24(2); Nov. 28†(2).

Twenty-Third District—Judge Lupton
Alleghany—Aug. 29; Oct. 3.
Ashe—July 18; Sept. 12†; Oct. 24.
Wilkes—Aug. 15(2); Sept. 19†(2); Oct. 10; Oct. 31†(2); Dec. 5.
Yadkin—Sept. 5*; Nov. 14†(2); Nov. 28.

FOURTH DIVISION

Twenty-Fourth District—Judge Campbell.
Avery—July 11(a)(2); Oct. 17(2).
Madison—Aug. 29†(2); Oct. 3*; Oct. 31†; Dec. 5*.
Mitchell—Sept. 12(2).
Watauga—Sept. 26; Nov. 14†.
Yancey—Aug. 8; Aug. 15†(2); Nov. 28.

Twenty-Fifth District—Judge Clarkson.
Burke—Aug. 15; Oct. 3; Oct. 17; Nov. 21(2).
Caldwell—Aug. 22(2); Sept. 19†(2); Oct. 24†(2); Dec. 5(2).
Catawba—July 25(a)(2); Aug. 8; Sept. 5†(2); Sept. 19(a); Nov. 7(2).

Twenty-Sixth District—Mecklenburg.
Schedule"A"—Judge Froneberger.
Aug. 8*(2); Aug. 22†(2); Sept. 5*(2); Sept. 19†(2); Oct. 3*(2); Oct. 24*(2); Nov. 7*(2); Nov. 21†(2); Dec. 5*(2).
Schedule "B"—Judge McLain.
July 11*(2); Aug. 8†(2); Aug. 22†(2); Sept. 5†(2); Sept. 19†(2); Oct. 3†(2); Oct. 17†(2); Oct. 31†(2); Nov. 14†; Nov. 21† (2); Dec. 5†(2).
Schedule "C"—Judge to be Assigned.
July 11*(2); Aug. 8*(2); Aug. 22†(2); Sept. 5*(2); Oct. 3*(2); Oct. 17† Oct. 24* (2); Nov. 7*(2); Nov. 21†(2); Dec. 5*(2).
Schedule "D"—Judge to be Assigned.
Aug. 8†(2); Sept. 5†(3); Oct. 3†(2); Oct. 17†(2); Oct. 31†(2); Nov. 14†(3); Dec. 5 †(2).

Twenty-Seventh District.
Schedule "A"—Judge Jackson.
Cleveland—Oct. 24*(2); Nov. 28†(2).
Gaston—July 11*; July 18†(2); Aug. 1*; Sept. 5†(3); Sept. 26†(2); Oct. 10*; Nov. 14†(2); Dec. 12†.
Schedule "B"—Judge Houk.
Cleveland—July 11(2); Sept. 26†(2).
Gaston—Aug. 1†; Aug. 29*(2); Oct. 10†; Oct. 17†(2); Oct. 31†(2); Nov. 21*(2); Dec. 5*(2).
Lincoln—Sept. 12(2).

Twenty-Eighth District—Buncombe.
Judge Anglin.
Aug. 8†(2); Aug. 22*(2); Sept. 5†(2); Sept. 19†(2); Oct. 3†(3); Oct. 24*(2); Nov. 14†#; Nov. 21*; Nov. 28†; Dec. 5†(2).
Judge to be Assigned.
July 11*(2); July 25†(2); Aug. 8†#; Aug. 22†(2); Sept. 5*(2); Sept. 26*; Oct. 3†#; Oct. 24†(2); Nov. 7†(3); Dec. 12*.

Twenty-Ninth District—Judge Falls.
Henderson—Aug. 15†(2); Oct. 17.
McDowell—Sept. 5(2); Oct. 3†(2).
Polk—Aug. 29.
Rutherford—Aug. 15*†; Sept. 19†*(2); Nov. 7*†(2).
Transylvania—Oct. 24(2).

Thirtieth District—Judge Farthing.
Cherokee—Aug. 1; Nov. 7(2).
Clay—Oct. 3.
Graham—Sept. 12.
Haywood—July 11(2); Sept. 19†(2); Nov. 21(2).
Jackson—Oct. 10(2).
Macon—Aug. 8; Dec. 5(2).
Swain—July 25; Oct. 24.

Numerals following the 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. ELSIE LEE HARRIS, RALEIGH, N. C.
MRS. BONNIE BUNN PERDUE, RALEIGH, N. C.
MISS NORMA GREY BLACKMON, RALEIGH, N. C.
MRS. IDA M. GODWIN, 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.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1966

B-W ACCEPTANCE CORPORATION, PLAINTIFF, v. JOHN K. SPENCER, JR., AND WIFE, ANN LANIER SPENCER, DEFENDANTS AND NORGE SALES CORPORATION, FORREST SAM ROGERS, SOUTHEAST MACHINERY COMPANY AND BORG-WARNER CORPORATION, ADDITIONAL DEFENDANTS.

(Filed 26 August, 1966.)

1. Actions § 10—

An action is commenced as to each defendant when summons is issued against him. G.S. 1-14.

2. Limitation of Actions § 4—

An action, or a cross-action against an additional defendant, on the ground of fraud is barred in three years after the right of action accrues, and the right of action accrues and the statute begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. G.S. 1-52(9).

3. Sales § 14—

A right of action for damages for breach of warranty is barred three years after the right of action accrues. G.S. 1-15, G.S. 1-46, G.S. 1-52(1).

4. Limitation of Action § 4—

Generally, a right of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at the time under no disability, and once the statute of limitations begins to run, it continues until stopped by appropriate judicial process.

5. Limitation of Actions § 17—

Where the applicable statute of limitations is pleaded, the burden is upon claimants to show that their action, or cross-action, was instituted within the time prescribed by the applicable statute.

6. Corporations § 1—

Ordinarily, a corporation and its subsidiaries maintain their separate legal entities notwithstanding that the parent corporation owns all of the capital stock of the subsidiaries and the corporations have identical membership on their boards of directors; in order to establish responsibility on the part of the parent corporation for the acts of its subsidiaries there must be additional circumstances showing fraud, actual or constructive, or agency so that the subsidiary is merely an instrumentality of the parent corporation.

7. Same—

Allegations that subsidiary corporations were merely agents and *alter egoes* of the parent corporation, without allegation of facts tending to show that the parent corporation had complete dominion of the finances, policies, and practices in respect to the transaction in question, constitute mere conclusions and cannot justify disregard of the separate corporate identities.

8. Limitation of Actions § 12—

Plaintiff corporation, the endorsee of a note, instituted action against defendants on the note executed by defendants for the purchase price of machinery. Defendants filed a counterclaim against plaintiff and a cross-action against the manufacturer and the parent corporation of the manufacturer, who were made additional parties, alleging fraud and breach of warranty in the sale of the machinery. *Held:* In the absence of allegation sufficient to warrant the disregard of the separate corporate entities, defendants cannot maintain that the institution of the action by plaintiff corporation tolled the running of the statute of limitations on the cross-action against the manufacturer and its parent corporation.

9. Appearance § 1—

The appearance of a party under order of court for the purpose of a pretrial examination does not amount to a waiver of service of summons, since the appearance is not voluntary. G.S. 1-103.

10. Limitation of Actions § 18— When facts alleged by claimant disclose that right of action was barred by statute duly pleaded, dismissal is proper.

Where the allegations of the cross-actions of the original defendants against the additional defendants for fraud and breach of warranty disclose on the face of the pleading that the acts constituting the basis of the cross-actions were known to the original defendants more than three years prior to the filing of the cross-actions and more than three years prior to the date when one of the additional defendants, without being served with proper process, filed a reply, and more than three years prior to the service of irregular process upon the other additional defendant, and the additional defendants plead the three-year statute of limitations as a bar to the cross-actions, judgment dismissing the cross-actions as to the additional defendants is without error.

11. Pleadings § 30—

Judgment on the pleadings is properly entered on motion when the facts shown and admitted by the pleadings entitle movants to judgment as a matter of law, there being no controverted issues of facts sufficient to constitute a cause of action or a defense in favor of the pleader.

12. Bills and Notes § 17—

Where, in an action on a note by the holder, the answer admits the execution of the note by defendants and the balance due thereon for the purchase price of machinery, and alleges as a counterclaim and cross-action against the holder and the manufacturer and the parent corporation of the manufacturer, joined as additional parties, fraud and breach of warranty in the sale of the machinery, but fails to allege that plaintiff holder knew anything about the alleged false warranties and false representations or participated in them in any way, the counterclaim is fatally deficient in substance, and the granting of judgment on the pleadings in favor of the holder is correct.

13. Estoppel § 6—

The facts constituting the basis of an equitable estoppel must be pleaded.

14. Limitation of Actions § 15—

A defendant asserting that plaintiff and the additional parties defendant were estopped to plead the statute of limitations against his counterclaim and cross-action must allege facts constituting a basis for the estoppel, and additional facts set forth in the brief as ground for the estoppel cannot be considered.

15. Pleadings § 30—

On motion for judgment on the pleadings, the pleadings alone will be considered, and additional facts set forth in the brief will not be considered in passing upon the correctness of the granting of judgment on the pleadings.

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

APPEAL by original defendants from *Houk, J.*, 15 February 1965, Schedule "A" Session of MECKLENBURG. Docketed and argued as Case No. 285, Fall Term, 1965, and docketed as Case No. 284, Spring Term 1966.

Civil action, commenced by the issuance of summons on 27 November 1963 by the clerk of the Superior Court of Mecklenburg County, and service on the original defendants on 4 December 1963, to recover from the original defendants the sum of $12,618.08, the balance due and unpaid on a negotiable promissory note dated 27 January 1961 in the sum of $21,558.60, executed and delivered by the original defendants to Southeast Machinery Company and payable to it or its order, as the purchase price of 8 New KM-G-1 Norge Dry Cleaners and 20 Norge Washers. The note was secured by a conditional sales agreement covering the dry cleaners and

washers and delivered by the original defendants to Southeast Machinery Company for the purpose of securing the payment of their note. Southeast Machinery Company on or about 3 March 1961 for valuable consideration assigned by endorsement the note and conditional sales agreement to plaintiff. Plaintiff alleges in substance in its complaint that it purchased the note before maturity for value and without notice of any infirmity therein, and further that the original defendants have made payments on said note and that there is due and payable on said note the sum of $12,618.08 with interest.

Original defendants were granted an extension of time until 23 January 1964 within which to file answer. On 22 January 1964 the original male defendant petitioned the court for an order directing the president, vice-president, and treasurer of plaintiff to appear before a commissioner to be appointed by the court to be examined by defendants for the purpose of obtaining necessary information to file their answer, and that they be allowed leave to inspect the minute books of plaintiff and any paper writings containing any written contractual arrangements between plaintiff and Forrest Sam Rogers. On 30 January 1964 the original male defendant petitioned the court that Norge Sales Corporation, hereafter called Norge, Southeast Machinery Company, hereafter called Southeast, and Forrest Sam Rogers, hereafter called Rogers, be made additional defendants, and that the president, vice-president, and treasurer of both corporations be directed to appear before a commissioner to be appointed by the court to be examined by defendants for the purpose of obtaining necessary information to file their answer and "cross-complaints against Norge, Southeast, and Rogers," and that they be allowed leave to inspect the minute books, stock books and financial records of these two corporations to determine the capitalization of Norge and Southeast, and to inspect any paper writings containing any contractual arrangements between Norge, Southeast, and plaintiff. On 5 March 1964 the clerk of the Superior Court of Mecklenburg County entered an order making Norge, Southeast, and Rogers additional defendants in this action, and granting in substance the requests contained in the two above petitions filed by the original male defendant.

On 7 October 1964, Pless, J., presiding, entered an order in substance as follows: If defendants have not examined the parties they are entitled to examine by the order of the clerk of the Superior Court by 15 November 1964, then the defendants shall be required within 20 days after 15 November 1964 to file answer, and if the defendants do not answer within that time, plaintiff shall be entitled to a judgment by default final.

On 2 November 1964, Huskins, J., presiding, by consent of the parties granted the original defendants until 22 November 1964 to conclude the examinations heretofore ordered in this case.

On 25 January 1965 plaintiff moved for a judgment by default final on the ground that the original defendants had filed no answer.

On 1 February 1965 the original defendants filed an answer and counterclaim against Borg-Warner Corporation, hereafter called Borg, Norge, Southeast, Rogers, and plaintiff for the recovery of damages from them, jointly and severally, in the sum of $50,000. In their answer they admit executing a note in the amount of $21,558.60 payable to Southeast, that Southeast endorsed said note to plaintiff, that they have made payments on this note, but they deny that they owe on this note $12,618.08. In their answer they deny all other crucial allegations of the complaint. In their counterclaim they allege in brief summary: Norge manufactured the dry cleaners and washers sold by Rogers to them. Rogers and Southeast held themselves out to them as agents and representatives of Norge, and were permitted by Norge to do so. Southeast had a capitalization of $1,000, had sales of over one million dollars annually, and was practically owned by Rogers, who was its president. Rogers and Southeast by means of advertisements of Norge and by false warranties and false representations — which are alleged in great detail in the counterclaim — induced them to purchase the dry cleaners and washers, and to execute the note and conditional sales contract plaintiff sues on in this action. The dry cleaners were installed by Southeast under the direct supervision of factory representatives of Norge. During the first ten months following the delivery and installation of the dry cleaners, and especially during the first three months all 8 dry cleaners failed to function properly and required extensive repairs, and numerous patent and latent defects in them were discovered, and replacement parts had to be purchased by defendants. Their spare parts account with Southeast to purchase replacements for the defective parts between February 1961 and December 1961 amounted to $2,487.24. Seventeen of the motors of the 20 washing machines burned out within the warranty period and Norge refused to make them good. Defendants were required to replace them at a cost of $24 each plus labor in order to operate them. The discharge pumps did not work satisfactorily and the porcelain interiors of the washing machines were unsatisfactory and had to be replaced at great trouble and expense to defendants. On many occasions, on account of the faulty design and construction of the washing machines, defendants were burdened with large puddles of water on the floor. The washing machines were defective and did not comply with the warranties and representations.

The defendants notified Norge and Southeast that the machines were defective and did not comply with their warranties and representations, and that defendants' losses and expenses in attempting to use the machines were prohibitive, and that they were losing most of their business and were in danger of losing all of their business, because of their inability to keep the machines operating properly. That Rogers guaranteed defendants that they would gross at least $1,400 per month in dry cleaning sales alone at their laundry, and gave his promise in writing that if defendants did not gross as much as $1,400 per month, he would make up the difference. Defendants allege further that plaintiff is a wholly owned subsidiary corporation of Borg; that Norge is also a wholly owned subsidiary of Borg; that plaintiff is an *alter ego* of Borg, and that Norge is an *alter ego* of Borg; that Borg has dominion and control over Norge and plaintiff; that the three corporations are directly controlled by identical boards of directors, and that the individuals who served on the board of directors of Borg also served as officers of Norge and plaintiff; that the various corporate structures of these three corporations were formed for the purpose of insulating Borg from liability of its subsidiaries, and for the purpose of insulating one subsidiary from the liabilities of another. They move that Borg be made a party defendant and pray (1) that plaintiff have and recover nothing of defendants, and if plaintiff is entitled to any amount that such amount be set off against the claims of the original defendants; and (2) that they recover from Borg, and its subsidiaries Norge, plaintiff, Southeast, and Rogers, jointly and severally, the sum of $50,000 as damages.

On 1 February 1965 the clerk of the Superior Court of Mecklenburg County made Borg an additional party defendant in this action.

Norge filed a reply to the further answer and counterclaim of the original defendants. In its reply it admits that it and plaintiff are wholly owned subsidiaries of Borg, and denies all the other crucial allegations of the further answer and counterclaim of the original defendants. In its reply to the original defendants' counterclaim it alleges that more than three years have elapsed since defendants' cause of action on its counterclaim has accrued, and it pleads this lapse of time in bar of any recovery by the original defendants on their counterclaim against it. Borg and plaintiff filed separate replies to defendants' answer and counterclaim against them in the identical language of the reply of Norge. The same attorney represents plaintiff, Norge, and Borg.

Plaintiff, Norge, and Borg each made a separate motion, identical in terms, that the original defendants' counterclaim against

each one of them for damages be dismissed for the reason that it is shown affirmatively on the face of original defendants' counterclaim against them for damages that more than three years have elapsed since their cause of action alleged in their counterclaim against them has accrued, and that recovery on their counterclaim against them is now barred by the three-year statute of limitations. Southeast and Rogers filed no reply. There is nothing in the record to show service of process on them. Defendants' brief states that Rogers is insolvent. The court entered a judgment that plaintiff's motion for judgment on the pleadings be allowed, for that the original defendants' counterclaim against it for damages is barred by the three-year statute of limitations. The court entered a separate judgment in behalf of Borg identical in language to the judgment entered in behalf of plaintiff. The court entered a separate judgment in behalf of Norge identical in language to the judgment entered in behalf of plaintiff. From these three separate judgments, the original defendants appeal.

H. Glenn Pettyjohn for original defendants Spencer, appellants.
Louis A. Bledsoe, Jr., and Joseph A. Moretz for plaintiff and additional defendants Norge Sales Corporation and Borg-Warner Corporation, appellees.

PARKER, C.J. G.S. 1-14 provides "an action is commenced as to each defendant when the summons is issued against him." The period prescribed for the commencement of the counterclaim for relief on the ground of fraud is three years after the cause of action has accrued. The action "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." G.S. 1-15; G.S. 1-46; G.S. 1-52(9). The authorities are to the effect that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454; *Wimberly v. Furniture Stores,* 216 N.C. 732, 6 S.E. 2d 512. The period prescribed for the commencement of the counterclaim, after the cause of action has accrued, for relief on the ground of breach of warranties is three years. G.S. 1-15; G.S. 1-46; G.S. 1-52(1).

Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations, when he is at liberty to sue, being at the time under no disability. *Washington v. Bonner,* 203 N.C. 250, 165 S.E. 683; *Winstead v. Manufacturing Co.*, 207 N.C. 110, 176 S.E. 304; *Motor Lines v. General Motors Corp.*, 258

N.C. 323, 128 S.E. 2d 413. When the statute of limitations begins to run, it continues until stopped by appropriate judicial process. *Speas v. Ford,* 253 N.C. 770, 117 S.E. 2d 784.

The burden was on the original defendants to show that they instituted the counterclaim to recover $50,000 damages from Norge, Rogers, Southeast, plaintiff, and Borg, jointly and severally, within the time prescribed by the statute of limitations. *Swartzberg v. Insurance Co.,* 252 N.C. 150, 113 S.E. 2d 270.

Original defendants' argument in brief summary is as follows: (1) Plaintiff, Norge, and Borg are actually a single entity, that the corporate structure should be disregarded, and that a counterclaim against one of them is effective against all; (2) the statute of limitations had not run against their counterclaim when plaintiff instituted this action, and the institution of this action tolled the running of the statute against plaintiff's *alter ego* Norge, and plaintiff's *alter ego* Borg; and (3) if a counterclaim or set-off is not barred at the commencement of the action in which it is pleaded, it does not become so afterward during the pendency of the action.

Ordinarily, a corporation retains its separate and distinct identity where its stock is owned partly or entirely by another corporation. 18 C.J.S., Corporations, § 5(j), p. 375. See *Troy Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132.

This is said in 19 Am. Jur. 2d, Corporations, § 717:

> "The fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity; and, ordinarily, no liability may be imposed upon the latter for the torts of the subsidiary corporation. The facts that corporations have common officers, occupy common offices, and to a certain extent transact business for each other do not make the one corporation liable for the action of the other, except upon established legal principles. However, a corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded."

In *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34, it was held that the mere fact that one corporation owns all the capital stock of another corporation, and the further fact that the members of the board of directors of both corporations are the same, nothing else appearing, is not sufficient to render the parent corporation liable for the contracts of its subsidiary. In order to establish liability on the part of the parent

corporation on such contracts, there must be additional circumstances showing fraud, actual or constructive, or agency.

In 1 Fletcher, Cyclopedia Corporations, perm. ed., p. 204 *et seq.*, it is said: "The control necessary to invoke what is sometimes called the 'instrumentality rule' is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal. It must be kept in mind that the control must be shown to have been exercised at the time the acts complained of took place in order that the entities be disregarded at the time."

The clearest statement we have found with respect to this area of the law is in *Lowendahl v. Baltimore & O. R. Co.*, 247 App. Div. 144, 287 N.Y.S. 62, 76, affirmed 272 N.Y. 360, 6 N.E. 2d 56, where the Court said:

> "Restating the instrumentality rule, we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:
>
> "'(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> "'(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> "'(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.' See Powell 'Parent and Subsidiary Corporations,' chapters I to VI, *passim*, and numerous cases cited."

Quoted with approval in *National Bond Finance Co. v. General Motors Corp.*, 238 F. Supp. 248 (1964), affirmed 341 F. 2d 1022. See also *Fisser v. International Bank*, 282 F. 2d 231 (1960).

Original defendants allege in their counterclaim that the false warranties and false representations inducing the sale of the dry cleaners and washers to them were made to them by Southeast and Rogers, who held themselves out to original defendants as agents and representatives of Norge, and were permitted by Norge to do so. They further allege that plaintiff is an *alter ego* of Borg and that Norge is an *alter ego* of Borg. Original defendants' counterclaim alleges conclusions, but it does not allege facts to show that Borg had complete domination not only of the finances but of policy and

business practice of plaintiff and Norge in respect to the transaction attacked so that the corporate entity of plaintiff and Norge had at the time no separate mind, will or existence of their own. A careful examination of the whole of original defendants' counterclaim cannot justify a disregard of the corporate identity of plaintiff and of Norge and of Borg under either the general or specific tests announced by the cases and textbooks as set forth above. Original defendants' argument that plaintiff, Norge and Borg are actually a single entity, that the corporate structure should be disregarded, and that a counterclaim against one of them is effective against all, and that the institution of this action tolled the running of the statute against plaintiff's *alter ego* Norge and plaintiff's *alter ego* Borg is unsound.

Plaintiff's action was commenced by the issuance of summons on 27 November 1963. On 4 December 1963 there was service on original defendants. On 5 March 1964 Norge, Southeast, and Rogers, on motion of the original defendants, were made additional defendants by the clerk of the Superior Court of Mecklenburg County, and the secretary or assistant secretary of Norge and Southeast, and Rogers individually were ordered to appear before a commissioner on the ..... day of the year 1964 as subpoenaed, for the purpose of being examined in this action in the manner prescribed by Chapter 1, Article 46, of the General Statutes of North Carolina, and the said secretary or assistant secretary of Norge and Rogers individually were ordered to bring with them the minute books of the corporations and paper writings containing the written contractual arrangements between themselves and between themselves and plaintiff. There is nothing in the record to show that any summons was ever issued against Norge, Southeast, and Rogers. G.S. 1-14. "Due process of law" requires that a defendant shall be properly notified of the proceeding against him, and have an opportunity to be present and to be heard. "When the defendant has been duly served with summons personally within the State, or has accepted service or has voluntarily appeared in court, jurisdiction over the person exists and the court may proceed to render a personal judgment against the defendant. If there has been no service of summons and no waiver by appearance, the court has no jurisdiction and any judgment rendered would be void." 1 McIntosh, N. C. Practice and Procedure, 2d Ed., § 933(1). When Norge under order of the court appeared for examination by original defendants to obtain information for original defendants to file an answer and counterclaim, that did not amount to a waiver of service of summons by appearance, because G.S. 1-103 provides a voluntary appearance of defendant is equivalent to personal service of summons.

The only summons in this case in the record before us against Borg is one issued on 1 February 1965 by the deputy clerk of the Superior Court of Forsyth County, which commands Borg through its duly appointed process agent in Durham, North Carolina, to appear before the undersigned clerk at his office in the courthouse in Winston-Salem, North Carolina, and file written answer to the complaint in this action within 30 days after the date of service of this summons. Such summons is, to say the least, highly irregular. Original defendants' answer and counterclaim to recover $50,000 damages, by reason of breach of warranties and fraudulent representations, from plaintiff, Borg, Norge, Southeast, and Rogers, jointly and severally, was verified on 30 January 1965, filed on 1 February 1965, and in this pleading original defendants moved that Borg be made an additional defendant. Borg was made an additional defendant on 1 February 1965. The original defendants' answer and counterclaim was filed in the office of the clerk of the Superior Court of Mecklenburg County on 1 February 1965. Norge's reply to original defendants' answer and counterclaim was verified on 18 February 1965. There is nothing in the record to show when it was filed in court. Borg's reply to original defendants' answer and counterclaim was verified on 18 February 1965. There is nothing in the record to show when it was filed in court. The same is true in respect to plaintiff's reply. The original defendants' answer and counterclaim clearly and affirmatively shows that during the months of March and April 1961 they had actual knowledge of the alleged breach of warranties and fraudulent representations in the sale of the dry cleaners and washers to them; that their spare parts account between February 1961 and December 1961 to purchase replacements for defective parts in the dry cleaners amounted to $2,487.24; that they made payments upon their note given for the dry cleaners and washers though they had actual knowledge of breach of warranties and fraudulent representations; and that they notified Norge and Southeast that the machines were defective and did not comply with their warranties and representations, and their expenses in attempting to use the machines were prohibitive, and that they were in danger of losing all their business.

Original defendants had actual knowledge of the alleged false representations and of the alleged breach of warranties in March and April, 1961, and at that time the statute of limitations began to run against them as to their alleged counterclaim for damages against plaintiff, Norge, and Borg. This was more than three years prior to original defendants' filing their answer and counterclaim for damages on 1 February 1965; more than three years prior to the date when Norge, who had not been served with proper process,

filed a reply to their answer and counterclaim, which reply was verified by Norge on 18 February 1965 which voluntarily brought Norge into this action; more than three years prior to the irregular process issued against Borg on 1 February 1965 ordering it to appear in the office of the clerk of the Superior Court of Forsyth County and answer the complaint in this action; and more than three years prior to the date when Borg, who had not been served with proper process, filed a reply to original defendants' answer and counterclaim. Since original defendants' answer and counterclaim was not filed until 1 February 1965, we assume that Norge's and Borg's replies were not filed before they were verified, and certainly they were not filed before original defendants filed their answer and counterclaim. Since the plea of the three-year statute of limitations by Norge and Borg is clearly established by facts alleged in the original defendants' answer and counterclaim, it follows that the judgments on the pleadings in favor of Norge and Borg are correct. Our view finds support in *Speas v. Ford, supra.* In that case, where defendant Ford in his answer alleges that he refused to comply with his contract on the contractual date because of his discovery of fraudulent representations inducing his execution of the contract, and files a cross-action against plaintiffs and the additional defendants for damages for such fraud more than three years after the contractual date, and when each of the parties thus brought into the action denied the alleged fraud and pleaded the three-year statute of limitations, judgment dismissing the cross-action as to the additional defendants thus brought in on original defendant's motion based upon their plea of the three-year statute of limitations was held without error.

In *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384, it is said:

> "A court of record has inherent power to render judgment on the pleadings where the facts shown and admitted by the pleadings entitle a party to such judgment. [Citing authority.]
>
> "A motion for judgment on the pleadings is in the nature of a demurrer. [Citing authority.] Its function is to raise this issue of law: Whether the matters set up in the pleading of an opposing party are sufficient in law to constitute a cause of action or a defense. [Citing authority.]
>
> * * *
>
> "A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact."

Original defendants assert in their counterclaim that Rogers and Southeast by false warranties and false representations—which are

alleged in great detail in the counterclaim—induced them to purchase the dry cleaners and washers, and to execute the note and conditional sales contract plaintiff sues on in this action. They further allege that Southeast and Rogers were agents of Norge. We have held that neither plaintiff nor Norge is an *alter ego* of Borg. There is no allegation in original defendants' answer and counterclaim that plaintiff knew anything about the alleged false warranties and false representations or participated in them in any way. Neither does it allege any facts to show that plaintiff was responsible legally for the alleged torts of Southeast and Rogers. Original defendants' counterclaim is so fatally deficient in substance as against plaintiff that it presents no material issue of fact to support a recovery from plaintiff of damages in the amount of $50,000, or to operate as a set-off against plaintiff's claim. Consequently, it is subject to a judgment on the pleadings. The judgment on the pleadings should have been granted on the ground that the original defendants' counterclaim is fatally deficient in substance. Therefore, the granting of the judgment on the pleadings in favor of plaintiff was correct, though it was placed on the wrong ground. *Sanitary District v. Lenoir,* 249 N.C. 96, 105 S.E. 2d 411; *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673.

Original defendants in their brief contend that equity should prevent appellees from pleading the statute of limitations as a defense against their counterclaim. This contention is not tenable. In the first place, defendants have not pleaded that the appellees are estopped to plead the statute of limitations, 2 Strong's N. C. Index, Estoppel, § 6, and second, "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Coppersmith v. Insurance Co.,* 222 N.C. 14, 21 S.E. 2d 838. On a motion for judgment on the pleadings, we consider the pleadings, and nothing else. Consequently, the detailed facts set forth in original defendants' brief as to why appellees should be estopped to plead the statute of limitations cannot and will not be considered by the Court in considering the motion for judgment on the pleadings. *Erickson v. Starling, supra.*

All three judgments below are

Affirmed.

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

KAYANN PROPERTIES, INC., v. MERLE D. COX; HARRY R. STANLEY AND WIFE, MAE K. STANLEY.

(Filed 26 August, 1966.)

1. Partition § 1—

General rules governing involuntary nonsuit apply to special proceedings for partition, and nonsuit is properly granted in such proceeding if petitioner fails to establish an interest in the lands in question or fails to establish a present right to partition.

2. Same—

Ordinarily, a tenant in common is entitled as a matter of right to partition of the lands, G.S. 46-3, or, if actual partition cannot be made without injury to some or all of the parties interested, he is usually entitled to partition by sale. G.S. 46-22.

3. Partition § 6—

A petitioner seeking sale for partition has the burden of alleging and proving the facts upon which the order of sale must rest. G.S. 46-22.

4. Partition § 1—

The existence of a life estate does not *per se* preclude sale for partition, although the life estate cannot be disturbed so long as it exists. G.S. 46-23.

5. Partition § 2—

A tenant in common may by express or implied contract waive his right to partition for a reasonable time, in which instance partition will be denied him or his successors who take with notice.

6. Partition § 1—

Partition proceedings are equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property and will enforce the equitable principle that he who seeks the relief must do equity.

7. Husband and Wife § 11— Separation agreement held to constitute implied contract precluding sale for partition.

The deed of separation in question, incorporated in a consent judgment between the parties, provided that the wife should have exclusive use of the property during her lifetime, that the husband would make the mortgage payments on the property and pay the costs of major repairs, that the husband's one-half interest should be subject to an equitable lien as security for his obligation to make monthly payments for her support, and contained further provisions for the protection of the wife or her estate upon the death of either party. *Held:* The provisions of the separation agreement are inconsistent with the sale of the property for partition during the lifetime of the wife and constitute an implied contract waiving the right to partition during her lifetime, binding upon the husband and those claiming as his grantees, notwithstanding that plaintiff partitioner, who had purchased one-half of the husband's interest subject to the life estate, purchased more than ten years after the rendition of the consent judgment, and notwithstanding the consent judgment was not a muniment of title in his chain of title.

APPEAL by petitioner from *Mintz, J.*, January 3, 1966 Civil Session of GUILFORD (Greensboro Division).

This petition for partition by sale was filed June 1, 1965. The parties stipulated that Judge Mintz might hear the proceeding and decide any issues of fact which might arise. The petitioner's evidence tended to show the following undisputed facts:

The property which petitioner seeks to partition is 2.1 acres of land located within the city limits of Greensboro, east of Interstate Highway No. 40, on the northeast corner of the intersection of High Point Road and the ramp from that road to Pinecroft Road and Interstate Highway No. 40. One hundred feet of the 286.2 feet of the south line of the lot is the northern line of High Point Road; the remaining footage borders on the ramp. The east line, 507.6 feet in length, is the center of a 16-foot dirt road. The only buildings on the lot are a 12-room, 2-story brick house, and a 3-car garage, which has an apartment over it. The house is located about 300 feet from High Point Road. The rough pencil map introduced in evidence does not show the location of the buildings on the lot. The property is zoned "Residential 90-S," which requires a minimum plot width of 60 feet. Respondent Merle Cox has the right to sole possession and occupancy of the entire property so long as she lives and owns a one-half undivided interest in fee in the entire property. By the terms of a consent judgment hereinafter referred to, she also acquired a lien on the other one-half interest which then belonged to her husband, Truitt Cox. Subject to the interest of Merle Cox, petitioner owns a one-fourth undivided interest in the property and respondents Harry R. Stanley and wife own the other one-fourth interest.

Prior to his marriage to Merle Cox on November 14, 1943, Truitt Cox purchased the property in question and had the deed made to her as sole owner. After their marriage, Mr. and Mrs. Cox occupied the property as their home. Sometime about 1945, Mrs. Cox contracted Parkinson's disease, from which she still suffers. In May 1948, Mr. and Mrs. Cox separated. Since then Merle Cox has occupied the premises as her home, renting rooms in the house and the garage apartment.

In June 1950, Truitt Cox instituted an action for absolute divorce against Mrs. Cox upon the grounds of two years' separation. She filed a cross action against him for alimony without divorce. Mr. Cox also instituted a suit against her in which he sought to have title to the property in question vested in them as tenants by the entireties. Respondent Harry R. Stanley was one of the two attorneys who represented Truitt Cox in these actions. During the pendency of the actions, on January 19, 1951, Mr. and Mrs. Cox

entered into a deed of separation. The provisions of this deed of separation are set out in detail in the statement of facts in the case of *Stanley v. Cox*, 253 N.C. 620, 117 S.E. 2d 826. It contained the usual provisions of such instruments and adjusted the property rights of the parties as follows:

(a) Mr. Cox released to Mrs. Cox all furnishings and equipment in the garage apartment and in the dwelling which they had occupied.

(b) Mrs. Cox agreed to convey to Mr. Cox a one-half undivided interest in the property so that title would be vested in them as tenants in common.

(c) Mr. Cox agreed to make the payments due on the mortgage loan encumbering the property as they fell due. If Mrs. Cox should die before the mortgage was fully paid, he agreed to pay the balance due immediately so that her heirs or devisees would take their one-half interest in said property free of all encumbrances. If Mr. Cox should die before the mortgage was paid in full, his estate was made liable for the balance due, which was made a lien upon his one-half interest. Mr. Cox also agreed to pay during Mrs. Cox's lifetime (1) all *ad valorem* taxes and hazard insurance premiums on the realty, (2) all bills for major repairs to the property, and (3) all necessary local medical and drug bills.

(d) Mrs. Cox was given the sole possession and occupancy of the premises during her lifetime (except as provided below) and all rents from the property. In addition, Mr. Cox agreed to pay her $100.00 a month. Should Mrs. Cox enter a nursing home or change her residence, she was to be given the option of retaining possession of the property or surrendering it to Mr. Cox for rental by him. Should she keep the property but not reside in it, Mr. Cox's payments would be reduced to $50.00 a month; should she surrender it to him, he agreed to pay her $250.00 a month so long as he retained control of the property and received the rentals. At any time after 90 days, however, upon 60 days' notice to him, Mrs. Cox might repossess the property.

(e) Mrs. Cox agreed to dismiss her cross action for alimony without divorce and acknowledged that the parties had lived continuously separate and apart since May 1948.

At the time of the execution of the deed of separation, and as a part of the same transaction, Mrs. Cox conveyed the property to a third person, who immediately reconveyed it to Truitt Cox and Merle Cox as tenants in common. Both these deeds and the separation agreement were duly recorded on January 19, 1951. Two days thereafter, Mr. Cox secured his divorce. The judgment, entered on January 22, 1951, in addition to incorporating the issues and dis-

solving the bonds of matrimony, recited that the parties had theretofore entered into a deed of separation in which plaintiff (Mr. Cox) had agreed to make certain payments for the use and benefit of the defendant (Mrs. Cox) and, that, in consequence, she had withdrawn her cross action.

The judgment concluded as follows:

> "By consent of the plaintiff, IT IS FURTHER ORDERED AND DECREED that the plaintiff shall pay to the defendant each, every and all of the payments specified in the aforesaid agreement dated January 19, 1951, as the same shall fall due and become payable from time to time, the defendant to have the right to move the court for attachment of the plaintiff as for a civil contempt in the event the plaintiff shall fail to make any of said payments which are specified in said agreement, and IT IS FURTHER ORDERED AND ADJUDGED that said payments shall be and remain a lien upon the estate and property of the plaintiff; and that the costs of this action shall be paid by the plaintiff.
>
> "This the 22nd day of January 1951.
>
> DAN K. MOORE
> Judge Presiding.
>
> "Plaintiff consents to the last paragraph of the foregoing decree:
> HARRY R. STANLEY
> NORMAN A. BOREN
> Attorneys for the Plaintiff."

Thereafter, on January 22, 1951, by deed recorded on the same day, Truitt Cox conveyed to respondents Harry R. Stanley and wife a one-fourth undivided interest in the property. Sometime later, prior to June 1960, the Stanleys instituted an action against Merle Cox under G.S. 41-10 to quiet title against her claims (1) that the Stanley's one-fourth interest was subject to the lien created by the consent judgment to secure the payments by Truitt Cox as provided in the deed of separation and (2) that she had the right to occupy Truitt Cox's one-half interest during her lifetime. This Court held in *Stanley v. Cox, supra,* that "the consent part" of the divorce judgment created an enforceable lien upon the property which the Stanleys had purchased from Truitt Cox, and that Mrs. Cox had the right of sole occupancy and possession of the entire property so long as she lives. In short, Mrs. Cox's claims against the Stanleys were held to be valid and not a cloud upon their title.

On April 7, 1965, Truitt Cox and his present wife, Thelma Cox, in consideration of $5,000.00 and the payment of all past-due taxes

on the property, conveyed Truitt Cox's remaining one-fourth undivided interest in the property to petitioner. The conveyance was made subject to the separation agreement between Truitt Cox and Merle Cox. Truitt Cox now owns no real estate whatever.

Petitioner's attorney testified that, in examining the title to this property, he did not inspect the index of judgments docketed prior to 1954 in the office of the Clerk of the Superior Court and that he, therefore, did not find and report the divorce judgment entered January 22, 1951.

Petitioner alleges in its petition that "the nature and size of the land is such that an actual partition thereof cannot be made without injury to the several persons interested therein." Respondents deny that an actual partition cannot be made of the property without injury to the petitioners. They further allege that the property is not subject to partition during the lifetime of Merle Cox for that petitioner's predecessor in title, Truitt Cox, had impliedly agreed not to partition the property so long as her rights in it continued; that petitioner purchased with both actual and constructive notice of the separation agreement and the divorce judgment; that a partition would defeat the purpose of the deed of separation; that the property, because of its location adjacent to the Greensboro-High Point Road and Interstate 40 is a very valuable tract of land and that petitioner seeks to force a judicial sale in order to acquire Mrs. Cox's remainder in the property at a price substantially less than its market value.

At the close of petitioner's evidence, respondents moved the court to dismiss the proceedings as of nonsuit. The motion was allowed and petitioner appeals.

Booth, Osteen, Fish & Adams by Roy M. Booth for petitioner.

Smith, Moore, Smith, Schell & Hunter by Herbert O. Davis and Charles L. Melvin, Jr., for Merle D. Cox, respondent.

Harry R. Stanley, respondent, in propria persona.

SHARP, J. This appeal presents only the question of nonsuit. All assignments of error with reference to the exclusion and admission of evidence have been abandoned. General rules governing involuntary termination on nonsuits in civil actions apply to special proceedings for partition. 68 C.J.S., Partition § 104 (1950). If the petitioner has no interest in the lands described in the petition, or no present right to partition, the proceeding is properly dismissed. *Burchett v. Mason,* 233 N.C. 306, 63 S.E. 2d 634. *Cf. Haddock v. Stocks,* 167 N.C. 70, 83 S.E. 9.

Prima facie, a tenant in common is entitled, as a matter of right, to a partition of the lands so that he may enjoy his share in severalty. G.S. 46-3; *Brown v. Boger,* 263 N.C. 248, 139 S.E. 2d 577; *Seawell v. Seawell,* 233 N.C. 735, 65 S.E. 2d 369. If, however, an actual partition cannot be made without injury to some or all of the parties interested, he is equally entitled to a partition by sale, G.S. 46-22; *Coats v. Williams,* 261 N.C. 692, 136 S.E. 2d 113, but the burden is on him who seeks a sale in lieu of actual partition to allege and prove the facts upon which the order of sale must rest. G.S. 46-22; *Brown v. Boger, supra; Seawell v. Seawell, supra; Wolfe v. Galloway,* 211 N.C. 361, 190 S.E. 213. The existence of a life estate is not, *per se,* "a bar to a sale for partition of the remainder or reversion thereof," G.S. 46-23, since, for the purpose of partition, tenants in common are deemed seized and possessed as if no life estate existed. The actual possession of the life tenant, however, cannot be disturbed so long as it exists. *Davis v. Griffin,* 249 N.C. 26, 105 S.E. 2d 119; *Moore v. Baker,* 222 N.C. 736, 24 S.E. 2d 749.

While it is the general rule that a tenant in common may have partition as a matter of right, it is equally well established that a cotenant may, either by an express or implied contract, waive his right to partition for a reasonable time. When he does, partition will be denied him or his successors who take with notice. *Mineral Co. v. Young,* 220 N.C. 287, 17 S.E. 2d 119; *Chadwick v. Blades,* 210 N.C. 609, 188 S.E. 198; *Rosenberg v. Rosenberg,* 413 Ill. 343, 108 N.E. 2d 766; *Seals v. Treatch,* 282 Ill. 167, 118 N.E. 422; *Appeal of Latshaw,* 122 Pa. 142, 15 Atl. 676; *Coleman v. Coleman,* 19 Pa. St. 100, 57 Am. Dec. 641. See also Note, 15 N.C.L. Rev. 279 (1937); Annot., Partition — Contracts Against, 132 A.L.R. 666 (1941); 68 C.J.S., Partition § 44 (1950); 40 Am. Jur., Partition §§ 4-7 (1942); 2 Am. Law of Property § 6.26 (1952). In *Mineral Co. v. Young, supra,* this Court reversed an order of the Superior Court decreeing the division by sale of mineral rights which were subject to a lease, and a portion of which had been acquired by the lessee. The opinion quotes with approval from *Arnold v. Arnold,* 308 Ill. 365, 367-68, 139 N.E. 592, 593, as follows:

> " 'It has been said in general terms that an adult tenant in common has an absolute right to partition (citing cases); but it has been in cases where there was neither an equitable nor legal objection to the exercise of the right, and partition was in accordance with the principles governing courts of equity. Whenever any interest inconsistent with partition has been involved, the general rule has always been qualified by the statement that equity will not award partition at the suit of one in

violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one from whom he claims, or where partition would be contrary to equitable principles. Partition will not be awarded in a court of equity, where there has been an agreement either not to partition, or where the agreement is such that it is necessary to secure the fulfillment of the agreement that there should not be a partition. Such an agreement may be verbal, if it has been acted upon, and it need not be expressed, but will be readily implied, and enforced, if necessary to the protection of the parties. (Citing cases.)' " 220 N.C. at 291-92, 17 S.E. 2d at 122.

In this State partition proceedings have been consistently held to be equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. *Allen v. Allen,* 263 N.C. 496, 139 S.E. 2d 585; *Brown v. Boger, supra; Roberts v. Barlowe,* 260 N.C. 239, 132 S.E. 2d 483. Partition is always subject to the principle that he who seeks it by coming into equity for relief must do equity. 2 Am. Law of Property § 6.26 (1952). " 'Equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed on the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel.' " *Chadwick v. Blades, supra* at 612, 188 S.E. at 200. "The refusal of partition to one who has brought suit therefor in violation of his contract appears to bear a close analogy to the grant of specific performance of a contract." 2 Tiffany, Real Property § 474 (3d Ed. 1939).

The separation agreement between Mr. and Mrs. Cox does not contain an express stipulation that Truitt Cox shall not partition the property. It is apparent, however, both from the instrument itself and from the circumstances surrounding its execution that neither party considered the possibility of partition during the life of Mrs. Cox. Mr. Cox's goal was an absolute divorce. Mrs. Cox, suffering from a slowly progressive and eventually incapacitating disease, sought to secure a livelihood for herself and a place to live during the remainder of her life. Mr. Cox's earning capacity and the property on High Point Road were the only assets available for her purpose.

Mr. Cox's agreement to pay off the mortgage on the property immediately upon the death of Merle Cox so that her heirs or devisees would take a one-half interest in the property free of all encumbrances is entirely inconsistent with a partition by sale — and if it be true, as petitioner alleges, that an actual partition of the 2.1 acres cannot be made without injury to the tenants in common,

this agreement is inconsistent with any partition at all. Furthermore, in the event Mrs. Cox should die before the mortgage was paid in full, the entire balance due on it was made a lien upon Mr. Cox's one-half interest in the property. This clause of the contract reveals (1) that neither party envisioned that the other would sell his interest during her lifetime, and (2) that the mortgage lien should be removed from Mrs. Cox's one-half interest — her one tangible asset — as early as possible so that she would have this security in the event of Mr. Cox's death or incapacity, or in the event she had to enter a nursing home in some other locality. In all probability, this interest is now her anchor to windward, for Mr. Cox, having sold his entire share in the property, obviously lacks any incentive to preserve it, and it little concerns him whether the sums he obligated himself to pay are a lien upon the property. At the hearing he testified as follows: "I have paid her (Merle Cox) $100.00 every month. . . . I have not breached my contract in any respect. . . . I can't go much further though."

It was only three days after the execution of the deed of separation that Mr. Cox conveyed half of his undivided interest in the property (one-fourth of the whole) to respondent Stanley (his attorney) and Mrs. Stanley — presumably in payment of fees due Mr. Stanley. When, however, the Stanleys sought a judicial pronouncement that they held their one-fourth interest free of any claims by Mrs. Cox, this court held (1) that she had the right to sole occupancy and possession of the entire property during her life; (2) that the consent provisions of the divorce judgment — which bore the signature of respondent Harry R. Stanley as attorney for Mr. Cox — created an equitable lien upon Mr. Cox's one-half undivided interest in the property to secure all payments which, in the separation agreement, he had agreed to make for Mrs. Cox's benefit; and (3) that the Stanleys, having purchased with notice of the judgment, were equally bound by its consent provisions. *Stanley v. Cox, supra.*

Recognizing that this lien upon their one-fourth interest, together with Merle Cox's life estate in the whole, will greatly depress the value of the fee if the property is sold for partition now, the Stanleys join with Merle Cox in denying petitioner's right to partition the property during her lifetime. Petitioner, however, contends that its one-fourth interest is not burdened with a lien to secure the payment to Mrs. Cox of "each, every and all of the payments" specified in the separation agreement for these reasons: (1) it was unaware of the consent provisions in the divorce judgment which is not one of its muniments of title; (2) the judgment was not recorded in the office of the Register of Deeds; and (3)

no muniment of its title disclosed its existence. *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174. See *Winborne v. Guy,* 222 N.C. 128, 22 S.E. 2d 220; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197.

Petitioner recognizes that, without Merle Cox's joinder in its petition for partition by sale, G.S. 46-24, she cannot be dispossessed of the premises during her lifetime, G.S. 46-23, but it argues that her right to continuing occupancy will fully protect her in the manner contemplated in the deed of separation. This argument overlooks the realities. If the property is sold subject to the uncertain duration of her life estate and the lien on the Stanleys' interest, the value of the property will most certainly be reduced. *Eberts v. Fisher,* 54 Mich. 294, 20 N.W. 80. The sale would likewise sacrifice the security, which it was one of the major purposes of the deed of separation to provide. Mrs. Cox could protect herself only by purchasing the property at the sale. This she might not be able to do. There is nothing in the record, however, which suggests that she would be able to outbid petitioner in a contest. But even if she became the last and highest bidder, and thus acquired the fee in the other half of the property, a lien upon it to secure Mr. Cox's payments would be no lien at all! The creditor would have purchased the security. It is apparent that the partition which petitioner seeks would be in contravention of the separation agreement and would defeat its purposes. An agreement against partition will therefore be implied. 68 C.J.S., Partition § 44 (1950); 40 Am. Jur., Partition § 7 (1942). "(I)f the intention is sufficiently manifest from the language used, the court will hold that the parties may effectively bind themselves not to partition even without express use of the word." *Michalski v. Michalski,* 50 N.J. Super. 454, 462, 142 A. 2d 645, 650.

If we concede, as petitioner contends, that its one-fourth interest (unlike that of the Stanleys) is not subject to the lien which the consent provisions of the divorce judgment imposed, it is, nevertheless, subject to the implied agreement contained in the deed of separation.

Since we hold that petitioner has no right to partition the property in suit during the lifetime of Merle Cox without her consent, it is not necessary to decide whether petitioner produced satisfactory proof that the land could not be partitioned in kind without injury to some or all of the cotenants. On this point see *Brown v. Boger, supra; Mineral Co. v. Young, supra.*

The judgment below is

Affirmed.

RURAL PLUMBING AND HEATING, INC., v. H. C. JONES CONSTRUCTION CO., INC., ET AL.

(Filed 26 August, 1966.)

1. Appeal and Error § 41—

An exception to the exclusion of evidence will not be sustained when it is not made to appear what the excluded evidence would have been. Rule of Practice in the Supreme Court No. 19(2).

2. Trial § 31—

Where all evidence upon an issue is uncontradicted and tends to support plaintiff's claim, the court may instruct the jury that if it finds the facts to be as all of the evidence tends to show to answer the issue in the affirmative.

3. Pleadings § 29—

The issues arise upon the pleadings, and the parties may not agree upon improper issues, and the pleadings must support the judgment, and the judgment may not be based upon facts not alleged in the pleadings or which are entirely inconsistent therewith.

4. Same; Trial § 6—

The parties may establish any material fact by stipulation or judicial admission and thereby eliminate the necessity of submitting an issue in regard thereto to the jury.

5. Trial § 6—

A party is bound by his stipulations and may not thereafter take an inconsistent position.

6. Pleadings § 29—

It is the duty of the trial court to submit such issues as are necessary to settle the material controversies arising upon the pleadings, and in the absence of such issues and the absence of admissions of record sufficient to justify the judgment rendered, the Supreme Court will remand the case for a new trial.

7. Trial § 6—

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties.

8. Pleadings § 29; Trial § 40— In this case, compromise agreement entered after filing of complaint is considered as an amendment to the complaint in furtherance of the ends of justice.

Plaintiff sued for the balance due under contract. Subsequent to the filing of the complaint the parties entered a compromise agreement under which plaintiff agreed to accept a lesser sum provided defendant made payments on the contract in accordance with a schedule therein set forth, and the executory compromise agreement provided further that upon default in payments in accordance with the schedule the original sum demanded should be due, and that the compromise agreement might be filed in the pending action and have the effect of a consent judgment for the original amount subject only to credits for payments made. The issue submitted related only to whether defendants had defaulted in the pay-

ments stipulated under the compromise agreement and the credits which should be allowed against the original amount claimed. The uncontradicted evidence tended to show default in payment under the compromise schedule. *Held:* Notwithstanding the issues did not arise on the pleadings, the judgment will not be disturbed, but, in furtherance of the ends of justice, the compromise settlement will be taken as an amendment to the complaint, all the parties having stipulated that the issues submitted should be based upon the compromise agreement and there being no question of surprise.

9. Waiver § 2—

The acceptance of payments after default as credits upon the amount stipulated to be due upon such default is not a waiver of such default.

10. Waiver § 3—

When the facts relied upon as a waiver do not appear from the pleadings, such facts must be specifically pleaded as a defense.

APPEAL by defendant from *Bailey, J.*, October 1965 Regular Civil Session of WAKE.

Plaintiff originally instituted this action against one defendant, H. C. Jones Construction Company, Inc. (Jones Co.), to recover an alleged balance due on six separate construction contracts.

Plaintiff, a North Carolina corporation with its principal office located in Wake County, is engaged in the business of installing plumbing, heating and air-conditioning systems. Defendant, a South Carolina corporation, is a general contractor engaged principally in the construction of motels and related buildings. Defendant Keith T. Jones, who later made himself a party, is an officer, director, and the major stockholder of defendant Jones Co. In the complaint, filed on March 27, 1963, plaintiff sought to recover of defendant Jones Co. $186,692.91, which, it alleged, was the balance defendant owed it for installing plumbing, heating and air conditioning for defendant in six separate construction projects as follows:

(1) $7,000.00 with interest from August 31, 1962, balance due on contract made between plaintiff and defendant on October 25, 1961, for installations in a motel in College Park, Maryland.

(2) $343.00 with interest from January 1, 1963, extra work on motel in Hampton, Virginia.

(3) $4,850.00 with interest from September 26, 1962, balance due on contract of August 17, 1962, for installations at Holiday Inn Motel in Richmond, Virginia.

(4) $60,000.00 with interest from January 5, 1963, balance due on contract of January 3, 1962, for installations in motel in Princeton, New Jersey.

(5) $84,499.91 with interest from February 28, 1963, on contract of July 9, 1962, for installations in apartment building in Princeton, New Jersey. This balance was later adjusted to $71,099.91.

(6) $30,000.00, balance due on contract of August 31, 1962, for installations in motel at Andrews Air Force Base in Maryland.

Upon the oral argument here, it was stipulated that the sums which plaintiff sought to recover in causes of action 1, 2, 3, and 6 have now been paid, and that this appeal involves only causes of action 4 and 5.

On April 1, 1964, when the suit had been pending slightly more than a year, plaintiff, defendant Jones Co., Keith T. Jones, and the United States Fidelity and Guaranty Company (U. S. F. & G.), which had issued a labor and material payment bond in the amount of $60,000.00 on the Princeton, New Jersey motel project, entered into an executory contract by which the fourth and fifth causes of action were conditionally compromised and settled. This agreement (contract) reduced plaintiff's claim on these two projects from $131,099.91 to $105,000.00 ($50,000.00 for the Princeton motel and $55,000.00 for the apartment). Paragraph 1 of the contract provided for payments as follows:

(a) $10,000.00 upon execution of the contract, receipt of which was acknowledged.

(b) $15,000.00 on or before July 15, 1964.

(c) $25,000.00 "on or before the date of completion of and settlement for the Chamberlain Apartment project in Richmond, Virginia," but in any event, not later than September 15, 1964. (The Chamberlain project involved a separate contract which is not included in any of the six causes of action set out in the complaint. Its settlement date merely fixed the time on which the third payment was due under the contract of April 1, 1964. The evidence also discloses that proceeds from this project settled the first three causes of action.)

(d) $25,000.00 on or before the completion of and settlement for the construction of the Quality Court Motel at Florence, South Carolina but, in any event, not later than September 15, 1964. (The Florence project was likewise not involved in any of the causes of action set out in the complaint. "About the time" of the execution of the contract of April 1, 1964, plaintiff contracted with defendant to make installations in the Quality Court Motel which defendant was constructing at Florence, South Carolina. This sum of $25,000.00 was "included

within the (Florence) contract for the total sum of $112,550.00 between plaintiff, Ludwig Zahn, Keith Jones, and Quality Courts of Florence, Inc. for plumbing, heating, and air-conditioning installations." Unlike the Chamberlain situation, (c) above, the reference to the Florence project was more than a schedule for payments on the contract. Monthly progress payments on the Florence contract were to be made to plaintiff as the construction progressed. 22% of each such payment, however, was to be credited upon the $25,000.00 specified in paragraph (d).)

(e) $10,000.00 on October 1, 1964.

(f) $10,000.00 on December 1, 1964.

(g) $10,000.00 on January 1, 1965.

(h) All accrued interest to be paid on the first day of October, 1964, and again on January 1, 1965.

The contract provided that all principal payments made should be applied one-half to each of the two projects involved until the balance due on the motel was fully paid; thereafter all payments were to be applied to the apartment house balance. In paragraph 4 of the contract, U. S. F. & G. admitted liability to the extent of $50,000.00 upon defendant's obligations to plaintiff on the Princeton motel project. Upon payment in full of the sums called for in the contract, this action and another pending in a Federal District Court in New Jersey were to be nonsuited; until payment in full, this action was to "remain in its present status." Paragraph 7 of the contract provided the consequences of a default as follows:

"7. In the event Jones Company shall default in any of the payments herein agreed to be paid, and if such default shall continue for a period of thirty (30) days after written notice of such default, then:

(a) U. S. F. & G. shall immediately and without notice of any kind whatsoever pay to Rural the sum of Fifty Thousand Dollars ($50,000.00) with interest at the rate of six percent (6%) per annum from 1 April 1964, to the date of payment, LESS, any amounts of principal and interest theretofore credited to the motel project in Princeton, New Jersey under the terms hereof, and shall pay all costs of court in the pending legal actions by Rural against U. S. F. & G.; and

(b) Jones Company shall be obligated to and shall pay to Rural the sum of Sixty Thousand Dollars ($60,000.00) with interest from 5 January 1963 for the plumbing, heating and air conditioning systems installed in the aforesaid motel building, LESS, any amounts of principal and interest there-

tofore credited to said motel project under the terms hereof, and shall be obligated to and shall pay to Rural the sum of Seventy-one Thousand Ninety-nine and 91/100 Dollars ($71,099.91) with interest from 28 February 1963 for the plumbing, heating and air conditioning systems installed in the aforesaid . . . (Princeton) apartments, LESS, any amounts of principal and interest theretofore credited to said apartment project under the terms hereof; and

(c) This agreement may be filed by Rural as a judicial admission of liability by U. S. F. & G. and by Jones Company in any or all of the aforesaid pending actions and shall have the legal effect of a consent judgment, confession of judgment, or summary judgment for the amounts herein agreed to be paid, subject only to proof by Jones Company or U. S. F. & G. of the prior payments to be credited upon said amounts."

Keith T. Jones, in paragraph 8 of the contract, unconditionally guaranteed its performance as well as the payment of all obligations of Jones Company under the terms of the compromise agreement in the event of its default.

Plaintiff, contending that Jones Company had defaulted in the payment of the sums specified in the contract of April 1, 1964, calendared this case for trial at the October 1965 Session. At the trial, Jones Co., and Keith T. Jones stipulated:

1. On the dates indicated defendant made the following payments in reduction of the amounts due under the contract between the parties dated April 1, 1964:

May 22, 1964	$10,000.00
May 25, 1964	3,278.00
June 22, 1964	3,036.00
July 31, 1964	3,564.00
August 14, 1964	15,000.00
September 3, 1964	4,400.00
September 28, 1964	2,200.00
TOTAL	$41,478.00

2. On October 6, 1964, U. S. F. & G. paid to Rural Plumbing and Heating, Inc., the sum of $31,180.00 in principal and $1,281.52 in interest, under the terms of the contract. (Paragraph 4).

3. There is now on deposit in Wachovia Bank and Trust Company, Charlotte, North Carolina, the sum of $3,413.53, which plaintiff has attached and which Jones Co. and Keith T. Jones

have agreed shall be applied in reduction of the amounts due under the contract.

4. On the trial of this action, "if the jury should find in favor of the plaintiff and should find that the foregoing and other payments, if any, were made to Rural Plumbing and Heating, Inc., under the terms of said contract, the Presiding Judge shall be authorized to determine and set forth in the judgment the dates of such payments and the various amounts of interest due to the plaintiff.

At a pre-trial conference, the issues (hereinafter set out) had been settled. Plaintiff's evidence tended to show: Plaintiff has received no part of the sum of $25,000.00 which was to be paid on or before the Chamberlain Apartment project was completed but not later than September 15, 1964. Jones Co. informed plaintiff on July 27, 1964, "that the Chamberlain Apartment job would be closed out and the $25,000.00 or a part of it would be forthcoming." When no money was forthcoming plaintiff's attorney informed defendant's counsel by letter dated July 28, 1964, that defendant had received settlement on the Chamberlain Apartments on July 24, 1964; that plaintiff was demanding payment of the $25,000.00 due under paragraph 1(d) of the contract; and that the letter was the written notice of default specified by the contract. On August 11, 1964, defendant's attorney advised plaintiff's counsel that the Chamberlain Apartment job had not been "fully settled," that $20,000.00 was still due defendant from it, and that plaintiff should be hearing from defendant "within the next few days" concerning the $15,000.00 due under paragraph 1(b) of the contract and the $25,000.00 due under paragraph 1(c), the amounts then due. On August 14, 1964, plaintiff's counsel replied to this letter. They acknowledged receipt of defendant's check for $15,000.00, but they specifically contradicted defendant's contention that the Chamberlain project had not been settled. They reaffirmed plaintiff's notice of defendant's default set forth in their letter of July 28, 1964, as to the payment required by paragraph 1(c) of the contract. (This letter of August 14, 1964, introduced by defendant, was the only evidence offered by defendant.)

On September 3rd, Keith T. Jones advised plaintiff by telephone that he had the check from the Chamberlain job and that it would be sent to plaintiff immediately. On the same day plaintiff's attorney, by letter, informed defendant's counsel of this telephone conversation, and also gave him notice that the progress payment due August 20, 1964, on the Florence motel project (see paragraph 1(d) of the contract) had not been received. He also advised defendant's counsel that, in view of his letter of August 11th, plaintiff had not

called on U. S. F. & G. to make the payment required of it upon Jones Co.'s default, but that unless the $25,000.00 payment due under paragraph 1(c) of the contract and the progress payments then due on the Florence project were received by noon on September 7, 1964, plaintiff would not only call on U. S. F. & G. for payment, but would take the necessary steps to collect the additional amounts due under the contract from Jones Co. and Keith T. Jones.

From time to time, plaintiff received certain progress payments from the Florence motel job, the following portions of which were credited to the amount due under paragraph 1(d) of the contract:

May 25, 1964	$ 3,278.00
June 22, 1964	3,036.00
July 31, 1964	3,564.00
September 3, 1964	4,400.00
September 28, 1964	2,200.00
	$16,478.00

These payments represented 22% of the total payments which Jones Co. made to plaintiff on the Florence project. On September 30, 1964, plaintiff's counsel wrote defendant's attorney that, under the contract, Jones Co. had been in default for a period of more than 30 days after written notice of such default; that the provisions of paragraph 7 of the contract were in effect; that notwithstanding, if the sum of $38,150.00 ($25,000.00 plus the progress payments due August 20, 1964, and September 20, 1964, on the Florence job) was received by 11:00 a.m. on October 3, 1964, plaintiff would waive all default and reinstate the agreement of April 1st; that otherwise plaintiff would enforce the contract. The specified payment was not received.

Without objection or exception the following issues were submitted to the jury and answered as indicated:

1. Did the defendant H. C. Jones Construction Co., Inc., default in any of the payments agreed to be paid in the contract between the parties dated 1 April 1964, and did such default continue for a period of thirty days after written notice of such default?

ANSWER: Yes.

2. What amounts, if any, have been paid to Rural Plumbing and Heating, Inc., as credits against the amount due under the terms of said contract?

ANSWER: $72,658.00. (This figure is the sum of the stipulated payments, plus the principal sum of $31,180.00, paid on the Princeton motel project by U. S. F. & G.)

3. What amounts, if any are now due to Rural Plumbing and Heating, Inc., under the terms of said contract?

ANSWER: $58,441.91.

Thereafter, in accordance with the stipulation, Judge Bailey made the interest calculations and entered judgment against Jones Co. and Keith T. Jones, jointly and severally, in the amount of $58,441.91 (the sum of the original balances alleged to be due in causes of action 4 and 5, less the credits) with interest at the rate of 6% from November 5, 1965, until paid; and the sum of $14,573.34, in accrued interest. The judgment further ordered Wachovia Bank and Trust Company as garnishee to pay to plaintiff, as a credit on the judgment, the sum of $3,413.53, referred to in stipulation 3. From this judgment defendants Jones Co. and Keith T. Jones appeal.

Lassiter, Leager, Walker & Banks for plaintiff appellee.

George M. Anderson and E. Ray Briggs for defendant appellants.

SHARP, J. Defendants' assignments of error 1 through 4 relate to the exclusion of evidence. These assignments do not comply with Rule 19(3), Rules of Practice in the Supreme Court, in that appellant did not incorporate therein the excluded evidence and thus disclose the alleged error. They will not, therefore, be considered. *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597. In our view of this case, however, they are immaterial.

Although appellant does not raise the point, this case presents a novel situation in that the issues submitted to the jury did not arise upon the pleadings but upon a contract entered into by the parties a year after the pleadings had been filed. The contract specified that, if certain payments totaling $105,000.00 were made as they came due, plaintiff's claim of $131,099.91, contained in causes of action 4 and 5, would be discharged. If, however, Jones Co. defaulted, and its default continued for 30 days after plaintiff had given written notice thereof, the contract became "a judicial admission" that Jones Co.'s liability to plaintiff was the amount for which plaintiff had sued.

The stipulation entered into at the time of the trial on November 4, 1965, incorporated the contract by reference and established the payments which Jones Co. had made pursuant to it. This stipulation clearly reveals that Jones Co. had paid in full only the amounts due under paragraph 1(a) and (b) of the contract; all other payments were in default. If this default had continued for thirty days after written notice to Jones Co., the contract constituted a judicial admission of defendants' liability in the amount of

$131,099.91, less the stipulated payments. To fix the amount, it would be necessary only to subtract the stipulated payments and to compute the interest due. Thus, the only issue of fact which the parties left unstipulated was whether plaintiff had given notice of default as required by the contract and, if so, whether that default had continued for a period of 30 days thereafter. The uncontradicted evidence was that such notice had been given on July 28, 1964, reaffirmed on August 14, 1964, September 4, 1964, and September 30, 1964, and that the default has continued to date. Plaintiff was entitled, therefore, to have had the judge instruct the jury that, if it found the facts to be as all the evidence tended to show, it would answer the issue relating to notice and continued default in favor of the plaintiff. *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726. The first issue submitted to the jury incorporated these questions, and was answered in plaintiff's favor.

It is the rule with us that "issues arise upon the pleadings, when a material fact . . . is maintained by one party and controverted by the other." G.S. 1-196; *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311; McIntosh, North Carolina Practice and Procedure § 508 (1929). The pleadings must support the judgment, which may not be based on facts not alleged in the complaint and entirely inconsistent with it. *McCullen v. Durham,* 229 N.C. 418, 50 S.E. 2d 511; *Shelton v. Davis,* 69 N.C. 324. Although the parties may not agree upon improper issues, *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 876; *Miller v. Miller,* 89 N.C. 209, they may, by stipulation or judicial admission, establish any material fact which has been in controversy between them, and thereby eliminate the necessity of submitting an issue to the jury with reference to it. *Millikan v. Simmons,* 244 N.C. 195, 93 S.E. 2d 59. Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position. *Austin v. Hopkins,* 227 N.C. 638, 43 S.E. 2d 849; 83 C.J.S., Stipulations § 22(a) (1953). The sum and substance of the foregoing precepts is that it is the duty of the judge to submit such issues as are necessary to settle the material controversies in the pleadings. In the absence of such issues, without admissions of record sufficient to justify the judgment rendered, this Court will remand the case for a new trial. *Tucker v. Satterthwaite,* 120 N.C. 118, 27 S.E. 45.

The contract of April 1, 1964, and the stipulation of November 4, 1965, incorporating it were made part of the record in this case at the trial. They did not, however, change the theory upon which the fourth and fifth causes of action were stated in the complaint. They created no inconsistencies and in no way negated any material allegation. See *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785; *King*

v. Coley, 229 N.C. 258, 49 S.E. 2d 648. Although they added the issues of default and notice to the case, the ultimate issue — the amount of Jones Co.'s liability to plaintiff growing out of causes four and five — remained the same.

Without any doubt the parties' contract and stipulations prevented a compulsory reference in this case, and greatly simplified what would otherwise have been a very involved lawsuit. Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. *Chisholm v. Hall, supra;* 83 C.J.S., Stipulations § 2 (1953). In some jurisdictions the parties may "waive the issues made by the pleadings and stipulate for a trial on the merits regardless of such issues." 83 C.J.S., Stipulations §§ 10(6), 22a. (1953). See *Blades v. Des Moines City Ry. Co.,* 146 Iowa 580, 123 N.W. 1057; *Traill v. Ostermeier,* 140 Neb. 432, 300 N.W. 375; *Bruner v. Burch,* 179 Okla. 338, 65 P. 2d 1215. This, however, is not the rule in North Carolina except in controversies without action, which do not contemplate pleadings, G.S. 1-250, and perhaps in a case agreed. McIntosh, *op. cit. supra* § 518. Nor, under our practice, do stipulations dispense with the necessity that the pleadings support the proof. "(W)here the pleadings do not distinctly and unequivocally raise an issue, it should not be submitted." *Henderson v. R. R.,* 171 N.C. 397, 398, 88 S.E. 626, 627.

After plaintiff had decided to invoke the provisions of paragraph 7 of the contract, the proper procedure would have been for it to have filed an amended complaint in which the two remaining causes "were brought up to date," and those which had been settled eliminated from the pleadings. This would have greatly clarified a confused situation and preserved some symmetry in the case. Notwithstanding, under the circumstances here disclosed, the ends of justice will best be served by treating the stipulations and contract as an amendment to the complaint. The purpose of the requirement that issues must arise on the pleadings is to prevent surprise and to give each party the opportunity to prepare his case. *King v. Coley, supra.* No risk of surprise existed here.

Defendants make no point here that the issues submitted did not arise upon the pleadings nor did they, at the trial, tender other issues or except to those used. Indeed, after trial all parties stipulated that the issues submitted to the jury were based on the contract of April 1, 1964. This case has been fairly tried, and, upon the whole record, it is apparent that the result would have been the same had all rules of pleadings been strictly observed. It is also patent that another trial upon this same evidence would result in an identical verdict.

The procedure followed here appears to be without precedent in this jurisdiction, and we note the irregularity in order to point out that such a departure from established rules of pleadings is not to be encouraged and is hazardous. For example, defendants assign as error the failure of the court to charge that plaintiff had waived Jones Co.'s default by crediting 22% of the two progress payments received from the Florence job more than 30 days after giving notice of default against the $25,000.00 due under paragraph 1(d) of the contract. This assignment is without merit for two reasons: (1) The circumstances under which these payments were made and received were not such as to constitute a waiver. *Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E. 2d 871; (2) Defendants have no pleadings which raise the issue. When the facts constituting a waiver do not appear in the pleadings, the party relying thereon must specially plead the defense, and it "must be pleaded with certainty and particularity and established by the greater weight of the evidence." *Hall v. Odom*, 240 N.C. 66, 70, 81 S.E. 2d 129, 133. *Accord, Wright v. Insurance Co.*, 244 N.C. 361, 93 S.E. 2d 438; *Lamb v. Staples*, 236 N.C. 179, 72 S.E. 2d 219.

Defendants' other assignments have been considered and found to be without merit.

The judgment of the court below is

Affirmed.

CORNELIA TAYLOR LONG v. GEORGE G. HONEYCUTT.

(Filed 26 August, 1966.)

1. Reference § 3—

Where the complaint seeks to recover the aggregate amount of loans and advancements made by plaintiff to a corporation and other payments made by plaintiff for the benefit of the corporation, which obligations plaintiff alleged that defendant had personally assumed by contract in acquiring plaintiff's stock in the corporation, *held*, the ordering of a compulsory reference by the court in its discretion will be upheld, since it cannot be ascertained as a matter of law from the pleadings that plaintiff's cause of action did not require the consideration of a "long account." G.S. 1-189.

2. Appeal and Error § 19—

An assignment of error which fails to disclose the question sought to be presented without the necessity of going beyond the assignment itself will not be considered.

3. Appeal and Error § 41—

The exclusion of evidence will not justify a new trial when the record discloses that appellant's cause would be in no way benefited had such evidence been admitted.

4. Husband and Wife § 3—

When there is nothing in the record to show that the husband was the agent of the wife or had authority to act for her at the conference in question, and the record discloses that the wife was not present at the conference, statements made at such conference, offered as tending to show the intentions of the parties with respect to the contract sued on by the wife, are not competent for the purpose of showing the wife's understanding and intent in regard to the contract.

5. Appeal and Error § 35—

Where the charge of the court is not set forth in the record, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts.

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

APPEAL by defendant from *Crissman, J.*, 22 March 1965 Session of FORSYTH. Docketed and argued as Case No. 446, Fall Term 1965. Docketed as Case No. 442, Spring Term 1966.

Civil action to recover the sum of $11,707.16 together with interest from 27 February 1959, allegedly due by contract and unpaid.

Plaintiff alleges in substance in her complaint: Plaintiff and defendant are residents of Forsyth County. Southeastern Beverage Company, Inc., hereafter called Southeastern, is a bankrupt corporation, the president of which at the time of its bankruptcy was the defendant. Prior to 27 February 1959, the majority of the outstanding stock of Southeastern was held by plaintiff, who from time to time extended loans to Southeastern, and paid various debts of Southeastern. On 27 February 1959, defendant desired to purchase the controlling interest in Southeastern, and accordingly entered into a contract with plaintiff whereby defendant obtained control of Southeastern. On 27 February 1959, plaintiff and defendant entered into a written contract, which provided, *inter alia*, as follows: "That George G. Honeycutt hereby agrees to assume and be responsible for the management of Southeastern Beverage Company, Inc., and also any and all obligations that may on this date be lawfully due by the said corporation." The obligations of Southeastern on 27 February 1959, which defendant agreed to assume, included $11,707.16 owing to plaintiff for loans made to Southeastern and for other payments made by plaintiff for the benefit of Southeastern. Plaintiff has made repeated demands on defendant for payment of his personal obligations as set forth in the written contract between the parties, both before and after Southeastern went

bankrupt under the defendant's management, but defendant has steadfastly refused to pay his debt.

Defendant admits in his answer that Southeastern is bankrupt, that he was president at the time of its bankruptcy, and admits that prior to 27 February 1959 the majority of the outstanding stock of Southeastern was owned or controlled by plaintiff. All other allegations of the complaint are denied, except the residence of the parties, which is admitted.

For a further answer and defense to plaintiff's complaint, defendant alleges in substance (We omit certain paragraphs which were stricken out by an order of Gambill, J., on motion of plaintiff, to which defendant excepted but has not carried his exception forward as an assignment of error.): During the early part of February 1959, plaintiff desired to withdraw from Southeastern as a substantial stockholder, and plaintiff and defendant reached an agreement whereby defendant agreed to save plaintiff harmless as to liability on two notes which had been executed by Southeastern, and on which plaintiff and defendant were endorsers. The said notes were in the total principal amount of $18,340 and were subsequently paid by defendant. As a part of the same agreement, plaintiff agreed to transfer her 24,000 shares of common "A" stock which she owned in Southeastern to defendant, and it was also agreed that plaintiff would retain or have issued to her a total of 10,000 shares of common "B" stock in Southeastern. On 27 February 1959 plaintiff and defendant entered into a written agreement. Said agreement contained the following language in paragraph 7 of the agreement: "That George G. Honeycutt hereby agrees that in the event the profits from any sale by him of his interest in the Southeastern Beverage Company, Incorporated, or the net earnings from the said business shall, at any time in the future, justify same, that he will reimburse CORNELIA TAYLOR LONG insofar as possible for her investment in the said company to the present time, the said amount being the sum of $28,807.00." Defendant is informed and believes and, therefore, alleges that the sum of $11,707.16 referred to in plaintiff's complaint as owing by him to her constituted her investment in Southeastern and was a part of the sum of $28,807.00 referred to in the above-mentioned contract between the parties.

For a second further answer and defense to plaintiff's complaint, defendant alleges in substance: The agreement of 27 February 1959 between the parties was also purportedly entered into by Major Cola Bottling Company, a corporation, hereafter called Major. Under the terms of the agreement and as a substantial portion of the consideration to defendant, Major agreed to transfer its 25,000 shares of common "B" stock in Southeastern to defendant. At

the time the agreement was entered into, Major was not a corporation, and insofar as the defendant is aware there was no corporation by that name, the reason being that this corporation had not done business for many years and its charter had been revoked by the Secretary of State of North Carolina; therefore, the agreement of Major, of which the plaintiff was the *alter ego,* was unenforceable, and the 25,000 shares of common "B" stock were never transferred to defendant.

For a third further answer and defense to plaintiff's action, defendant alleges in substance: If defendant did enter into a written agreement with the plaintiff under which he agreed to pay plaintiff the indebtedness alleged in the complaint, which is denied, then such agreement was the result of mutual mistake between plaintiff and defendant, and defendant pleads such mutual mistake in bar of plaintiff's right to recover anything of defendant under said agreement.

On 21 September 1962, defendant, pursuant to an order of the court, filed an amendment to his further answer and defense, reading as follows: "Following February 27, 1959, Southeastern Beverage Company, Inc., had no profits and no net earnings and finally was declared a bankrupt in 1960."

On 28 September 1964, the Honorable Frank M. Armstrong, judge presiding, entered an order of compulsory reference in substance as follows: It appearing to the court that the trial of issues of fact in this case will require the examination of a long account, it is ordered by the court on its own motion, as provided in G.S. 1-189, that all issues both of fact and of law in this action should be referred to Bannister R. Browder as referee, who will hear the evidence of both plaintiff and defendant and report his findings of fact and conclusions of law to the court not later than 28 October 1964. To this order plaintiff and defendant objected and excepted.

On 10 February 1965 the referee, Bannister R. Browder, filed his report with the court, which is as follows:

> "1. This is an action on a written contract wherein plaintiff sued defendant for the recovery of $11,707.16 alleging liability resting on the terms of the written contract. (Complaint and prayer for relief).
>
> "2. During the course of the hearing, plaintiff waived and/or reduced her claim by $160 leaving the alleged liability of the defendant at $11,547.16 (R. pp. 6, 7, 74, 75, 76, 89).
>
> "3. Plaintiff introduced into evidence as plaintiff's Exhibit No. 2 a contract executed by Cornelia Taylor Long, George G. Honeycutt and Ralph Long, President of the Major Cola Bot-

tling Company, dated February 27, 1959, and executed on March 3, 1959.

"4. Plaintiff introduced as plaintiff's Exhibit No. 1 forty-seven checks (R. p. 5) representing loans or advancements to Southeastern Beverage Company for various sums and amounts payable to Internal Revenue Service, Piedmont Natural Gas Co., Piedmont Tire Co., Chattanooga Glass Co., Laurens Glass Works, Cox Roofing Co., Southeastern Beverage Co., First National Bank and Cash, all being used to the benefit of Southeastern Beverage Company for numerous corporate expenses such as social security, taxes, payments, tires for the company trucks, bottles used in the corporation's business, rent for the premises occupied by the corporation, purchase of Sun Drop syrup used by the corporation, purchase of ginger ale, making up the payroll for the corporation, crowns for bottled drinks, cartons, license tags for the company trucks and payment on pickup truck (R. pp. 7-16).

"5. Checks composing Plaintiff's Exhibit No. 1 were issued during the year 1958 and were also issued during the early part of 1959 (R. p. 3), were drawn on plaintiff's private bank account (R. p. 5), were all delivered to Mr. Ralph Long or to Mr. Rufus Davis (R. p. 17).

"6. Payment in full for said advances or loans has been demanded of the defendant (R. p. 25) and defendant has never made any payment (R. pp. 4, 21, 25).

"7. Mr. Ralph Long, husband of plaintiff, was secretary of Southeastern Beverage Co. (R. pp. 20, 83).

"8. Mr. Rufus Davis was the plant manager of Southeastern Beverage Co. (R. pp. 79, 84, 119).

"9. The defendant, George G. Honeycutt, was president and treasurer of Southeastern Beverage Co. (R. pp. 20, 147), and as treasurer was responsible for keeping, or having kept, the books of the corporation (R. p. 147).

"10. The plaintiff, Cornelia Taylor Long, was never an officer of Southeastern Beverage Co., never participated in the operation of the corporation (R. p. 20) and never asked for access to the corporate books (R. p. 57).

"11. Proceeds of plaintiff's Exhibit No. 1 — with the exception of the $160.00 waived heretofore — went to the use and benefit of Southeastern Beverage Co. (R. pp. 7-16, 86, 87, 89, 93, 121, 123).

"12. Immediately prior to the preparation and execution of plaintiff's Exhibit No. 2, plaintiff and defendant owned 50% each of the voting stock of Southeastern Beverage Co. (R. pp.

17, 18); plaintiff's 50% of the voting stock was 24,000 shares of $1.00 par value A common stock (R. pp. 104, 105), plaintiff owned 7,690 shares of class B nonvoting $1.00 par value stock of Southeastern Beverage Co., same having been issued for advances or loans to Southeastern Beverage Co. prior to the January, 1958 (R. pp. 104, 105, 106, 35-38, 129, 48).

"13. Immediately prior to the preparation and execution of Plaintiff's Exhibit No. 2, the corporate records of Southeastern Beverage Co. did not reflect the advances or loans made by plaintiff or defendant as 'accounts payable'; (R. pp. 159, 170) however, Mrs. Frances Poe, the bookkeeper of Southeastern Beverage Co. during the year of 1958 and through March, 1959 (R. p. 162), prepared lists of advancements or loans by both plaintiff and defendant to the corporation periodically (R. p. 169) from a page in said corporate records entitled 'Loans by Officers' (R. p. 173) which listed advances by plaintiff and defendant; the 'loans by officers' page contained the date and amount of every loan or advance by plaintiff or defendant and at any time would reflect the exact amount contributed by each (R. pp. 130, 174).

"14. Plaintiff's Exhibit No. 2 was prepared by Mr. George F. Phillips, attorney for defendant, (R. pp. 25, 157).

"15. Plaintiff's husband, Ralph Long, represented her in negotiating plaintiff's Exhibit No. 2 (R. pp. 32, 51, 103, 138, 155, 182, 184, 193, 195).

"16. Plaintiff never talked with the attorney who prepared the contract (R. p. 26), never talked with the defendant before it was signed (R. p. 26) and never talked with defendant or defendant's attorney in regard to the meaning of the provisions of the contract (R. p. 26).

"17. The figure of $28,807 contained in paragraph 7 of Plaintiff's Exhibit No. 2 did not include $11,547.16 presently sued for (R. p. 113) but was reached by dealing with the shares of stock of Southeastern Beverage Co. under control of the plaintiff; namely, 24,000 shares A voting common stock owned by plaintiff; $25,000 of B nonvoting common stock owned by Major Cola Bottling Company, 7,690 shares of B nonvoting common stock owned by plaintiff — all of this stock having a par value of $1.00 — 2,310 shares of nonvoting common B par value $1.00 stock to be transferred and delivered to plaintiff and reductions from these investments, or funds theretofore contributed to the capital structure of the corporation as evidenced by stock retained (7,690 shares), stock to be transferred to plaintiff (2,310 shares), and by plaintiff's escape from lia-

bility on amounts owed on two corporate notes endorsed by plaintiff ($18,000.00), plus or minus current interest due or current interest prepaid (R. pp. 104-106, 108).

"18. Plaintiff received no cash for execution of Plaintiff's Exhibit No. 2 (R. p. 79), did not ask her husband how the $28,807 mentioned in paragraph 7 of the Plaintiff's Exhibit No. 2 was derived (R. p. 56) but makes no issue that she did or did not receive 2,310 shares of nonvoting B stock (R. p. 81).

"19. Negotiations concerning Plaintiff's Exhibit No. 2 took place in the defendant's office (R. pp. 101, 138); redrafts of Plaintiff's Exhibit No. 2 were made at Mr. Long's suggestion (R. p. 102).

"20. The defendant says he knows how the figure of $28,807 was reached but cannot break this figure down into component parts (R. pp, 140, 142).

"21. After the execution of the contract, the defendant and Mr. Ralph Long met with defendant's attorney, Robert Stockton, in an effort to clarify Plaintiff's Exhibit No. 2 (R. pp. 212, 213), but no modification of Plaintiff's Exhibit No. 2 was made (R. p. 216).

"The Referee submits to the Court his conclusions of law as follows:

"1. The contract, Plaintiff's Exhibit No. 2, entered into between the parties is an entire integrated contract.

"2. The parties to the action have not contended that the written contract did not contain their entire and complete agreement; neither party contends that any oral contemporaneous contract was made which would not add to or vary the written contract; neither party contends that any contemporaneous oral contract was made which contradicts the simple written word of the contract.

"3. Neither party contends that Plaintiff's Exhibit No. 2 was abandoned nor does either party contend that Plaintiff's Exhibit No. 2 was followed by any subsequent parol agreement or modified by subsequent conduct.

"4. Defendant maintains that the use of the word 'obligations' in paragraph 1 of Plaintiff's Exhibit No. 2 in relation to paragraph 7 of said Exhibit constitutes an uncertain and ambiguous term but offers no credible testimony to support said contention in that defendant fails to offer testimony explaining all of the component parts of the figure of $28,807 contained in paragraph 7.

"5. Uncertainty or ambiguity, if any exists, in interpreting

the contract must be held against the party preparing the contract *i.e.* the defendant.

"6. The common and legal connotation of the word 'obligations' in paragraph 1 of Plaintiff's Exhibit No. 2 in view of conclusion of law No. 5 would include all debts owed by the corporation on the date of its execution and these debts included the loans or advancements made by plaintiff in the amount of $11,547.16; the term 'investment' as used in paragraph 7 of Plaintiff's Exhibit No. 2, as explained fully by plaintiff's witnesses and as not explained by defendant's witnesses and as taken in its normal and legal meaning would include, in light of finding of law No. 5 above, only the capital structure of the corporation less in this instance notes of the corporation personally endorsed by the plaintiff, and if interpreted otherwise would leave paragraph 1 of Plaintiff's Exhibit No. 2 meaningless.

"7. If ambiguity in this contract did as a matter of fact exist, such ambiguity should be inclined against the defendant as author of the contract. The entire written agreement should be construed to give effect to all paragraphs.

"Upon the foregoing findings of fact and conclusions of law, the Referee reports to the Court his decision as follows:

"The defendant is indebted to the plaintiff in the sum of $11,547.16, together with interest on the principal amount from March 3, 1959."

Defendant filed exceptions to the referee's report, demanded a jury trial, and submitted what he deemed to be appropriate issues.

When the case came on to be heard before Judge Crissman and a jury, the parties entered into the following stipulation:

"It is stipulated and agreed by and between the attorney for the plaintiff and the attorney for the defendant that the evidence to be read to and considered by the jury shall consist entirely of the adverse examinations of the plaintiff and defendant taken 29 August 1963 and the transcript taken before the referee on 2 and 7 October 1964 and as subsequently shortened and limited by agreement of counsel."

Judge Crissman did not submit to the jury the issues tendered by defendant, but did submit to the jury the following issues, which were answered as appears:

"1. Were the advances made by the plaintiff to the Southeastern Beverage Company intended by the parties to be included in the provisions of paragraph I of the contract?

"Answer: Yes.

"2. If so, in what amount is the defendant indebted to the plaintiff?

"Answer: $11,547.16."

Defendant did not except to the failure to submit the issues tendered by him, and did not except to the issues submitted to the jury by Judge Crissman.

From a judgment entered in accordance with the verdict that plaintiff recover from defendant the sum of $11,547.16 with interest thereon from 13 September 1961, together with the costs of this action, defendant appeals to the Supreme Court.

Robert M. Bryant for defendant appellant.

Craige, Brawley, Lucas & Horton by Hamilton C. Horton, Jr., for plaintiff appellee.

PARKER, C.J. Defendant assigns as error the order of compulsory reference. This assignment of error is overruled.

G.S. 1-189 provides in relevant part: "Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases: 1. Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein." It is said in *Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145: "The ordering or refusal to order a compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court." Plaintiff alleged in her complaint the obligations of Southeastern on 27 February 1959, which defendant agreed to assume, included $11,707.16 owing to plaintiff for loans made to Southeastern and for other payments made by plaintiff for the benefit of Southeastern. Defendant in his answer denied this allegation of fact in plaintiff's complaint. At the time Judge Armstrong entered his order of compulsory reference, it would seem Judge Armstrong from reading the pleadings could reasonably expect a long and tedious inquiry in respect to loans made to Southeastern by plaintiff and in respect to payments made by plaintiff for the benefit of Southeastern in order to settle the litigation, and he was authorized by G.S. 1-189 to order a compulsory reference. It may not be said as a matter of law from reading the pleadings that plaintiff's cause of action did not require the consideration of a "long account." This is in line with our following decisions: *Perry v. Doub,* 249 N.C. 322, 106 S.E. 2d 582; *Grimes v. Beaufort County,* 218 N.C. 164, 10 S.E. 2d 640; *Texas Co. v. Phil-*

lips, 206 N.C. 355, 174 S.E. 115; *Fry v. Pomona Mills, Inc.,* 206 N.C. 768, 175 S.E. 156; *Manufacturing Co. v. Horn,* 203 N.C. 732, 167 S.E. 42; *Bank v. Evans,* 191 N.C. 535, 132 S.E. 563. *Finance Co. v. Culler,* 236 N.C. 758, 73 S.E. 2d 780, relied upon by defendant is clearly factually distinguishable.

Defendant states in his brief that the court was in error "when it refused to allow the defendant to introduce in evidence the list of 'Accounts Payable' of the Southeastern Beverage Company since the theory under which the plaintiff seeks to recover is based on her being a creditor of the corporation," and he further states in his brief that the court erred "in refusing to admit evidence of a note which was made out to plaintiff by the corporation and which was assigned by plaintiff to defendant's wife at the same time she executed the contract involved in this case." These assignments of error are overruled for failure to comply with our Rules, because they do not disclose the question sought to be presented without the necessity of going beyond the assignments of error themselves to the record, and such failure to comply with our Rules does not present the exceptions for review. *Plumbing Co. v. Harris,* 266 N.C. 675, 147 S.E. 2d 202; *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364. And further, an examination of the record shows that the evidence excluded was, if not irrelevant, certainly not prejudicial. Defendant testified: "No list of creditors of the corporation ever submitted to me had Mrs. Cornelia Taylor Long's name appearing on it."

Defendant assigns as error the refusal of the court to allow the testimony of Robert Stockton, an attorney at law, in respect to a conference had in his office with defendant and plaintiff's husband in connection with a contract between plaintiff and defendant with Major Cola Bottling Company, and as to his legal opinion in respect to certain parts of that contract. Defendant states in his brief as follows: "Was the court not in error when it refused to allow the testimony of Robert Stockton to be admitted in evidence when such testimony tended to show that the intention of the parties was for indemnification purposes only?" There is nothing in the record to show that at such conference plaintiff's husband was her agent or authorized to act for her, and plaintiff was not present at the conference. A reading of Mr. Stockton's testimony fails to show that defendant was prejudiced by the court's refusal to admit it in evidence. This assignment of error is overruled.

The other assignments of error made by defendant are formal. The court's charge to the jury is not set forth in the record. Consequently, it is presumed that the jury was instructed correctly on

every principle of law applicable to the facts. *Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200.

In the trial below we find

No error.

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

L. H. WALL v. COLVARD, INC.

(Filed 26 August, 1966.)

1. Appeal and Error § 38—

Assignments of error not brought forward in the brief are deemed abandoned.

2. Appeal and Error § 22—

In the absence of objection or exception to the admission or exclusion of evidence, findings of fact which are supported by the evidence must be sustained.

3. Chattel Mortgages and Conditional Sales § 2—

Where at the time of the execution of a chattel mortgage the mortgagor owns merchandise and equipment on the premises at a specified location, a chattel mortgage listing the chattels by quantity, as "one cigarette machine; two cold drink machines;" etc., and covering "also, all merchandise, supplies and equipment now located" at the designated business address, is held to identify the property with sufficient certainty.

4. Chattel Mortgages and Conditional Sales § 15—

Upon default, the chattel mortgagee is entitled to possession of the property.

5. Trover and Conversion § 1; Claim and Delivery § 6—

Where the holder of a junior chattel mortgage seizes the property under claim and delivery and refuses the demand for the surrender of the property by the holder of a senior registered chattel mortgage in default, there is a conversion of the property by the junior mortgagee, and the senior mortgagee is entitled to recover from him the value of the property at the time of its conversion, with interest.

6. Trover and Conversion § 1—

After an act of conversion has become complete, an offer to return or restore the property by the wrongdoer does not bar an action for conversion.

7. Corporations §§ 1, 6—

Acquisition of the entire capital stock of a corporation by one person does not affect the corporate entity, and the execution in the name of the corporation by such person of a chattel mortgage is a corporate act and binding, provided the rights of its then existing creditors are not affected. G.S. 55-3.1.

APPEAL by defendant from *McLean, J.*, September 1965 Session of CALDWELL.

Action for conversion. The parties waived a jury trial. Both plaintiff and defendant offered evidence which presents a confused picture of the events culminating in this action. Except as indicated, however, it seems to be without material conflict. It tends to show:

Sometime prior to January 1961, plaintiff, his son W. F. Wall, and Clyde Nelson formed the corporation denominated "Wall & Nelson, Inc." for the purpose of operating a service station for the sale of Phillips 66 gasoline and associated products. Of the one hundred shares of stock issued, plaintiff, his son, and his son's children owned all but five, which plaintiff had turned over to Nelson so that he could be an officer of the corporation. Nelson himself never invested any money in the corporation. He was, however, its vice-president and the operator of the business. Plaintiff, who was president, Nelson, and W. F. Wall constituted the board of directors. The business was conducted upon premises leased by Wall & Nelson, Inc. from defendant Colvard, Inc., a wholesale distributor of Phillips 66 products. As a result of Nelson's poor management, the business of Wall & Nelson, Inc. was operated at a loss. On November 1, 1961, plaintiff and his family sold Nelson their stock in the corporation for $7,400.00, and all the officers and directors other than Nelson resigned. Thereafter Nelson remained the sole stockholder in the corporation.

To enable Nelson to purchase the Wall stock, R. W. Colvard, president of defendant corporation, "gave him a note." The "understanding was he paid Mr. Wall" and that Colvard would carry the note until the following spring. Plaintiff has collected the $5,000.00 due him from the proceeds of this note, but Nelson has not paid the note for $1,200.00 which he executed and delivered to plaintiff for the balance of the purchase price. Although the record is far from explicit on this point, we deduce that the note which Colvard "gave" Nelson may have been the note which Nelson executed to First Union National Bank of Lenoir on January 1, 1962, in the amount of $5,486.00, and which defendant Colvard probably endorsed. In any event, defendant is now the assignee of this note.

In January 1961, plaintiff had advanced Wall & Nelson, Inc. approximately $6,000.00 to pay for merchandise. In August 1961, he

had advanced it about $2,400.00 more to pay taxes, meet payrolls, etc. Plaintiff made these loans to the corporation upon the understanding that it was to secure these loans by a chattel mortgage on its assets. At the time Nelson became the owner of all the stock in the corporation, this chattel mortgage had not been executed, and the corporation owed plaintiff $8,874.34. Upon plaintiff's request, on November 3, 1961, Wall & Nelson, Inc., "by Clyde H. Nelson, vice-president," executed and delivered to plaintiff a chattel mortgage, in usual form, to secure the corporation's note for $8,874.34, due 90 days after date. It conveyed to plaintiff the following described personal property:

"One Ford pickup truck
One cigarette machine
Two cold drink machines
Cigarette vending machine
Coffee vending machine
Cash register
Show case
Small tools
A quantity of batteries
A quantity of tires
A quantity of tire chains
A quantity of oil

"Also, all merchandise and supplies and equipment now located at the Phillips 66 buildings at the intersection of East Harper Avenue and the South By-Pass" in Caldwell County.

The mortgage likewise covered "all new merchandise purchased by the corporation for use in its business." At the time the chattel mortgage was executed, the corporation owned only one Ford pick-up truck, one cigarette machine, two cold drink machines, one cash register, one coffee vending machine, and one show case. It was duly filed for registration in the office of the Register of Deeds of Caldwell County on November 3, 1961.

Neither Nelson, nor anyone for him, ever made a payment on this chattel mortgage. When the mortgage became due on March 3, 1962, plaintiff made no attempt to foreclose, because Nelson was then paying on the Colvard note for the purchase price of the stock, and, when that was paid off, plaintiff expected him to begin paying off the chattel mortgage.

As security for the note in the amount of $5,486.00 which Nelson executed to the First Union National Bank of Lenoir, presum-

ably to enable him to buy plaintiff's stock, Nelson and wife, as individuals, executed and delivered a chattel mortgage on the merchandise and equipment in the filling station in question. This mortgage was recorded on January 27, 1962. (This note and chattel mortgage were not introduced in evidence.) With reference to this transaction, Mr. Colvard, who owns "practically all the stock (in defendant corporation)," dealt with "Clyde Nelson rather than Wall & Nelson, Inc." Although Colvard knew of the existence of Wall & Nelson, Inc., he did not examine the grantor index of chattel mortgages in the Register of Deeds office to see whether this corporation had previously mortgaged the personal property in question. His record examination of mortgages given by Nelson and wife failed, of course, to reveal the prior chattel mortgage which Wall & Nelson, Inc. had given to plaintiff on the same property.

After Nelson purchased all the stock in Wall & Nelson, Inc., he managed the service station as an individual operator for defendant, which sold him gas, oil, and some tires on consignment. He was supposed to pay defendant weekly as he sold these products. On September 12, 1962, however, Nelson owed defendant $5,000.00-$6,000.00, and the only security it had was the note for $5,486.00 and the chattel mortgage on the filling station merchandise, supplies and equipment which had been recorded subsequent to plaintiff's mortgage. In order to evict Nelson from the filling station, defendant, on September 12, 1962, instituted an action on the note and took claim and delivery for "all merchandise and equipment in the Phillips 66 station at #518 East Harper Street, Lenoir, North Carolina." In the affidavit, Mr. Colvard averred that the actual value of the property taken was $5,000.00. The sheriff of Caldwell County served the summons and other papers in the claim and delivery proceeding upon Nelson and took possession of the merchandise and equipment at the service station, including the Ford truck, cash register, two cold drink machines, and the coffee machine. At the time, he made a detailed inventory of the merchandise and equipment which covers 17 pages of the record.

While the sheriff was inventorying the property, plaintiff's son, W. F. Wall, came to the service station and informed defendant's agent, Mr. Wilfong, who was assisting the sheriff, that plaintiff had a first mortgage on all the stock of goods and equipment. Wilfong replied that a title search had not revealed any such mortgage. In the meantime, Nelson had taken the papers which the sheriff had served upon him to plaintiff, who immediately called defendant's attorney of record, Mr. Ted G. West, informed him of his recorded mortgage, and demanded that he release the property. Mr. West refused, but stated that if plaintiff did have a prior recorded mort-

gage, defendant would pay it off. At that time, plaintiff did have a first lien on all the property included in his mortgage except the cash register, which was subject to a purchase-money lien in the amount of $400.00. After holding the property for three days, no replevin bond having been filed, the sheriff delivered the property to defendant.

Plaintiff's evidence tended to show that the wholesale value of the property which the sheriff seized was $8,900.00-$8,977.00. Defendant's evidence tended to show that it was worth only $1,500.00-$2,500.00. In November 1962, defendant offered to give the property still in his possession to plaintiff or to Nelson. Both refused this offer. On August 25, 1965, defendant's action against Nelson and wife was nonsuited by the court because of the failure of Colvard, Inc. to appear to prosecute it.

Judge McLean made findings of fact which are summarized as follows:

1. Plaintiff is the owner and holder of a note and chattel mortgage in the amount of $8,874.34, executed by Wall & Nelson, Inc. on November 3, 1961, filed for record on the same day in the office of the Register of Deeds of Caldwell County.

2. On September 12, 1962, this note and chattel mortgage were in default.

3. On that day, the items embraced in plaintiff's chattel mortgage were seized by the sheriff under claim and delivery proceedings instituted by defendant, and were thereafter delivered to defendant.

4. On September 12, 1962, plaintiff demanded of defendant the possession of these articles of personal property, and defendant refused to deliver them.

5. Plaintiff's chattel mortgage was properly executed by Wall & Nelson, Inc., with the authority of its board of directors, and delivered to plaintiff for valuable consideration.

6. Defendant has retained possession of the property in question.

7. The value of the property at the time it was seized by defendant was $7,130.00, but defendant is entitled to a credit of $800.00 for the cash register which plaintiff has recovered.

Upon these findings Judge McLean concluded as a matter of law that, at the time defendant took possession of the property under claim and delivery, plaintiff was entitled to its immediate possession; that when defendant refused to deliver the property to plaintiff upon his demand, defendant converted the property; that plaintiff is entitled to recover of defendant the sum of $6,330.00.

Defendant excepted to findings of fact 2 through 6, and to each conclusion of law, and appealed from the judgment entered.

Seila, Wilson & Palmer by W. C. Palmer for plaintiff appellee.

Ted G. West; Ferree & Brewer by Joe Brewer for defendant appellant.

SHARP, J. Defendant assigns as error only the findings of fact and conclusions of law contained in the judgment. Assignments of error 1 through 6 are based upon findings of fact 2 through 7. Assignment of error No. 4 to finding of fact No. 5 is not brought forward in the brief and is, therefore, deemed abandoned. *Cotton Mills v. Local, 584,* 251 N.C. 234, 111 S.E. 2d 476. Assignments of error 1, 2, 3, 5, and 6 challenge only the sufficiency of the evidence to support those findings. Since there were no objections or exceptions to the admission or exclusion of evidence, if the evidence supports the findings of fact, they must be sustained. 1 Strong N. C. Index, Appeal and Error § 22 (1957). As the statement of facts clearly reveals, findings 2, 3, 4, 6, and 7 (those which defendant now assigns as error) are fully supported by the evidence, and they, together with findings 1 and 5, clearly support the conclusions of law.

Defendant, whose chattel mortgage was recorded about three months after plaintiff's, is the junior mortgagee. The description of the property listed in the chattel mortgage, when considered in connection with the evidence that Wall & Nelson, Inc. owned only one Ford truck, one cigarette machine, two cold drink machines, one cigarette vending machine, one coffee vending machine, one cash register, one show case, and the further evidence that all the property was on the service station premises at a specified location, meets identification requirements of the law. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745. *Cf. Forehand v. Farmers Co.*, 206 N.C. 827, 175 S.E. 183. The quantity is the *entire* stock, and there was only one business and stock in trade owned by the mortgagor located at the intersection of East Harper Street and the South By-Pass in Caldwell County. "The slightest inquiry would have enabled a third party to identify the property intended to be montgaged." *In re Coleman & Brown,* 2 Fed. 2d 255 (5th Cir.). Plaintiff, the senior mortgagee whose mortgage was in default, was entitled to the possession of the property. *Rea v. Credit Corp.*, 257 N.C. 639, 127 S.E. 2d 225.

A junior mortgagee who seizes the mortgaged property and holds it against the senior mortgagee is liable in an action by the senior mortgagee for the conversion of the property. *Credit Corp. v. Satter-*

field, 218 N.C. 298, 10 S.E. 2d 914; *Foy v. Hurley,* 172 N.C. 575, 90 S.E. 582; *Grainger v. Lindsay,* 123 N.C. 216, 31 S.E. 473; 15 Am. Jur. 2d, Chattel Mortgages § 183 (1964); 14 C.J.S., Chattel Mortgages §§ 229, 248 (1939); Annot., Chattel Mortgages — Junior Mortgagee, 43 A.L.R. 395 (1926). Conversion is "'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" *Peed v. Burleson's, Inc.,* 244 N.C. 437, 439, 94 S.E. 2d 351, 353. "Withholding the posession from the plaintiff, under a claim of title inconsistent with his own" is a conversion. *University v. Bank,* 96 N.C. 280, 3 S.E. 359. Plaintiff, having alleged and shown his title to the property seized by the sheriff at defendant's instance, *Vinson v. Knight,* 137 N.C. 408, 49 S.E. 891, is entitled to recover the value of the property at the time and place of its conversion, with interest.

After an act of conversion has become complete, an offer to return or restore the property by the wrongdoer will not bar the cause of action for conversion. *Stephens v. Koonce,* 103 N.C. 266, 9 S.E. 315; 89 C.J.S., Trover and Conversion § 86 (1955).

The arguments in defendant's brief are directed to the sufficiency of plaintiff's chattel mortgage and the authority of Nelson to execute it. Although the assignments of error do not present these questions, it is noted that at the time Nelson, as vice-president of Wall & Nelson, Inc., executed and delivered to plaintiff the chattel mortgage in question, Nelson was the sole stockholder, director, and officer of the corporation. The existence of the corporation was not imperiled by Nelson's acquisition of all its stock. G.S. 55-3.1. It might be argued, with logic, that his act was the corporation's act. See Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation,* 34 N. C. Law Rev. 471 (1956). See also G.S. 55-36(b). In a number of jurisdictions "the sole stockholder or the stockholders by unanimous action may do as they choose with the corporation's assets provided the interest of its creditors are not affected." 18 Am. Jur. 2d, Corporations § 487 (1965) and cases therein cited. So far as the record discloses, except for the conditional vendors of the cash register and truck, plaintiff was the corporation's only creditor at the time the mortgage in suit was given.

The judgment of the court below is

Affirmed.

JOAN E. BELK v. DR. DONALD C. SCHWEIZER

(Filed 26 August, 1966.)

1. Trial § 35—

In this action for malpractice, the sole expert testimony offered by plaintiff, apart from the adverse examination of defendant, was the deposition of a physician which was read to the jury. The court charged that the testimony of plaintiff's expert was difficult of comprehension. *Held:* Under the circumstances, the court's statement could be construed as a statement that the expert's testimony was so confused and vague that it was of little probative value, and the charge must be held prejudicial upon plaintiff's appeal from an adverse verdict, plaintiff having offered sufficient evidence to go to the jury upon the issues. G.S. 1-180.

2. Physicians and Surgeons § 11—

A physician who holds himself out as having special knowledge and skill in the treatment of a particular organ or disease is required to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge ordinarily possessed by physicians similarly situated who devote special study and attention to the treatment of such organ or disease.

3. Same—

A qualified physician or surgeon is not an insurer and does not guarantee the correctness of his diagnosis, and ordinarily is not responsible for a mistake in diagnosis if he uses the requisite degree of skill and care.

4. Physicians and Surgeons § 19— Evidence held sufficient to be submitted to the jury in this action for malpractice.

Plaintiff's evidence tended to show that she put herself in the care of defendant, a specialist in the field of obstetrics and gynecology, that thereafter she suffered great pain and continual bleeding, that she asked defendant concerning the possibility of her having a tubular pregnancy, that upon her recurrent complaint of pain and bleeding, defendant by telephone diagnosed her illness as a kidney infection and proceeded to prescribe medicine therefor, that she contacted another physician who said she was in a serious condition and advised her to return to defendant, that plaintiff returned to the defendant who was unable to make a successful manual examination because of her pain, that her condition became progressively worse, and that she was later placed in a hospital and operated on for a ruptured tubular pregnancy. *Held:* The evidence is sufficient to be submitted to the jury in plaintiff's action for malpractice.

APPEAL by plaintiff from *Shaw, J.*, 25 October 1965 Civil Session of FORSYTH.

Civil action to recover damages allegedly caused by defendant's negligent failure to diagnose plaintiff's illness as tubular pregnancy and his failure to operate to remove it, thereby causing her to suffer great pain, and causing permanent injury to her female organs. The

case was tried upon issues raised by the pleadings and upon evidence offered by the parties. The jury found that plaintiff was not injured by negligence of defendant as alleged in the complaint.

From a judgment that plaintiff recover nothing from defendant, she appeals.

White, Crumpler, Powell, Pfefferkorn and Green by Harrell Powell, Jr., William G. Pfefferkorn, and Edward R. Green for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and W. F. Maready for defendant appellee.

PARKER, C.J. This is a summary of the allegations of fact in the complaint: Defendant, Dr. Donald C. Schweizer, is a practicing physician in the city of Greensboro, and holds himself out to be a specialist in the field of obstetrics and gynecology. Plaintiff, Joan E. Belk, a young married woman, visited defendant in his office on 19 May 1959 for medical services. At that time defendant, performing routine services for plaintiff, discovered she had a small ulcer at the mouth of her womb, and he treated her for this condition. On 9 November 1959 she went to defendant's office and explained to him that her last menstrual date was 4 August 1959. On 18 November 1959 she started a vaginal bleeding and called the defendant. Defendant was out of town on this occasion, and she was treated by his assistant. On 23 November 1959 plaintiff saw defendant in his office, and explained to him that she had been bleeding for approximately twelve days, had suffered great pain, was swollen, and had a temperature. On 27 November 1959 she was examined by defendant, at which time she was still bleeding. On 1 December 1959 she returned to defendant's office, and explained to him that she had had chills and fever the night before, was bleeding heavily and passing clots, was having severe cramps and pain, and was swollen. On 1 December 1959 defendant hospitalized her for an operation known as a D and C. (It was stipulated that a D and C is a dilatation and curettage.) She inquired of defendant as to the possibility of her having a tubular pregnancy. Defendant ran certain laboratory tests and told her that it could not be a tubular pregnancy. She remained in the hospital from 1 December 1959 to 3 December 1959. On 5 December 1959 she contacted defendant by telephone, stating to him that she had a temperature, was experiencing great pain in her back and side, was bleeding extensively, was swollen, and her complexion was discolored. The defendant did not come to see her nor did he request her to come to his office nor

go to the hospital. From the symptoms given to him on the telephone, without seeing her, he diagnosed her illness as a kidney infection and proceeded to prescribe medicine for a kidney infection. Plaintiff's husband on several occasions asked defendant what should be done for plaintiff, and defendant said he would hospitalize her if her husband thought it necessary. During this period defendant prescribed a large amount of the narcotic Demerol to relieve her pain. On 7 December 1959 she contacted another physician in Greensboro, Dr. Francis Berry, who came to see her, advised her she was in a very serious condition, and told her to return the next day to defendant. Plaintiff returned the following day to see the defendant, who attempted manually to examine her for a pelvic mass, but due to the pain this caused her, he was unable to make a successful examination. Defendant told her on this occasion that he did not know what was wrong with her, and to feel free to call another physician. Her condition became progressively worse, and she had a high temperature and was still bleeding. She contacted Dr. Francis Berry. She was placed in a hospital and was operated on by Dr. Berry for a ruptured tubular pregnancy. She remained in the hospital for twelve days.

Since that time she has been treated continuously by physicians and surgeons as a result of the negligence of defendant in failing to diagnose her illness as being caused by a tubular pregnancy. She avers and believes that if the tubular pregnancy had been diagnosed in apt time that these operations and expenses would not have been necessary.

The complaint alleges in substance that defendant was negligent in the following respects: (1) At all times complained of defendant did not possess the degree of professional learning, skill and ability which other physicians similarly situated ordinarily possessed, and he failed to exercise reasonable care and diligence in his application of his knowledge and skill to plaintiff's case; (2) he failed and neglected to use proper methods in his treatment of plaintiff from 9 November 1959 to 9 December 1959; (3) in examining plaintiff he did not use the care and methods used by physicians engaged in medical practice in Greensboro, and he negligently failed to correctly diagnose her condition; (4) he diagnosed plaintiff's illness as a kidney infection without seeing her, from a telephone examination; (5) he failed and refused to visit with plaintiff or to hospitalize her at a time when he knew or in the exercise of reasonable diligence should have known that her condition was serious and required immediate attention; (6) he was negligent in failing to notify plaintiff that the treatment which he was giv-

ing her had failed and to initiate other treatments and to attempt other diagnosis; (7) in the exercise of reasonable diligence he should have discovered that plaintiff had a tubular pregnancy and should have treated her for the same; (8) he was negligent in that he failed to hospitalize plaintiff and perform an exploratory operation in order to properly diagnose her condition, particularly in view of the fact that he was unable to examine her manually due to the fact that she was in a swollen condition and suffering extreme pain; (9) defendant knew or should have known that tubular pregnancy was very serious, would undoubtedly rupture and cause severe consequences to plaintiff, but nevertheless he treated plaintiff conservatively while not ruling out the possibility that plaintiff had a tubular pregnancy; and (10) other allegations of negligence of a similar nature.

Defendant in his answer admits that he saw plaintiff on the occasions alleged in her complaint, but he denies that he was guilty of negligence in any respect.

The parties offered evidence in support of the allegations of fact in their pleadings.

The deposition of Dr. Lonis L. Schurter, consisting of 36 pages in the record, was read to the jury by plaintiff. Plaintiff has no other medical evidence, except that it read to the jury an adverse examination of defendant. Defendant offered in his behalf the testimony of six doctors, which appears in the record on pages 134 through 345.

Plaintiff assigns as error the part of the charge of the court to the jury appearing in parentheses:

> "In response to a hypothetical question regarding the failure of Dr. Schweizer to do a culdoscopy or a cul-de-sac puncture on Mrs. Belk at the time of the D & C and while she was under anesthetic, Dr. Schurter stated that he had an opinion satisfactory to himself as to whether the treatment and examination was in accordance with approved medical practices in the community of Greensboro. (His answer is difficult of comprehension generally, because he does not say that he thinks at this stage a culdoscopic examination — no, his answer is difficult of comprehension generally, but he does say that he thinks at this stage a culdoscopic examination would be diagnostic, and that is the virtue, is the diagnostic examination.)"

Plaintiff further assigns as error the following part of the judge's charge:

"The defendant further contends that the evidence of Dr. Schurter, introduced by the plaintiff, is the evidence of a doctor who has never practiced in the specialty of obstetrics and gynecology exclusively; that Dr. Schurter's opinions are vague and indefinite; . . ."

Even if we concede that the second part of the charge challenged by plaintiff was a statement of a contention of the defendant rather than the expression of the statement of an opinion by the judge as to the credibility of Dr. Schurter's testimony, still it would seem that the statement of the court that Dr. Schurter's testimony was difficult of comprehension could be construed by the jury as a statement of an opinion by the court that Dr. Schurter's testimony in this respect was so confused and vague that it had little probative value, and that such expression of opinion by the court of Dr. Schurter's testimony was highly prejudicial, if not utterly disastrous, to plaintiff's case, particularly when Dr. Schurter was plaintiff's only medical witness other than the adverse examination of defendant, and was in many respects plaintiff's principal witness.

G.S. 1-180 reads: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. . . . " Moore, J., speaking for the Court, said in *Upchurch v. Funeral Home,* 263 N.C. 560, 140 S.E. 2d 17: "The slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

The court in its charge may not intimate or express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, either directly or indirectly, in any manner, and if the judge does intimate or express such an opinion, it is prejudicial. 4 Strong's N. C. Index, Trial § 35.

"The law imposes on the trial judge the duty of absolute impartiality. The expression of an opinion by the trial court on an issue of fact to be submitted to a jury, being prohibited by statute, is a legal error." *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107.

In *S. v. Benton,* 226 N.C. 745, 40 S.E. 2d 617, the court instructed the jury, "The evidence as testified to by the witnesses has been rather clear." The Court held that under the circumstances of the case the expression, "The evidence as testified to

by the witnesses has been rather clear," must have been understood by the jury to have referred to the State's witnesses, and not defendant's, and was held for error as an expression of an opinion by the court upon the weight of the evidence. In *S. v. Horne,* 171 N.C. 787, 88 S.E. 433, the Court in its charge to the jury stated: "The State calls your attention to the fact that Dr. Stovall gave an admirably lucid account of what he conceived to be and his opinion of the mental condition of the defendant." The Court held that this expression was well calculated to weigh heavily against defendant, and awarded a new trial. In *S. v. Bryant,* 189 N.C. 112, 126 S.E. 107, the court made the following statement: "This witness has the weakest voice or the shortest memory of any witness I ever saw." The Court held that this expression of opinion entitled defendant to a new trial. As to other cases involving prejudicial comments on witnesses by the trial judge, see: *Sneed v. Creath,* 8 N.C. 309; *Noland v. McCracken,* 18 N.C. 594; *McRae v. Lawrence,* 75 N.C. 289; *S. v. Rogers,* 173 N.C. 755, 91 S.E. 854.

Defendant makes these contentions: The burden of proof is on the appellant not only to show error but to show that he was prejudiced to the extent that the verdict of the jury was thereby probably influenced against him. *Freeman v. Preddy,* 237 N.C. 734, 76 S.E. 2d 159. The Court said in *Freeman v. Preddy, supra:*

> "In applying this rule, we have consistently held that when, upon a consideration of the whole record, it clearly appears that the appellant, under no aspect of the testimony, is entitled to recover and that the evidence considered in the light most favorable to him is such that the trial judge would have been fully justified in giving a peremptory instruction, or directing a verdict, against him on the determinative issue or issues, any error committed during the trial will be deemed harmless. [Citing authority]."

Higgins, J., in a clear and accurate statement of the law as to the duties a physician owes his patient, said for the Court in *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762:

> "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. [Citing authority.] If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the conse-

quences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

A physician, who holds himself out as having special knowledge and skill in the treatment of a particular organ or disease, is required to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge which physicians similarly situated who devote special study and attention to the treatment of such organ or disease ordinarily possess regard being had to the state of scientific knowledge at the time. 70 C.J.S., Physicians and Surgeons, p. 949.

A qualified physician or surgeon does not guarantee or insure the correctness of his diagnosis, and ordinarily he is not responsible for a mistake in diagnosis if he uses the requisite degree of skill and care. Generally stated, a qualified physician or surgeon is not liable for an honest error or mistake in judgment if he applies ordinary and reasonable skill and care, keeps within recognized and approved methods, and forms his judgment after a careful and proper examination or investigation. He is not charged with the duty of omniscience, and ordinarily is not an insurer. In order to afford a basis for an action for malpractice, the want of skill or care must be a proximate cause of the injury or death of the patient. 70 C.J.S., Physicians and Surgeons, § 48, a, c, d, e.

This case presents for review very difficult questions of medicine and of law. A very large part of the evidence in the case consists of the nature and characteristics of tubular pregnancy, the medical problem presented thereby, the treatment rendered to plaintiff by defendant, and as to whether the methods used are or are not generally approved and recognized in the profession in the Greensboro area or in similar localities.

Plaintiff alleged in her complaint "that at all times herein complained of, the defendant did not possess the degree of professional learning, skill and ability which other physicians similarly situated, ordinarily possessed." Plaintiff introduced no evidence in support of this allegation in her complaint.

In applying the rule quoted from *Freeman v. Preddy, supra,* it cannot be said, in our opinion, after a careful examination of all the evidence in the light most favorable to plaintiff, and particularly plaintiff's evidence tending to show the care, treatment, and lack of attention given her by defendant who held himself out as an expert in the field of obstetrics and gynecology, that plaintiff under no aspect of the evidence is entitled to recover.

For error in the charge, plaintiff is entitled to a

New trial.

BROWN *v.* HATCHER.

JASPER BROWN, ADMINISTRATOR OF THE ESTATE OF LIDA T. BROWN, DECEASED, V. CHARLIE HATCHER, ADMINISTRATOR OF THE ESTATE OF MELISSA ETTA BROWN, DECEASED.

(Filed 26 August, 1966.)

1. Executors and Administrators § 24a—

Allegations that the personal services rendered decedent were under an express contract to reimburse plaintiff therefor does not preclude recovery on *quantum meruit* under an implied promise to pay for such services.

2. Executors and Administrators § 24c—

The relationship of mother-in-law and daughter-in-law does not raise a presumption that personal services rendered by the daughter-in-law were gratuitous.

3. Executors and Administrators § 24a—

In an action to recover for personal services rendered a decedent prior to her death, plaintiff has the burden of showing, even in the absence of a presumption that the services were gratuitous, that the circumstances under which the services were rendered were such as to raise the inference that they were rendered and received with the mutual understanding that they were to be paid for, and the circumstances must be such as to put a reasonable person on notice that the services were not gratuitous.

4. Same— Evidence held insufficient to show that personal services were rendered under mutual understanding that they should be paid for.

The evidence tended to show that for some 30 years prior to her death decedent and her son and daughter-in-law lived together in a house upon land upon which decedent had a dower right, that although decedent lived in rooms on one side of the house and the son and his family lived in rooms on the other side of the house, the two parts of the house were connected by a door, that the parties lived together as a single family, and that in recognition of their mutual interdependence the daughter-in-law and the mother-in-law each performed services for the other. The evidence further tended to show that the daughter-in-law rendered dutiful and valuable services to the mother-in-law during the last three years of the mother-in-law's life during which she was ill, but there was no evidence that the mother-in-law made any promise or intimated that she expected to pay for such services. *Held:* The evidence does not justify the inference that the services were rendered and received under a mutual understanding that they would be paid for, and nonsuit was proper.

5. Same—

Expressions of appreciation for kindnesses do not, without more, amount to an implied promise to pay for personal services.

APPEAL by defendant from *Carr, J.*, 27 September 1965 Civil Session of JOHNSTON.

This action was begun on 3 January 1964, by Lida T. Brown to recover the value of personal services which she allegedly rendered to her mother-in-law, Melissa Brown, defendant's intestate,

from 1937 until June 24, 1963, the date of Mrs. Brown's death. Plaintiff alleged that shortly after she and her husband, Jasper Brown, were married, they moved into the home occupied by Melissa Brown at her request and upon her promise that plaintiff would be compensated at her death for all services which plaintiff might render her during the interim. Answering, defendant denied the allegations of the complaint and the claim of plaintiff. Thereafter, on 12 August 1964, Lida T. Brown died and Jasper Brown, as her administrator, was substituted as plaintiff. At the trial, plaintiff sought to recover only for the services which Lida Brown had rendered her mother-in-law during the three-year period immediately preceding the latter's death on 24 June 1963. Plaintiff's evidence tended to show:

Jasper and Lida Brown were married a year before his father died, sometime "in the thirties." Prior to his marriage he had lived with his mother and father in the house where he was born. Jasper was one of six children, and when his father's real estate was divided among them, he got "two shares of his father's estate to look after Melissa." All or a part of his share was encumbered by his mother's dower. After his father's death, Jasper took his wife to live in the home with his mother, and he farmed his two shares. He grew tobacco on his mother's dower and paid her "standing rent" of $100.00 a year. That was "all she had to live on. (He) had to help her with the rest of what she got."

"Miss Melissa" occupied two rooms on one side of the house; Lida and Jasper occupied the two on the other side. There was a connecting door between the two living quarters. Plaintiff's five children were born there and grew up, as he had done, in that house. As they came along, Jasper made a room out of the back porch. Miss Melissa and his family got along "as good as anybody could." He did things for her, as he had done all his life, and she likewise did things for him. Until she died, "Miss Melissa was good to Jasper and the children and to Miss Lida throughout the time they lived in the house. . . . " They lived in the house together although Miss Melissa had her own kitchen. When the children were born she helped. They did things for her, and she did things for them.

At the time of her death, Miss Melissa was over 80 years old. During the three years before her death, however, she was not able to cook, wash, or clean for herself, and Lida did these things for her. For six months before she died she was bedridden. Lida carried food to her, cleaned her room, fixed her bed, gave her her medicine, and did for her what was necessary. During the last year and a half of Miss Melissa's life, Lida slept on a cot in the

room with her five nights out of the week. Miss Melissa often said that if it were not for Jasper and Lida she didn't know what she would do. Lida was good to Miss Melissa, who depended upon her.

Plaintiff's witnesses estimated that the value of the services performed by Lida for Melissa during the last years of Melissa's life was $30.00 per week. None of them ever heard Miss Melissa say that she wanted Lida paid for what she did for her, nor did anyone ever hear Lida say that she was making any charges for what she did for Miss Melissa, or that she expected to be paid.

Defendant's motion for a judgment of nonsuit at the close of plaintiff's evidence was overruled. Defendant then offered evidence which tended to show: During the last three years of her life, not only Jasper and Lida, but all of Miss Melissa's children waited upon her. The last year or two before Miss Melissa's death, Lida herself was in failing health from diabetes. Miss Melissa was in fairly good health and able to care for her own needs until about one month before her death when she had a fall. She was a person who wanted to do things for herself; her wants were few, and she did not require much waiting upon. During the last three years of her life she cooked many meals for herself, and warmed food which neighbors and her other children brought her on a hotplate in her own kitchen where she always ate. Miss Melissa and Jasper's family got along well together. Over the years Lida did a lot for Miss Melissa, who did "a whole lot" for Lida, Jasper, and "their young'uns." Defendant's witnesses, like plaintiff's, never heard Lida say anything about expecting compensation for anything she did for Miss Melissa.

Defendant's motion for judgment of nonsuit made at the close of all the evidence was likewise overruled. Issues were submitted to the jury and answered as follows:

> "1. Did the plaintiff's intestate, Lida T. Brown, perform services of value for defendant's intestate, Melissa Etta Brown, during the last three years of the life of the said Melissa Etta Brown under circumstances upon which an implied agreement arose that she was to receive compensation for said services?
>
> "ANSWER: Yes.
>
> "2. If so, in what amount is the defendant Administrator indebted to the plaintiff Administrator for said services?
>
> "ANSWER: $3,040.00."

Judgment was entered upon the verdict, and defendant appeals assigning as error, *inter alia,* the denial of his motion for nonsuit.

L. Austin Stevens; Wiley Narron; W. Kenneth Hinton for plaintiff appellee.

William I. Godwin; Britt & Ashley by William R. Britt for defendant appellant.

SHARP, J.: Plaintiff offered no evidence tending to establish the express contract which his intestate had alleged. This failure, however, will not defeat his right to recover the fair value of those services if the evidence justifies the inference they were rendered under an implied promise to pay. *Thormer v. Mail Order Co.*, 241 N.C. 249, 85 S.E. 2d 140; *Grady v. Faison*, 224 N.C. 567, 31 S.E. 2d 760. The relationship of mother-in-law and daughter-in-law was not sufficient to raise a presumption that the services were rendered gratuitously, *Cline v. Cline*, 258 N.C. 295, 128 S.E. 2d 401, but if Lida did render them gratuitously, they may not be converted into a debt after the death of Miss Melissa. *Nesbitt v. Donoho*, 198 N.C. 147, 150 S.E. 875. Even when there is no presumption that the services were gratuitous, in order to recover for them, plaintiff must show circumstances from which it might be inferred that the services were rendered and received with the mutual understanding that they were to be paid for, that is, "under circumstances calculated to put a reasonable person on notice that the services are not gratuitous." *Lindley v. Frazier*, 231 N.C. 44, 46-47, 55 S.E. 2d 815, 816. *Accord, Johnson v. Sanders*, 260 N.C. 291, 132 S.E. 2d 582; *Twiford v. Waterfield*, 240 N.C. 582, 83 S.E. 2d 548.

This case is analogous to *Callahan v. Wood*, 118 N.C. 752, 24 S.E. 542, in which the plaintiff, a son-in-law, sued the estate of his mother-in-law for services rendered her prior to her death. He had lived with her in her house since the day he married her daughter. The "plaintiff's five children were born under her roof, all the parties rendering assistance to each other during the time. There was no agreement to pay either way, and nothing was paid, except in such mutual services." In reversing judgment for the plaintiff, Faircloth, C.J., said:

> "Does the law imply a promise to pay the plaintiff for the services of himself and wife under these circumstances? . . . Is there any reason more favorable to a son-in-law, under the situation in the present case, where the relation of 'one family' was established and recognized by the parties until death, without any fact found or evidence tending to show that there was any intention on the one part to pay for the services or on the other part to charge for the same? The law does

not look favorably upon such after-death charges, in the absence of any intention between the parties prior to death.

"We do not put our decision entirely on the kinship relation, but also on the 'one-family' relation established and maintained by the parties and the entire absence of any intention to the contrary on the part of either party. We approve of the language of *Ruffin, J.*, in *Williams v. Barnes*, 14 N.C. 348, saying: 'Such claims ought to be frowned on by courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence sow jealousies in families.' *Hudson v. Lutz*, 50 N.C. 217; *Young v. Herman*, 97 N.C. 280." *Id.* at 757-58, 24 S.E. at 542-43. *Accord, Lindley v. Frazier, supra.*

Miss Melissa, Jasper and Lida lived in the same house, albeit she lived on one side and they on the other. The same door connected the two sides as it had always done; the old home had not been constructed as an apartment house. At the time for the trial, according to plaintiff, it was "about the same" as it was when he and Lida married over thirty years ago. "It was about rotted down then, and it is now." But, however mean the house, it was Miss Melissa's during her lifetime (G.S. 30-5, since repealed by Sess. Laws 1959, ch. 879 § 14), notwithstanding it was on one of the two shares allotted to Jasper "to look after Melissa." It cannot reasonably be said that Miss Melissa, Jasper and Lida, and their five children, all of whom were born there, lived as separate family entities in the old four-room homestead. If, in fact, Miss Melissa did always prefer the quiet of her own kitchen at mealtime to the noise of five children at her son's table, the preference is understandable. Yet, they were still one family. During the years when Miss Melissa was helping Lida with the five small children, it is inconceivable that her services were given or received with any idea of pecuniary compensation. In recognition of their mutual interdependence, they did things for each other. Surely, had Lida become ill and died while Miss Melissa was still able to work, she would have helped care for Lida and her family without expecting any recompense.

The evidence is plenary that Lida rendered dutiful and valuable services to her mother-in-law during the last three years of the latter's life, but, considering the *modus vivendi* of the two women throughout the previous thirty years, we can find nothing in the evidence which would have put Miss Melissa, or any other reasonable person, on notice that Lida had begun to charge her for services when her health failed three years before her death. It is noted that

while Miss Melissa often said that Lida was good to her, no witness ever heard her say that she wanted, or expected, Lida to be paid for what she did for her — and this despite the allegation in the complaint that Melissa "frequently reiterated her intention to compensate plaintiff for services. . . . " Expressions of appreciation for kindness do not, without more, amount to an implied promise to pay for it. *Johnson v. Sanders, supra.* Seldom indeed do we review a case of this nature in which, as here, evidence to sustain such an allegation is totally lacking.

We hold that plaintiff's evidence does not justify the inference that Lida's services to Miss Melissa were rendered and received with the mutual understanding that they were to be paid for. Defendant's motion for judgment of involuntary nonsuit should have been granted.

Reversed.

MARY GIBBS WILLIAMS v. JOSEPH R. BOULERICE; CECILIA W. BOULERICE AND ROBERT E. HARE; WILLIAM LEON HARE.

(Filed 26 August, 1966.)

1. Automobiles § 19—

A driver faced with a sudden emergency caused by the negligence of another is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made, and ordinarily the factual determination of the reasonableness of the choice is a question for the jury.

2. Automobiles § 41v— Whether defendant's choice of conduct when confronted by sudden emergency was that of a reasonably prudent man held for jury.

The evidence tended to show that defendant driver, traveling east, was confronted with a sudden emergency when a car, traveling south along a street making a dead-end intersection from defendant's left, entered the intersection and turned right in such manner that defendant, upon the narrow street, was forced to turn to her right and travel partially on the right shoulder in order to avoid a collision. The evidence further tended to show that after the cars had passed without collision, defendant, to avoid a fire hydrant on the right shoulder, turned left into the street, and that she continued to the left across the street and ran into the ditch, resulting in injury to plaintiff passenger. *Held:* Conceding that defendant, in the emergency, was forced to turn to her right, whether a person of ordinary care and prudence, similarly situated, having returned to the paved street, would have taken action such as turning to the right or applying the brakes so as to keep the automobile on the street and out of the ditch

on the left, is a question for the jury, and nonsuit was improvidently entered.

3. Negligence § 7—

Only negligence which proximately causes or contributes to the accident in suit is of legal import, and proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that injury was probable under the circumstances, foreseeability being an essential element of proximate cause.

4. Same—

It is not required that defendant could have foreseen the injury in the exact form in which it occurred, but it is sufficient if defendant, in the exercise of reasonable care, might have foreseen that some injury would result from his acts or omissions, or that consequences of a generally injurious nature might have been expected.

5. Negligence § 28—

An instruction on foreseeability which, in effect, charges that a reasonably prudent man must have been able to foresee the particular injury which ensued, constitutes prejudicial error.

6. Appeal and Error § 42—

An erroneous instruction on a material aspect of the cause must be held for prejudicial error, notwithstanding that in another part of the charge the court correctly states the law in regard thereto.

APPEAL by plaintiff from *Mintz, J.*, 20 September 1965 Session of PASQUOTANK.

Civil action to recover damages for personal injuries sustained by plaintiff while riding as a passenger in an automobile driven by her daughter Cecelia W. Boulerice and owned by her son-in-law Joseph R. Boulerice.

Factory Street in Elizabeth City runs generally east and west, and Fleetwood Street, which runs generally north and south, at its southern end makes a "T" intersection with and ends at Factory Street. Both streets are two-way streets and hard surfaced. Factory Street is narrow with narrow shoulders. At the northeast corner of the intersection a ditch about six feet deep and five or six feet wide begins near the eastern edge of Fleetwood Street, and runs for an unspecified distance in an easterly direction parallel to the north side of Factory Street. A fire plug or hydrant about two or three feet high is located on the south side of Factory Street. This hydrant is about two feet from the Factory Street pavement and about thirty feet east of the intersection.

Plaintiff's evidence tends to show the following facts: About 2:50 p.m. on 17 July 1962 the Boulerice car was headed in an easterly direction on Factory Street and approaching the intersection of Factory and Fleetwood Streets. It was traveling at a

speed of about 25 miles an hour. As the Boulerice car entered the intersection, a Ford automobile, driven by William Leon Hare and owned by his father Robert E. Hare, came out of Fleetwood Street, entered the intersection, turned to its right in the intersection, and headed toward Parsonage Street. The Boulerice car turned to its right to avoid the Ford automobile hitting it. The two automobiles came very close together when they passed, but did not strike or collide. Plaintiff testified as follows:

> "The Hare Ford turned to its right after it came out into the intersection and headed toward Parsonage Street. The Boulerice car pulled to its right to avoid the other car hitting it, and then the fire plug was so close, in just a moment it cut back to the left and went across to the ditch. The fire plug was on the right side of Factory Street, in the direction in which we were going and close to the paved portion of the street. There was a small drain or gully running parallel with Factory Street over on my right. After the Boulerice car cleared the Ford, she cut back to the left and went back across the street to a ditch on the left. I can't say whether or not the Boulerice car slowed down its speed or whether the brakes were applied prior to the time it struck the ditch. There was no oncoming traffic meeting the Boulerice car or other vehicles in the immediate vicinity, other than the Hare automobile, at the time of the accident. The ditch on the left side of Factory Street, in which the Boulerice car struck and overturned, is about six feet deep and five to six feet across the top. The Boulerice car went diagonally across the street, struck the ditch with a thud and turned over on its left side on the north side of Factory Street."

When the car overturned plaintiff sustained injuries.

Plaintiff alleges that defendant Cecelia Boulerice was negligent in that she operated the Mercury automobile without due caution and circumspection and without maintaining a proper lookout; that she failed to keep the said automobile under control; that she drove on the wrong side of the street; and that she either operated the automobile without proper equipment or failed to properly use such equipment. Plaintiff alleges that the defendant William Leon Hare was negligent in that he operated the Ford automobile in a careless and reckless manner, at a high and illegal rate of speed and in a manner likely to injure the person or property of the plantiff; that he failed to keep a proper lookout; that he failed to keep his automobile under control; that he drove

on the wrong side of the street; and that he failed to exercise reasonable care when approaching the intersection.

Plaintiff alleges that her injuries were caused by the joint and concurrent negligence of the defendants.

Defendant Joseph R. Boulerice does not deny that the Mercury automobile was a family purpose car or that it was being operated with his consent, knowledge, and approval. Defendant Cecelia W. Boulerice denies any negligence on her part, and alleges that the movements of the Mercury automobile were caused by the sudden emergency brought about by the negligence of the driver of the Ford.

Defendant Robert E. Hare does not deny that the Ford automobile was driven from time to time with his permission by his son, defendant William Leon Hare. Defendant William Leon Hare denies that he was operating an automobile at the time of the accident, alleging that he was not in the vicinity. He alleges that the negligence of the driver of the Mercury proximately caused the injuries to the plaintiff.

At the conclusion of plaintiff's evidence, upon motion of defendants Boulerice, the court entered a judgment of compulsory nonsuit to plaintiff's action against defendants Boulerice, and plaintiff excepted. The court denied a similar motion by defendants Hare, and they excepted.

Defendants Hare then introduced evidence. At the end of all the evidence defendants Hare renewed their motion for judgment of compulsory nonsuit, which the court denied, and they excepted. The court submitted to the jury issues of negligence and damages. The jury answered the first issue of negligence, No. Judgment was entered in accord with the verdict.

Plaintiff appealed from the judgment of compulsory nonsuit entered in her case against defendants Boulerice, and appealed from the judgment that she recover nothing from defendants Hare.

Russell E. Twiford for plaintiff appellant.

Leroy, Wells & Shaw by Dewey W. Wells for defendants Hare, appellees.

John H. Hall for defendants Boulerice, appellees.

PARKER, C.J.

APPEAL AS TO DEFENDANTS BOULERICE

Plaintiff assigns as error the entry of judgment of compulsory nonsuit of her action against defendants Boulerice.

Plaintiff's evidence shows Cecelia Boulerice was faced with a sudden emergency. " 'One who is required to act in an emergency

is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made.'" *Lamm v. Gardner,* 250 N.C. 540, 108 S.E. 2d 847; *Lawing v. Landis,* 256 N.C. 677, 124 S.E. 2d 877; *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849. Ordinarily, the factual determination as to reasonableness of a choice is a question for the jury. *Rouse v. Jones,* 254 N.C. 575, 119 S.E. 2d 628; *Lamm v. Gardner, supra; Simmons v. Rogers, supra; Hunter v. Bruton,* 216 N.C. 540, 5 S.E. 2d 719; *Woods v. Freeman,* 213 N.C. 314, 195 S.E. 812; *Waller v. Hipp,* 208 N.C. 117, 179 S.E. 428. The true and ultimate test of Cecelia Boulerice's operation of the automobile in the emergency is this: What would a reasonably prudent person have done in the light of all the surrounding facts and circumstances? *Lamm v. Gardner, supra.*

Defendant Cecelia Boulerice made two choices. Her first choice was to turn to the right to avoid the oncoming Ford driven by Leon Hare. She was then faced with a fire hydrant. Her second choice was to turn her car to the left onto the pavement of the street. Even if we concede that her choices up to this point were those that a person of ordinary care and prudence, similarly situated, would have made, the jury could find from plaintiff's evidence that a person of ordinary care and prudence, similarly situated, having returned to the paved street, would have taken action such as turning to the right, or applying the brakes to keep the automobile on the street and out of the ditch, and in failing to do so defendant Cecelia Boulerice's choice of conduct did not accord with what an ordinarily prudent person would or might have done under the same or similar circumstances.

Plaintiff's evidence, considered in the light most favorable to her, and giving her the benefit of every reasonable inference to be legitimately deduced therefrom, would permit a jury to find Cecilia Boulerice was negligent in the operation of her automobile and that such negligence was a proximate cause of plaintiff's injuries. Plaintiff's case against the defendants Boulerice should have been submitted to the jury and the court committed error in deciding the question as a matter of law. *Lake v. Express, Inc.,* 249 N.C. 410, 106 S.E. 2d 518; *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297.

The case of *Patterson v. Ritchie,* 202 N.C. 725, 164 S.E. 117, relied upon by defendants Boulerice, is factually distinguishable. In that case the driver of the automobile in which plaintiff's intestate was riding as a guest on a State highway in the midst of heavy traffic was suddenly confronted by a situation caused by a truck approaching him from the opposite direction, and he was

required to act quickly for the safety of himself and his guest. Under the circumstances shown by the evidence, the court held he was not negligent in swerving the automobile suddenly to his right, thus causing it to leave the hard surface and to run onto the shoulder of the highway. The collision occurred within a short distance with a post which was standing beside the highway. In the instant case, Cecilia Boulerice swerved to the right onto the shoulder, then turned back onto the street, and after returning back to the street, failed to apply her brakes and to keep the automobile in the street and out of the ditch.

The judgment of compulsory nonsuit in plaintiff's case against defendants Boulerice was improvidently entered, and is

Reversed.

APPEAL AS TO DEFENDANTS HARE

Plaintiff excepts to and assigns as error certain portions of the judge's charge to the jury.

After explaining the general principles of law applicable to the case and in the course of applying the law to the evidence, the court gave the following instruction relating to proximate cause:

> "Her case is bottomed on the theory, and she has alleged and has offered evidence which she says and contends should satisfy you that her daughter, in attempting to avoid this car, ran off the road on the right, and then in attempting to get her car out of what has been described as a drain ditch on the right, she cut back to the left, her maneuvering, or her cut back to the left, as a result of that, she went across the road and in the ditch. Now, you — the burden is on Mrs. Williams to satisfy you, if she has satisfied you that young Hare committed any such act, as I have outlined here for you, and that act was a negligent act, and it is negligence per se, but it is for you to say whether or not it caused this injury, and before you can answer that part of it, proximate cause, then you would answer this question, *whether or not such acts would have caused a reasonable and prudent person namely, the driver of Mrs. Williams' car, or the car she was riding in, to have taken the action that she took, and whether or not her action from that point on was that of a reasonable and prudent person.*
>
> "*. . . But you will not charge this plaintiff with a bad choice on the part of her hostess driver Mrs. Boulerice, but you will only charge her with satisfying you that Mrs. Boulerice acted as a reasonable and prudent person would act under the same or similar circumstances.*" (Emphasis ours.)

The only negligence of legal importance is negligence which proximately causes or contributes to the death or injury under judicial investigation. *Miller v. Coppage,* 261 N.C. 430, 135 S.E. 2d 1; *Oxendine v. Lowry,* 260 N.C. 709, 133 S.E. 2d 687. Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767. Foreseeability is an essential element of proximate cause. *Pinyan v. Settle,* 263 N.C. 578, 139 S.E. 2d 863; *Pittman v. Swanson,* 255 N.C. 681, 122 S.E. 2d 814. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. *Slaughter v. Slaughter,* 264 N.C. 732, 142 S.E. 2d 683; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292.

In that part of the charge which applied the law to the evidence, the court's instruction on proximate cause was limited to the element of foreseeability, and that element was incorrectly stated. Although the court correctly defined proximate cause in an earlier general statement of the law, the subsequent erroneous instruction constitutes error. *Barber v. Heeden,* 265 N.C. 682, 144 S.E. 2d 886; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Mitchell v. White,* 256 N.C. 437, 124 S.E. 2d 137. For error in the charge plaintiff is entitled to a

New trial.

Appeal as to defendants Boulerice — Reversed.

Appeal as to defendants Hare — New trial.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1966

STATE v. CHARLES RONALD GRAY.

(Filed 21 September, 1966.)

1. Criminal Law § 71—

It is well settled law in this State, consistently followed for at least 140 years, that testimony of a confession or admission made by a defendant charged with a crime is not admissible in evidence over his objection unless it was made voluntarily and understandingly, without inducement of hope or fear.

2. Same—

A defendant's mental capacity and whether he was in custody at the time of making the statement are circumstances to be considered, along with others, upon the question of whether his statement or confession was voluntarily and understandingly made without inducement or fear, but the mere fact that the confession was made while defendant was in the custody of police officers does not, of itself, render the confession incompetent.

3. Same—

Whether the alleged confession of defendant was voluntarily and understandingly made is a question of fact to be determined by the trial judge upon the *voir dire*, in the light of the evidence offered by the State and the defendant and the court's observation of the demeanor of the witnesses, and the court's ruling must be supported by its findings of fact incorporated in the record.

4. Same—

The findings of fact by the trial judge upon the *voir dire* as to the voluntariness of a confession are conclusive if they are supported by competent evidence in the record, and no reviewing court may properly set

aside or modify these findings if they are supported by competent evidence.

5. Same—

Even though the testimony of the defendant is to the effect that he did not make any statement to the officer, it is incumbent upon the court, upon the *voir dire*, to hear the evidence and find the facts with respect to whether the confession, if made, was made voluntarily and understandingly.

6. Same; Constitutional Law § 1—

In determining the admissibility of an alleged confession by defendant, the courts of this State must protect defendant's rights not only under the laws of this State but also under the Due Process Clause of the 14th Amendment to the Constitution of the United States, and, in regard to the latter, the State court is bound by the interpretation placed upon the 14th Amendment by the Supreme Court of the United States. The decision of the Supreme Court of the United States in *Miranda v. Arizona*, 384 U.S. 436, is controlling in prosecutions commenced after the announcement of that decision if it is applicable to the facts of the case.

7. Same—

Where the evidence is to the effect that the confession of defendant, if made at all, was made within a few minutes after his arrest and was made in a private home where defendant had voluntarily gone, accompanied by his cousin and a police officer, that the officer informed defendant of the nature of the charge against him, of his right to remain silent, of the possible use against him of any statement he might make, and of his right to confer with counsel before making any statement whatsoever, and the record discloses further that defendant was able to employ counsel, *held*, the mere fact that defendant was not advised that if he were an indigent he was entitled to have a lawyer appointed to represent him does not render the statement of defendant incompetent under the decision in *Miranda*.

8. Criminal Law § 162—

The refusal to permit questions designed solely to elicit repetition of the witness' testimony theretofore entered cannot be held for prejudicial error.

9. Same—

Any error in sustaining the objection to a question asked a witness is cured when the witness is immediately thereafter allowed to testify in regard to the matter.

10. Criminal Law § 161—

A *lapsus linguae* in the charge not called to the attention of the court at the time will not be held for prejudicial error when it is apparent from the record that the jury could not have been misled thereby.

11. Criminal Law § 109—

An instruction will not be held for prejudicial error upon the contention that the court, in stating that the two offenses charged were separate and distinct and that defendant might be found guilty of the one and not

guilty of the other, failed to charge that the defendant might be found not guilty of both charges when the court thereafter instructs the jury separately as to each count in the indictment that it would be the duty of the jury to render a verdict of not guilty if it had a reasonable doubt as to defendant's guilt on that charge.

12. Criminal Law § 131—

When the sentence imposed is well below the maximum permitted by the applicable statutes, the contention that the sentence is unduly severe must be addressed to the power of executive clemency.

APPEAL by defendant from *Mintz, J.*, June 1966 Criminal Session of MARTIN.

The defendant was tried under an indictment, proper in form, charging him and his cousin, Van Gray, with felonious breaking and entering and with larceny by breaking and entering on 27 July 1965. He was represented, both in the superior court and in this Court, by two attorneys of his choice. He was found guilty as charged. On each count he was sentenced to confinement in the State Prison for not less than four nor more than six years, the two sentences to run concurrently.

The defendant and Van Gray were both arraigned at the September-October 1965 Session of the superior court. The defendant then entered a plea of guilty after signing a waiver of counsel. He was then sentenced to confinement in the State Prison for a term of not less than four nor more than seven years and began the service of that sentence. Van Gray received a suspended sentence and was placed on probation. Thereafter, the defendant filed a petition for post conviction review and on 19 January 1966 a new trial was ordered as to him. This Court denied the petition of the State for *certiorari* to review the order granting such new trial. The present appeal is from the judgment entered pursuant to his conviction at the second trial.

The session of the superior court at which the second trial occurred convened 13 June 1966 (erroneously stated in the record as 18 June 1966). On that date the Supreme Court of the United States announced its decision in *Miranda v. State of Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. It is stated in the defendant's brief, and not controverted by the State, that the trial of the defendant actually commenced on 15 June 1966, and that the jury returned its verdict on 16 June 1966.

At this second trial Deputy Sheriff Beach and Police Officer Roberson were permitted, over objections, to testify to certain statements made by the defendant, while he was in custody, as set forth below. The defendant contends that the admission of this evidence violated his rights under the Constitution of the United States, as

interpreted by the Supreme Court of the United States in the *Miranda* case.

At the second trial the defendant also excepted to numerous other rulings and instructions by the trial judge, but in his brief he argues only the foregoing contention with reference to the *Miranda* case, three rulings of the court excluding evidence offered by the defendant, and the inclusion in the charge to the jury of the following statement:

> "The Court instructs you that you may return a verdict or any one of the following verdicts which you may find to be supported by the evidence when you determine what the facts are and apply it to the law as the Court gives you the law. That is, you may find him Guilty as charged or you may find him not guilty of breaking and entering and guilty of larceny or you may find him guilty of larceny and not guilty of breaking and entering. They are separate offenses."

Before the testimony of either officer as to statements by the defendant was admitted, the court heard on *voir dire*, in the absence of the jury, the testimony of Deputy Beach, the testimony of the defendant's cousin, William Lee Gray, and that of T. A. Weaver, the owner of the building allegedly broken and entered and of the personal property allegedly stolen. The court, upon this evidence, found:

> "The Court finds that the defendant was advised at the time of his arrest or immediately thereafter that he had a right to have and confer with counsel. That he had a right to remain silent or to make a statement and that any statement he made might be used against him. The Court being of the opinion that the defendant fully understood his rights, finds that any statement that the defendant made at the time or immediately thereafter to Deputy Sheriff Beach was freely, voluntarily and understandingly made, without any promise of reward, duress or other pressure."

Before the jury was excused for the examination of these witnesses on *voir dire*, T. A. Weaver, the owner of the property, had testified, in the presence of the jury, that a house belonging to him had been broken into, a window pane having been broken with a brick, and that certain specified properties, including approximately $5.00 in money, an old clock, an old writing slate, and several old picture frames, were missing, all of which facts he had reported to Deputy Beach. He had also testified, in the presence of the jury, that the defendant came to his home with another boy and said

that he "had the stuff and he wanted to apologize," asking Mr. Weaver to drop the charge.

Also, prior to the said *voir dire* examinations concerning statements by the defendant, Van Gray, the original codefendant, was called as a witness for the State and testified, in the presence of the jury, that he and the defendant went to the building in question in the defendant's 1965 Ford automobile; that the defendant broke the window and both of them entered the building and took therefrom the picture frames, the clock and the money which they found in a tin box within a trunk. Van Gray admitted that this was contrary to his testimony at the defendant's post conviction hearing. Van Gray further testified that at the time of his own arrest, prior to the arrest of the defendant, he had confessed to Deputy Beach and had told the deputy that the defendant was with him at the time of the break-in.

Prior to the above mentioned *voir dire* examination concerning statements by the defendant, and solely for the purpose of corroborating Van Gray's present account, his probation officer, F. Webb Williams, was permitted to testify, in the presence of the jury, to a conversation with Van Gray in which Van Gray recounted the facts in accordance with his present testimony and contrary to his testimony at the defendant's post conviction hearing.

Also, prior to such *voir dire* examination Deputy Beach testified, in the presence of the jury, that in his investigation of the break-in he talked to Van Gray. Solely for the purpose of corroborating Van Gray's present account, Deputy Beach was then permitted to testify that Van Gray told him he and the defendant had gone to the Weaver house in the defendant's automobile; that the defendant had knocked out a window pane and that they had taken some old picture frames, an old clock and some money out of a trunk.

Deputy Beach testified, in the presence of the jury, that he proceeded to look for the defendant and found him at the home of Mr. Weaver, together with Billy Gray, brother of Van Gray. He thereupon put the defendant under arrest and "told him he was charged with a felony, breaking and entering and he did not have to say a word." He advised the defendant at the time of the arrest that "he would have time for a lawyer if he wanted one." He also at that time advised the defendant that "anything he said might be used against him in court."

Thereupon, the jury was excused and the witnesses testified on *voir dire*, in the absence of the jury, in substance as follows:

(1) *Deputy Sheriff Beach* testified that he had a conversation with the defendant in the presence of Mr. Weaver and Billy Gray.

He did not threaten the defendant in any way. He did not promise the defendant anything. He did not tell him in any manner that the court would be lighter upon him if he would make a statement. He did nothing to induce the defendant to make a statement. He advised the defendant that he "had a right to remain silent," and that "anything he said might be used against him in a court of law." He further advised the defendant that "he could employ counsel." The defendant did not ask for any attorney to be obtained for him and did not ask to be allowed to make a telephone call to any attorney. The defendant then made a statement to Deputy Beach. He was then carried to the police station and there requested, and was granted, permission to make a telephone call, this being some twenty or thirty minutes after his statement to Deputy Beach. The defendant did not ask Deputy Beach to communicate with any lawyer for him, nor did he ask to see his mother. Deputy Beach informed the defendant that Van Gray had implicated him. Before the defendant made his statement to Deputy Beach, the latter told the defendant that he was under arrest for breaking and entering and larceny at the Weaver house, that "anything he said would be held against him," and that "if he wanted time to get a lawyer before we proceeded he could have that." The defendant replied that he did not want a lawyer and that he wanted to give the articles back to Mr. Weaver. He asked Deputy Beach, "Couldn't we just drop it right here, settle it right here?"

(2) *William Lee Gray*, brother of Van Gray, testified that he was present in the Weaver home at the time Deputy Beach informed the defendant that he was under arrest, that he did not hear the deputy say anything else to the defendant except that he wanted the defendant to go with him to the scene of the alleged offense, that he does not remember hearing the deputy ask the defendant whether he wanted a lawyer or whether he wanted to make a telephone call, and that he did not hear Deputy Beach make any suggestion about the defendant's being entitled to counsel. He further testified that he, himself, has been convicted on two counts of breaking and entering. (He is not charged with participation in the offense now in question.) He and the defendant were at the Weaver house when Deputy Beach arrived. He heard Mr. Weaver tell Deputy Beach that the defendant wanted to give the articles back to Mr. Weaver and wanted Mr. Weaver to drop the charges. Thereupon, Deputy Beach put the defendant under arrest. The defendant then "explained that he had taken the stuff and he wanted to return it or he had it and wanted to return it." The witness does not remember whether the defendant's word was "taken" or "had." He heard no

confession by the defendant at the Weaver house, no admission and no statement that he went in Mr. Weaver's house.

(3) *T. A. Weaver* testified that he, Deputy Beach, Billy Gray and the defendant were all in the room together and he heard the conversation between the deputy and the defendant, that Deputy Beach put the defendant under arrest and told him he could get an attorney if he wanted it, and that the deputy told the defendant that anything he said could be used against him. He thinks the deputy told the defendant he did not have to make any statement.

Thereupon, the jury returned to the courtroom. The court overruled the objection of the defendant, and Deputy Beach testified in substance as follows:

The defendant stated to Deputy Beach that he would like to settle the whole thing and bring back the articles stolen from Mr. Weaver. Deputy Beach told the defendant that he was under arrest and that it would be a matter for the court to decide. The defendant, Mr. Weaver and Van Gray then accompanied Deputy Beach out to the scene of the alleged crime. There, the defendant stated that he had taken a brick and broken out the window, that he had climbed into the window first, going in because he wanted to see if he could find an old piano, for which he had a buyer, that having entered the house, they decided to take the slate, the old picture frames and the clock; that they broke into the trunk and, using a pair of scissors, prized open the little green tin box which was in the trunk, that in the box they found two two-dollar bills and change amounting to approximately another dollar, and that they divided the money, the defendant taking one of the two-dollar bills and the other articles. Deputy Beach and Officer Roberson recovered some of the picture frames from beneath a barn near the defendant's home, the defendant having shown the officers where the picture frames were. In the presence of the defendant, the defendant's mother stated to Deputy Beach that the defendant told her he had purchased these articles at an auction sale in Tarboro, the defendant making no comment to this statement by his mother. He proceeded to the attic of his home and brought down and gave to the deputy the remaining picture frames, the slate and the clock.

Deputy Beach then advised the defendant's mother that the defendant had to go to the police station with him, and there would be a hearing before a justice of the peace. He advised her to have counsel for the defendant if she wanted one. She replied that "she did not have any money to spend on that boy." She went to the police station shortly thereafter. The defendant was not locked in jail but was allowed bond, which he secured immediately so that he spent no time in jail prior to his trial.

The State then rested and the defendant took the stand in his own behalf. He testified in substance:

At the time of his arrest and of his conversations with Deputy Beach, he was eighteen years of age and had graduated from high school. Thereafter he attended college. He did not break into the house and did not steal the articles in question. On the date of the alleged offense he did not go anywhere with Van Gray. Van Gray brought to him and gave him the picture frames, the clock and slate, which were antiques and which the defendant then cleaned and repaired, this being his hobby. He has not had the money or the tin box from which it is alleged to have been taken. Van Gray did not tell him the articles so given to him had been stolen. He placed the large picture frames under the near-by barn for fear his mother would throw them away if he took them into the house. When he discovered these articles had been stolen, he went to Mr. Weaver and told him he "had the stuff and would bring it back to him." While they were talking Deputy Beach came in and "in just a few minutes" put him under arrest without telling him anything about making a statement, hiring a lawyer or anything of that kind. He went to the police station but made no statements there. When in the presence of his mother and uncle, Deputy Beach stated that he (the defendant) had broken into the trunk he denied doing so. He has never admitted to anybody that he broke into the house and took anything out of it. He did not do so. He does not believe he ever talked to Officer Roberson about anything. He did not admit the whole thing to Officer Roberson. At age fourteen he was convicted in the juvenile court on a charge of larceny of some antiques.

The defendant's mother testified that she has never heard him admit taking the articles. She has heard him deny doing so and state that he had nothing to do with it.

His uncle, James Gray, testified that he was at the police station the night of the defendant's arrest and did not hear the defendant make a confession of any kind.

Police Officer Roberson then testified for the State in rebuttal as follows:

He assisted Deputy Beach in the investigation of this occurrence. On the night the defendant was arrested he had a conversation with him at the police station with reference to this matter.

Thereupon, the jury was sent out and on *voir dire,* in the absence of the jury, Officer Roberson testified that this conversation took place a few minutes before the defendant's preliminary hearing. Deputy Beach was present. The officers asked the defendant where he got the articles in question. Officer Roberson did not then

know whether or not the defendant had been warned by Deputy Beach concerning his rights or advised as to his right to counsel. He was not present when Deputy Beach had the conversation with the defendant at the residence of Mr. Weaver. At the time of Officer Roberson's conversation with the defendant at the police station, the stolen articles had been recovered. The defendant and Officer Roberson lived only four or five houses apart. The defendant has known Officer Roberson all of his life. The defendant was then eighteen years of age and Officer Roberson twenty-seven.

Upon this testimony the court found:

> "The Court finds that at the time he made a statement to Sgt. Roberson and Deputy Sheriff Beach the defendant had been advised of his rights to have counsel, advised that any statement he made might be used against him and that he understood his rights."

The jury then returned to the courtroom and, over the defendant's objection, Officer Roberson was permitted to testify, in the presence of the jury, that the defendant "stated that he and Van Gray had gone in Mr. Weaver's house and had taken this stuff out." At that time the various items were at the police station, the officers having recovered them. Van Gray was then present with the defendant, he having already admitted his part in the occurrence. Officer Roberson did not tell the defendant that he had a right to employ a lawyer, and he is not sure whether or not he told the defendant that anything he might say to the officer could be used against him.

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

James R. Vosburgh and Leroy Scott for defendant appellant.

LAKE, J. For at least one hundred forty years, long before the insertion of the Fourteenth Amendment into the Constitution of the United States, it has been the well settled law in this State that when one is on trial for an alleged criminal offense, a confession or admission by him may not be admitted in evidence, over his objection, unless it was made voluntarily and understandingly, not induced through use by the police of "the slightest emotions of hope or fear." It was so held in *State v. Roberts,* 12 N.C. 259. This Court has consistently followed and applied this basic principle since that decision in 1829 when it was recognized as already established by a "course of approved adjudications." *State v. Barnes,* 264 N.C. 517,

142 S.E. 2d 344; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777; *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619; *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232.

However, the mere fact that a confession was made while the defendant was in the custody of police officers, after his arrest by them upon the charge in question and before employment of counsel to represent him, does not, of itself, render it incompetent. *State v. Barnes, supra; State v. Crawford, supra; State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *State v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24. The test of admissibility is whether the statement by the defendant was in fact made voluntarily. *State v. Rogers, supra; State v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *State v. Livingston,* 202 N.C. 809, 164 S.E. 337. "Any circumstance indicating coercion or lack of voluntariness renders the admission incompetent." *State v. Guffey, supra.* The fact that the defendant was in custody when he made the statement is a circumstance to be considered. *State v. Guffey, supra.* The mental capacity of the defendant is also a circumstance to be considered. *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396. There may, of course, be coercion of the mind without physical torture or threat thereof. *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620.

Whether the defendant did or did not make the statement attributed to him is a question of fact to be determined by the jury from the evidence admitted in its presence. *State v. Guffey, supra.* Whether the statement, assuming it to have been made, was made voluntarily and understandingly, so as to permit evidence thereof to be given in the presence of the jury, is a question of fact to be determined by the trial judge in the absence of the jury upon the evidence presented to him in the jury's absence. *State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847, *cert. den.,* 369 U.S. 807, 82 S. Ct. 652, 7 L. Ed. 2d 555.

When the State proposes to offer in evidence the defendant's confession or admission, and the defendant objects, the proper procedure is for the trial judge to excuse the jury and, in its absence, hear the evidence, both that of the State and that of the defendant, upon the question of the voluntariness of the statement. In the light of such evidence and of his observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. *State v. Barnes, supra; State v. Outing, supra; State v. Rogers, supra.* The trial judge should make findings of fact with reference to this question and incorporate those findings in the record. Such findings of fact, so made by the trial judge, are con-

clusive if they are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported by competent evidence in the record. *State v. Barnes, supra; State v. Chamberlain, supra; State v. Outing, supra; State v. Rogers, supra.*

It is to be noted that this defendant, a college student at the time of his trial, did not testify before the judge, in the absence of the jury, with reference to the voluntariness of his alleged statements to the police officers. He testified, in the presence of the jury, that he did not make the statements at all, saying, "I have never admitted to anybody I broke in that place and took anything out of it." Thus, his own version of the matter is not that he was coerced or tricked into the making of a confession or that he made a confession due to his having no counsel to advise him or due to "the slightest emotions of hope or fear." His own testimony is that he did not make the statements which the police officers testified he did make. The jury apparently believed the officers and not the defendant, though there is evidence in the record to support the verdict without the alleged confession.

Notwithstanding the failure of the defendant, himself, to testify to an overpowering of his mind resulting in a confession of guilt, the seasonable objection by his counsel to the admission of the testimony of the officers concerning the alleged confession, and their exception to the ruling permitting the officers so to testify, bring us to the question of whether, as a matter of law, this testimony was incompetent.

Neither in his brief nor in oral argument before this Court does the defendant contend that the rulings of the trial court allowing the officers so to testify violated, in any respect, the long established law of this State as above summarized. We hold that in the admission of the testimony of the police officers concerning these alleged statements to them by the defendant, the trial judge complied meticulously with the law of this State and committed no error thereunder.

Nevertheless, "In passing on the admissibility of a confession, it is as much the duty of the State courts to protect the prisoner's rights under the Due Process Clause of the 14th Amendment to the Constitution of the United States as it is to protect his rights under our State Constitution." *State v. Barnes, supra.* In that inquiry, this Court is bound by the interpretation placed upon such provision of the Federal Constitution by the Supreme Court of the United States.

The defendant contends that the admission of the testimony of

the police officers with reference to the alleged statements by the defendant violated this provision of the Constitution of the United States, as interpreted by the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. He so contends on the ground that the record does not show, and the trial court did not find, that the officers told the defendant, prior to the alleged statements by him, that if the defendant was indigent a lawyer would be appointed to represent him if he so desired. The defendant's second trial, from which this present appeal is taken, commenced two days after the announcement of the decision in the *Miranda* case. That decision, therefore, controls our decision here, if it is otherwise applicable to the facts disclosed in the present record. *Johnson v. New Jersey,* 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

The trial court found as a fact that before the defendant made the statements in question, if he did make them, he was advised that he had a right to have and to confer with counsel; that any statement he made might be used against him; that he had a right to remain silent; and also found as a fact that if the defendant made the statements he made them freely, voluntarily and understandingly, without promise of reward, duress or other pressure. Each of these findings is amply supported by competent evidence in the record.

There is nothing in the record to suggest that this defendant was informed that if he was an indigent person he was entitled to have counsel appointed for him and to confer with such court appointed counsel before answering any question put by the officer, and the trial judge made no finding that the defendant was so advised. On the other hand, there is no evidence in the record and no contention in the record or before us in the defendant's brief, or in the argument of his able counsel, that the defendant was or is an indigent person unable, financially or otherwise, to employ counsel to advise and defend him. On the contrary, the record shows that the defendant was never confined in jail but was allowed bond and that such bond was posted by or for him shortly after his arrest. It also appears from the record that at his trial he was represented by not one but two experienced and capable counsel, admittedly privately employed to defend him. The record shows that the defendant was, at the time of his arrest in August, 1965, a high school graduate and that approximately a month thereafter he became a student at East Carolina College. There is nothing in the record to suggest that his college fees and expenses were paid otherwise than by himself or his relatives.

We are, therefore, brought to this question: Did the Supreme Court of the United States in the *Miranda* case hold that, as a matter of law, irrespective of a defendant's actual ability to employ counsel, no statement made by him to an officer, while in the custody of the officer and in response to a question by the officer, may be introduced in evidence against the defendant unless it affirmatively appears that the officer first told the defendant *that if he was an indigent person* counsel would be appointed to represent him?

We do not so interpret the decision in the *Miranda* case. It clearly appears from that opinion of the Supreme Court of the United States that the admissibility of evidence of a confession, made in response to police interrogation while the defendant is in custody, depends upon the sufficiency of the record to demonstrate "the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court "spelled out" procedural safeguards which must be employed "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it."

It is to be observed that in the present case the statements ascribed by the police officers to the defendant were not made while the defendant was in jail or in the presence of the police officers alone or after prolonged questioning. The record shows that they were first made, if at all, in a private home to which the defendant had voluntarily gone to discuss this matter with the owner of the property he is charged with having broken and entered and stolen. His statement to Deputy Beach was made, if it was made, there in the living room of that home in which room were the defendant, the man he had voluntarily gone to see, the defendant's cousin, who had accompanied him on that mission, and Deputy Beach. The statement was made, if it was made at all, within a few minutes after the officer arrived and informed the defendant that he was under arrest, and also informed him of the nature of the charge against him, of his right to remain silent, of the possible use against him of any statement he might make and of his right to confer with counsel before making any statement whatever. The defendant never requested the appointment of counsel. Officer Roberson, in whose presence the subsequent statements were made, if they were made, was no stranger to the defendant. Both are young men who then lived on the same street of a small town, only a few houses apart, and who had known each other for many years. There is no evidence whatever in this record that the defendant was coerced by or was in fear of either officer, or that either induced any statement by him through "the slightest emotions of hope or fear."

In the *Miranda* case the defendant was questioned "in a room

in which he was cut off from the outside world." He was "in a police-dominated atmosphere." The Court said, "An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today." The Court stressed the fact that "interrogation still takes place in privacy," and that police officers are frequently urged by police manuals to conduct their interrogations "alone with the person under interrogation," and to deprive the subject of "every psychological advantage," such as having "his family and other friends * * * nearby, their presence lending moral support." The police arrested *Miranda* and took him to a special interrogation room where they secured a confession. In the companion cases, decided in the same opinion, the defendants were detained and interrogated, night and day, for lengthy periods. "In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." Of *Miranda,* the Court said, "The indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies." Stewart, one of the other defendants, was said to be "an indigent Los Angeles Negro who had dropped out of school in the sixth grade." Under these circumstances, the Court said, "This atmosphere carries its own badge of intimidation."

Thus, the *Miranda* case does not hold that the Fourteenth Amendment to the United States Constitution forbids the introduction in evidence of a confession made in custody if "adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings." The right to be protected by such procedural devices is the right of the defendant against self-incrimination through the use of confessions or admissions not "the product of his free choice." The facts of the present case distinguish it from the *Miranda* case and its companions, decided contemporaneously.

In its "spelling out" of its holding, the Court said in the *Miranda* case:

> "[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. * * * However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed."

These safeguards were stated to be (1) advice in unequivocal terms that the prisoner has the right to remain silent; (2) the explanation that anything said can and will be used against him in court; (3) clear information to the prisoner that he has the right

to consult with a lawyer and to have the lawyer with him during interrogation; and (4) warning that "if he is indigent a lawyer will be appointed to represent him."

We do not understand the *Miranda* case to hold that a confession may not be admitted in evidence when shown to have been freely and voluntarily made by one who, in fact, is not an indigent, is not unable to obtain advice of counsel of his choice, and so is not entitled to have court appointed counsel, merely because he was not advised of a right which he would have had if, in fact, he had been an indigent.

We hold that the admission of this defendant's alleged statements to the officers does not violate his right under the Due Process Clause of the Fourteenth Amendment, as interpreted by the United States Supreme Court in the *Miranda* case, because there is nothing in the record to show, and it has not been contended by the defendant, either in the trial court or before us, that this defendant was an indigent entitled to have counsel appointed for him at the time of his arrest and conversations with the officers. It cannot violate this defendant's constitutional right against self-incrimination for the officers in their interrogation to fail to advise him of rights which some other person might have but which he does not have in view of his own circumstances.

There being nothing in this record to show that the statements alleged to have been made by the defendant were not voluntary, in fact, or that procedures adequate to safeguard his right against self-incrimination were not followed at his interrogation, his exceptions to the rulings allowing the officers to testify as to such statements are without merit and are overruled.

The remaining exceptions brought forward by the defendant in his brief are also without merit. His assignments of error 26, 27 and 28 relate to the sustaining by the court of the State's objections to questions directed by his counsel to his mother and uncle as to whether they heard the defendant admit "taking this stuff." The defendant's mother had testified, immediately prior to these questions:

> "Charlie Gray has never admitted to me that he took this stuff from anywhere. I was present with Deputy Sheriff Beach and Sheriff Roberson in the front of the police station or at the police station but there was no conversation I remember. I did not hear him and have never heard him any other time admit that he took these things. I have heard him deny he took them."

There was no error in refusing to permit questions designed solely to elicit repetition of this testimony. *In Re Smith's Will,* 163 N.C.

464, 79 S.E. 977. After the court sustained the objection to the question directed to the defendant's uncle, the uncle was permitted to testify, without objection:

> "I didn't hear him say anything in front of Jerry Beach. * * * I don't remember him saying anything particularly."

Any error which there may have been in sustaining the objection to this question, directed to the uncle, was cured by allowing the uncle immediately thereafter to so testify. *Baynes v. Harris,* 160 N.C. 307, 76 S.E. 230.

The only other exception brought forward in the defendant's brief relates to the above quoted passage from the charge of the court to the jury. In the passage in question, the court said:

> "[Y]ou may find him guilty as charged or you may find him not guilty of breaking and entering and guilty of larceny or you may find him guilty of larceny and not guilty of breaking and entering. They are separate offenses."

Obviously, this statement is a *lapsus linguae* since in it the court twice told the jury they could find the defendant not guilty of breaking and entering and guilty of larceny. However, it was not called to the attention of the court at the time, and we do not believe the jury could have misunderstood the intent of the court to say that it could find the defendant guilty or not guilty of either of the offenses.

In any event, this is not the basis of the defendant's exception to this portion of the charge. He contends that this statement of the court was error because the court did not instruct the jury that it could find the defendant not guilty of both offenses. The statement in question occurred near the beginning of the charge. In the last two paragraphs of the charge, the court dealt separately with the offense of breaking and entering and with the offense of larceny. He expressly told the jury, as to each count of the indictment, that if it had a reasonable doubt as to the defendant's guilt, it would be the duty of the jury to render a verdict of "not guilty" on that charge. The court instructed the jury fully and correctly as to the elements of each of the offenses with which the defendant was charged and as to the burden of proof. We find no prejudicial error in the charge to the jury. There can be no question but that the jury understood from this charge, considered as a whole, that it could acquit the defendant of either or both of these separate and distinct charges, and should so acquit him if they had a reasonable doubt as to his guilt. They found him guilty of both.

Rule 28 of the Rules of Practice in this Court provides: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." We have, nevertheless, examined the remaining assignments of error set forth in the defendant's statement of the case on appeal. We find no basis therein for disturbing the judgment rendered below, a conclusion in which the defendant's counsel apparently concurs since these assignments are not mentioned either in his original or in his supplemental brief in this Court.

The sentence imposed by the court below is well below the maximum permitted to be imposed for either of these offenses by the applicable statutes. G.S. 14-54, 14-70 and 14-72. If it be thought that the sentence imposed is unduly severe in view of the nature of the property taken and of the defendant's alleged offer to the owner to return it prior to his arrest, which question is not before us, the defendant may, if so advised, seek relief from the Board of Paroles or some other exercise of the powers of executive clemency.

No error.

WELBORN PLUMBING AND HEATING CO., INC., v. RANDOLPH COUNTY BOARD OF EDUCATION.

(Filed 21 September, 1966.)

1. Contracts § 33—

Ordinarily, provisions in a construction contract that all disputes and misunderstandings between the parties relative to the performance of the contract should be determined by the architect or engineer and that his decision should be conclusive upon the parties, is valid in the absence of fraud or mistake, or unless the architect, unknown to the contractor, has guaranteed to keep the cost of the work below a stated sum.

2. Same— Subcontractor may not recover of owner sums withheld in accordance with decision of architect binding on parties under the contract.

Where the stipulations and evidence disclose that the construction contract in question provided that costs caused by defective work should be borne by the party responsible for same, that payments might be withheld by the owner in part or in whole on account of conditions not complied with, and that the decision of the architect in regard to controversies arising out of the performance of the contract should be final and conclusive on the parties, and that the architect authorized the withholding of a certain sum from payments to a subcontractor to compensate the main contractor for damages to a wall constructed by the main contrac-

tor, and that the damage to the wall resulted from the failure of the subcontractor to take proper precaution when he dug a ditch parallel to the wall in wet earth, *held*, the subcontractor may not recover of the owner the amount withheld, since, under provisions of the contract the decision of the architect in regard thereto was final, there being no allegation or evidence of fraud or of gross mistake, or that the architect, unknown to the subcontractor, had guaranteed to keep the cost of the work below a stated sum.

3. Contracts § 1—

Ordinarily, when competent parties who are on an equal footing enter into an agreement on a lawful subject fairly and honorably, the law will not inquire as to whether the contract was good or bad or whether it was wise or foolish.

4. Trial § 22—

When it appears affirmatively from the stipulations of the parties and all the evidence that plaintiff, as a matter of law, is not entitled to recover, defendant's motion for judgment of involuntary nonsuit should be allowed.

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

APPEAL by defendant from *Riddle, S.J.*, 1 March 1965 Session of RANDOLPH. Docketed and argued as Case No. 607, Fall Term 1965. Docketed as Case No. 602, Spring Term 1966, and docketed as Case No. 604, Fall Term 1966.

Civil action to recover the sum of $1,541.58, balance allegedly due on a contract to install heating facilities in an addition to Archdale Public School building in Randolph County for the sum of $9,580.

Defendant in its answer admits that on 12 January 1961 plaintiff and defendant entered into a contract with each other providing, *inter alia*, that plaintiff was to install heating facilities in an addition to Archdale Public School, which was to be constructed according to plans and specifications submitted by defendant through its architects. It further admits in its answer that it was to pay plaintiff for this work the sum of $9,580 and that it has paid plaintiff for this work the sum of $8,038.42. As a further answer and defense to plaintiff's action, it avers in substance: In the course of its work, plaintiff excavated a ditch in a place, at a time, and under such circumstances as to cause damages in the sum of $1,541.58 to the general structure of the new addition to Archdale Public School, and it was authorized and directed by its architect, who had complete supervision and responsibility for the work, to pay said sum to L. S. Bradshaw & Sons, General Contractors, to remedy the damages caused by plaintiff. Plaintiff breached said contract by its de-

fective and ill-timed work in excavating the ditch causing damages in the sum of $1,541.58. It, through its officers and agents, and through its architects and attorneys, made demands upon plaintiff for the fulfillment of its contract in the respects herein referred to, and plaintiff failed and refused to abide by the terms of its contract. Plaintiff has been paid and fully compensated for all of the work accomplished by it on the Archdale Public School, and defendant is not indebted to plaintiff in any sum whatever. The contract entered into by and between the parties required, *inter alia,* that plaintiff would maintain continuously adequate protection and exercise reasonable precautions for the safety of adjacent property, and that plaintiff was not to endanger any work by cutting, digging or otherwise, and that plaintiff would be responsible for any damages resulting from its failure or improper construction or operation, and would bear all costs caused by defective work for which it was responsible. We have omitted from the further answer and defense other things the plaintiff was required to do under the contract, which are irrelevant here.

The parties waived trial by jury. G.S. 1-184 *et seq.*

From a judgment entered by Judge Riddle that plaintiff have and recover from the defendant the sum of $770.79, defendant appeals.

Miller & Beck by G. E. Miller and Thomas L. O'Briant for defendant appellant.

Bencini & Wyatt by Joe D. Floyd for plaintiff appellee.

PARKER, C.J. Before Judge Riddle the parties stipulated: (1) Defendant, as the governmental agency of Randolph County, North Carolina, charged with the responsibility of constructing and maintaining public schools in said county, has authority to enter into contracts for these purposes. On 12 January 1961 the defendant entered into a contract with plaintiff providing, *inter alia,* that plaintiff was to install heating facilities in the addition to the Archdale Public School, which was to be constructed according to plans and specifications submitted by defendant through its architects; (2) the work contracted to be performed by plaintiff for defendant in connection with the Archdale Public School is governed by the contract between the parties dated 12 January 1961, the proposal of the same date of plaintiff to defendant for the accomplishment of the work proposed, the contract and the proposal of plaintiff each referring to and incorporating therein "Contract Documents" as prepared by the architect, John James Croft, Jr., and referred to as

"General Conditions," Section 00-G1, consisting of seven pages, and "Heating Work" referred to as Section 38-011, consisting of two pages; (3) defendant deducted the sum of $1,541.58 from the contract price of $9,580, being the amount approved by the architect for payment to the general contractor for the protection and repair of damage; and (4) the wall in question was a foundation bearing wall with earth filling inside the building and backfilling on the outside of the building.

This evidence seems undisputed: The building plans for the addition to Archdale Public School called for the construction of three new walls and the use of one wall of the existing building. The particular wall involved in the instant case was a new foundation wall some 15 feet in height from its base "with earth filling inside the building and backfilling on the outside of the building." Under the contract plaintiff was to install heating lines adjacent to the outside of this foundation wall along its entire length. To install the heating lines plaintiff had to dig a ditch along the entire length of this foundation wall. At the time plaintiff dug the ditch the general contractor had finished the wall, and had mounted on it the concrete frames which would support the roof of the building; the wall was up and the roof was partially on.

Plaintiff's evidence, considered in the light most favorable to it, tends to show that it performed its work according to the terms of its contract with defendant, that defendant is indebted to it in the amount sued for, to wit, $1,541.58, which was deducted from the contract price by order of the architect, John James Croft, Jr.

Defendant's evidence tends to show that for a period of three days prior to plaintiff's digging the ditch on the outside of the foundation wall there had been constant rainfall, and as a result thereof the ground was extremely wet and muddy, and plaintiff was guilty of negligence in the manner in which it dug the ditch too close to the foundation wall, and guilty of negligence also in digging the ditch under the conditions of wetness and mud, and as a proximate result thereof the foundation wall cracked and bowed out some two or three inches; that the architect, John James Croft, Jr., knew certain work had to be done by the general contractor to correct the damaged condition of the new foundation wall, and that he authorized the payment by defendant of $1,541.58 from the contract price of $9,580 to the general contractor for this work, and defendant deducted this amount from the contract price. The first witness for plaintiff was Clyde B. Welborn, its president. Just before defendant's counsel, Mr. Miller, began his cross-examination of this witness, the court asked Mr. Miller this question: "Do you admit every-

thing was alright *(sic)* about the work except causing this wall to fall, is that right?" Mr. Miller replied: "Yes sir."

Defendant assigns as error the denial by the court of its motion for judgment of involuntary nonsuit made at the close of all the evidence. It contends as follows: (1) It deducted the sum of $1,541.58 from the contract price of $9,580, being the amount approved by the architect for payment to the general contractor for the protection and repair of damage to the foundation bearing wall, and that the decision of the architect under the contract entered into by and between the parties is final and conclusive, and it is not indebted to plaintiff in any amount; and (2) "the evidence construed in a light most favorable to the plaintiff clearly establishes plaintiff's negligence in performance of its contract, which negligence constituted a breach of contract precluding recovery on the express contract" and "there is no allegation in the pleadings or evidence in the record which recovery *(sic)* may be had under any other theory of law."

The contract entered into by and between the parties here contains the following as to "Status of the Architect":

> "Architect is Owner's authorized representative. He shall have general supervision of work, and authority to stop work to insure its proper execution.
>
> "The Architect shall give all orders and directions contemplated under this contract and specifications relative to the execution of the work. He shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract, and shall decide all questions which may arise in relation to said work and the construction thereof. His estimates and decisions shall be final and conclusive.
>
> "The Architect shall decide the meaning and intent of any portion of the specifications and of any plans or drawings where the same may be found obscure or be in dispute.
>
> "Any differences or conflicts in regard to their work which may arise between the Contractor under this contract and other contractors performing work for the Owner shall be adjusted and determined by the Architect.
>
> "The Architect shall certify to Owner when payments to Contractor are due and amounts to be paid. The Architect shall make decisions on all claims of the Contractor."

"In building and construction contracts the parties frequently provide that the completion, sufficiency, classification, or amount of

the work done by the contractor shall be determined by a third person, usually an architect or engineer. Such stipulations which, in their origin, were designed to avoid harassing litigation over questions that can be determined honestly only by those possessed of scientific knowledge, have generally been held valid. This is true even though the architect or engineer is employed by the owner unless unknown to the contractor, he has guaranteed to keep the cost of the work below a certain sum." 13 Am. Jur., 2d, Building, Etc. Contracts, § 32.

This is said in 13 Am. Jur., 2d, Building, Etc. Contracts, § 34:

> "Although plain language in the contract is required in order to make the decision or certificate of an architect or engineer acting thereunder final and conclusive, it may be stated generally that the decision of the architect or engineer is conclusive as to any matter connected with the contract if the parties, by any stipulation, constitute the architect or engineer the final arbiter of such matter as between the parties. Accordingly, where the contract provides that the work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator between the parties, and the parties are bound by his decision, in the absence of fraud or gross mistake. The same rule applies where it is provided that payments shall be made only upon the certificate of the architect.
>
> "It is also clear that where the parties stipulate, expressly or in necessary effect, that the determination of the architect or engineer shall be final and conclusive, both parties are bound by his determination of those matters which he is authorized to determine, except in case of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment. The reason underlying this rule is that under such circumstances the contract makes the architect or engineer the arbitrator, and his determination can be attacked only in the same manner as that of any other arbitrator. On the other hand, where the stipulations are such that the meaning to be gathered therefrom is that the architect's or engineer's certificate shall not be final, the parties are not bound by the certificate."

See annotations in 54 A.L.R. 1255 and 110 A.L.R. 137, where cases from many jurisdictions are analyzed.

These principles find support in our cases. In *Chemical Co. v. O'Brien,* 173 N.C. 618, 92 S.E. 594, the Court said: "The agreement, in several places, makes the final certificate of the architect conclu-

sive as to a completion of the building in accordance with the contract; and this certificate having been fully and formally given, the authorities are that it was not afterwards open to the architect or the builder to withdraw it nor to question or impeach it as to observable defects or those which were or could have been discovered by the architect in the proper performance of his duties except in case of fraud or mistake so palpable as to indicate bad faith or gross neglect." The following application of the law is found in *Lacy v. State,* 195 N.C. 284, 141 S.E. 886: "It may be noted that the contract includes a provision to the effect that all disputes and misunderstandings between the parties thereto, relative to the construction and meaning of its provisions, and also relative to the performance by either of the parties thereto of said contract, shall be referred to the engineer in charge of the work, and that his decision with respect to such disputes and misunderstandings shall be final. The controversy between the claimant and the State Highway Commission has been decided against the contention of the claimant by the engineer in charge. His decision, by the express terms of the contract, is final."

There is no allegation or evidence in this case to raise an issue of fraud or gross mistake as in *McDonald v. MacArthur,* 154 N.C. 122, 69 S.E. 832. There is neither allegation nor proof in the record that John James Croft, Jr., employed as architect by defendant had, unknown to plaintiff, guaranteed to keep the cost of the work below a certain sum.

The parties stipulated before Judge Riddle that the work contracted to be performed by plaintiff for defendant in connection with the Archdale Public School is governed by the contract between the parties dated 12 January 1961; and that defendant deducted the sum of $1,541.58 from the contract price of $9,580, being the amount approved by the architect for payment to the general contractor for the protection and repair of damage.

The contract entered into between the parties, *inter alia,* agreed that "costs caused by defective, mishandled, or ill-timed work shall be borne by party responsible for same"; that plaintiff would "continuously maintain adequate protection, and exercise reasonable precautions for safety of adjoining property, work, employees on work, and public," and "not endanger any work by cutting, digging, or otherwise," and "make good damage, injury, or loss sustained; save Owner harmless." The parties further agreed in the contract that "payments may be withheld in part of *(sic)* whole on account of (a) conditions of contract not complied with, . . . (e) defective work not remedied, . . . (j) unsettled questions between parties relative to this contract or between contractors involved in work."

The contract also provides: "The Architect shall give all orders and directions contemplated under this contract and specifications relative to the execution of the work. He shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract, and shall decide all questions which may arise in relation to said work and the construction thereof. His estimates and decisions shall be final and conclusive."

Plaintiff finds itself in a helpless position, but it is a position of its own making. It agreed in the contract to be responsible for any damage, injury, or loss sustained as a result of its work. It further agreed that the architect should decide such question of damages or any other question which might arise in relation to the work, and that the architect's decision should be final and conclusive. "Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish." *Roberson v. Williams,* 240 N.C. 696, 83 S.E. 2d 811.

The dispute involved in this case was resolved pursuant to the agreement between the parties. It having been made to appear affirmatively from the stipulations and all the evidence that as a matter of law plaintiff is not entitled to recover, defendant's motion for judgment of involuntary nonsuit should have been allowed. *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234; *Walker v. Story,* 256 N.C. 453, 124 S.E. 2d 113.

Reversed.

PLESS and BRANCH, JJ., took no part in the consideration or decision of this case.

ATLANTIC COAST LINE RAILROAD COMPANY, AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PARTNERS TRADING AND DOING BUSINESS AS CLINCHFIELD RAILROAD COMPANY, v. STATE HIGHWAY COMMISSION OF NORTH CAROLINA.

(Filed 21 September, 1966.)

1. Highways § 2—

G.S. 60-43, prior to its repeal and re-enactment, empowered the Highway Commission, upon the widening of a highway, to require a railroad company to widen its highway crossings so as to conform to the increased width of the highway.

2. Unjust Enrichment § 1; Actions § 4—

The equitable principle of unjust enrichment does not apply when the services are rendered gratuitously or in discharge of some legal obligation, and costs incurred by a railroad company in widening its crossings pursuant to lawful order issued by the Highway Commission are *damnum absque injuria* and may not be recovered under the doctrine of unjust enrichment, since the sums are spent in discharge of a legal obligation.

3. Highways § 9—

The State Highway Commission is not subject to suit on the theory of unjust enrichment to recover costs incurred by a railroad company in widening its grade crossings pursuant to lawful order of the Highway Commission, there being no contention of any "taking" by the Commission, since there is no statutory provision authorizing suit in such instance, and the right to bring a common law action against the Highway Commission where there is no statutory remedy is applicable solely where there has been a "taking" of property by the Commission.

4. Appeal and Error § 47—

The striking of a portion of the complaint cannot be prejudicial when the matter alleged therein is stipulated by the parties.

PLESS, J., not sitting.

APPEAL by plaintiff from *Farthing, J.*, February-March 1966 Session of McDOWELL.

Civil action instituted by plaintiff to recover costs incurred in widening crossings at "Old Linville Road" and "State Line Road" in McDowell County. The evidence offered by plaintiff, if true, tended to show that both of these roads were in existence prior to the construction of the crossings involved. In the performance of its duties defendant widened, graded and paved "Old Linville Road" in November 1958 and "State Line Road" in 1959. As a result of defendant's work on these roads, the roads were considerably widened. Defendant requested plaintiff to widen the crossings on Old Linville Road in August 1959, and on State Line Road on February 9, 1961. Plaintiff refused because defendant refused to pay the costs incurred.

On April 26, 1962, hearing was held after due notice to plaintiff, and after hearing defendant ordered plaintiff to widen the two crossings. The order was forwarded and received by plaintiff together with a letter referring to G.S. 60-43 and G.S. 136-20, subsection (e). Upon receipt of the order, plaintiff substantially complied, and appealed from the order to the Superior Court of McDowell County. From the judgment rendered by that court plaintiff appealed to this Court. *Highway Commission v. Railroad,* 260 N.C. 274, 132 S.E. 2d 595. There the Court held that G.S. 136-20 does not apply to the instant facts, as it relates only to the construction of under-

passes, overpasses, or the installation and maintenance of gates, alarm signals or other safety devices at railroad crossings.

Plaintiff did not attack G.S. 60-43, nor did the Court refer to or make any ruling relative to G.S. 60-43.

Subsequent to the opinion in *Highway Commission v. Railroad, supra,* plaintiff commenced this action. Prior to trial, defendant filed motion to strike certain portions of the complaint, which motion was allowed, and plaintiff excepted. Upon trial, at the conclusion of plaintiff's evidence, defendant demurred to the evidence and moved for judgment as of nonsuit which motion was allowed. Plaintiff appeals.

A. K. McIntyre and E. P. Dameron for plaintiff appellant.

Attorney General Bruton, Deputy Attorney General Lewis, and Staff Attorney Costen for the defendant appellee.

BRANCH, J. In order to decide this appeal, it is necessary to consider and construe G.S. 60-43. Although this statute has been repealed and substantially re-enacted as G.S. 62-224, it was in effect when the work was done. G.S. 60-43 until repealed and substantially re-enacted, subsequent to this litigation, read as follows:

> "Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in nowise be construed to abrogate, repeal or otherwise affect

any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law."

In *Atlantic Coast Line Railroad v. Goldsboro,* 155 N.C. 356, 71 S.E. 514, an ordinance of the City of Goldsboro similar to this statute, required the railroad to do construction work at its own expense to make its tracks conform to improvements made by the City, and in that case the Court held that "the ordinance requiring the plaintiff to lower its track from 6 to 18 inches at the points where the cross streets pass over the railroad track is a legal exercise of the public authority vested in the defendant."

"The plaintiff took its charter expecting that towns and cities would grow up along the line of its road, and knowing that with the development of the country new roads and, in the cities and towns, that new streets would be laid out across its right of way. And it took its charter knowing, too, that the State would have the right to lay out such roads and new streets, and to require the railroad to make such alterations as would prevent the passage over its track by the public being impeded."

In the same case the Court quoted with approval from the case of *English v. New Haven,* 32 Conn. 241, as follows: ". . . (T)he city had the right to require the railroad company to widen the crossing of a street over its track or to make such other changes as the *public convenience and necessity* might require in order that there should be no hindrance to the public in crossing the railroad track." (Italics ours.)

Our Court in the case of *Raper, Admr. v. Wilmington & Weldon Railroad Company,* 126 N.C. 563, 36 S.E. 115, held: "Where they (railroad) interfere with the highway in any manner, they must, as far as they can, make it as safe and convenient to the public as it would have been had the railroad not been built."

In the instant case, the roads were widened by the defendant in the exercise of its duty, and the crossings created a sudden "bottleneck." The Legislature clearly intended the statute to apply to the facts that exist here and provide a remedy such as public safety, convenience and necessity might require.

The plaintiff railroad brings this action alleging that the order of the Highway Commission was illegal and exceeded the bounds of authority, and that the defendant was unjustly enriched to the extent of costs incurred as a result of defendant's order. The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to

pay a fair compensation therefor. *Beacon Homes, Inc. v. Holt,* 266 N.C. 467, 146 S.E. 2d 434; *Dean v. Mattox,* 250 N.C. 246, 108 S.E. 2d 541.

The action is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. However, the rule does not apply when the services are rendered gratuitously or *in discharge of some obligation. Twiford v. Waterfield,* 240 N.C. 582, 83 S.E. 2d 548; *Allen v. Seay,* 248 N.C. 321, 103 S.E. 2d 332; *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 582.

"In order that the law will give redress for an act causing damage, that act must be not only hurtful, but wrongful. There must be *damnum et injuria.* It is a well-established maxim of the law that damage without wrong, or *'damnum absque injuria,'* does not constitute a cause of action." 1 Am. Jur. 2d, Actions, p. 598; *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176; *Evans v. Morrow,* 234 N.C. 600, 68 S.E. 2d 258; *Lodge v. Benevolent Asso.,* 231 N.C. 522, 58 S.E. 2d 109; 1 Strong N. C. Index, p. 20. "An injury sustained in obeying a regulation within the scope of the police power, or damages incurred in complying with the provisions of a statute under coercion of a degree of the highest judicial tribunal enjoining the violation thereof, must be considered *'damnum absque injuria.'* Injury resulting from a proper exercise of a lawful power of the sovereignty is remediless, except so far as the sovereign power gives a remedy." 1 Am. Jur. 2d, Actions, p. 600. See also *Lyerly v. State Highway Commission,* 264 N.C. 649, 142 S.E. 2d 658.

The plaintiff relies upon the case of *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290, which held, in part, that in an unusual case where no clear or adequate remedy was provided by statute or by the Constitution of North Carolina, the common law which provides a remedy for every wrong will furnish the appropriate action for the adequate redress of such grievance. However, the present case can be distinguished from the *Sale* case. The *Sale* case was an action to recover an agreed consideration *for the taking of a portion of the plaintiff's real property and damage to the remainder of such property.* In the instant case, the plaintiff brought his suit on the theory of unjust enrichment, and the plaintiff further stipulated that *this action is not based upon the taking of any of plaintiff's right of way or to recover compensation for any such taking.* "A stipulation of the parties is a judicial admission and is binding on them." *Moore v. Humphrey,* 247 N.C. 423, 101 S.E. 2d 460.

The law regarding immunity of the State to suit and the exceptions thereto have been concisely and clearly set out by Bobbitt, J. in *Teer Company v. Highway Commission,* 265 N.C. 1, 143 S.E.

2d 247, where he states: "Absent waiver, the State is immune from suit. *Smith v. Hefner,* 235 N.C. 1, 68 S.E. 2d 783; *Ferrell v. Highway Commission,* 252 N.C. 830, 833, 115 S.E. 2d 34.

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

"The basic rule is that the Highway Commission is not subject to suit except in the manner expressly provided by statute. *Sherrill v. Highway Commission,* 264 N.C. 643, 142 S.E. 2d 653, and cases cited. An exception to this basic rule is well established, to wit: Where private property is *taken* for a public purpose by a governmental agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor. *Sherrill v. Highway Commission, supra.*"

It therefore appears from the statutes and the record that the plaintiff does not come under the exceptions allowing it to sue the Highway Commission.

The plaintiff assigns as error the striking of portions of the complaint which in effect show the work was not performed voluntarily. It was stipulated that the work was done pursuant to defendant's order. Therefore plaintiff could not be prejudiced by the allowance of this motion to strike. Our Court stated in the case of *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551, that "matter in a pleading is irrelevant within the purview of the statute (G.S. 1-153) if it has no substantial relation to the controversy between the parties in the particular action." See also *Howell v. Ferguson,* 87 N.C. 113.

Affirmed.

PLESS, J., not sitting.

DOROTHY M. CHESSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ELMER R. CHESSON, DECEASED, v. PILOT LIFE INSURANCE COMPANY.

(Filed 21 September, 1966.)

1. Insane Persons § 8—

The executed contract of a mentally incompetent person is ordinarily voidable and not void.

2. Same; Cancellation and Rescission of Instruments § 3—

In an action to rescind a transaction, plaintiff's evidence that her intestate was mentally incompetent on the date he executed the agreement places the burden upon defendant to show that defendant was ignorant of the mental incapacity, had no notice thereof such as would put a reasonably prudent person upon inquiry, paid a fair and full consideration, that defendant took no unfair advantage of the incompetent, and that plaintiff could not restore the consideration or make adequate compensation therefor. Failure of defendant to establish any one of these factors entitles plaintiff to the relief.

3. Same; Insurance § 19— Evidence held for jury in action to annul for mental incapacity insured's surrender of policy for cash value.

Plaintiff's evidence was to the effect that for at least a year prior to insured's surrender of the policy in suit for its cash value, insured had been repeatedly committed to a hospital for acute alcoholism and resulting mental disorder, and that on the date in question he was incapable of understanding the nature and consequences of his act and incapable of transacting any business, and surrendered the policy for a cash value less than the dividend which would have been paid on the policy within a month. *Held:* Plaintiff's evidence was sufficient to defeat defendant's motion to nonsuit the action to annul the cancellation of the policy, and the jury's findings that defendant was not ignorant of such mental incapacity and had notice thereof sufficient to put a reasonably prudent person upon inquiry, and that defendant took unfair advantage of the insured, entitles plaintiff to the relief, the restoration of the consideration being accomplished by credit on the judgment.

4. Evidence § 55—

Where witnesses have testified as to the mental incapacity of the person in question, affidavits made by the witnesses in prior proceedings to have the person in question committed to a state hospital are competent for the purpose of corroborating their testimony.

5. Insurance § 34—

"Accidental means" within the coverage of an indemnity clause providing additional benefits if death results from injuries solely through external, violent and accidental means, requires that the occurence or happening which produces the death be accidental in the sense that it is unusual, unforeseen and unexpected, the word "accidental" being descriptive of the term "means."

6. Same—

Testimony to the effect that insured had been repeatedly committed for acute alcoholism and resulting mental disorder during the prior year, that

on the occasion in question he was standing in a corridor in a nervous condition, and that he suddenly threw his arms and hands across his chest and inexplicably jumped straight backward, striking his head on the cement floor, and died of cerebral hemorrhage, *is held* insufficient to show that his death resulted solely through violent, external and accidental means, since if insured voluntarily jumped backward the fall was not through accidental means, while if he jumped backward as a result of hypertension, delirium tremens, or some other mental or physical infirmity, the fall was not the sole cause of his death.

APPEAL by defendant from *Mintz, J.*, February 1966 Session of BEAUFORT.

Action by the beneficiary and administratrix of an insured to rescind his cancellation of a policy of life insurance for its cash surrender value and to recover the benefits provided therein.

On May 22, 1957, defendant Insurance Company issued to Elmer R. Chesson a policy of life insurance in the face amount of $5,000.00. Chesson was then 33 years old and the manager of the Colonial Stores in Belhaven. Plaintiff Dorothy M. Chesson, wife of the insured, was named as beneficiary. The policy contained the following accident indemnity insurance provision:

> "Upon receipt of proof satisfactory to the Company, while this Policy is in full force and effect, that the Insured, while under the rated age of sixty-five and prior to the maturity of this Policy in any respect, has sustained bodily injury resulting in death within ninety days thereafter through external, violent and accidental means, death being the direct result thereof and independent of all other causes, then upon surrender of this Policy, and subject to its terms and stipulations, the Company will pay in addition to the face amount of this Policy, the sum of Five Thousand Dollars."

This accident-indemnity provision did not apply if death occurred "from disease or from bodily or mental infirmity in any form."

In 1963, Chesson was committed to Dorothea Dix Hospital, a State mental institution, for acute alcoholism with resulting mental disorders. He was a patient there in May 1963, and again in July 1963. On August 13, 1963, he quit his job at Colonial Stores and was recommitted to Dorothea Dix Hospital; in December 1963, he was a patient in the Veterans Hospital at Durham. In March 1964, he was again committed to Dorothea Dix Hospital, where he remained until the early part of May 1964, when he returned to his home in Belhaven. On May 14, 1964, Chesson removed the insurance policy from the chest of drawers where it was kept, took it to defendant's home office in Guilford County, and requested the full amount of its cash surrender value. Plaintiff was aware that Ches-

son had, on two previous occasions, borrowed a total of $386.53 on the policy, but she was not aware that the insurance policy had been abstracted from the chest until after Chesson's death on June 8, 1964. Defendant informed her of the transaction by a letter dated June 23, 1964.

Plaintiff's evidence tends to show: From January 1, 1964, until June 8, 1964, Chesson's mental condition was such that he was incapable of understanding the nature and consequence of his acts and incapable of transacting any business. Plaintiff, who was employed as a hospital nurse, transacted the family business and paid the bills, including the premiums on the insurance policy.

After Chesson left home on May 14, 1964, he did not return until June 7, 1964. He had been drinking heavily. Fearing for her safety and that of their 16-year-old daughter, plaintiff swore out a warrant for his arrest and had him committed to jail. The following afternoon, June 8, 1964, Mr. Sam Boger, the Chief of Police of Belhaven, took Chesson out of jail and into the corridor of the City Hall to await the arrival of a relative who was to return him to the State hospital. Chesson was still suffering from the effects of alcohol. According to Chief Boger, while he was standing about 6 feet from Chesson, facing him in the open passageway, the following incident occurred:

> "Mr. Chesson was standing smoking and he was very nervous, and all at once Mr. Chesson threw his arms and hands across his chest, this way, and more or less jumped straight backwards, striking his head on a cement floor. Yes, he did jump straight back. It was more like he jumped backwards, more so than just collapsing to the floor. He ended up on the floor. . . . There was blood on the cement under his head. Mr. Chesson was frothing at the mouth. . . . Of course, we carried him to the hospital."

Chesson died about one hour and forty-five minutes after he reached the hospital. According to Dr. J. T. Wright, who attended him:

> "He had been suffering with hypertension, and had been dissipating the night before. He had been drinking about a year. When he could get it he was drinking excessively. . . . In fact that is what he was sent to Raleigh for. . . . He was not feeble-minded."

In the opinion of Dr. Wright, Chesson's death was caused by a cerebral hemorrhage.

Defendant's evidence tends to show: Chesson, clean and neatly dressed, came in a taxicab to the home office of defendant in Greens-

boro on May 14, 1964. He identified himself to Mr. Larry Rayle, the supervisor in the policy loan and cash surrender section of defendant's policyholders' service department, gave him the policy, and requested its surrender value. While records were being assembled and computations being made, Chesson requested that he be allowed to sign the necessary papers and said that he would come back for the check. He then left in the taxicab. In making the calculations, Rayle discovered that if the policy remained in effect another month, Chesson would be entitled to a dividend of $32.00, in addition to the policy's cash surrender value of only $25.40. When Rayle explained the situation to him, Chesson said he wanted the money immediately. Rayle then prepared a check for $25.40 (a refund of the April and May premiums) and delivered it to Chesson together with a letter setting forth the details of the transaction and the previous loans. Chesson took the check and left in the taxicab. He did not appear to have been drinking; he walked steadily and Rayle detected no odor of alcohol on his breath. Nothing in his appearance suggested that he was incompetent. In the opinion of Rayle, Chesson was mentally capable of transacting the business he conducted with him as well as any other business.

Psychiatrists of Dorothea Dix Hospital, testifying for defendant, said that Chesson was suffering from a mental disorder called a "depressive reaction." In the opinion of Dr. David H. Fuller, Jr., on May 14, 1964, Chesson had sufficient mental capacity to transact ordinary business on his own behalf, and when he left Dorothea Dix on May 9, 1964, he was not then in need of further psychiatric treatment.

Issues were submitted to the jury and answered as follows:

"1. Was Elmer R. Chesson on May 14, 1964, mentally competent to transact business?

ANSWER: No.

"2. (a) On May 14, 1964, was the defendant ignorant of Elmer R. Chesson's mental incapacity?

ANSWER: No.

(b) Did the defendant on May 14, 1964, have notice of such incapacity as would put a reasonably prudent person upon inquiry about his mental capacity to transact business?

ANSWER: Yes.

(c) Was Elmer R. Chesson paid a fair and full consideration for the surrender of his policy?

ANSWER: Yes.

(d) Did defendant on May 14, 1964, take unfair advantage of Elmer R. Chesson?

ANSWER: Yes.

(e) Is plaintiff able to restore the consideration or to make adequate compensation therefor?

ANSWER: Yes.

"3. Was the death of Elmer R. Chesson an accidental death within the meaning of the terms and provisions of the contract of insurance policy No. 441493?

ANSWER: Yes.

"4. What amount, if any, are plaintiffs entitled to recover of the defendants?

ANSWER: $10,000.00."

Defendant excepted to the submission of issue No. 3.

From the judgment that plaintiff recover of defendant the sum of $10,000.00 less the sum of $413.00 (loan, interest, and premium refund), defendant appeals assigning as error, *inter alia,* the failure of the court to nonsuit the action.

Carter & Ross for plaintiff appellee.

Peel & Peel; Rodman & Rodman for defendant appellant.

SHARP, J. The executed contract of a mentally incompetent person is ordinarily voidable and not void. *Reynolds v. Earley,* 241 N.C. 521, 85 S.E. 2d 904; *Walker v. McLaurin,* 227 N.C. 53, 40 S.E. 2d 455; *Carawan v. Clark,* 219 N.C. 214, 13 S.E. 2d 237. If, however, the person has been adjudged incompetent from want of understanding to manage his affairs and the court has appointed a guardian for him, he is conclusively presumed insane insofar as parties and privies to the guardianship proceedings are concerned; as to all others, it is presumptive (but rebuttable) proof of the ward's incapacity. *Medical College v. Maynard,* 236 N.C. 506, 73 S.E. 2d 315; *Sutton v. Sutton,* 222 N.C. 274, 22 S.E. 2d 553. See *State v. Duncan,* 244 N.C. 374, 93 S.E. 2d 421. Although the insured, Chesson, had been committed to Dorothea Dix Hospital under the provisions of Article 7, Chapter 122 of the General Statutes, as an alleged mentally disordered person, he had not been judicially declared insane as provided by G.S. 35-2, and no guardian had been appointed for him.

Plaintiff's evidence tended to show that on May 14, 1964, Chesson lacked the ability to understand the nature and effect of the act in which he was engaged when he surrendered the insurance policy for the amount of its unearned premiums, $25.40. Defendant offered cogent evidence to the contrary. The jury's answer to the first issue, however, established that on the day he surrendered the policy, Chesson was not mentally competent. The burden then devolved

upon defendant, if it would sustain its insured's cancellation of the policy, to show that it "(1) was ignorant of the mental incapacity; (2) had no notice thereof such as would put a reasonably prudent person upon inquiry; (3) paid a fair and full consideration; (4) took no unfair advantage of plaintiff; and (5) that the plaintiff has not restored and is not able to restore the consideration or to make adequate compensation therefor." *Carawan v. Clark, supra* at 216, 13 S.E. 2d at 238. *Accord, Wadford v. Gillette,* 193 N.C. 413, 137 S.E. 314. Its failure to establish each of these propositions, in the absence of unusual circumstances, would result in an annulment of the cancellation. *Lawson v. Bennett,* 240 N.C. 52, 81 S.E. 2d 162; *Dougherty v. Byrd,* 221 N.C. 17, 18 S.E. 2d 708. *Cf. In re Will of Shute,* 251 N.C. 697, 111 S.E. 2d 851; *In re Will of Kemp,* 234 N.C. 495, 67 S.E. 2d 672. The jury's answers to the second issue showed defendant unable to prove requirements (1), (2), (4), and (5). Obviously, the parties could be restored to their position on May 14, 1964, by plaintiff's returning to defendant the sum of $413.80. The judgment of the court accomplished this return.

Defendant, treating the complaint as having stated three distinct causes of action, made three separate motions of nonsuit: (1) to the cause of action for rescission of the surrender of the policy; (2) to the cause of action for the face amount of the policy; (3) to the cause of action for double indemnity for accidental death. Plaintiff's evidence tending to establish insured's mental incapacity was sufficient to defeat defendant's motions of nonsuit as to the first two "causes." *Carland v. Allison,* 221 N.C. 120, 19 S.E. 2d 245. The judge submitted the issues relating to this aspect of the case to the jury under a charge which was strictly in accord with the law as stated in *Carawan v. Clark, supra,* and *Wadford v. Gillette, supra.*

At the conclusion of plaintiff's evidence, the affidavits of Dorothy M. Chesson and Dr. James T. Wright, made on March 25, 1964, in the proceedings before the Clerk of the Superior Court to have Chesson recommitted to the State hospital were admitted by the court, over defendant's objection, for the purpose of corroborating these two witnesses, who had theretofore testified that Chesson lacked mental capacity to know and understand the consequences of his actions. The affidavits were clearly competent for this purpose. Stansbury, N. C. Evidence (2d Ed. 1963) §§ 50, 51. Each of defendant's assignments of error relating to the first and second issues is found to be without merit.

We come now to the assignment of error based upon defendant's exception to the refusal of the court to dismiss the cause of action based upon the accident indemnity clause of the policy. In order to recover the double indemnity proceeds of $5,000.00, plaintiff must

show that her husband "sustained bodily injuries resulting in death . . . through external, violent, and accidental means" and that his death was "the direct result thereof and independent of all other causes." If his death resulted wholly or in part from disease or bodily or mental infirmity, or if it did not result from bodily injury sustained through accidental means, she is not entitled to recover. As this Court has pointed out many times " 'accidental means' refers to the occurrence or happening which produces the result and not to the result. That is, 'accidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. . . . (T)he emphasis is upon the accidental character of the causation —not upon the accidental nature of the ultimate sequence of the chain of causation." *Fletcher v. Trust Co.*, 220 N.C. 148, 150, 16 S.E. 2d 687, 688. *Accord, Gray v. Insurance Co.*, 254 N.C. 286, 118 S.E. 2d 909; *Langley v. Insurance Co.*, 261 N.C. 459, 135 S.E. 2d 38.

The testimony upon which plaintiff relies to establish death by accidental means is that of Mr. Boger, the eyewitness, who said that as Chesson stood smoking nervously in the corridor, he suddenly threw his arms and hands across his chest and jumped straight backwards, striking his head on the cement floor. The immediate cause of his death was a cerebral hemorrhage.

The theory of plaintiff's case is that the fall caused the hemorrhage. There is no *competent* evidence that this is so. Conceding, however, for the purpose of weighing the motion for nonsuit, that the fall caused the hemorrhage rather than the converse, the record is devoid of any evidence that the fall was accidental. Chesson did not trip over an obstacle; he was not startled by an unexpected noise; he was not shoved or pushed. One moment he was standing still; the next, he jumped straight backwards and ended up on the floor. If he jumped backwards voluntarily, the fall was not through accidental means. *Langley v. Insurance Co., supra.* If he jumped backwards involuntarily as a result of a stroke brought on by hypertension, delirium tremens, or some other disease, mental or physical infirmity, the fall was not the sole cause of his death, and insured's death is not covered by the policy.

In our opinion, the admitted evidence does not show that Chesson's death from a cerebral hemorrhage was caused by accidental means. The reason for his backward jump is left to conjecture. Defendant's motion to dismiss plaintiff's cause of action for the accidental indemnity insurance should have been allowed.

The verdict on the third and fourth issues is set aside and the judgment entered is vacated. The cause is remanded to the Superior Court for the entry of judgment that plaintiff recover of the

defendant the sum of $4,586.20 with interest ($5,000.00, the face amount of the policy, less $413.80).

Error and remanded.

STATE v. HARTWELL C. VAUGHAN
AND
STATE v. JOSEPH W. CATENA
AND
STATE v. CLYDE EUGENE SMITH.

(Filed 21 September, 1966.)

1. Criminal Law § 26—

Where judgments as in case of nonsuit are entered in a criminal prosecution on the ground that the evidence offered by the State was insufficient to warrant its submission to the jury, defendants have been subjected to jeopardy.

2. Criminal Law § 104.1—

A judgment of nonsuit entered for insufficiency of the State's evidence to warrant its submission to the jury has the force and effect of a verdict of not guilty of the offense charged in the warrant or indictment G.S. 15-173.

3. Criminal Law § 142—

An appeal may be taken by the State in criminal prosecutions only in those instances specified in G.S. 15-179.

4. Same; Hunting § 1—

Defendants were prosecuted for violation of G.S. 113-109(b). The offense is defined in the first sentence of this statute, and the second sentence of the statute provides that proof of certain facts should constitute *prima facie* evidence of the violation of the provisions of the preceding sentence. Judgment of nonsuit was entered at the conclusion of the State's evidence on the ground that, although the State had proved a *prima facie* case pursuant to the second sentence of the statute, the provision of the statute creating the rule of evidence was unconstitutional. *Held:* G.S. 15-179 does not authorize the State to appeal from the judgment of nonsuit.

HIGGINS, J., dissenting.

PLESS, J., joins in this dissenting opinion.

APPEAL by the State from *Hubbard, J.*, March 1966 Criminal Session of GATES.

Criminal prosecutions on warrants, tried *de novo* in the superior court after appeal by defendants from convictions and judgments

of the Gates County Recorder's Court. Each of the three appellants was charged in a separate warrant. The three cases were consolidated for trial, judgment and appeal.

One warrant charges that Vaughan, on or about December 18, 1965, "did unlawfully and willfully hunt deer by aid of an artificial light after sunset and before sunrise with the aid of an artificial light on a highway, G.S. 113-104, G.S. 113-109, against the form of the Statute," etc. In the warrants as to Catena and Smith, "G.S. 113-109" is omitted; otherwise, these warrants contain allegations identical to those in the Vaughan warrant.

Defendants having pleaded not guilty, a jury was selected, sworn and empaneled.

The State offered evidence which, in brief summary, tends to show: The car occupied by the three defendants entered North Carolina from Virginia and parked on the highway next to a rye grain field. Someone in the car raked the field at least twice with a strong light that threw a beam more than fifty feet. A loaded rifle and several hunting knives were in the car. A quilt and deer hair were in the trunk (boot) of the car. The incident occurred shortly after midnight.

At the conclusion of the State's evidence, defendants moved for judgment as in case of nonsuit. The record shows: "The Court ruled that the State proved a *prima facie* case pursuant to G.S. 113-109(b), but holds that said Section establishes a standard for a *prima facie* case that is so vague as to render it unconstitutional. As to each defendant the motion is allowed."

The State excepted "(t)o the entry of the foregoing judgment in each case," and gave notice of appeal.

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

Jones, Jones & Jones for defendant appellees.

BOBBITT, J. G.S. 113-109(b) provides: "Any person who takes or attempts to take deer between sunset and sunrise with the aid of a spotlight or other artificial light on any highway or in any field, woodland, or forest, in violation of this article shall, upon conviction, be fined not less than two hundred fifty dollars ($250.00) or imprisoned for not less than ninety days. The flashing or display of any artificial light from any highway or public or private driveway so that the beam thereof is visible for a distance of as much as fifty feet from such highway or public or private driveway, or such flashing or display of such artificial light at any place off such highway or driveway, when such acts are accompanied by the possession of

firearms or bow and arrow during the hours between sunset and sunrise, except as authorized herein for the hunting of raccoons, opossums, or frogs, shall constitute *prima facie* evidence of a violation of the provisions of the preceding sentence."

The warrants on which these criminal prosecutions are based charge the criminal offense created by and defined in the first sentence of G.S. 113-109(b). The validity of this first sentence of G.S. 113-109(b) is not questioned by Judge Hubbard's ruling or by defendants on constitutional grounds or otherwise.

"(J)eopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case." *S. v. Bell,* 205 N.C. 225, 171 S.E. 50; *S. v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243; *S. v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838. Unquestionably, jeopardy attached as to each of these defendants in respect of the criminal offense created and defined in the first sentence of G.S. 113-109(b) and charged in each of the three warrants. The judgments as in case of nonsuit were entered on the ground the evidence offered by the State was insufficient to warrant submission to the jury and to support verdicts of guilty.

Our first question is whether the judgment is one from which an appeal may be taken by the State.

Whether the State's evidence, independent of the second sentence of G.S. 113-109(b), was sufficient to warrant submission to the jury, is not before us. The only reasonable interpretation of Judge Hubbard's ruling is that he considered the evidence insufficient to withstand defendants' said motions unless the State was entitled to go to the jury under the rule as to *prima facie* evidence stated in the second sentence of G.S. 113-109(b). This second sentence, purporting to establish a rule of evidence, was declared unconstitutional by Judge Hubbard.

A motion for judgment as in case of nonsuit challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support a verdict of guilty of the criminal offense charged in the warrant or indictment on which the prosecution is based. When the motion is allowed, and judgment is entered in accordance therewith, "such judgment shall have the force and effect of a verdict of 'not guilty' as to such defendant" as to the criminal offense charged in the warrant or indictment. G.S. 15-173; *S. v. Stinson,* 263 N.C. 283. 139 S.E. 2d 558.

G.S. 15-179 provides that, where judgment has been given for the defendant in a criminal action, an appeal may be taken by the

State in the cases specified therein *and no other*. It contains no provision authorizing an appeal by the State from a judgment as in case of nonsuit. The State contends its appeal from said judgments as in case of nonsuit is authorized by the 1945 amendment (Session Laws of 1945, Chapter 701) of G.S. 15-179. G.S. 15-179, as amended in 1945, provides that an appeal may be taken by the State when judgment has been given for the defendant "6. Upon declaring a statute unconstitutional."

In 4 Am. Jur. 2d, Appeal and Error § 268, these statements appear: "As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right." Again: "Statutes authorizing an appeal by the prosecution will be strictly construed." In 24 C.J.S., Criminal Law § 1659(a), pp. 1028-1029, this statement appears: "While there is authority holding that statutes granting the state a right of review should be liberally construed, it is generally held that, being in derogation of the common law, they should be strictly construed, and that the authority conferred thereby should not be enlarged by construction."

In *S. v. Mitchell*, 225 N.C. 42, 33 S.E. 2d 134, this Court dismissed an appeal by the State where judgment had been given for the defendant on the ground the statute purporting to create and to define the purported criminal offense on which the prosecution was based was unconstitutional. It has been stated that the decision in *Mitchell* "prompted the legislature to enact subsection 15-179(6) granting appeal in all such cases." "Criminal Law—The Right of the State to Appeal in Criminal Cases," 42 N.C.L.R. 887, 902. The decision in *Mitchell* was filed *(per curiam* opinion) on February 28, 1945; and the 1945 Act, amending G.S. 15-179, was ratified March 17, 1945. Our research discloses the bill for the enactment of the provision now constituting G.S. 15-179(6) was introduced in the General Assembly (Senate) on February 13, 1945. 1945 Senate Journal, p. 166; Institute of Government's Daily Legislative Bulletin, No. 36, February 13, 1945. Hence, there is uncertainty as to the exact relationship between the *Mitchell* decision and the 1945 Act.

In our view, the General Assembly, by said 1945 amendment, intended to give the State the right to appeal when a criminal action is dismissed on the ground the statute purporting to create and to define the purported criminal offense on which the prosecution is based is unconstitutional and therefore affords no basis for such prosecution. Here, defendants were put in jeopardy in respect of the criminal offense charged in the warrants. The judgments were entered on the ground the evidence was insufficient to support convictions. In our opinion, and we so hold, said 1945 amendment to

G.S. 15-179 does not authorize an appeal by the State from a judgment as in case of nonsuit notwithstanding such judgment is based *in part* upon a ruling that a statute purporting to create *a rule of evidence* is unconstitutional.

Having reached the conclusion that the State's appeal must be dismissed, we do not discuss whether the second sentence of G.S. 113-109(b) is invalid on constitutional grounds or otherwise.

Appeal dismissed.

HIGGINS, J., dissenting. I am unable to agree with that part of the opinion which states: "The judgments as in case of nonsuit were entered on the ground the evidence offered by the State was insufficient to warrant submission to the jury and to support the verdicts of guilty." Of course, if such were the case, the State ordinarily would not have the right of appeal and the appeal should be dismissed. Here is the judgment according to the record: "The court ruled that the State proved a *prima facie* case pursuant to G.S. 113-109(b), *but holds that said section establishes a standard* for a *prima facie* case that is so vague as to render it unconstitutional. As to each defendant the motion is allowed." (emphasis added.) What did Judge Hubbard hold was unconstitutional? Unquestionably, to me at least, he held G.S. 113-109(b) unconstitutional upon the ground of vagueness in that part of the statute relating to a *prima facie* case. Such seems to me to be the plain and inescapable meaning of the judgment. Judge Hubbard dismissed the cases because of the unconstitutionality of the Act, or part of the Act. What difference does it make whether the statute goes out because it is unconstitutional in part or in toto?

The Congress and the Legislatures have power to prescribe what facts or group of facts shall be considered evidence of the existence of the ultimate fact of guilt. The ultimate fact of guilt is usually a conclusion from other facts. However, the Federal and State Constitutions prescribe limits which the Congress and the Legislatures may not transgress. These limits cannot go beyond due process. *Tot v. U. S.*, 319 U.S. 463; 12 Am. Jur., Constitutional Law, § 552; 20 Am. Jur., Evidence, §§ 9 and 11; *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768; *State v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97.

When a criminal Act of the Legislature is held unconstitutional by the trial court, the State may appeal. G.S. 15-179(6). The effect of the Court's opinion in this case is to say that although Judge Hubbard held the Act (or part of the Act) unconstitutional, the State cannot appeal; and solely upon that ground he undertook to dismiss the case. How could the State ever appeal when a defendant is discharged because of the unconstitutionality of a statute?

Frankly, I am inclined to believe that under the authorities the Legislature was within its power when it fixed (in addition to G.S. 113-109(b)) the facts which make out a *prima facie* case. *Washington v. Person,* 352 P. 2d 189. I am not in favor of dismissing this case without facing up to the constitutional question involved, and I vote against dismissing the appeal.

PLESS, J., joins in the dissenting opinion.

DANNY J. MOORE, BY HIS NEXT FRIEND, JAY MOORE, v. LAURA H. MOORE.

(Filed 21 September, 1966.)

1. Negligence § 24a—

In order for plaintiff to be entitled to go to the jury on the issue of negligence he must introduce evidence either direct or circumstantial, or a combination of both, sufficient to support a finding that defendant was guilty of the act of negligence alleged in the complaint and that such act proximately caused plaintiff's injury, including the essential element of proximate cause that injury was reasonably foreseeable under the circumstances.

2. Negligence § 37f— Evidence held insufficient to show that burning of child from electric cord was the result of negligence of defendant.

Evidence tending to show that a three year and eleven month old child, together with other members of his family, were guests in defendant's home, that he and his two sisters were put to bed in a room, that his mother looked in on two occasions and ascertained the boy was in bed, that thereafter the fifteen year old daughter of defendant found the boy lying on the floor beside the bed with the end of an extension cord in his mouth, emitting sparks, that the boy was badly burned, that after the accident it was found that the insulation on the cord where the wires joined the plug was frayed, exposing the wires, *is held* insufficient to be submitted to the jury on the issue of defendant's negligence on the theory that defendant permitted a dangerous and defective cord to be in the room, since there was no evidence that the cord was defective or that its wires were exposed prior to the accident, and defendant could not have reasonably anticipated that the boy would leave the bed and ground the current by taking the plug in his mouth.

3. Evidence § 54—

A party offering the testimony of witnesses is not entitled to impeach their testimony by showing that they made different statements at other times.

APPEAL by plaintiff from *Parker, J.,* March, 1966 Civil Session, CARTERET Superior Court.

This civil action was instituted to recover for the severe burns suffered by Danny J. Moore, age three years, eleven months, as a result of his contact with the open end of an extension cord connected with a switch in the wall of the bedroom in the defendant's home.

The complaint alleged the defendant was negligent in that "she owned and kept on her premises an extension cord which was defective in that there were a number of exposed or uninsulated wires at the end of the cord . . . adjacent to the open plug . . . when she knew or should have known that children, and especially this plaintiff, were liable to be injured by the defective condition of said cord." The defendant demurred to the complaint for failure to state facts sufficient to constitute a cause of action. The court overruled the demurrer. The defendant, by answer, denied all allegations of negligence.

The material evidence, quoted in part and summarized in part, disclosed the following: Jay Moore and wife, Carolyn Moore, son, Danny J. Moore, age three years eleven months, daughters Dolores and Doreen, ages two and one, lived in Morehead City. The defendant, her husband, Ashley Moore, and two daughters, Kitty, age 15, and Lovie Jane, age 13, lived in Kinston. Jay Moore and Ashley Moore are brothers. On July 25, 1964, the defendant and her two daughters were visitors in the Jay Moore home. On that day Carolyn Moore, with her three children, left Morehead City with the defendant and her two daughters to visit the Ashley Moores in Kinston.

At approximately 7:30 in the evening Danny J. and his two sisters were put to bed—Danny J. in the twin bed on the left, Dolores in the twin bed on the right, and the baby on a floor mattress between the twin beds. Danny's mother, the defendant and her two daughters were present, assisting in making and completing the sleeping arrangements for the little ones.

In addition to the beds, the room contained two chests of drawers and a night stand on which there was a "lamp." Apparently the lamp was not connected with the wall switch. The defendant, on adverse examination, testified: "There was no extension cord in the bedroom. . . . I told Lovie Jane to put one on in there that night. . . . The extension cord was in the closet. I had not owned it over a month . . . I had used it . . . once or twice . . . She knew where to plug it in." Apparently the purpose of having the cord was to activate the lamp on the night stand so that the overhead light could be turned off.

The mother testified: "I checked on the children personally dur-

ing the night. I just opened the door and looked in and the first time none of them were asleep so I told them to be quiet, to get quiet and to go to sleep, and the next time the two girls were asleep; so I cautioned Danny to be quiet so he wouldn't wake them up and to go back to sleep. Danny was on the bed the last time I saw him."

Thereafter, Kitty checked the bedroom. This is her story: "I went to his bedroom that night immediately prior to the accident. I saw that Danny was lying in between the mattress and the bed that he was supposed to be on, and I saw sparks flying and I didn't know what to do, so I just grabbed him by his foot and pulled him away from it . . ." Somehow Danny had left his bed and either disconnected the extension cord from the lamp (if it was so connected) or picked up the disconnected cord, placed the plug in his mouth completing the electric circuit and causing his injury.

After the accident the insulation at the point where the wires joined the plug was frayed, exposing the wires. The plug was in the child's mouth when Kitty entered the room and discovered the accident. He was horribly burned.

At the close of the evidence the court entered judgment of involuntary nonsuit. The plaintiff appealed.

Harvey Hamilton, Jr., Henry C. Boshamer for plaintiff appellant.
George McNeill and Joseph C. Olschner for defendant appellee.

HIGGINS, J. This appeal presents the question of law whether the plaintiff offered evidence sufficient to permit the jury to find (1) the defendant was guilty of the act of negligence alleged in the complaint; and, if so, (2) whether such act proximately caused the plaintiff's injury. In such cases the evidence is sufficient if, upon its fair and reasonable consideration, it permits the jury to make the required findings. *Davis v. Parnell,* 260 N.C. 522, 133 S.E. 2d 169; *Griffin v. Blankenship,* 248 N.C. 81, 102 S.E. 2d 451. The proof may be by evidence, direct, circumstantial, or a combination of both. *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33; *Kirkman v. Baucom,* 246 N.C. 510, 98 S.E. 2d 922.

To permit recovery for an injury, the jury must find the defendant was guilty of one or more of the negligent acts alleged and that the injurious result was reasonably foreseeable. *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767. Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. *Mattingly v. R. R.,* 253 N.C. 746, 117 S.E. 2d 844. The breach

of duty may be by negligent act or a negligent failure to act. *Williams v. Kirkman,* 246 N.C. 510, 98 S.E. 2d 922.

Ordinarily, before conduct is actionable, injury from it must be reasonably foreseeable. "The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. (citing authorities) . . . One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable." *Herring v. Humphrey,* 254 N.C. 741, 119 S.E. 2d 913.

In this case two hurdles confront the plaintiff. Both must be cleared before he gets to the jury. (1) The plaintiff must have offered some evidence the defendant kept for use in the home a defective extension cord and that she had actual or constructive knowledge of the defect. (2) She should have reasonably foreseen that the plaintiff was likely to sustain injury as a result of the use being made of the cord. The evidence discloses that the defendant bought the cord new a month or two before July 25, 1964. She had used it only a time or two. The defendant sent her daughter for the cord and gave instructions that it be used to connect the current with the lamp on the night stand. There is no evidence the wires were exposed or that the cord was defective prior to the accident. After the accident there was a break in the insulation near the plug. In this connection, it should be remembered that Danny was discovered on the floor with the plug in his mouth and sparks were flying from the wires. Whether he broke the insulation or whether grounding the circuit caused the insulation to burn off is left to conjecture.

During the entire time the children were being put to bed, Danny's mother was present, actively participating. She returned to the room on two occasions. Each time Danny was in his bed. Should the defendant have anticipated Danny would leave his bed, ground the current by taking the plug in his mouth and thereby injure himself? Such an unfortunate and regrettable result can only be classed as remotely and slightly probable. Such is not sufficient foundation to support a finding of actionable negligence. *Herring v. Humphrey, supra; Brady v. R. R.,* 222 N.C. 367, 23 S.E. 2d 334.

The other assignments of error relate to the refusal of the court to permit the plaintiff's witnesses, Jay Moore and Harold Collins, to say that Kitty Moore and Lovie Jane Moore had made state-

ments different from their testimony. The court was correct in excluding this evidence. Both girls were called and testified as witnesses for the plaintiff. The party who offered them could not contradict nor impeach them by showing they had made different statements at other times. *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473; *State v. Cohoon,* 206 N.C. 388, 174 S.E. 91; *Smith v. R. R.,* 147 N.C. 603, 61 S.E. 575.

The plaintiff failed to offer evidence sufficient to permit a finding of liability on the part of the defendant. The judgment of nonsuit was proper and is

Affirmed.

REDEVELOPMENT COMMISSION OF THE CITY OF GREENVILLE, PETITIONER, v. AMELIA S. CAPEHART; MARJORIE CAPEHART ST. CYR AND HUSBAND, JOHN DOE ST. CYR; COUNTY OF PITT, NORTH CAROLINA, AND CITY OF GREENVILLE, NORTH CAROLINA.

(Filed 21 September, 1966.)

1. Eminent Domain § 9; Courts § 7—

The landowner must file exceptions to the final report of the commissioners within 20 days after the report is filed, with right to appeal to the Superior Court at term, G.S. 40-19, and when the landowner files no exceptions and does not appeal from the order of confirmation by the clerk, *recordari* to the Superior Court is properly denied when the application therefor merely alleges merit without specifying facts supporting this conclusion, fails to negate laches, and the application is not made to the next succeeding term of the Superior Court.

2. Eminent Domain § 14; Estates § 7—

Where land subject to a life estate is taken by eminent domain the compensation paid represents the realty, and the life tenant is not entitled to the cash value of her life estate out of the proceeds, but only to the interest or income for life from the total amount of the award.

APPEAL by defendant Marjorie Capehart St. Cyr from *Parker, J.,* at February 21, 1966, Term of PITT Superior Court in No. 116, and from *Mintz, J.,* at May 23, 1966 Term of PITT Superior Court in No. 117.

Under the authority of Chapter 160 of the General Statutes plaintiff has been incorporated and is authorized to clear and rebuild certain areas in the City of Greenville which it has found to be "slum and blighted areas".

The defendant Mrs. Amelia S. Capehart is the widow of the late Dr. W. M. Capehart, and Marjorie Capehart St. Cyr is his daughter by a previous marriage. The will of Dr. Capehart provided: "I give, devise and loan to my wife, Amelia Capehart, in place of or in lieu of her dower, a life estate and use in and to and upon the house and lot of land and my office and the land upon which it is located, being the house and lot where we are now living and the office which I am now using, and being the land which was conveyed to me by D. R. Little and wife and which deed is recorded in Book P 13 page 2 of the Pitt County Registry and which land lies on the Eastern side of Greene Street in Greenville, N. C., for and during the term of her life; and at her death I give and devise the same, said land, absolutely and in fee simple forever to my daughter, Marjorie Capehart, of New York City, N. Y. * * * I charge and require my said wife during her said life estate and occupancy of the said lot of land to keep the taxes paid thereon, and keep the same in a reasonable state of repair."

The plaintiff filed a petition in this proceeding against the two respondents to take the lands referred to above, proceeding under the chapter on Eminent Domain, G.S. 40-11, *et seq.* The defendants filed separate responses, denying the petitioners are justified or entitled to take the land under the authority of Chapter 40 as asserted by the petitioners.

Pursuant to notice the matter came on for hearing before the Clerk of Pitt Superior Court on 7 October, 1965, and he on 12 October, 1965, signed an order granting petitioners' prayers and appointing Commissioners of Appraisal. Respondent Marjorie Capehart St. Cyr noted exception to the order and gave notice of appeal but did not pursue it.

The Commissioners held a hearing, pursuant to notice, on 15 November, 1965, and awarded damages of $11,000 for the taking of the property, filing their report on 19 November, 1965. Notice of the award was given 3 December, and neither respondent noted any further exception.

On 28 December, 1965, no exceptions to said report having been filed, the Clerk entered his judgment in the matter, after notifying respondent's counsel of his intention to do so. Respondent Marjorie Capehart St. Cyr took no further action in this matter until her petition for *writ of recordari* was filed on 14 January, 1966, but was not heard at the next, the January 24th Term. The matter was heard before Parker, J., presiding at the February 21 Civil Term of Pitt Superior Court, and upon judgment dated 23 February, deny-

ing this petition, respondent Marjorie Capehart St. Cyr appealed to the Supreme Court.

The above facts relate to the appeal in Case No. 116.

The facts in Case No. 117: On 5 April, 1966, after the $11,000 had been paid into the Clerk of Pitt Superior Court, Amelia S. Capehart filed a motion in the cause asking the Clerk to calculate and pay to her in cash her interest in the said $11,000, contending that she is entitled to the present cash value of the money, based upon her life expectancy as shown in the mortuary tables. G.S. 8-46 and 47.

Upon a hearing of this motion the Clerk held as a matter of law that Amelia S. Capehart's life estate in the said $11,000 was $6,984.12, based upon her life exceptancy, which amount he ordered paid to her. Marjorie St. Cyr appealed from the order, and the appeal was heard by Mintz, J., at the May 1966 Term of Pitt Superior Court. The appeal was based solely upon questions of law, as to whether or not the life tenant, Amelia S. Capehart, should be paid her life estate interest in cash. The appellant contended that the $11,000 was in lieu of the land and buildings and that her stepmother was entitled only to the income from them. Therefore, she contended, Mrs. Capehart was entitled to receive only the income, or interest, from the $11,000 for life. Judge Mintz affirmed the order of the Clerk and Marjorie Capehart St. Cyr appealed to the Supreme Court.

Kenneth G. Hite, H. Horton Rountree for petitioner appellee.
Sam B. Underwood, Jr., for defendant appellant.

PLESS, J. In *Abernathy v. R. R.*, 150 N.C. 97, 63 S.E. 180, Connor, J., speaking for the Court, said: "While in other special proceedings, when an issue of fact is raised upon the pleadings it is transferred to the civil docket for trial, in condemnation proceedings the questions of law and fact are passed upon by the clerk, to whose rulings exceptions are noted, and no appeal lies until the final report of the commissioners comes in, when upon exceptions filed, the entire record is sent to the Superior Court, where all of the exceptions are passed upon and questions may be then presented for the first time."

This excerpt was incorporated in the opinion in *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543, where it is said: "As to the procedure in a case of this kind, our decisions are to the effect that notwithstanding the appearance of issuable matter in the pleadings, it is the duty of the clerk, in the first instance, to pass upon all disputed questions

presented in the record, and go on to the assessment of the damages through commissioners duly appointed, and allowing the parties, by exceptions, to raise any questions of law or fact issuable or otherwise to be considered on appeal from him in his award of the damages as provided by law."

In her response Mrs. St. Cyr had denied the right of plaintiff to take the property in question and when the Clerk appointed the commissioners to appraise the property on 7 October she took an exception to his order and gave notice of appeal, but did not pursue it. Here again a quotation from *Abernathy v. R. R., supra,* is pertinent: "No appeal lies until the final report of the Commissioners comes in when upon exception filed the entire record is sent up to Superior Court where all the exceptions may then be presented."

The commissioners filed their report awarding defendants $11,000 for the taking of the property on 19 November, 1965. Notice of the award was given to the respondent on 3 December, but she filed no further exceptions at that time or prior to 28 December, 1965, when the Clerk entered his judgment in the matter after notifying the respondent's counsel of his intention to do so.

G.S. 40-19 provides that: "Within 20 days after filing the report * * * any persons interested in the said land may file exception to said report and upon the determination of the same by the court either party to the proceedings may appeal to the court at term and thence after judgment to the Supreme Court."

The Clerk's judgment was signed some 40 days after the report had been made by the Commissioners to his office, and 25 days after the respondent had had formal notice thereof. In her failure to file exceptions or appeal during these times she waived her right to do so.

Having failed to perfect her appeal within the time, the respondent thereupon sought to present her alleged grievances by filing a petition for writ of *recordari,* but here again she fails to comply with the rules. To be entitled to *recordari* the petitioner must show she is not guilty of *laches,* there is merit in her case, and she must specify the facts from which the court may determine, instead of a general allegation of merit. Application should be made promptly to the next term of court. McIntosh Practice & Procedure, Sec. 1882.

In view of (1) the long delay in filing the petition, and (2) the fact that the jury awarded $11,000 when the respondent had said in her pleadings one time that $10,150 would be sufficient for the land, it is apparent that she has not been diligent and that she lacks merit.

The next term of Superior Court of Pitt County after the judgment was signed by the Clerk was on 24 January, 1966, but the record does not show that application was made at that term and it

was not presented until the term of court convening 21 February, 1966.

In view of the foregoing, Judge Parker's denial of the application was correct in Case No. 116, and it is therefore affirmed.

We find only one North Carolina case that deals with the question presented in Case No. 117. This is *Miller v. Asheville,* 112 N.C. 759, 16 S.E. 762, in which it is said: "When (as here) the property is taken under the right of eminent domain, the fund realized is substituted for the realty and is held subject to like charges and trusts, and when limited over on a contingent remainder it will be divided among the parties entitled, upon the happening of the contingency, in the same manner as the realty itself would have been if it had remained intact."

However, the question has been determined by a number of other courts, and it is said in 27 Am. Jur. 2d 28: "According to the predominate view, where property is condemned and the question is raised as to whether the award should be distributed between a life tenant and remaindermen, the award stands in the place of the realty and must be maintained as a whole, with the life tenant receiving the income and the corpus being reserved for ultimate distribution to the remaindermen."

In 91 A.L.R. 2d 965, it is stated: "* * * the courts have generally held that the rights of the life tenant and remainderman in the condemnation proceeds are the same as they were in the realty represented by the proceeds, that is, the life tenant has the right to the use of the proceeds during his life, and the remainderman is entitled to the corpus upon the death of the life tenant."

We accordingly hold that the life tenant, Mrs. Capehart, is entitled to the interest or income from the $11,000 award, and that at her death the respondent, Mrs. St. Cyr, would be entitled to the corpus of the award.

There was error in the ruling below.

In Case No. 116

Affirmed.

In Case No. 117

Reversed.

E. J. MATHIS, DOING BUSINESS AS ASHEVILLE ELEVATOR SERVICE, v. MORLEY SISKIN, AND JACK SCHULMAN AND WIFE, EVELYN SCHULMAN.

(Filed 21 September, 1966.)

1. Contracts § 1—

Where, in an action for breach of contract, plaintiff introduces the contract in evidence, specifying that the owner agreed to pay for the proposed work, and introduces evidence that the agreement was signed for the owner by the owner's duly authorized agent, and that the owner breached the contract, the owner's motion to nonsuit is correctly denied, and the owner's conflicting evidence that the agent was not authorized to execute the contract for him, raises a question for the jury.

2. Evidence § 23.1—

The admission of testimony of a telephone conversation by plaintiff with defendant relative to the contract in suit will not be held for prejudicial error when defendant does not aptly seek permission to examine plaintiff as to the identification of the caller, and plaintiff's later testimony on cross examination that he did not know defendant's voice well enough to identify it positively it goes to the credibility of plaintiff's earlier identification of the caller, but does not require allowance of defendant's motion to strike the direct testimony.

3. Principal and Agent § 4—

While extra-judicial declarations of a purported agent are not admissible to show the existence of the agency or the extent of the agent's authority, the agent himself is competent to testify that he was authorized by the principal to make the contract in question and that he made it in the principal's behalf.

4. Same—

The fact that the court interpolates a statement relating to the test for determining the principal's liability for the agent's tort between correct and adequate statements of the law governing the liability of a principal upon a contract made for him by the agent, is not prejudicial error in an action for breach by the principal of the contract it appearing that the charge, as a whole, was not misleading.

5. Contracts § 21—

Where the court clearly states what acts by defendant constitute a breach of contract by repudiation of it in advance of an attempt by plaintiff to perform, an excerpt from the charge containing an inaccurate definition of an anticipatory breach of a contract is not prejudicial.

6. Appeal and Error § 38—

Assignments of error not supported by authority or discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant Jack Schulman from *Martin, S.J.*, March 1966 Session of BUNCOMBE.

This is a suit for damages for breach of contract. The complaint

alleges that the plaintiff and Siskin executed a written contract, a copy being attached to the complaint and designated "Plaintiff's Exhibit A." It is alleged that, in the execution of the contract, Siskin was acting individually and also as agent for and on behalf of the Schulmans. The document so attached to the complaint states that it is a contract by and between the plaintiff "and MORLEY SISKIN, managing agent of the HOTEL ASHEVILLE * * * which said property is owned by Jack Schulman and wife, Evelyn Schulman, hereinafter known as OWNER"; that the plaintiff has agreed to furnish and erect an elevator, pursuant to certain specifications, for the price of $12,942; that the "OWNER" agrees to pay 75 per cent upon the plaintiff's receipt of the equipment ordered by him, and the balance upon completion of the installation; and that, should the plaintiff be unable to complete the installation by reason of the willful default of the "OWNER," the entire balance of the contract shall become due and payable with interest. The complaint then alleges that, after the execution of the contract, the plaintiff ordered the necessary equipment and did work preparatory to installing the elevator; that the plaintiff was then told by Jack Schulman that he was cancelling the order and that upon arrival of the equipment the defendants refused to permit the plaintiff to install the elevator and thereby broke the contract, to his damage.

The document designated "Plaintiff's Exhibit A" in the record filed in this Court is not a contract but only a set of specifications. However, this Court is advised by the Clerk of the Superior Court of Buncombe County that the document attached originally to the complaint included also the document now designated "Plaintiff's Exhibit A-1," its parts having been separated at the trial for introduction in evidence. Consequently, the record is considered as if it showed both of these documents attached to the complaint under the designation "Plaintiff's Exhibit A" and no question of variance between allegation and proof arises on this account.

The Schulmans filed an answer denying all material allegations in the complaint.

Before trial, a judgment of voluntary nonsuit was entered as to the defendant Siskin and, at the close of the plaintiff's evidence, a judgment of involuntary nonsuit was entered as to Evelyn Schulman, Jack Schulman's motion for such judgment being denied.

The jury found that Siskin executed the contract as agent of Jack Schulman and within the scope of his authority, that Jack Schulman broke the contract, and that the plaintiff is entitled to recover $5,000. From judgment in accordance with the verdict Jack Schulman appeals.

The plaintiff's evidence consisted of the testimony of the plain-

tiff, the deposition of Morley Siskin, and plaintiff's Exhibits A, A-1, B, and 6, together with other exhibits not now material. Exhibit A-1 consists of the contract. Exhibit A consists of the specifications referred to in Exhibit A-1. Exhibit B, introduced without objection, consists of a written statement by Siskin to the effect that Jack Schulman knew of Siskin's negotiations with Mathis and of the final contract resulting therefrom, and instructed Siskin to have the contract prepared and to sign it for him.

The plaintiff testified, in substance, that his negotiations were with Siskin; that after the contract was signed he ordered the specified equipment and materials; on 11 November, while these were in transit to him, Jack Schulman telephoned him and cancelled the order; he returned to his suppliers that part of the equipment for which they would allow him credit; other items could not be reused or returned for credit; had he been allowed to perform the contract it would have cost him about $9,878 to install the elevator; taking into account credits received on returned materials, labor costs not incurred because of the breach and lost profits, his total damages were $5,780.02.

Siskin testified by deposition to the effect that he and the Schulmans had discussed the need for a new elevator in the hotel; they told him to go ahead and take care of the details; they saw, knew of and approved the contract with the plaintiff, both as to form and content, and instructed Siskin to sign it; in the negotiations with the plaintiff he was representing Mr. and Mrs. Schulman and so informed the plaintiff; Schulman told Siskin he had cancelled the installation of the elevator because of his financial circumstances, this being about the time of the telephone call as to which the plaintiff testified.

Jack Schulman testified, in substance, that he and his wife are the owners of the hotel; he had no conversation with the plaintiff concerning the installation of an elevator; he did not authorize Siskin to enter into any contract on his behalf concerning an elevator; he did not know the contract was being prepared; he received a letter from the plaintiff's attorney (plaintiff's Exhibit 6, dated 14 November) referring to the above mentioned telephone call cancelling the contract, and advising that suit would be entered if he did not permit the installation of the elevator to proceed; he did not reply to this letter.

Mrs. Schulman testified that she did not at any time authorize Siskin to enter into any contract on her behalf with reference to the elevator, and Siskin never showed her the contract on which the plaintiff sues.

Prince, Jackson, Youngblood & Massagee; Williams, Williams & Morris by Ann H. Phillips and William C. Morris, Jr., for appellant.

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

LAKE, J. There was no error in the denial of Jack Schulman's motion for judgment of nonsuit. The contract states expressly that the "Owner" agrees to make payments of the purchase price and identifies "Owner" as Jack Schulman and wife. Siskin testified that he was acting as Schulman's agent and Schulman instructed him to have this contract prepared and to sign it for him. The plaintiff testified that Schulman telephoned him and cancelled the contract the day before the equipment arrived. Siskin corroborated this. The plaintiff's Exhibit 6, a letter written by his attorney to Schulman three days after the telephone conversation, was an election by the plaintiff to treat Schulman's anticipatory renunciation of the entire contract as an immediate breach and to sue for damages. See *Pappas v. Crist*, 223 N.C. 265, 25 S.E. 2d 850; *Edwards v. Proctor*, 173 N.C. 41, 91 S.E. 584. The plaintiff testified specifically as to the damages sustained by him as a result of the breach. Thus, the plaintiff's evidence, taken to be true and considered in the light most favorable to him, as it must be upon a motion for judgment of nonsuit *(Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53), is sufficient to establish each element of his alleged cause of action against Jack Schulman. The latter's testimony contradicting the plaintiff's evidence as to these various matters raised a question for the jury, which the jury resolved in favor of the plaintiff.

Upon the circumstances shown in this record, there was no error in admitting the testimony of the plaintiff that he had a telephone conversation with Jack Schulman in which Schulman stated he was cancelling the contract. Testimony by the recipient of a telephone call as to the nature of the conversation is not admissible, over objection, without identification of the other party to the conversation by some means other than such party's own statement of his name in the course of the call. *Manufacturing Co. v. Bray*, 193 N.C. 350, 137 S.E. 151. However, when the plaintiff testified that he received a telephone call from Jack Schulman, the defendant did not seek permission to examine the plaintiff as to the identification of the caller before the plaintiff proceeded to testify as to the content of the conversation. Under these circumstances, it was not error to permit the plaintiff to testify as to what the caller said in that conversation. Plaintiff's testimony thereafter, on cross examination, that he had talked to Jack Schulman previously, but not on the telephone, that he did not know Schulman's voice well enough to

know *positively* that it was Schulman who had called, and that all he *knew* about it was that someone, who said he was Jack Schulman, called him, would go to the credibility of his earlier testimony identifying the caller, but would not require the allowance of the defendant's motion to strike the direct testimony concerning the content of the conversation. See Stansbury, North Carolina Evidence, § 96. Furthermore, the plaintiff's identification of the person talking to him on the telephone is corroborated by the deposition of Siskin stating that, about the date of this telephone call, Schulman told Siskin he had cancelled the installation of the elevator.

There is no merit in the numerous exceptions to the rulings of the court permitting Siskin to testify that he was acting in the negotiations of this contract as agent for Schulman and that Schulman authorized him to make the contract. While extra-judicial declarations of a purported agent are not admissible to show the existence of the agency or the extent of his authority to contract, the alleged agent is competent to testify that the agency existed, that he was authorized by the principal to make the contract in question, and that in making it he was acting as such agent in the principal's behalf. *Sealey v. Insurance Co.,* 253 N.C. 774, 117 S.E. 2d 744.

The court's instruction to the jury that "[A]n agent is acting in the course of his authority of his agency, when he is engaged in that which he was employed to do and is at the time about his principal's business," standing alone, would not be a correct statement of the test of an agent's authority to bind the principal by contract. This statement relates to the test for determining the principal's liability for the agent's tort. However, this statement in the charge is preceded and followed by correct and adequate statements of the law governing the liability of the principal upon a contract made for him by an alleged agent. Thus, when the entire charge is considered, we are of the opinion that the jury could not have been misled by the portion to which the defendant has excepted. The exception is, therefore, overruled. *Gathings v. Sehorn,* 255 N.C. 503, 121 S.E. 2d 873; *In Re Will of Crawford,* 246 N.C. 322, 98 S.E. 2d 29; *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898; *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356.

The defendant also excepts to the court's instruction that "[T]he breach which is alleged is what is known as an anticipatory breach, that is, a breach of the contract while the contract was still executory, before either side had performed it in full." While, as the defendant contends in his brief, this is not an accurate definition of an anticipatory breach of a contract, it does not appear that the defendant has been prejudiced in any way by this inaccuracy. The context in which this statement appears in the charge includes a

statement of sufficient clarity as to what acts by Schulman would constitute a breach of the contract by repudiation of it in advance of an attempt by the plaintiff to perform so as to make such attempt by the plaintiff unnecessary. The portion of the charge to which this exception is directed is not, in our opinion, prejudicial error justifying a new trial of this action and this assignment of error is, therefore, overruled.

The remainder of the appellant's 81 assignments of error are deemed abandoned since his brief contains no authority or discussion relating thereto. Rule 28 of the Rules of Practice in the Supreme Court.

No error.

STATE v. GEORGE B. MOORE.

(Filed 21 September, 1966.)

1. Criminal Law § 24—

A plea of not guilty by reason of temporary insanity is not a judicial admission that the defendant committed any unlawful act, and the burden remains upon the State to prove defendant's guilt of all elements of the offense charged.

2. Criminal Law § 62—

A lay witness, from observation, may form an opinion as to a person's mental condition and testify thereto before the jury.

3. Same—

The State's witness testified to the effect that defendant, in an intoxicated condition, lay down on a couch for about ten minutes and remained motionless, apparently asleep or passed out on the couch, at a time when an African wildlife program was showing on a television in the room, that defendant suddenly raised up from the couch with a shotgun in his hands and said, "Don't nobody crowd me, the first one that does, I will down him." *Held:* It was prejudicial error to exclude the question asked on cross-examination, pertinent to defendant's plea of temporary insanity, as to whether defendant at that time was not acting like a man out of his right mind.

4. Criminal Law § 109—

An additional instruction to the effect that defendant had pleaded not guilty by reason of insanity and that the court charged the jury that defendant had the duty of satisfying the jury of this defense, and that there had been no legal competent evidence of insanity offered by defendant in the cause, must be held for prejudicial error as permitting the jury to decide the question of defendant's guilt solely upon whether he had proved his insanity.

STATE *v.* MOORE.

APPEAL by defendant from *Nettles, E.J.,* June, 1966 Mixed Session, POLK Superior Court.

In this criminal prosecution the defendant, George B. Moore, was indicted for murder in the first degree for the killing of Winford Agner. When arraigned, the defendant entered a plea of "not guilty by reason of temporary insanity." The Solicitor announced he would only ask for a verdict of murder in the second degree or manslaughter.

The State's witness, Stanley Jones, testified he was at the home of the defendant Moore in the early evening of January 11, 1965. Moore and the deceased, Winford Agner, had worked together that day, "putting down linoleum in Moore's house." They prepared and ate supper together. "I hung around and talked with them and messed with the television. . . . I think they took a drink while I was there, so George was pretty full and he talked pretty wild . . . he was in the process of moving and he showed me what he had to move, and after he had . . . left the table, walked by me and laid down across the bunk . . . He said, 'I believe I will go home.' . . . And he said, 'By the way, I am already at my home anyhow.' " For about ten minutes the defendant remained motionless, apparently asleep or passed out on the couch. At the time, the television was on, showing an African wildlife program. Suddenly the defendant raised up from the couch with a shotgun in his hand, saying, "Don't nobody crowd me. The first one that does, I will down him." The gun was pointed toward the cookstove. The witness and Agner were in the room, or Agner was in the act of entering. (Thereafter, the record does not say so, but it may be inferred from the defendant's hypothetical questions, his brief, and the preliminary statements in the record, that the gun fired and Agner was killed.)

Jones specifically testified that up to the time the defendant arose from the couch with the gun in his hand there had been no trouble, no dispute, no harsh words. "Everything was pleasant and enjoyable."

On cross-examination, the defense attorney asked the witness Jones this question: "When he got up from the couch with a gun and said these words, I will ask you if he wasn't acting like a man not in his right mind?" The court, upon the Solicitor's objection, refused to permit the witness to answer the question. The refusal is the subject of Exception and Assignment of Error No. 3. The couch was near the television set. The only evidence about the gun is its presence in Moore's hand when he arose from his sleep or stupor.

After the State rested, the defendant called two doctors who qualified as experts and in response to hypothetical questions would

have answered: "From the story given me . . . obviously this is a somnolence type of activity where a man awakens by a noise and at that time he is orientated in a condition . . . not knowing what he is doing and he may act or do anything without consciously knowing what he is doing. . . . I would say he did not know what he was doing, what was wrong." "A television program which has sounds or scenes of violence may cause a person in deep sleep—any external stimuli can cause a reaction. . . . He does not know where he is or what he is doing and also usually he has either acts of activity or violent behavior."

The defendant was not permitted to present the medical evidence to the jury. However, it must be said the form of the hypothetical question left something to be desired.

The court submitted the case to the jury which recessed for the night without arriving at a verdict. Next morning the court gave this further instruction:

> "Members of the Jury something has been said in this case with respect to insanity. In fact the defendant entered a plea of not guilty by reason of insanity. The Court charges you that the law presumes every man to be sane and when the plea of insanity is interposed, then the defendant has the duty of going forward with the evidence and satisfying the Jury. It rests upon the defendant to satisfy you that he was not guilty by reason of insanity and satisfy you from the evidence either offered for him or against him of that condition, that is of insanity. The Court charges you there has been no legal competent evidence of insanity offered by the defendant in this case."

The jury found the defendant guilty of manslaughter. From a judgment of imprisonment for not less than six years nor more than 10 years, he appealed.

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

Christ Christ for defendant appellant.

HIGGINS, J. The plea of not guilty by reason of temporary insanity is not a judicial admission that the defendant committed any unlawful act. Under a plea of not guilty the State must prove all elements of the offense charged. *State v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147; *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *State v. DeGraffenreid,* 223 N.C. 461, 27 S.E. 2d 130.

After the State's witness Jones had described the defendant's acts and conduct immediately before he arose from the couch with the

gun, he should have been permitted to say whether the defendant acted like a man not in his right mind. The State was attempting to make out its case by his testimony as to what the defendant did and said. He formed an opinion as to defendant's mental state. The defendant was entitled to have the jury consider it. A lay witness, from observation, may form an opinion as to one's mental condition and testify thereto before the jury. *White v. Hines,* 182 N.C. 275, 109 S.E. 31. Conceding the hypothetical questions were somewhat technically objectionable, there was enough of unusual and strange conduct shown by the witness Jones to raise the question whether the defendant had sufficient understanding to render his acts felonious. The court committed error in refusing to permit Jones to express his opinion. Assignment of Error No. 3 is sustained.

The additional charge given to the jurors after they had been unable to agree may well have been understood by them to mean that the only issue before them was whether the defendant had proved his insanity. On that issue the court further charged he has offered no competent evidence. Prior to the charge the jury had been unable to agree. Thereafter the guilty verdict was rendered. The jury may have decided the defendant's guilt solely upon the question whether he had proved his insanity.

For the reasons herein stated, the defendant is entitled to a new trial, and it is so ordered.

New trial.

KITCHEN EQUIPMENT COMPANY OF VIRGINIA, INCORPORATED, v. INTERNATIONAL ERECTORS, INC., 3400 S.W. 15TH AVE., FORT LAUDERDALE, FLORIDA AND PEDEN STEEL COMPANY, RALEIGH, NORTH CAROLINA.

(Filed 21 September, 1966.)

Garnishment § 1; Pleadings § 8—

Defendant in an action on contract is not entitled to file a cross-action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. G.S. 1-440.1 through G.S. 1-440.46.

APPEAL by defendant, International Erectors, Inc., from *Hubbard, J.,* January, 1966 Civil Session, PASQUOTANK Superior Court.

The plaintiff instituted this civil action against the defendant, International Erectors, Inc., a Florida corporation, for the recovery of $6,305.63, balance due on account for equipment furnished and

labor performed for the defendant in the construction of a mill in Martin County, North Carolina. The verified complaint alleged on information and belief that Peden Steel Company, a North Carolina corporation, is indebted to the defendant, International, in an unknown amount. The plaintiff gave bond and obtained an attachment and garnishment order against Peden. Peden answered the garnishment proceeding by stating that it is indebted to defendant in a sum not in excess of $1,045.44.

International filed an answer to the plaintiff's complaint, admitting in part and denying in part the allegations of the plaintiff. "As a further defense . . . and by way of cross-action against Peden Steel Company, this answering defendant avers:" (Here the defendant alleges that Peden was the contractor and the defendant a subcontractor for a part of the construction work on the plant; that Peden breached its contract with the defendant in certain specified particulars to the defendant's damage in the sum of $40,000.00, and demanded judgment against Peden for that amount.) Peden filed a demurrer to the cross-action for that it is a misjoinder of parties and causes. Judge Hubbard sustained the demurrer. The defendant excepted and appealed.

Bailey, Dixon & Wooten by J. Ruffin Bailey for defendant Peden Steel Co., appellee.

Aydlett & White by Gerald F. White for defendant International Erectors, Inc., appellant.

HIGGINS, J. In this action the plaintiff, Kitchen Equipment Company, sued the defendant, International Erectors, Inc., a Florida corporation, for breach of contract to pay for materials furnished and labor performed for the defendant in connection with a construction job in Martin County, North Carolina. By supplemental proceeding in attachment as authorized by G.S. 1-440.1 through G.S. 1-440.46, the plaintiff served on Peden a garnishment order requiring an answer as to any property held for, or money due to the defendant, to the end that the plaintiff might acquire a lien thereon for the satisfaction of any judgment recovered. Peden answered, stating it was due defendant not to exceed $1,045.44.

The defendant answered plaintiff's complaint. As a further defense and cross-action against Peden (in the case only as garnishee) the defendant attempted to assert a cause of action based on the breach of a contract between the defendant and Peden. Peden demurred thereto on the ground of misjoinder of parties and causes. From the judgment sustaining the demurrer, the defendant appealed.

Was the demurrer properly sustained? No other question arises on this appeal.

The plaintiff's cause of action involves a contract between the plaintiff and International. Peden was not a party to that contract. The cross-action involves a contract between International and Peden. The plaintiff was not a party to that contract.

After Peden is brought into the case for the limited purpose of garnishment, the defendant cannot, by cross-action, have it held to answer a suit for damages allegedly due for breach of contract between the defendant and the garnishee. "Independent and irrelevant causes of action may not be litigated by cross-action. (citing authorities) . . . Ordinarily only those matters germane to the cause of action asserted in the complaint and in which all of the parties have a community of interests may be litigated in the same action." *Gibbs v. Light Co.*, 265 N.C. 459, 144 S.E. 2d 393. "Ordinarily, a defendant should not be permitted to bring in an additional party defendant whose presence is not necessary to a complete determination of the cause of action alleged by the plaintiff . . ." *Clark v. Freight Carriers*, 247 N.C. 705, 102 S.E. 2d 252; *Hobbs v. Goodman*, 240 N.C. 192, 81 S.E. 2d 413; *Schnepp v. Richardson*, 222 N.C. 228, 22 S.E. 2d 555.

Peden has a right to require that International bring a separate suit (and give a bond for costs) to settle the rights of the two parties to their contract.

The judgment sustaining the demurrer to the cross-action is

Affirmed.

MRS. LILLIAN D. HENDERSON v. HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 21 September, 1966.)

1. Insurance § 3—

Notwithstanding that a policy of insurance will be construed liberally in favor of insured and strictly against the insurer preparing the contract, the courts cannot by construction enlarge the terms of the policy beyond the meaning of the language used.

2. Insurance § 34—

In an action on a provision of a policy providing benefits for death resulting directly and independently of all other causes from bodily injuries effected solely through accidental means, the burden is upon plaintiff to show coverage within the terms of the policy.

3. Same—

There is a distinction between death by "accident" and death by "accidental means"; death as a result of an intentional act, even though an unusual and unexpected result of the act, is not a death by "accidental means" when there is no mischance, slip or mishap occurring in the doing of the intentional act.

4. Same—

Evidence tending to show that insured died from anoxia and cardiac stoppage shortly after exposure to smoke and gases in the discharge of his duties as a fireman is insufficient to show that his death was effected solely through accidental means within the coverage of the policy in suit.

APPEAL by plaintiff from *Martin, S.J.*, March 1966 Civil Session of BUNCOMBE.

Civil action by the plaintiff, beneficiary, to recover on a certificate of accident insurance issued by the defendant, in which it contracted to pay $5,000 for loss of life of the insured, Benjamin Franklin Henderson, "resulting from bodily injuries sustained during the term of this policy and effected solely through accidental means." The policy was in full force and effect at the time of the insured's death on January 15, 1962.

The evidence presented at the trial tended to show that insured was 54 years old, and in good health; that on January 15, 1962, as a member of the Enka Fire Department, he went to a fire on Plemmons Street where a dwelling was burning. He entered the back window of the dwelling with a fire hose and went to a bedroom at the front of the dwelling; that Charles Lee McMahan, another member of the fire department, shortly thereafter observed Mr. Henderson lying across a double bed in the corner of the front bedroom, with his head toward an open window. McMahan knocked the glass out of a double window and the smoke cleared out immediately, and Henderson shortly thereafter got off the bed and went ahead with the hose into another part of the house. There was an awfully thick, black and heavy smoke settling right down over the ground around the house, and the smoke had an awfully strong smell; that there were old automobile tires, hose and old mattresses in the basement of the house. About ten or fifteen minutes later Henderson went to his automobile and started to drive off in company with his son, Bobby Henderson, who was sitting in the front seat. There was evidence from Bobby Henderson that when his father started to drive off his father suddenly fell toward him on the seat "and was struggling to get his breath, breathing hard and had his eyes closed"; that Bobby Henderson spoke to his father and he did not respond; that he attempted mouth-to-mouth resuscitation and then immediately carried him to a medical clinic, where Dr.

Willis and Dr. Chipley worked with him. He never opened his eyes or moved; that after examination, the doctors pronounced insured dead.

There was medical opinion evidence from a physician admitted as an expert by the court "that the smoke in some way caused changes in his body, giving him cerebral ischemia due to anoxia, causing temporary loss of consciousness, with carbon dioxide excess in the lungs creating anoxia in the lungs, followed by anoxia of the blood and then anoxia of the cardiac muscle due directly to anoxia or to spasm of the coronary arteries producing cardiac-ventricular type cardiac fibrillation and cardiac arrest."

Plaintiff notified the Company of death through her attorney on January 26, 1962, and on March 19, 1962, defendant denied the claim.

This action was instituted in Buncombe County Superior Court and came on for trial at the March Session 1966. At the conclusion of plaintiff's evidence the defendant demurred to the evidence and made motion for judgment as of nonsuit, and demurred *ore tenus* to the complaint for failure to state a cause of action. Defendant's motion for judgment as of nonsuit was allowed and demurrer *ore tenus* was sustained.

Plaintiff excepted and appealed.

Don V. Young for plaintiff appellant.

Williams, Williams and Morris and Ann H. Phillips for defendant appellee.

BRANCH, J. Plaintiff assigns as error the granting of judgment of nonsuit. The policy here involved provides coverage "against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of this policy, *and effected solely through accidental means.*" (Emphasis ours.)

We are cognizant of the well-settled law in this state that "since insurance policies are prepared by the insurer, they must be construed liberally in favor of the insured and strictly against the insurer," *Barker v. Iowa Mutual Insurance Co.*, 241 N.C. 397, 85 S.E. 2d 305, but that the rule of liberal construction does not justify the courts in enlarging the terms of the policy beyond the meaning of the language of the policy. *Weiss v. Insurance Co.*, 215 N.C. 230, 1 S.E. 2d 560.

The contract must be construed as the parties have made it. *Scarboro v. Insurance Co.*, 242 N.C. 444, 88 S.E. 2d 133.

In order to repel the defendant's motion for nonsuit, the plain-

tiff must bring the insured's death within the coverage provision above quoted.

It now seems to be well-settled law in this state that our courts have drawn a distinction between "accident" and "accidental means," on the theory that although the results of an intentional act may be an accident, the act itself, that is, the cause, where intended, is not an "accidental means," that where an unusual or unexpected result occurs by reason of the doing by the insured of an intentional act, with no mischance, slip or mishap occurring in doing the act itself, the ensuing death or injury is not caused by "accidental means."

In the case of *Skillman v. Insurance Co.*, 258 N.C. 1, 127 S.E. 2d 789, the evidence tended to show that insured was suffering from hypertension, and while driving his car along a straight highway he ran off the highway and into a river. The policy sued on provided for payment of loss "upon receipt by the company of due proof that the death of insured resulted, directly and independently of all other causes, from bodily injury sustained solely through external, violent and *accidental means.*" (Emphasis ours.) Denny, C.J., speaking for the Court in this case, said:

> "This Court has consistently held that there is a distinct difference in the meaning of the terms 'accidental death' and 'death by external accidental means.' In *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687, Barnhill, J., later C.J., said: ' "Accidental" means that which happens by chance or fortuitously, without intent or design and which is unexpected, unusual and unforeseen. 29 Am. Jur., 706-7, sec. 931. "Accidental means" refers to the occurrence or happening which produces the result and not to the result. That is, "accidental" is descriptive of the term "means." The motivating, operative and causal factor must be accidental in the sense that is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the ultimate sequence of the chain of causation.' See also *Slaughter v. Ins. Co.*, 250 N.C. 265, 108 S.E. 2d 438, and *Cf. Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173."

The case of *Langley v. Durham Life Ins. Co.*, 261 N.C. 459, 135 S.E. 2d 38, was a case in which the evidence tended to show that the insured was found lying face down on his bed some six to ten hours after death, his face buried but not entangled in the bed covers, and his nose, lips and entire face flat. In this case the Court again recognized the difference between accident and accidental means, and Bobbitt, J., speaking for the Court, said:

> "While there is a division of authority elsewhere (see 29 A Am. Jur., Insurance Sec. 1166 and Comment Note, 166 A.L.R. 469), this Court has consistently drawn a distinction between the terms 'accidental death' and 'death by external accidental means.'"

The Court has made the same distinction between accidental means and accident in the cases of *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687; *Scott v. Insurance Co.*, 208 N.C. 160, 179 S.E. 434; *Mehaffey v. Insurance Co.*, 205 N.C. 701, 705, 172 S.E. 331.

There are very strong equities for the plaintiff in this case, in that this was a policy of insurance issued under a group or blanket policy to furnish coverage to a fireman when in the exercise of his duties, and if there were such ambiguities as to allow a construction of the policy, we would tend to grant relief to the plaintiff; however, in order for the plaintiff to establish coverage she must show that insured's death was caused by "accidental means." In the instant case the insured was voluntarily performing an intentional act and there is no evidence of any unusual mishap, slip or mischance occurring *in the doing of the act.* To the contrary, it appeared that the *result* was unusual and unexpected and unforeseen.

An ambiguity in a life policy is to be construed most favorably to the insured. The Courts cannot make a contract for the parties and can only enforce the contract which the parties have made. *Davis v. Fidelity Mutual Life Insurance Co.*, 107 F. 2d 150.

Unless the plaintiff's evidence in this case permits the legitimate inference that the insured's death resulted directly and independently of all other causes from bodily injuries sustained during the term of this policy and *effected solely through accidental means,* nonsuit is proper. *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438.

It is unnecessary for the Court to consider the plaintiff's second exception in view of the result herein reached.

Affirmed.

VERNON POWELL v. MRS. THOMAS CROSS, JR. AND MR. THOMAS CROSS, JR.

(Filed 21 September, 1966.)

1. Judgments § 33—

A plea of *res judicata* based on a prior judgment of compulsory nonsuit can be sustained only when the allegations and evidence in the two actions are substantially the same, and in the second action plaintiff is not limited to the evidence that was adduced at the former trial.

2. Same—

It is error for the court to determine a plea of *res judicata* entered in a second action brought within one year of judgment of involuntary nonsuit entered in the prior action, solely from the pleadings in the two actions and the judgment roll in the prior action, since the plea cannot be properly determined until the introduction of evidence in the second action, so that it can be ascertained that not only the allegations but the evidence in the two actions are substantially identical.

APPEAL by plaintiff from *Mintz, J.*, May 1966 Session of MARTIN.

Plaintiff seeks to recover damages for injuries to his person and to his automobile allegedly caused on 7 August 1961 by the actionable negligence of the *feme* defendant in driving a family purpose automobile owned by her husband, the male defendant, with his consent. The complaint in the instant case was verified by plaintiff on 19 February 1966.

Defendants filed an answer to the complaint here on 28 March 1966. Defendants allege as a first answer and pleas of estoppel and *res judicata* the following: On 31 August 1964 plaintiff instituted an action for damages against them and Stephen M. Ginelewicz arising out of an automobile accident on 7 August 1961, which is the subject matter of this action. At the November 1964 Session of Martin County Superior Court the case came on for trial. Plaintiff called as a witness for himself the passenger in the automobile operated by Mrs. Thomas Cross, Jr., and her testimony showed affirmatively that the accident was not caused by any negligence on the part of Mrs. Cross. When the plaintiff rested his case, the defendants Cross made a motion for judgment of compulsory nonsuit, which motion was allowed and judgment to that effect was signed on 25 November 1964. From this judgment of compulsory nonsuit, plaintiff appealed to the Supreme Court, Spring Term 1965. The Supreme Court in an opinion reported in 263 N.C. 764, 140 S.E. 2d 393, by unanimous decision affirmed the judgment of nonsuit. (It appears from our decision in our Reports that the trial proceeded as against defendant Ginelewicz, and the jury absolved Ginelewicz of blame. Judgment was entered dismissing the action.)

The allegations in the complaint filed in the instant action are substantially the same as those filed in the action on 31 August 1964, and the facts essential to the plaintiff's action were judicially determined in the trial at the November 1964 Session of the Martin County Superior Court and affirmed by the Supreme Court in its opinion in the volume of our Reports stated above. Defendants specifically plead the judgment of compulsory nonsuit entered at the November 1964 Session of Martin County Superior Court, and duly affirmed by the Supreme Court, as an estoppel and *res judicata* of plaintiff's right to bring this action. In their answer defendants plead three further defenses, which are not relevant to the decision of this appeal and are omitted.

Plaintiff filed a reply to the affirmative defenses of defendants.

When the case came on for trial at the May 1966 Session of Martin County Superior Court, Judge Mintz presiding determined in his discretion that it was proper to adjudicate the pleas of estoppel and *res judicata* before a trial of the cause of action on its merits. Judge Mintz's judgment states in substance: The court reviewed the complaint filed by plaintiff on 31 August 1964, and the answer of defendants filed to said complaint, and also reviewed the judgment rendered in the action at the November 1964 Session of Martin County Superior Court; the record of evidence on appeal and the decision of the Supreme Court of North Carolina reported in 263 N.C. 764; and the complaint of the plaintiff filed on 21 February 1966 in the instant case, and the answer of the defendants filed thereto and the reply of the plaintiff to the answer of the defendants. That after hearing argument of the counsel of the parties, the court, being of the opinion that the pleas of *res judicata* and estoppel should be sustained and the action of the plaintiff dismissed, ordered that the action of the plaintiff be dismissed. From this judgment plaintiff appeals to the Supreme Court.

Edgar J. Gurganus for plaintiff appellant.
Griffin & Martin by Clarence W. Griffin for defendant appellees.

PARKER, C.J. On plaintiff's appeal in the prior action the Supreme Court affirmed the judgment of compulsory nonsuit in an opinion filed on 24 February 1965 on the ground of insufficiency of plaintiff's evidence. The record shows that the instant action was commenced by the issuance of summons on 21 February 1966, which is within one year after the judgment of compulsory nonsuit was affirmed in the Supreme Court. G.S. 1-25.

The sole question presented on this appeal is whether the trial

court erred in sustaining defendants' pleas of estoppel and *res judicata,* and dismissing the instant action on that ground, before plaintiff had introduced any of his evidence in the instant action. The answer is, Yes.

It is settled law in this jurisdiction that when a prior action is nonsuited on the ground of insufficiency of plaintiff's evidence, a plea of *res judicata* on the ground of a prior judgment of compulsory nonsuit can be sustained when, and only when, the allegations and evidence in the two actions are substantially the same. A plea of *res judicata* ordinarily cannot be determined on the pleadings in the two actions, the judgment of compulsory nonsuit entered in the prior action on the ground of insufficiency of the evidence, the record of evidence in the prior action on appeal, and the decision of the Supreme Court in respect to the prior action. A plea of *res judicata* can be determined only after the evidence in the second action is presented. *Walker v. Story,* 256 N.C. 453, 124 S.E. 2d 113; *Moore v. Carroll,* 253 N.C. 220, 116 S.E. 2d 459; *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123; *Pemberton v. Lewis,* 243 N.C. 188, 90 S.E. 2d 245; *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Brown v. Johnson,* 207 N.C. 807, 178 S.E. 570; *Batson v. Laundry,* 206 N.C. 371, 174 S.E. 90; *Hampton v. Spinning Co.,* 198 N.C. 235, 151 S.E. 266.

In considering the question as to whether the judgment of compulsory nonsuit is *res judicata* as to the second action, "the evidence to be considered on such motion may not be limited to the evidence that was adduced in the former trial, but contemplates a consideration of all the evidence adduced in support of the allegations of the respective complaints. It is only by a consideration of all such evidence that the court may determine whether or not the evidence in both trials was substantially the same." *Pemberton v. Lewis, supra.*

This is said in 3 Strong's N. C. Index, Judgments, § 38:

> "In order to sustain a plea of estoppel by judgment in an action instituted after judgment of nonsuit the court must find that the allegations and evidence in the second action are substantially identical with the first. Therefore, the plea may not be properly determined prior to the introduction of the evidence. The court should not allow the plea without first hearing the evidence and finding the facts as to the identity of the allegations and evidence. But when the court denies the plea, it is discretionary with the court whether to find the facts."

See *Walker v. Story, supra,* p. 455, as to estoppel by judgment, when the judgment in the prior action constitutes an adjudication thereof upon the merits, not to a judgment of involuntary nonsuit entered on account of the insufficiency of plaintiff's evidence.

Wilson v. Hoyle, 263 N.C. 194, 139 S.E. 2d 206, relied on by defendants, is factually distinguishable, in that it is stated in the opinion, "The stipulations referred to in the judgment establish the identity of parties and of subject matter in the two actions."

The trial court committed error in sustaining defendants' pleas of *res judicata* and estoppel and in dismissing plaintiff's action. ". . . [O]rdinarily, where there is a demurrer to the evidence and the court sustains the demurrer and enters a judgment of involuntary nonsuit, the plaintiff is permitted to bring another action in order that he may 'mend his licks,' if he can." *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809. The defendants' pleas of estoppel and *res judicata,* however, remain in the case to be passed on after all the evidence has been presented in the instant case. The judgment of the superior court is

Reversed.

ENGINEERING ASSOCIATES, INC., v. KENNETH OSCAR PANKOW.

(Filed 21 September, 1966.)

1. Contracts § 7—

An agreement of an employee, imposed as a condition of his continued employment, that he would not engage in work for any competitor of the employer for a period of five years after termination of the employment, without territorial restrictions, would be unenforceable for failure of consideration and for unreasonableness as to territory.

2. Same—

Where an employee is forced to resign for his refusal to sign an agreement that in the event he left the employment he would not work for any competitor of the employer for a period of five years, the employer is not entitled to restrain him from working for a competitor, even though he uses knowledge and skill acquired in the former employment, there being no evidence that the employee acquired his knowledge in bad faith or carried from the employment anything except the skill and knowledge acquired during his tenure.

APPEAL by plaintiff from *Martin, S.J.,* at June 6, 1966 Civil Session of BUNCOMBE Superior Court.

The plaintiff, Engineering Associates, Inc., is an engineering corporation engaged in the design, manufacture and sale of machinery to the ceramics, tobacco and other industries. Its evidence tends to show that it is one of only two such companies in the United States which are generally recognized as competent in the development and manufacture of this custom machinery.

In the summer of 1962 the defendant Pankow became an employee of the plaintiff, eventually becoming a Project Engineer. In this capacity he learned secret and confidential information as to the methods and designs of the plaintiff. During his employment of three and a half years the company sold him twenty shares of its closely held stock.

On 6 January, 1966, the President and Vice-president of the plaintiff corporation called defendant before them and asked him to sign a contract which provided that in the event the defendant left plaintiff's employment he would not work for any competitor of the plaintiff for a period of five years thereafter. The contract was presented to him as a condition of his continued employment by the plaintiff, and that if he declined to sign it he could pick up his pay check. The evidence reveals no advantage or other inducement moving to the defendant in return for his assent to the proposed contract. Defendant refused to sign the contract and submitted his resignation on 25 January, 1966, to be effective 25 February, 1966.

Subsequently defendant obtained employment at C. P. Clare Company and did additional engineering work for Fishburne Equipment Company. The latter was a competitor of the plaintiff in designing machines and mechanical devices, primarily in the tobacco industry. In defendant's work for Fishburne Equipment Company, he used knowledge he had acquired while working for the plaintiff.

The defendant was called as an adverse witness by the plaintiff and testified that he was never told that he was a trusted or special or confidential employee dealing with trade secrets until he was presented with the proposed contract . . . When defendant left the employment of the plaintiff, he took no plans, specifications, design data, or lists of sources of supply or customers.

On 20 April, 1966, the plaintiff instituted this action against the defendant for the purpose of obtaining an injunction against the defendant prohibiting his furnishing or selling to Fishburne Equipment Company or any other competitor of the plaintiff any information, plans, knowledge or trade secrets obtained by the defendant as an employee of the plaintiff. A temporary restraining order was entered which was continued until the trial, at which time the

defendant's motion for nonsuit was granted and the action was dismissed at the close of plaintiff's evidence.

Plaintiff appealed.

Lee, Lee & Cogburn by Max O. Cogburn for plaintiff appellant.

Herbert L. Hyde, Roy W. Davis, Jr., Van Winkle, Walton, Buck & Wall for defendant appellee.

PLESS, J. In *Greene Company v. Kelley,* 261 N.C. 166, 134 S.E. 2d 166, this Court said: "The courts generally have held that restrictive covenants not to engage in competetive employment are in partial restraint of trade, and hence to be enforceable they must be (1) in writing, (2) supported by a valid consideration, and (3) reasonable as to terms, time, and territory. Failure in either requirement is fatal. * * * (w)hen the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543. Therefore, the employer could not call for a covenant not to compete without compensating for it."

This case was later cited by Higgins, J., in a concise opinion in *Greene Co. v. Arnold,* 266 N.C. 85, 145 S.E. 2d 304.

Had the defendant signed the proposed contract the plaintiff would have been unable to enforce it. It fails to comply with requirements cited above in at least two particulars. First, there was complete lack of consideration; and second, it was unreasonable in view of the time and territory involved. It may be that in some instances and under extreme conditions five years would not be held to be unreasonable, but when it is coupled with no restrictions whatever as to territory there can be no doubt of its unreasonableness. In effect it would mean that this defendant would have been unable to use the skill, knowledge and experience gained in three and a half years anywhere in the world. As said in *Peerless Pattern Co. v. Pictorial Review,* 147 App. Div. (N.Y.) 715, that where a person in his new employment undertakes to use the knowledge acquired in the old, it is not unlawful, for "equity has no power to compel a man who changes employers to wipe clean the slate of his memory."

The defendant refused to sign the contract, and was well within his rights in doing so. The plaintiff, however, is asking the court to bind the defendant to a contract which he voluntarily and knowingly refused to sign.

To state the proposition is to decide the case. The Court has con-

sidered the plaintiff's position that in the absence of a contract the defendant should be enjoined from working for its competitor under the conditions alleged.

The plaintiff has offered no evidence that defendant acquired knowledge of its business in bad faith, and "an employee may take with him, at the termination of his employment, general skills and knowledge acquired during his tenure with the former employer." *Schulenburg v. Signatrol,* 212 N.E. 2d 865 (Ill. 1965). Nor is any abuse of confidence or bad faith in later employment shown as to the defendant. He has merely exercised the privilege every citizen has of accepting employment in the field for which he is trained. The plaintiff cannot, by unjustifiably discharging him, deprive him of this right.

The lower court was correct in dissolving the restraining order and dismissing the action.

No error.

STATE v. LEONARD FLETCHER.

(Filed 21 September, 1966.)

1. Assault and Battery § 8—

In a prosecution for felonious assault and for assault with a deadly weapon, the burden does not rest upon defendant to satisfy the jury of his plea of self-defense but the burden rests upon the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim.

2. Same—

In a prosecution for felonious assault and for assault with a deadly weapon, defendant's right of self-defense is not limited to his right to defend himself against a felonious assault, but defendant is entitled to repel a nonfelonious assault, and an instruction to the effect that defendant could not lawfully use force in self-defense unless he was threatened with death or great bodily harm must be held for prejudicial error.

APPEAL by defendant from *Falls, J.,* May 1966 Criminal Session of BUNCOMBE.

Criminal prosecution on indictment charging that defendant on March 13, 1966, unlawfully, wilfully and feloniously assaulted Earl Calloway with a deadly weapon, to wit, a tire tool, with intent to kill him, and thereby inflicted upon him serious injuries not resulting in his death, a violation of G.S. 14-32.

Evidence was offered by the State and by defendant. The jury returned a verdict of guilty of assault with a deadly weapon. Judgment imposing a prison sentence of two years was pronounced. Defendant excepted and appealed.

Attorney General Bruton, Deputy Attorney General Moody and Staff Attorney Vanore for the State.

Cecil C. Jackson, Jr., for defendant appellant.

BOBBITT, J. The judge instructed the jury they could return a verdict of guilty of felonious assault as charged, or a verdict of guilty of assault with a deadly weapon, or a verdict of not guilty. The evidence required that such instruction be given. G.S. 15-169; G.S. 15-170; *S. v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

It is unnecessary to review the evidence. When considered in the light most favorable to the State, it was sufficient to support a verdict of guilty of felonious assault as charged. When considered in the light most favorable to defendant, it was sufficient to require appropriate instructions as to defendant's right of self-defense in respect of repelling a felonious assault *and* in respect of repelling a nonfelonious assault.

Defendant excepted to and assigns as error this portion of the charge: "In either case, in order to excuse the killing on the plea of self-defense, it is necessary *for the accused to show* that he quit the combat before the mortal wound was given and retreated or fled as far as he could with safety and then urged by necessity, real or apparent, killed his adversary." (Our italics.) Other instructions relating to self-defense include the following: "In order to have the benefit of the principle of self-defense, the defendant *must show* that he was free from blame; that the assault upon him was with a felonious purpose, or appeared to be such, and that he used this deadly weapon only when apparently necessary to protect himself *from death* or *great bodily harm.*" (Our italics.) Again: "It is the law of this State that when a man provokes a fight by unlawfully assaulting another and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the alleged assailant to kill *in order to save his own life.* This is ordinarily true where a man unlawfully and willfully enters into a mutual combat with another and kills his adversary." (Our italics.)

The quoted instructions imply the burden of proof was on defendant to satisfy the jury he acted in self-defense. They would be appropriate in a homicide case when *the killing* with a deadly weapon is admitted or established, thereby raising the presumptions

that *the killing* was unlawful and was done with malice. They have no application in criminal prosecutions for felonious assault or assault with a deadly weapon. In prosecutions for felonious assault and for assault with a deadly weapon, it is not incumbent on a defendant to satisfy the jury he acted in self-defense. On the contrary, the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim. *S. v. Warren,* 242 N.C. 581, 89 S.E. 2d 109, and cases cited; *S. v. Sandlin,* 251 N.C. 81, 110 S.E. 2d 481; *S. v. Cloer,* 266 N.C. 672, 146 S.E. 2d 815.

Moreover, the court's instructions imply defendant could not lawfully use force in self-defense unless he was threatened *with death* or *great bodily harm.* We find no instruction with reference to the right of defendant to defend himself against a nonfelonious assault. Failure to instruct the jury with reference to defendant's right of self-defense in respect of repelling a nonfelonious assault is prejudicial error. *S. v. Anderson,* 230 N.C. 54, 51 S.E. 2d 895; also, see *S. v. Warren, supra.*

As stated by Ervin, J., in *S. v. Anderson, supra:* "The law does not compel any man to submit in meekness to indignities or violence to his person merely because such indignities or violence stop short of threatening him with death or great bodily harm. If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm. (Citations.)"

Indicated errors in the charge entitle defendant to a new trial. Discussion of defendant's other assignments of error is unnecessary. They relate to matters that may not arise at the next trial.

New trial.

STATE OF NORTH CAROLINA v. FRED T. MILLS.

(Filed 21 September, 1966.)

1. Automobiles § 71—

A witness may testify from his observation of defendant that in his opinion defendant was under the influence of intoxicating liquor at the time in question.

2. Criminal Law § 71—

The United States Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436, does not apply to prosecutions begun prior to 13 June 1966.

3. Same—

A statement made by defendant to a highway patrolman at the scene of the accident that defendant was driving the car when it ran off the road, is competent, and its admission in evidence without objection by defendant does not violate defendant's right not to incriminate himself, notwithstanding defendant was not at the time represented by counsel.

4. Automobiles § 72—

The evidence in this case *held* amply sufficient to sustain conviction of defendant for operating a motor vehicle on a public highway while under the influence of intoxicating liquor.

APPEAL by defendant from *May, S.J.*, January 1966 Session of McDOWELL.

Criminal prosecution upon an indictment charging defendant with unlawfully and wilfully driving an automobile upon the highways within the State while under the influence of intoxicating liquor. G.S. 20-138. Defendant was arrested on a warrant issued by a justice of the peace charging him with the identical offense charged in the indictment, and was bound over to the McDowell County Criminal Court. In the McDowell County Criminal Court, he made a motion for a jury trial, and the case was transferred to the Superior Court of McDowell County for trial. 1959 Session Laws, Chapter 530.

Plea: Not guilty. Verdict: Guilty.

From a judgment of imprisonment for 12 months, defendant appeals.

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

I. C. Crawford for defendant appellant.

PER CURIAM. Defendant offered no evidence. He assigns as error the denial of his motion for judgment of compulsory nonsuit entered at the close of the State's evidence. The State's evidence tends to show the following facts: Arthur Dillingham, a seventeen-year-old student, testified in substance: On 12 December 1965 he was driving a car in the vicinity of Baldwin Avenue on his way home. It was about 10 o'clock at night. A man passed him on the left side driving an automobile which went under a red light, struck a station wagon on the left side, and went off the right side of the road down an embankment. He stopped his car and went down the

embankment to this automobile to see if anyone was hurt. He saw defendant Mills getting out of the right side of the automobile which went over the embankment. There was a person in the back seat on the floor board, and he was unconscious. Defendant got out of the automobile and started up the bank towards the road. When defendant got up the embankment he was staggering. Dillingham smelled the odor of alcohol on defendant's breath.

Troy Messer testified in substance: He was driving his automobile east on Highway #70 about 150 feet below the red light at Baldwin Avenue. He attempted to make a left turn into Fifth Street at Clinchfield, and an automobile hit him on the left side. It was a green Ford. This automobile continued on down the highway on the left side and then swerved across the highway over into a swamp. He parked his automobile and ran down to see if anyone was hurt. When he arrived, defendant was getting out from under the steering wheel. He asked defendant if anyone was hurt, and all he said was, "Where am I and what's that over there?" Defendant was pointing to a church, and Messer told him he was in Clinchfield and that was a church over there. There was a man lying on the back floor board. Defendant talked crazy and kept wanting to leave, and Messer told him he had better stay there. Messer got close enough to defendant to smell his breath, and he smelled liquor on his breath.

Tommy Adams, a member of the State Highway Patrol, investigated the accident. He saw defendant sitting in the right rear of Deputy Sheriff Baxter's patrol car. He had a conversation with defendant. Defendant told him he was driving a Ford and started to pass a car, and the car turned in front of him and he wrecked. This question and answer were not objected to. Defendant had a strong odor of alcohol on his breath, and he was talking very loud and appeared to be intoxicated. In his opinion, defendant was under the influence of intoxicating liquor.

C. A. Waddell, a member of the State Highway Patrol, was riding in the patrol car with Tommy Adams. He saw defendant in the car of Deputy Sheriff Baxter. Defendant was talking loud and waving his arms and pointing, and he had a smell of alcohol. Defendant was sitting up against an open window and when he turned his head, Waddell smelled alcohol on his breath. He has an opinion satisfactory to himself that defendant was under the influence of some intoxicating beverage.

Defendant assigns as error that Patrolmen Adams and Waddell, over his objections and exceptions, were allowed to testify that in their opinion defendant was under the influence of intoxicating liquor. This assignment of error is overruled upon authority of *S.*

v. Warren, 236 N.C. 358, 72 S.E. 2d 763; *S. v. Dawson,* 228 N.C. 85, 44 S.E. 2d 527; *S. v. Harris,* 213 N.C. 648, 197 S.E. 142.

The record shows that the State asked Patrolman Adams if he had a conversation with defendant Mills and what did Mills say. Adams replied: "He [defendant] told me he was driving a Ford and started to pass this car, and the car turned in front of him and he wrecked." According to the record, the question and answer were not objected to. Defendant concedes that there was no objection to the question and answer, but contends that the admission of this evidence constitutes plain error in that he had not been warned of his constitutional rights, and the statement was obtained from him "in violation of Fifth Amendment privilege against self-incrimination," and that consequently no objections were necessary. Defendant contends that this statement of Patrolman Adams was rendered incompetent by the recent United States Supreme Court decision in *Miranda v. State of Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, decided 13 June 1966. The *Miranda* case, however, applies only to those trials begun after 13 June 1966. *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, decided 20 June 1966. The trial in the instant case was held in January 1966. There is no evidence in the record that defendant's intoxication amounted to mania. *S. v. Painter,* 265 N.C. 277, 144 S.E. 2d 6. It seems perfectly manifest that the statement challenged by defendant was voluntarily made, and its admission in evidence without objection by defendant did not violate his "Fifth Amendment privilege against self-incrimination." This assignment of error is overruled. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *S. v. Gray,* 268 N.C. 69, 250 S.E. 2d 1; *Johnson v. New Jersey, supra.*

The State's evidence was amply sufficient to carry the case to the jury on the charge set forth in the indictment.

Defendant's other assignments of error have been carefully examined and are overruled. They merit no discussion.

In the trial below we find

No error.

STATE OF NORTH CAROLINA v. CLARENCE (C. G.) MAJORS.

(Filed 21 September, 1966.)

1. Criminal Law § 159—

Exceptions not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 71—

The court's findings upon the *voir dire* are conclusive on appeal when supported by competent evidence, and when the findings support the conclusion that defendant's confession was voluntarily and knowingly made after defendant was warned of his constitutional rights, the admission of the confession in evidence will not be disturbed.

3. Burglary and Unlawful Breakings § 4; Larceny § 7—

The evidence in this case *held* amply sufficient to support verdict of guilty of feloniously breaking and entering and larceny by means of such felonious breaking and entering.

APPEAL by defendant from *Falls, J.*, April 1966 Criminal Session of BUNCOMBE.

Criminal prosecution on an indictment containing three counts: First count charges defendant on 26 March 1966 with a felonious breaking and entering a certain warehouse occupied by Pierce-Young-Angel Distributing Company, a North Carolina corporation, wherein merchandise, etc., were, with intent to commit larceny, a violation of G.S. 14-54; second count charges defendant on the same date with the larceny by means of a felonious breaking and entering of 14 cases of beer of the value of $82.60, the property of Pierce-Young-Angel Distributing Company, G.S. 14-72; and the third count charges defendant with receiving stolen goods. The third count was not submitted to the jury.

Defendant, an indigent who was represented by court-appointed counsel, entered a plea of not guilty to the charges in the indictment.

Verdict: Guilty as charged in the first count in the indictment, and guilty as charged in the second count in the indictment.

The court consolidated the verdict of guilty on the first and second counts in the indictment for judgment. From a judgment of imprisonment of not less than seven years nor more than ten years, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for the State.

Wade Hall for defendant appellant.

PER CURIAM. Defendant introduced no evidence in his own behalf. At the conclusion of the State's evidence the court denied

defendant's motion for judgment of compulsory nonsuit, and defendant excepted. This exception has not been brought forward and discussed in defendant's brief; consequently, it will be taken as abandoned by defendant. Rule 28, Rules of Practice in the Supreme Court, and cases cited under this rule. 254 N.C. 783, 810.

However, we have carefully studied the State's evidence. In brief, the State's evidence shows these facts: Pierce-Young-Angel Distributing Company, a North Carolina corporation, is a distributor of Budweiser beer in the city of Asheville, and has a warehouse located at 348 Depot Street in which it keeps this beer for distribution and sale. On Saturday, 26 March 1966, the doors of its warehouse were locked, and it had stored therein 498 cases of Budweiser beer. Between 26 March 1966 and the morning of 28 March 1966 its warehouse was broken into and entered, and 14 cases of Budweiser beer were stolen and carried out of its warehouse. The value of the 14 cases of beer was $82.60.

H. F. Holland, a Detective Sergeant of the Asheville Police Department, was a witness for the State. He testified that he talked with the defendant. At this point in his testimony the trial judge directed the jury to go to its room, and during its absence from the courtroom he conducted a preliminary inquiry to show the circumstances under which a confession of the defendant was made to the officer. During this preliminary inquiry, Holland and Detective Sergeant R. D. Poore testified for the State, and defendant testified in his own behalf. The testimony of the State's witnesses tended to show these facts: The defendant was sober when he made the confession. Sergeant Holland told defendant that he did not have to make any statement whatever unless he wanted to, and that any statement he did make, if he made one, could be used against him in a court of law. He also told defendant he had a right to counsel, and a right to telephone or to contact any of his friends he wanted to. Defendant, testifying in his own behalf, testified in substance that he had been tried approximately ten times and had served time in prison for breaking and entry; that he knew he had a right to a lawyer if he wanted one, but that officer Holland did not tell him he could have a lawyer if he wanted one. The trial judge, after hearing the testimony offered by the State and by the defendant as summarized above and other testimony of the officers and defendant, found as a fact that the statement which defendant made to officers Holland and Poore was a voluntary statement, voluntarily made, without the promise of reward or without threats or duress of any kind, and he further found as a fact that defendant was aware of his right to counsel and of his constitutional rights at the time he made the confession. The judge's findings of fact are adequately

supported by competent evidence, and are not subject to review by us. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. Defendant does not contend in his brief that his confession was incompetent as evidence. After the judge had made these findings of fact, the jury was recalled into the courtroom, and Holland testified in substance as to what the defendant said, which is in brief as follows: During Saturday night of the 26th of March he met a "stud" in a crap game at Southside and French Broad Avenue. The officer asked him what he meant in regard to a "stud." He said another colored man whom he did not know. This "stud" propositioned him to break into a place where they could get some whisky. He told the "stud" that he did not know where he could break in and get any money, but he knew where he could break in and get some beer and turn it into money. At that time he and the "stud" walked out Southside to Depot Street to the Pierce-Young-Angel Distributing Company's warehouse to "case the joint." The officer asked him what he meant by "case the joint." He said, "You know, how you go look over a place before you pull a job. That's what I had reference to." While they were "casing the joint" a car came by. He and this "stud" stepped behind a railroad boxcar that was sitting on the siding at the unloading platform at the warehouse door. This "stud" reached up and took his knife and cut the seal from the railroad boxcar which had not been opened. He was unable to get the door to the boxcar open. The "stud" picked up a brick, walked over to the window of the office of the warehouse, and knocked the glass out of the window. The "stud" crawled through the window, went around through the warehouse, and opened the sliding door from the inside. The "stud" handed out to him 14 cases of Budweiser beer in large 16-ounce cans. He walked around the corner of the building and set them in the vacant lot between Pierce-Young-Angel's building and a building next to it. The "stud" carried some of this beer away in a Ford automobile. He told the "cat" who was driving an Oldsmobile to pull down to the head of the trail so he would not have so far to carry the beer. He loaded a great part of the 14 cases of beer in the Oldsmobile. He sold four cases of this beer at 185 Pine Street for $2.50 per case. He had to sell the beer cheaper than it sold for, because it was "hot" and he had to take less for it. He carried four more cases to another place where he sold it for $2.50 per case. As to the rest of the beer, he sold it to a house off of dirt Eagle Street, and he and his friends drank some of it.

The State's evidence was amply sufficient to carry the case to the jury on the first two counts in the indictment and to support a verdict of guilty as charged in both counts.

We have examined the assignments of error carried forward and discussed in the brief, all of which relate to evidentiary matters. While there may have been technical error in the admission of the challenged evidence, it is manifest that it was harmless. We have also examined all defendant's exceptions which have not been carried forward and discussed in the brief, and error prejudicial to defendant has not been shown.

In the trial below we find

No error.

CECIL J. JACKSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM RUSSELL, JR., DECEASED, v. JUDY SPELLMAN BALDWIN AND WILLYSEE CLINE BALDWIN.

(Filed 21 September, 1966.)

1. Trial § 21—

On motion for compulsory nonsuit, plaintiff's evidence supported by allegation is to be taken as true and considered in the light most favorable to him, and defendant's evidence in conflict therewith is to be disregarded.

2. Negligence § 24a—

Nonsuit is proper in an action for negligence only when there is no material conflict in the evidence, and the sole reasonable inference therefrom is that there was no negligence on the part of defendant or that the negligence of defendant was not a proximate cause of the injury.

3. Automobiles § 41a—

Negligence may be established by circumstantial evidence, including physical facts at the scene, either alone or in combination with direct evidence, which permits the legitimate inference of negligence as a proximate cause.

4. Automobiles § 41g—

The physical facts at the scene tending to show that intestate was driving east on a dominant street and that defendant was driving north on the intersecting street, and that the collision occurred in the southeast quadrant of the intersection between the right rear of the truck intestate was driving and the front of the automobile driven by defendant, together with other evidence, *is held* sufficient to be submitted to the jury on the question of negligence and proximate cause.

APPEAL by plaintiff from *Martin, S.J.*, January 10, 1966 Civil Session of BUNCOMBE.

Action by the duly qualified and acting administrator for the wrongful death of his intestate, William Russell, Jr., resulting from

injuries sustained by plaintiff's intestate about 3:24 A.M. on September 5, 1963, as a result of a collision in the town of Hendersonville at the intersection of First Avenue and Washington Street. Plaintiff sues the defendant Judy Spellman Baldwin as the operator of the automobile involved and Willysee Cline Baldwin as the owner of the automobile.

The evidence, considered in the light most favorable to plaintiff, discloses these facts: First Avenue was approximately 30 feet wide and ran generally east and west. Washington Street was approximately 24 feet wide and ran generally north and south. There was a stop sign at the southeast corner of the intersection which faced traffic proceeding in a northerly direction. The view of this stop sign was unobstructed. Plaintiff's intestate was operating an International van truck in an easterly direction on First Avenue approaching the intersection; defendant Judy Spellman Baldwin was operating a 1962 Corvair automobile in a northerly direction on Washington Street approaching the intersection.

David S. Hudson, a police officer for the town of Hendersonville at the time of this collision, testified in substance as follows: That he arrived at the scene a few minutes after the collision and found an International van truck lying on its left side partially in the street and partially on the sidewalk on the south side of First Avenue; that he observed tire marks leading from debris in the intersection to the truck; that the debris, consisting of glass and dirt, covered an area about two feet in diameter located in the southeast quadrant of the intersection, approximately four feet from the eastern margin of the intersection and approximately twenty feet from the western end of the intersection; that the truck was damaged on the right rear from the rear of the wheel opening to the extreme rear of the truck; that the Corvair automobile was damaged on the front end, front hood, grill and bumper. Plaintiff's intestate was lying under the truck down to his waist, with legs extending from under the truck. He was bleeding from his nose, mouth and scalp. The officer further testified that he talked to Judy Spellman Baldwin at the scene of the accident and she stated that she was doing approximately 20 miles per hour and had the automobile in second gear.

There was evidence by Dr. Alex H. Veasey, who was admitted as a medical expert, that plaintiff's intestate was brought to the hospital on September 5 at about 3:25; that he was dead, and that in his opinion Russell died from severe head injuries.

Plaintiff offered another witness who testified that she had seen the van truck being operated by plaintiff's intestate about an hour

before the accident and at that time she observed no dents, damage or injury to the truck.

The defendants by cross examination of witness Hudson elicited information tending to show that the collision occurred approximately two years before the trial; that Washington Street had been widened since that time and the intersection altered, and that officer Hudson's testimony of the physical evidence was based largely on memory and approximation.

At the conclusion of plaintiff's evidence both defendants moved for judgment as of nonsuit. Each of the motions was allowed and judgment entered, from which plaintiff appeals.

Gudger and Erwin for plaintiff appellant.

Redden, Redden and Redden and Williams, Williams and Morris for defendants, appellees.

PER CURIAM. "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." *King v. Bonardi,* 267 N.C. 221, 148 S.E. 2d 32; 4 Strong's N. C. Index, Trial, Sec. 21; Supp. to Vol. 4, *ibid,* Sec. 21.

Nonsuit may be granted "only in case the evidence is free from material conflict, and the only reasonable inference to be drawn therefrom is either that there was no negligence on the part of the defendant, or that the negligence of defendant was not the proximate cause of plaintiff's injury." *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793.

Plaintiff did not offer any eyewitness testimony and therefore must rely on circumstantial evidence to prove his case. Our courts, recognizing this principle, in *Lane v. Dorney, supra,* stated: " 'What occurred immediately prior to and at the moment of impact may be established by circumstantial evidence, either alone or in combination with direct evidence.' *Kirkman v. Baucom,* 246 N.C. 510, 98 S.E. 2d 922. . . . 'Physical facts tell their own story. They may be sufficiently strong within themselves, or in combination with other evidence, to permit the legitimate inference of negligence on the

part of the driver. Physical facts are sometimes more convincing than oral testimony.' *Yost v. Hall,* 233 N.C. 463, 64 S.E. 2d 554."

The defendant Willysee Cline Baldwin in her answer admitted that she was the registered owner of the Corvair automobile operated by Judy Spellman Baldwin at the time of the collision, and the negligence of the driver is imputed to the owner by virtue of the *prima facie* presumption established by G.S. 20-71.1.

The physical facts, buttressed by the statement of Judy Spellman Baldwin, made at the scene of the accident, lead to such inferences of fact that the jury could reasonably find she operated the 1962 Corvair automobile in such manner as to make out a *prima facie* case of actionable negligence sufficient to sustain the allegations set out in the complaint.

Reversed.

STATE v. WILLIAM HARRIS NICHOLS.

(Filed 21 September, 1966.)

1. Burglary and Unlawful Breakings § 9—

Evidence that gloves, tape, chisels, crowbars, hammers and punches were found in the middle of the night in a vehicle which had been parked near a supermarket, and that defendant had at least constructive possession of the implements, is sufficient to sustain a conviction of defendant of unlawful possession of implements of housebreaking.

2. Burglary and Unlawful Breakings § 4—

Evidence that defendant and his accomplice unlawfully broke open the door of a supermarket in the middle of the night is sufficient to sustain a conviction of breaking and entering, notwithstanding they did not physically enter the building, since the fact that the parties were frustrated before the accomplishment of the intended larceny does not exculpate them.

3. Criminal Law § 50—

Testimony of a witness that he observed the door of the building in question after the alleged offense and that the door was bruised as if someone had been beating on it, *is held* competent as a shorthand statement of fact.

4. Criminal Law § 9—

Persons present aiding and abetting each other in the commission of the offense are equally guilty without regard to which one actually commits the offense.

APPEAL by defendant from *Parker, J.,* at June 1966 Mixed Term of PITT County Superior Court.

The defendant and two others were charged in a bill of indictment with breaking and entering the Harris Super Market of Greenville on 18 March, 1966, and in a second count were charged with the unlawful possession of implements of housebreaking, to wit: A pry bar, two crow bars, one 8-pound sledge hammer, two punches and two chisels. All of the defendants were convicted, but only Nichols appealed from judgment pronounced upon the jury's verdict.

The evidence of the State tended to show that Sgt. R. B. Elks of the Greenville Police Force saw a car carrying a Maryland license tag in the vicinity of the Harris Super Market in Greenville about 2 o'clock on the morning of 18 March, 1966. It stopped at the front of the store and there two men got out, the driver remaining in the car. Sgt. Elks said he could tell the glass in the front of the Super Market was shaking and was being jarred, and the front door popped open about a foot and a half; that after the door came open the two men went back to the car and got in and pulled off. They got in the right-hand side, one in the front and one (Nichols) in the back. When they jumped back in the car they proceeded south and soon afterwards the officer stopped the car, the driver got out and came back to the police car and asked what the trouble was. The three men were placed under arrest and the car was searched. In it were found gloves, tape, chisels, crowbars, hammers, and several punches and other articles. The State's witnesses testified that they went back and examined the door of the Super Market and found marks on it. They were on the inner rail of the door where the door slides into the casing.

The evidence was that the store had been locked upon being closed for the night.

Mr. Durwood Harris testified for the State that he observed the lock on the door and it was unlocked, and it was bruised as if someone had been beating on it.

The defendant made a statement in the presence of the officers that he was from New York, while the car bore a Maryland license.

Attorney General T. W. Bruton, Assistant Attorney General Millard R. Rich, Jr., for the State.

J. W. H. Roberts for defendant appellant.

PER CURIAM. The defendant excepts to the failure of the court to allow his motion for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence, the defendants having offered none.

Taken in the light most favorable to the State the evidence shows that a man from New York in a Maryland car is in Greenville, North Carolina, at 2 o'clock in the morning; that he and another occupant of the car get out of it and go to the door of the Harris Super Market; that a sound of shaking is heard by the officer; and that the glass rattled and the door came open, and that immediately afterwards the two men get back in the car and leave. A few blocks away they are apprehended and an examination of the car discloses the possession of a combination of articles that indicate substantial evidence that they are not being intended for use in any legitimate business.

While gloves, tapes, chisels, crowbars, hammers and punches all have their honest and legitimate uses, when no explanation is offered for this combination of articles by a man several hundred miles from his home, in the middle of the night, it is ample to sustain a possession of wrongful and unlawful possession of tools used in store breaking.

The fact that the shaking of the door and its opening was not followed by a physical entrance into the building does not prevent a finding by the jury that they broke and entered the building. The officers' car was close by and the men apparently became frightened and nervous from the sound of glass and the opening of the door, and fled. They had actually opened the door although they had not entered and the crime was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence.

In *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165, it is said: "If a person breaks or enters * * * with intent to commit the crime of larceny he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent * * * (H)is criminal conduct is not determinable on the basis of the success of his felonious venture."

Another exception of the defendant is that the witness Harris was permitted to state that he observed the door and it was unlocked and it was bruised as if someone had been beating on it. He says that this constitutes an invasion of the province of the jury. However, it is merely what is known as a shorthand statement of facts, which is a well recognized method of permitting a witness to describe an incident or scene that can hardly be described in any other manner. When a witness says that a person appeared to be mad or happy or suffering, he is merely using the language that is generally used by people in describing such conditions and there is no better way to do so than that. This has been recognized by our Court as competent evidence for many, many years, and there is

no error in permitting the statement to stand. Strong's Index, Vol. 2, Evidence 36, p. 281, where several North Carolina cases are cited.

It is proper for a witness to state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time * * * it would be a hopeless task for the most gifted person to clothe in language all the minute particulars, with their necessary accompaniments and qualifications, which have led to the conclusions he has formed." *State v. Skeen,* 182 N.C. 844, 109 S.E. 71.

The defendant further complains at the court's instructions as to aiding and abetting which were to the effect that if three persons were present at the time the crime was committed, were acting together, aiding and abetting each other, that it would make no difference who did the physical act of breaking open the door. This is a correct statement of the law and constitutes no error. *State v. Pearson,* 119 N.C. 871, 26 S.E. 117; *State v. Ham,* 224 N.C. 128, 29 S.E. 2d 449.

The defendant further complains that the court's charge was deficient in that it did not sufficiently go into the question of the unlawful possession of tools used in store breaking, but upon consideration of the charge we find it is ample for this purpose. We, therefore, hold that in the trial of the case there was

No error.

MARY JOHNSON BENTLEY v. THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY OF CINCINNATI, OHIO.

(Filed 21 September, 1966.)

1. Insurance § 34—

Evidence of plaintiff tending to show that insured fell, fracturing his right clavicle, and died some 15 days thereafter due to the injury and to insured's acute emphysema and myocarditis, *held* insufficient to show that the death ensued as a direct result of the injury, independent of all other causes.

2. Appeal and Error § 41—

The exclusion of evidence cannot be prejudicial when all the evidence, including the excluded evidence, is insufficient to take the issue to the jury.

APPEAL by plaintiff from *Farthing, J.,* March-April 1966 Regular Session of TRANSYLVANIA.

Plaintiff sues to recover death benefits under a policy of insurance issued to her deceased husband, she being the named beneficiary in the policy. In addition to the policy, itself, she introduced evidence tending to show:

On 1 April 1963 the insured fell from his bed to the floor. Immediately thereafter he said he had broken his ribs and shoulder. A "crushing sound" could be heard in the area of his ribs. Until his death on 15 April 1963 he complained of pain in his side and was unable to lie down to sleep. On the day before his death, each time he breathed there was a "gritting" sound in his side.

Prior to his fall the insured worked regularly at his employment and in doing chores about his home, his general appearance being good. However, he had emphysema and had suffered from asthma for several years.

The day after the fall an x-ray examination was made by Dr. Sader, the attending physician, who was not called as a witness. No x-ray picture was offered in evidence. The plaintiff "believes" Dr. Sader diagnosed the injury as a broken collarbone and broken ribs.

On advice of Dr. Sader the insured went to the hospital on the evening of 14 April for further x-ray examination, there being no evidence that any such further examination was made. He died the following morning. Dr. Sader did not inform the plaintiff of the cause of death. No autopsy was performed.

The hospital records show the admitting diagnosis was fracture of the right clavicle and acute emphysema, cough and shortness of breath. These records state the cause of death to be "acute emphysema, and bronchitis, and myocarditis, and arteriosclerosis, and coronary closure."

Dr. Cannon, who was not the attending physician at the time in question, and who last saw the insured professionally in January, testified that, "In addition to asthma, he had emphysema with which he had been living for a number of years."

The court sustained the defendant's objections to two hypothetical questions, substantially the same, directed to Dr. Cannon. Had he been permitted to answer, Dr. Cannon would have said, "Knowing his condition and the condition of his chest and everything, my opinion would be that the cause of death was due to the injury plus the complication accompanying it."

Neither the insured nor the plaintiff communicated with the defendant concerning his fall or death prior to 1 May 1963, 30 days after the fall, at which time the defendant's agent, who had read in the newspaper of the insured's death, came to the plaintiff's home. She then inquired of the agent as to whether he had "turned it in,"

there being no evidence that she then informed the agent about the fall. Nearly two years after the fall proof of loss forms, supplied to the plaintiff by the defendant, were completed by the attending physician and transmitted to the defendant by the plaintiff.

Pertinent provisions of the policy include:

> "If the death of the Insured occurs * * * as a direct result of * * * bodily injuries sustained independently of all other causes through violent, external and accidental means, of which, except in case of drowning or of internal injuries revealed by an autopsy, there is a visible contusion or wound, THIS COMPANY WILL PAY * * *
>
> * * * *
>
> "Death * * * resulting directly or indirectly, wholly or partially from any of the following causes are risks not assumed under this policy:
>
> * * * *
>
> "e. Disease, bodily or mental infirmity * * *
>
> * * * *
>
> "Written notice of injury on which claims may be based must be given to the Company within 20 days after the date of the accident causing such injury.
>
> * * * *
>
> "Affirmative proof of loss must be furnished to the Company at its said office within 90 days after the date of the loss for which claim is made."

At the conclusion of the plaintiff's evidence, the court granted the defendant's motion for a judgment of nonsuit. The plaintiff assigns as error only the granting of the motion for such judgment and the sustaining of the defendant's objections to the two hypothetical questions propounded to Dr. Cannon.

Potts & Hudson for plaintiff appellant.
Ramsey, Hill & Smart for defendant appellee.

PER CURIAM. The burden was upon the plaintiff to prove that the death of the insured was an event covered by the policy and that she gave to the defendant, within the time specified in the policy, the notice of the alleged injury and the proof of loss required by the policy. *Brevard v. Insurance Co.*, 262 N.C. 458, 137 S.E. 2d 837; *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214. The evidence, interpreted in the light most favorable to the plaintiff, together with all inferences in her favor which may reasonably

be drawn therefrom, is not sufficient to support a verdict to that effect. This would still be true even if Dr. Cannon had been permitted to answer the hypothetical questions propounded to him. It is, therefore, unnecessary to determine whether the objections to those questions were properly sustained. The judgment of nonsuit is

Affirmed.

CAROLINA POWER AND LIGHT COMPANY v. CECIL C. BRIGGS AND WIFE, FRANCES C. BRIGGS.

(Filed 21 September, 1966.)

Eminent Domain § 5—

Respondents, in an action to take land under eminent domain, are entitled to interest from the date the petitioner acquires the right to possession and not from the date the proceedings were instituted.

APPEALS by petitioner and by respondents from *Falls, J.*, April 1966 Session of BUNCOMBE.

Petitioner, Carolina Power and Light Company, instituted this condemnation proceeding April 2, 1962, in connection with its construction, maintenance and operation of a new steam plant for the generation of electricity on Powell Creek in Limestone Township, Buncombe County, North Carolina, to acquire the fee simple title to a portion of the land owned by respondents, Cecil C. Briggs and wife, Frances C. Briggs. G.S. 62-187; G.S. 40-11 *et seq.* The portion condemned contains 1.901 acres. The remaining portion, on which the Briggs residence is located, contains 3.545 acres and abuts the Long Shoals Road.

Respondents appealed from the clerk's order confirming the report of commissioners and demanded that the issue of damages be tried by a jury.

At trial in superior court, the issue submitted and the jury's answer are as follows: "What amount of damages, if any, are the defendants entitled to recover from petitioner for the taking of the lands and right of way described in the Petition, including damages, if any, to the remaining lands of defendants? ANSWER: $3500.00."

Judgment was entered divesting the title of respondents in the condemned portion of the property and vesting the fee simple title thereto in petitioner. The judgment provided for the payment by petitioner as compensation the total sum of $4,340.00, consisting of

$3,500.00, the amount of the verdict, and of interest thereon at 6% per annum from April 2, 1962, to the date of judgment, to wit, $840.00. The judgment taxed petitioner with the costs of the proceeding.

Respondents' appeal is based on asserted errors in rulings on evidence and portions of the charge. They seek a new trial.

Petitioner's appeal is directed solely to that portion of the judgment allowing said interest item of $840.00. Petitioner contends the judgment should be modified by striking this provision therefrom.

Van Winkle, Walton, Buck & Wall and Herbert L. Hyde for petitioner.

Williams, Williams & Morris for respondents.

PER CURIAM.

RESPONDENTS' APPEAL.

Each of respondents' assignments of error has received careful consideration. Conceding there may be technical error in certain of the court's rulings with reference to the admissibility of evidence, a careful reading of the evidence fails to show respondents were prejudiced thereby. Upon the entire record, we find no error of such nature as to justify a new trial.

PETITIONER'S APPEAL.

On June 8, 1962, petitioner paid into the office of the clerk of the superior court the sum of $6,975.00, the amount of damages assessed by the commissioners. Thereby petitioner acquired the right to "enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal." G.S. 40-19; *Topping v. Board of Education,* 249 N.C. 291, 106 S.E. 2d 502. In accordance with petitioner's said statutory right, the clerk entered an order "that the petitioner be and it is hereby placed and put into possession of the lands and premises described in the petition." For procedure in condemnation proceedings instituted by the State Highway Commission, see G.S. 136-103 *et seq.,* and *Highway Commission v. Industrial Center,* 263 N.C. 230, 139 S.E. 2d 253.

Applying the rule established in *Winston-Salem v. Wells,* 249 N.C. 148, 105 S.E. 2d 435, respondents were entitled to judgment for $3,500.00 and interest thereon from June 8, 1962, the date petitioner acquired the right to possession. The court was in error in allowing interest from April 2, 1962, the date petitioner instituted this proceeding. Hence, there should be subtracted from the principal of the

judgment an amount equal to the interest on $3,500.00 from April 2, 1962, to June 8, 1962. It is ordered that the judgment be and is so modified; and, as so modified, the judgment is affirmed.

On respondents' appeal: No error.

On petitioner's appeal: Modified and affirmed.

STATE v. GLENDON JONES.

(Filed 21 September, 1966.)

1. Criminal Law § 151—

The Supreme Court is limited to the record in the prosecution in which the appeal is taken and cannot consider defendant's contention that he thought his plea of guilty in such prosecution would wipe the slate clean in regard to other prosecutions pending against him.

2. Criminal Law § 131—

The hearing before the court to fix punishment after a plea of guilty is informal; however, it would seem advisable that the court see that the evidence adduced at such hearing is placed in the record so that the appellate court may have the information that was available to the lower court.

APPEAL by defendant from *Parker, J.*, April 1966 Mixed Session of BEAUFORT Superior Court.

The defendant was charged in three bills of indictment with the crime of forgery and uttering forged checks, true bills having been returned by the Grand Jury in Nos. 5952, 5953 and 5954 at the September 1965 Term. The defendant executed an affidavit of indigency and counsel was appointed to represent him after proper findings by the presiding Judge. Thereafter the defendant through his Court appointed counsel, J. D. Grimes, entered pleas of guilty in the three cases. They were consolidated for judgment and it was ordered that defendant be confined to State's Prison for a term of not less than 4 nor more than 7 years, on 8 November, 1965.

No notice of appeal was given at that time, but on 16 November, 1965, the defendant wrote the Clerk of Superior Court of Beaufort County that he wished to appeal. Nothing further was done until 11 April, 1966, when Judge Rudolph Mintz, then presiding, made an order to the effect that the letters written by the defendant constituted a substantial attempt to appeal. He ordered that Mr. Grimes be continued as defendant's counsel for the purpose of perfecting the appeal, and that he be allowed to appeal *in forma pauperis*. Pur-

suant to that order Mr. Grimes prepared the case on appeal as best he could with the limited record available, which consisted of copies of the bills of indictment, judgment, etc., and some correspondence between defendant and the Clerk of the Court. The evidence heard by the Court at the time judgment was pronounced was apparently not taken by the Court Reporter and does not appear in the case on appeal.

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

Junius D. Grimes, Jr., for defendant appellant.

PER CURIAM. The defendant, being represented by able counsel, entered pleas of guilty in three cases of forgery and uttering forged instruments. The maximum penalty of each of these counts is 10 years, so that the total could have been as much as 60 years. The judgment imposed is well within these limits.

Defendant complains that he thought he was getting "a clean sheet" but that other charges were not disposed of and are still pending. Since the record deals only with the forgery cases we are limited to them.

It has long been the custom in the State that upon a plea of guilty the hearing is informal, and it is seldom that the Court Reporter takes the evidence, and this is the history of this case. In view of recent rulings, it would seem to be advisable that the presiding Judge see that a record is made of the evidence adduced before him so that upon appeal the appellate court may have the information that was available to the lower court.

The burden is on the defendant not only to show error but also that the error complained of affected the result adversely to him, as the presumption is in favor of the trial below. Strong, Criminal Law § 160. The record imports verity and the Supreme Court is bound thereby. *Ibid* § 151. And where the matter complained of does not appear of record the defendant has failed to make irregularity manifest. *Ibid,* § 160.

The prisoner is not at fault for the paucity of the record, but we cannot assume that he has been illegally punished.

No error.

STATE v. BOBBY LOWERY.

(Filed 21 September, 1966.)

Obscenity—

An intentional indecent exposure of the person while sitting in an automobile on a public street, in such manner as to be seen by members of the passing public using the street, constitutes the common law offence of indecent exposure.

APPEAL by defendant from *Farthing, J.,* June 1966 Session of McDOWELL.

Criminal action charging one Bobby Lowery with indecent exposure. G.S. 14-190. The State offered evidence tending to show that Mrs. Judy Lytle was walking near Baldwin Avenue in the city of Marion with her six-year old child. Defendant drove his car on Baldwin Avenue within three or four feet of Mrs. Lytle and engaged her in conversation. At the same time he slid over toward Mrs. Lytle and she observed that he did not have pants on. Defendant had his hand on his private part and shook it at her. Defendant offered evidence tending to establish an "alibi."

Verdict: Guilty.

Defendant excepted and appealed to Supreme Court, assigning errors.

Attorney General Bruton, Deputy Attorney General McGalliard, and Assistant Attorney General Bullock for the State.

Everett C. Carnes and I. C. Crawford for defendant.

PER CURIAM. Defendant's principal contention is that the court should have granted his motion for nonsuit at the conclusion of the State's evidence, principally on the ground that this was not a public place.

Intentional exposure of private parts while sitting in an automobile on a public street in such manner that they could be seen by members of the passing public using the street, and were seen by a passerby, constitutes the common law offence of indecent exposure. *Noblett v. Commonwealth,* 194 Va. 241, 72 S.E. 2d 241; *State v. Edwards,* 233 N.C. 492, 64 S.E. 2d 421.

State's witnesses positively identified the defendant as the person who exposed his private parts in a public place.

The defendant noted several exceptions to the court's rulings on evidentiary matters and to portions of the charge to the jury. Upon examination we find none of them of substantial merit.

The evidence was sufficient to support the verdict, and we find

No error.

DENNIS M. SAWYER v. EDMOND WRIGHT.

(Filed 21 September, 1966.)

Quasi-Contracts § 1—

A party is not entitled to recover for material and work upon a chattel as against a party later acquiring title to the chattel when at the time the work was done neither he nor the later purchaser owned the chattel.

APPEAL by defendant from *Hubbard, J.*, at January 1966 Session of PASQUOTANK Superior Court.

During the year 1958 the defendant claimed to be the owner of a boat known as "Barbara Ann." He offered to sell it to the plaintiff at a total cost of $3500, which would include the expense of rebuilding the boat and it was to be delivered by 1 August, 1958. The plaintiff paid the defendant $975 on the purchase price, but the reconditioning of the boat had not been completed by 16 September, 1958, at which time the plaintiff learned that the defendant did not own the Barbara Ann but that she was the property of Elmer V. Midgett, Sr., and was subject to several liens. The plaintiff made arrangements to clear the title to the boat through Mr. Midgett and has brought suit to recover the $975 paid as part of the purchase price, and additional moneys expended.

The defendant admitted the payment of the $975 by the plaintiff and further admitted that he was not the owner of the boat at the time of the transaction. He attempted to set up a counterclaim against the plaintiff for $3,710.52 which he claims the plaintiff owes him for the boat, engine, and time and material for rebuilding it.

The case was referred to a referee who filed a report in the matter; but when the cause came on to be heard before Judge Hubbard the plaintiff moved for judgment on the pleadings, abandoning his claim for everything but the $975. The motion was allowed and plaintiff was awarded judgment against defendant in the sum of $975 with interest.

The court held that as a matter of law that the defendant had failed to state a valid counterclaim and denied it.

The defendant appealed from the judgment.

Worth & Horner by W. A. Worth for plaintiff appellee.
Frank B. Aycock, Jr., for defendant appellant.

PER CURIAM. The plaintiff paid the defendant $975 as part of the purchase price for a boat the defendant did not own. Upon this admission by the defendant, plaintiff was clearly entitled to recover that amount.

Defendant's contention that he was prevented from obtaining good title to the boat by plaintiff's wrongful interference in having the liens cancelled is without merit. The facts show that defendant admittedly was not the owner of the boat; that he did not do the work he contracted to do and he failed to deliver the boat on the agreed date. The plaintiff, in having the liens cancelled, was merely seeking to protect himself from further loss in view of his previous transactions with the defendant.

The defendant asserts a counterclaim and seeks to recover of plaintiff money which he expended in rebuilding a boat that neither he nor plaintiff owned at the time the work was done. There is no merit in his counterclaim under these conditions.

The judgment is

Affirmed.

PAUL ALLEN v. AUBREY BRANNON.

(Filed 21 September, 1966.)

APPEAL by plaintiff from *Riddle, J.*, January 1966 Session of RUTHERFORD.

Action and cross action arising out of a collision between a pickup truck owned and operated by plaintiff and an automobile owned and operated by defendant. The collision occurred August 16, 1964, about 5:30 p.m., on U.S. Highway #221, a paved two-lane highway extending north from Spartanburg, S. C., to Rutherfordton, N. C. Plaintiff drove his truck north on #221 and turned from the highway to his right, entering the premises of Lancaster's Service Station. There plaintiff got gas. Later, he drove into said highway for the purpose of proceeding south thereon. Meanwhile, defendant was proceeding north on said highway.

Plaintiff's version: He had entered the highway and was proceeding south thereon on his right side of said highway when the northbound car of defendant crossed the center line and collided with his truck.

Defendant's version: As he approached the Lancaster Service Station, he observed plaintiff's truck come to the highway and stop. Thereafter, plaintiff's truck entered the highway across defendant's line of travel when defendant was so close he was unable to avoid a collision notwithstanding he put on brakes and attempted to do so.

The jury answered two issues, to wit: "1. Was the plaintiff in-

jured, and was plaintiff's automobile damaged by the negligence of the defendant, as alleged in the Complaint? ANSWER: YES. 2. Was the defendant injured, and was defendant's automobile damaged by the negligence of the plaintiff, as alleged in the Answer? ANSWER: YES." Other issues, relating solely to damages, were not answered.

The court entered judgment (1) that plaintiff have and recover nothing of defendant, and that plaintiff pay the costs of the action, and (2) that defendant have and recover nothing of plaintiff.

Defendant excepted and appealed.

Hamrick & Hamrick for plaintiff appellant.
Hamrick & Jones for defendant appellee.

PER CURIAM. When considered in relation to the pleadings and the charge, the only reasonable interpretation of the verdict is that the jury found that the collision and all resulting damages were caused by the actionable negligence of defendant and by the actionable negligence of plaintiff. Hence, the verdict supports the judgment. See *Nicholson v. Dean,* 267 N.C. 375, 148 S.E. 2d 247, and cases cited.

There was no objection by plaintiff to the issues as submitted. Plaintiff, by exceptions to the charge, *undertakes* to challenge the sufficiency of the evidence to warrant submission of the second issue. However, careful examination of the evidence compels the conclusion that, when considered in the light most favorable to defendant, it was sufficient to require submission of the second issue and to support the jury's verdict with reference thereto.

Each of plaintiff's assignments of error has received careful consideration. In our view, none discloses prejudicial error. The verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. RUFUS J. SUTTON.

(Filed 21 September, 1966.)

APPEAL by defendant from *Farthing, J.,* March 1966 Session of RUTHERFORD.

Defendant escaped from the custody of the North Carolina Prison Department while serving a 2-year sentence imposed upon him by the Superior Court of Haywood County for the crime of nonsupport.

At the November 1965 Session of Rutherford, he was indicted for the escape (a misdemeanor), pled guilty, and received a sentence of 9 months to begin at the expiration of the uncompleted 2-year term. G.S. 148-45. Thereafter, while still serving the nonsupport sentence, defendant instituted proceedings under G.S. 15-217 *et seq.* to vacate the escape sentence on the ground that he had not been represented by counsel at the time he entered his plea of guilty. Judge Riddle heard defendant's petition and vacated the sentence. He ordered a new trial and appointed defendant's present counsel to represent him. At the March 1966 Session, defendant, through his attorney, James H. Burwell, Jr., Esquire, entered a plea of guilty to the escape charged in the bill of indictment. Judge Farthing, in open court, fully examined defendant with reference to the voluntariness of his plea and informed him in minute detail of the possible consequences of it. Defendant reaffirmed his plea of guilty, and Judge Farthing imposed a sentence of 9 months. Defendant was then remanded to the custody of the Prison Department to complete the nonsupport sentence before beginning the escape sentence. The next day, March 12, 1966, defendant, acting for himself and without the advice of counsel, by letter, gave notice of appeal to this Court. Judge Farthing ordered his attorney to prosecute his appeal.

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

J. H. Burwell, Jr., for defendant appellant.

PER CURIAM. Defendant's case on appeal contains no exception or assignment of error. The appeal itself, however, constitutes an exception to the judgment and presents for review any error appearing on the face of the record. 1 Strong, N. C. Index, Criminal Law § 154. No error appears. This case is another exemplification of the manner in which many defendants, at public expense, are abusing the unlimited right of appeal which this State grants to all who have been sentenced for crime — either upon a plea of guilty or a verdict of guilty.

No error.

STATE v. SYLVESTER SMITH.

(Filed 28 September, 1966.)

1. Assault and Battery § 12; Robbery § 4—

The evidence in this case held amply sufficient to be submitted to the jury upon the question of defendant's guilt of assault with a deadly weapon and of armed robbery.

2. Criminal Law § 109—

The court is required to submit the question of defendant's guilt of less degrees of the crime included in the indictment only in those instances in which there is evidence which would permit a conclusion of defendant's guilt of such less degrees.

3. Robbery § 1—

Robbery is the taking of another's personal property from his person or in his presence, against his will, by violence or intimidation, with intent to deprive the owner permanently of his property, and our statute, G.S. 14-87, merely provides a more severe punishment for common law robbery which is attempted or accomplished with the use of a dangerous weapon.

4. Robbery § 5— Evidence held not to require court to submit question of defendant's guilt of less degree of crime.

The evidence tended to show that defendant was apprehended by the owner of a filling station after defendant's accomplice had broken into the station, and that defendant by the use of a pistol disarmed such owner and took his rifle. *Held:* Even conceding that defendant took the rifle "for a temporary use" and that he intended thereafter to abandon the rifle at the first opportunity, the evidence conclusively shows that defendant intended to deprive the owner permanently of the rifle or to leave the recovery of the rifle by the owner to mere chance, and therefore the evidence discloses the *animus furandi*, and does not require the court to submit the qustion of defendant's guilt of assault as a less degree of the offense of robbery with firearms.

BOBBITT, J., concurs in result.

APPEAL by defendant from *Fountain, J.*, December 13, 1965 Mixed Session of PITT.

Defendant was tried and convicted upon two bills of indictment: one charged him with assault with a deadly weapon upon R. W. Spikes; the other, with armed robbery of a rifle from H. H. Adams. Defendant offered no evidence. The evidence for the State tended to show these facts:

About 5:00 a.m. on November 29, 1965, H. H. Adams was awakened by the noise of breaking glass in his service station, which was located about 40 yards from his home. The noise came over an intercom system connecting his bedroom with the service station. He dressed quickly, took his rifle, and set out for the station. Halfway there, he observed one Thomas Henry coming from the station toward him. Henry told Adams that someone had his car and wouldn't

give it back to him. Adams held the rifle on Henry and marched him to the street to see "where his partner was." On the street he saw a police car parked below a 1960 Chevrolet. Policeman Spikes and defendant were standing side-by-side near the parked cars. Adams, "thinking everything was under control," went up to the two with his rifle. When he was within three or four steps of them, defendant pushed the policeman in front of him, pointed a .38 caliber pistol in Adams' face and ordered him to drop the rifle. Adams failed to obey the order and defendant said, "If you don't drop it, I'll kill you." After saying this twice, defendant fired a shot, which struck not far from Adams' feet. Adams then dropped his rifle. Defendant picked it up, told Henry to get into the car, and said, "I'm going to kill the policeman because he's got my license number." After Spikes had assured defendant that he had not taken the license number, Henry said, "Please don't shoot him; let's go." The two men, carrying the rifle and the pistol with them, then drove off towards Vanceboro. As they left, the officer took down the license number of the car. When Adams returned to his station, he observed that a 40 x 40 glass had been broken with a tire tool. He found pliers and a screwdriver at the spot where he had encountered Henry.

Spikes was the night policeman for the town of Grifton. Driving by Adams' service station about 5:00 a.m. he had observed defendant apparently asleep, under the wheel of a parked 1960 Chevrolet automobile. Its motor was running, and the lights were burning on the inside. Spikes rapped on the window glass and asked defendant what he was doing. Defendant told him that he was taking a nap while he waited for his buddy, who had stepped into the bushes on the side of the street opposite the service station. After some conversation between the two, defendant said, "There comes my buddy." When the officer looked around, defendant grabbed his .38 caliber pistol from its holster, put it in the officer's back, and told him not to move or he would shoot him. It was at this time that Adams arrived with Henry.

About 40 minutes after defendant and Henry had driven off with the pistol and rifle, police found Henry standing by the wrecked car about four miles from Grifton. The license plate had been removed from the vehicle, and Adams' rifle was beside a telephone pole just below the place where the car had wrecked.

On December 1, 1965, defendant was in the Craven County jail. A deputy sheriff of Pitt County asked him what he had done with Officer Spikes' pistol. Defendant accompanied the officers to his home and showed them the pistol hidden in a trunk under a tray.

The jury's verdict was "guilty as charged in each of the two bills of indictment." From judgment of imprisonment, defendant appeals.

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

A. Louis Singleton for defendant appellant.

SHARP, J. Defendant makes two assignments of error: (1) the refusal of the court to dismiss the charges against him upon his motions for nonsuit, and (2) the failure of the court to instruct the jury that they might acquit him of the crime of armed robbery charged in the indictment and convict him of an assault with a deadly weapon upon Adams. G.S. 15-169. The first assignment requires no discussion. The factual statement reveals evidence plenary to convict defendant of the charges contained in both bills of indictment. The gist of defendant's appeal is his second assignment of error.

The question presented is this: Assuming the truth of the State's evidence, does it show that the offense committed upon Adams was the robbery with firearms alleged in the indictment? If the circumstances disclosed here would permit the inference that defendant took the rifle without felonious intent, it would have been the duty of the judge to submit to the jury the lesser and included offense of assault. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545; *State v. Lunsford*, 229 N.C. 229, 49 S.E. 2d 410; *State v. Holt*, 192 N.C. 490, 135 S.E. 324. If there could be any other inference, however, the judge would not be under such a duty. *State v. Fletcher*, 264 N.C. 482, 141 S.E. 2d 873; *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496; *State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834; *State v. Sawyer*, 224 N.C. 61, 29 S.E. 2d 34; *State v. Cox*, 201 N.C. 357, 160 S.E. 358.

Robbery, a common-law offense not defined by statute in North Carolina, is merely an aggravated form of larceny. *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595. The use, or threatened use, of firearms or other dangerous weapons in perpetrating a robbery "does not add to or subtract from the common-law offense of robbery," but the statute (G.S. 14-87) provides a more severe punishment for a robbery attempted or accomplished with the use of a dangerous weapon. *State v. Chase*, 231 N.C. 589, 58 S.E. 2d 364. Robbery is " 'the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation.' " *State v. Lunsford, supra* at 231, 49 S.E. 2d at 412. The taking must be done *animo furandi*, with a felonious intent to appropriate the goods taken to some use or purpose of the taker. The intent to convert to one's own use, however, "is met by showing an intent to deprive the owner of his property permanently for the use of the taker, although he might have in mind to benefit another." *State v. Kirkland*, 178

N.C. 810, 813, 101 S.E. 560, 562. "It is not necessary to constitute larceny that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker. It is sufficient if the taking be fraudulent, and with the intent wholly to deprive the owner of the property." Rapalje, Larceny & Kindred Offenses § 20 (1892); Annot.: 18 Am. & Eng. Ann. Cas. 824 (1911). "Although a person may wrongfully take the goods, yet unless he intended to assume the property in them, and to convert them to his own use, it will amount to a trespass only, and not to a felony. . . . (T)he distinction between robbery and forcible trespass is, that in the former there is, and in the latter there is not, a felonious intention to take the goods, and appropriate them to the offender's own use." *State v. Sowls,* 61 N.C. 151, 153-54. *Accord, State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569. See David J. Sharpe, *Forcible Trespass to Personal Property,* 40 N. C. L. Rev. 252 (1961).

In robbery, as in larceny, the taking of the property must be with the felonious intent *permanently* to deprive the owner of his property. *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739; *State v. Lawrence, supra; State v. Lunsford, supra;* 46 Am. Jur., Robbery § 10 (1943); 32 Am. Jur., Larceny § 37 (1941). Thus, if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery. *State v. Lunsford, supra.* If he takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny. *State v. McCrary, supra.* See 2 Bishop, Criminal Law (9th Ed.) §§ 840-852 (1923).

Defendant here clearly intended to appropriate the rifle to a use inconsistent with its owner's property rights. Assuming that defendant's immediate purpose was to deprive Adams of a weapon so Adams could not use it against him or prevent his escape, still this is not in the least inconsistent with an intent permanently to deprive Adams of his rifle. The narrow question here is whether the circumstances under which defendant took the rifle are susceptible to the inference that he had any intent other than that of permanently depriving Adams of the weapon.

In *State v. Davis,* 38 N.J.L. 176, 20 Am. Rep. 367, the defendant Davis took a horse and carriage which was standing in front of a residence and drove it rapidly away near midnight. The next day, when detection became imminent, Davis abandoned the horse and carriage several miles from where it was taken. The horse was exhausted from much driving and want of food. Davis had made no effort to return the property or to apprise its owner where his property could be found. In holding defendant guilty of larceny, the court said with reference to his taking:

"It is not a mere temporary taking which may consist with an intent to return, but a taking that may result by a natural and immediate consequence in the entire loss and deprivation of the property to the owner. An abandonment to mere chance is such reckless exposure to loss that the guilty party should be held criminally responsible for an intent to lose.

"If a person take another's watch from his table, with no intent to return it, but for the purpose of timing his walk to the station to catch a train, and when he reaches there leaves it on the seat, for the owner to get it back or lose it, as may happen. If a man takes another's axe with no intent to return it, but to take it to the woods to cut trees, and after he has finished his work cast it in the bushes, at the owner's risk of losing it, such reckless conduct would be accounted criminal. It is true that the probability of finding the horse and wagon may be greater than that of recovering the watch or axe, because they are larger and more difficult to conceal, but the intent is not to be measured by such nice probabilities; rather by the broader probability that the owner may lose his property, because the taker has no purpose of ever returning it to him." *Id.* at 369.

The severe punishment of felonies under the old English law, as the opinion in *State v. Davis, supra,* pointed out, led to some decisions *contra.* In *Philipps and Strong's Case,* 2 East, Pleas of the Crown 662, the defendants were indicted for stealing a mare and a gelding from one Goulter, who kept an inn. They took the animals and rode them to Lechlade, 33 miles away. There, they left them at different inns to be fed and cleaned for their return in three hours. They did not return and were later arrested 14 miles away while walking towards Farringdon. The jury, upon a special verdict, found that when defendants took the horses, they merely intended to ride them to Lechlade, to leave them there, and to make no further use of them.

"Upon this finding . . . in Trinity term, 1801, the Judges, (*dissentiente* Grose, J. *et dubitante* Lord Alvanley (a),) held it to be only a trespass and no felony. For there was no intention in the prisoners to change the property, or make it their own; but only to use it for a special purpose, *i. e.* to save their labour in travelling. The Judge who dissented thought the case differed from those first above-mentioned; because here there was no intention to return the horses to the owner, but, for aught the prisoners concerned themselves, to deprive him of them. But the rest agreed that it was a question for the jury; and that if

they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned." *Id.* at 663.

In *Rex v. Crump,* 1 Car. & P. 685, 171 Eng. Rep. 1357, defendant was indicted for stealing a horse, three bridles, two saddles, and a bag. He went to the owner's stable and took away the horse and the other property all together. Some distance away, he abandoned the horse and proceeded on foot to Tewkesbury, where he was arrested while attempting to sell the saddles. The court instructed the jury that if defendant, intending to steal the other articles, took the horse only in order to get off more conveniently with the other property, "as it were, borrowed the horse for that purpose, he would not be, in point of law, guilty of stealing the horse." The verdict was "not guilty of stealing the horse — guilty of stealing the rest of the property." As Scudder, J., pointed out in *State v. Davis, supra,* "It is odd that such a nice distinction and division of intention should be made dependent on the kind of property taken at the same time."

In *Rex v. Holloway,* 5 Car. & P. 525, 172 Eng. Rep. 1082, it was held, "If a poacher take a gun by force from a gamekeeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of."

In contrast to the severe penalties of the old English law, the punishments provided for robbery and larceny by the law today do not evoke such nice distinctions in defining felonious intent. Where the evidence does not permit the inference that defendant ever intended to return the property forcibly taken but requires the conclusion that defendant was totally indifferent as to whether the owner ever recovered the property, there is no justification for indulging the fiction that the taking was for a temporary purpose, without any *animus furandi* or *lucri causa.*

In *State v. Smith,* 68 S.W. 2d 696 (Mo. Sup. Ct.), prisoners, after a jail break, took an automobile at revolver point in order to make good their escape. In affirming a conviction of armed robbery, the court said, "We think the taking of the automobile was done with the intention of depriving the owner permanently, even though they later abandoned it."

It would be unreasonable to assume that defendant, fleeing from arrest for the crime of felonious breaking and entering, had any expectation of returning the rifle he had taken in order to effect his escape. To do so by any certain means would be to invite detection and capture. For the purpose of decision here, we assume that defendant took the rifle "for temporary use" and that after it had served his purpose of escape, he intended to abandon it at the first opportunity lest it lead to his detection. Such procedure, however,

would leave Adams' recovery of his rifle to mere chance and thus constitute "such reckless exposure to loss" that it is consistent only with an intent permanently to deprive the owner of his property. See 32 Am. Jur., Larceny § 37 (1941). In abandoning it, defendant put it beyond his power to return the rifle and showed total indifference as to whether Adams ever recovered his rifle. When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal *(animus furandi)*. A man's intentions can only be judged by his words and deeds; he must be taken to intend those consequences which are the natural and immediate results of his acts. If one who has taken property from its owner without any color of right, his intent to deprive the owner wholly of the property "may, generally speaking, be deemed proved" if it appears he "kept the goods as his own 'til his apprehension, or that he gave them away, or sold or exchanged or destroyed them. . . ." *State v. South,* 28 N.J.L. 28, 30, 75 Am. Dec. 250, 252.

In this case, there is no conflicting evidence relating to the element of the armed robbery charged in the indictment. The words of Connor, J., in *State v. Cox, supra* at 361, 160 S.E. at 360 are pertinent:

> "The statute (G.S. 15-169) is not applicable, where, as in the instant case, all the evidence for the State, uncontradicted by any evidence for the defendant, if believed by the jury, shows that the crime charged in the indictment was committed as alleged therein. . . . (T)here was no evidence tending to support a contention that the defendants, if not guilty of the crime charged in the indictment, were guilty of a crime of less degree."

We hold that the evidence in this case necessarily restricted the jury to return one of two verdicts, namely, guilty of robbery with firearms as charged in the indictment, or not guilty.

No error.

BOBBITT, J., concurs in result.

STATE v. GLENN E. BRUCE.

(Filed 28 September, 1966.)

1. Criminal Law § 91—

The admission of testimony of a statement made by defendant during the assault to the effect that it did not matter what defendant did to his victims since defendant was being sought in another state for murder, *held* not prejudicial when the court immediately withdraws the statement and instructs the jury to dismiss it from their minds, since it must be presumed that the jurors are men of character and sufficient intelligence to understand and comply with the instruction withdrawing the evidence.

2. Kidnapping § 2—

In a prosecution for kidnapping accomplished by intimidation and threats, a statement made by defendant to his victim during the assault that it did not make any difference what he did to her since the law was seeking him for murder in another state, is competent to show intimidation and the inducing of fear in his victim.

3. Kidnapping § 1—

Kidnapping is the unlawful taking and carrying away of a person by force and against his will; the use of actual physical force or violence is not necessary, it being sufficient if there be threats and intimidation and appeals to the fear of the victim which are sufficient to put an ordinarily prudent person in fear of his life or personal safety and to overcome his will.

4. Criminal Law § 71—

The interpretation placed by the U. S. Supreme Court upon the Due Process Clause of the Fourteenth Amendment of the Federal Constitution is controlling in determining the competency of an alleged confession by defendant.

5. Same—

The trial court's findings of fact supporting its conclusion that the confession offered in evidence was voluntarily and knowingly made will not be disturbed on appeal when the findings are supported by competent evidence and the findings support the conclusions of law.

6. Same— Evidence held sufficient to support finding supporting conclusion that confession was voluntary.

Defendant made the statement offered in evidence while he was being transported by officers from the scene where he had wrecked his vehicle in an attempt to evade the officers. The evidence on the *voir dire* was to the effect that the officers warned him that, in view of the seriousness of the offense with which he was charged, he should not make any statement until he had contacted an attorney, that he was advised that he was entitled to counsel and that if he were an indigent the State would furnish counsel, and that defendant made the incriminating statement in the normal conversation upon interrogation only in regard to his identity and where he was going, etc. *Held:* The evidence supports the conclusion that the confession was voluntarily and knowingly made and that none of defendant's constitutional rights were violated, and the admission of the confession in evidence was not error.

7. Kidnapping § 2—

Under G.S. 14-39 the court may impose a sentence of life imprisonment for kidnapping.

8. Constitutional Law § 36—

Punishment within the statutory maximum cannot be cruel or unusual in the constitutional sense.

9. Same; Criminal Law § 131—

The imposition of sentence of life imprisonment upon conviction of the offense of kidnapping, the sentence to run consecutively after sentence of life imprisonment theretofore entered in a prosecution of defendant for rape, is not cruel or unusual punishment and is not forbidden by constitutional provisions.

APPEAL by defendant from *Morris, E.J.*, 7 March 1966 Criminal Session of NEW HANOVER.

Criminal prosecution upon an indictment charging defendant on 23 September 1964 with force and arms at and in New Hanover County with unlawfully, wilfully, feloniously, and forcibly kidnapping one Betty Jean Phipps, a violation of G.S. 14-39.

Defendant was represented by court-appointed counsel, Messrs. George Rountree, Jr., and Cicero P. Yow, able and experienced members of the New Hanover County Bar. He pleaded not guilty. The verdict of the jury was guilty.

From a judgment that "defendant be confined to the State Central Prison for the remainder of his natural life; this sentence to run consecutively, and not concurrently, with the sentence imposed in Onslow County at the December 1964 Term of the Superior Court, presided over by Honorable Henry L. Stevens, Jr., in Case No. 5236, in which case the defendant was sentenced upon a charge of rape to prison for his natural life," defendant appeals.

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

George Rountree, Jr. and Cicero P. Yow for defendant appellant.

PARKER, C.J. This is a summary of the State's evidence: About 6:30 p.m. on 23 September 1964 Mrs. Betty Jean Phipps parked a Pontiac Tempest automobile owned by her husband and herself near the Wilmington Public Library at Fourth and Market Streets in the city of Wilmington. In the automobile with her were her two little daughters, one aged five years and the other six and a half years. She and her two daughters got out of the automobile and went into the library. She reads a lot to her daughters, and she came to the library to check out some books. They stayed in the library 15 or

20 minutes. When they came out of the library, it was getting dark. At that time she saw defendant sitting on a little mound in front of the library that marks off the driveway. Her automobile had two doors. She opened the left door, her oldest daughter "crawled in the back," she got in the automobile, and her youngest daughter "crawled across" her. The left door was open. Her oldest daughter screamed. She turned around, and defendant had a pistol "sticking in my neck." Defendant told her if she would do exactly what he said nobody would be hurt. Defendant pushed up the front seat and got in the back seat. He then got in the front seat. She put her daughters in the back seat. Defendant had his pistol in her ribs.

She asked defendant what he wanted, and he replied that he wanted her to drive him to "North 17." She had moved to Wilmington the prior July and did not know where North 17 was, and asked defendant where it was. He replied, "You just drive around and I'll tell you." She drove off from the library because she was afraid he would hurt her two girls and herself, and she kept driving as he directed because she was afraid he would kill them. With defendant holding his pistol in her ribs she drove many miles in and around Wilmington, and finally got on Highway #17 headed to Jacksonville, North Carolina. In Onslow County defendant had her to stop at a filling station, and he bought a small quantity of gasoline. While there defendant had his pistol under his jacket pointed toward her side, and told her not to make a sound and to tell her children to be quiet. She then drove on Highway #17 a short distance and turned off on a dirt road. Defendant had her to stop, took the keys out of the ignition, and ordered her and her children out of the automobile. After they got out, he drove her automobile away. From the time he got in the automobile at the library until they got out, he had the pistol pointed at her ribs at all times, except when one of her daughters spoke and then he would point the pistol at them.

As soon as she saw the tail lights of the car disappear, she and her daughters ran as fast as they could to the highway, and got in a ditch by the highway. She saw lights coming from each direction on the highway, and ran into the highway and "flagged down" the approaching vehicles, which were buses. They got in a bus which carried them to the police station at Holly Ridge. She told the officers what had happened, and gave them the license number of her automobile. They called her husband in Wilmington.

On her cross-examination by Mr. Rountree, she testified: "During most of the ride there was conversation going on. . . . He told me it didn't make any difference what he done to us, that the law was after him in New Jersey for killing somebody up there." Mr. Rountree moved to strike. Whereupon, the court instructed the

jury as follows: "Members of the jury, you need not consider that he said he was wanted in New Jersey for killing someone. Dismiss that from your mind." Defendant did not at this time make a motion for a mistrial, or file any exception.

This is a further summary of the State's evidence: W. B. Richardson, a member of the State Highway Patrol and stationed at New Bern, testified in substance: On the night of 23 September 1964 he was on duty north of New Bern on Highway #17. He received a radio message to be on the lookout for a 1963 Tempest sports coupe, license No. BR-8313. He immediately turned around and proceeded south on Highway #17 to New Bern, and while driving through New Bern he met this vehicle at the intersection of Queen and Broad Streets in New Bern. Broad Street is also U. S. Highway #17. He immediately made a U-turn in the street and followed this vehicle. He pulled up beside the vehicle, turned on the red light on the patrol car, and sounded his siren. Defendant, driving the Pontiac Tempest automobile, saw him and the patrol car, increased his speed and pulled over into Richardson's lane of traffic forcing him to fall back. Defendant increased his speed to 65 or 70 miles an hour in New Bern, and ran through red lights. The street defendant was driving on was a four-lane street. Defendant crossed the median between the north-bound and south-bound traffic, got into the south-bound lane, and was going north in the south-bound lane. The traffic at the time was fairly heavy. As defendant approached the intersection of Front and Broad Streets near the mouth of the Neuse River bridge, he swerved his automobile to avoid striking a sailor in the highway, lost control of his vehicle, skidded up on the curbing, came back to the street in a diagonal skid, and struck a light pole and wrecked. Defendant jumped out of the wrecked automobile and ran down the embankment. Richardson jumped out of the patrol car and gave pursuit. He hollered for defendant to stop and he did, throwing up his hands. Richardson told him he was under arrest. He found about 40 rounds of .22-caliber ammunition in defendant's pocket. By that time several other officers had arrived, and he turned defendant over to them. He searched the wrecked automobile and found in it five boxes of .22 ammunition and a pistol. Defendant was within about 10 to 20 feet of the automobile when he searched it. After he had searched the car, he took the defendant and the pistol and ammunition and proceeded south on Highway #17 to meet officers from Onslow County. Trooper Campbell rode with him. On the way to meet the Onslow County officers he had a conversation with the defendant. He does not remember who started the conversation. He talked with defendant, asked him his name, where he was from, and where he was going. After that defendant started

talking and talked continuously while he was with Richardson. At this point Richardson was asked by the solicitor, "What did he tell you?" The court asked the prosecuting officer, "Is this offered as a purported confession?" The prosecuting officer replied, "Yes." Whereupon, the court asked the jury to retire from the courtroom. In their absence Richardson was examined by Mr. Rountree, of counsel for defendant, and testified as follows:

> "I had this conversation with the defendant after he was under arrest and in my patrol car. . . . At that particular time I had ceased to search around for suspects, and the finger of suspicion had come to rest upon the defendant. I did not tell him at that time that he was entitled immediately to representation by counsel, but Trooper Campbell did. I told him I didn't want to hear about the case. Trooper Campbell told him the seriousness, did he realize the seriousness of this charge; and he, Trooper Campbell, advised him to contact an attorney before he did much talking like that.
>
> "I don't say that we advised him in the words as set out, as to his legal rights, but we did tell him he was entitled to counsel, and he made the statement that he had no money to hire counsel. We explained that the State would furnish him one. I did not question him about what had happened, other than where he was going, his name was all I was interested in. I told him I was not the investigating officer, and that he would be turned over to the Onslow County authorities, and that so far as I was concerned, I had no charges other than no operator's license and speeding and reckless driving, and due to the fact that the other charges were greater than mine, that I would not bring charges myself.
>
> "I told him not to say anything. Trooper Campbell told him he'd better not talk until he'd contacted an attorney. That was before we got out of the city of New Bern. As quickly as he started talking we told him not to do it. When he mentioned money, I told him that the State would get him counsel. I said, 'Well, the State will furnish you (counsel).' I even started a conversation not even pertaining to this. In our conversation it so happened he had worked for a man in Whiteville that I knew and I started talking with him about that.
>
> "Trooper Campbell was in the car with me. As I have stated before, Trooper Campbell told him that he had better contact counsel before he started talking and asked him — he said, 'Do you realize the seriousness of this charge?' Trooper Campbell did not ask him any questions, just talk, conversation mostly.

> This gentleman here did most of the talking. He talked continuously, almost. I am sure that there were questions asked. In a normal conversation, you would ask a question, and I am sure that some questions were answered, but I don't remember."

After Mr. Rountree had finished his questioning of Richardson, the prosecuting officer questioned Richardson, and in answer to his question Richardson replied:

> "In spite of my telling him not to say anything, and in spite of Trooper Campbell telling him he didn't have to say anything, he still wanted to talk. In spite of the fact we tried to change the subject and talk about something else, he came back to this and talked about it."

There is nothing in the record at this point to indicate that defendant desired to testify as to the circumstances under which his purported confession was made or to offer evidence in this respect, and he offered no evidence.

After Richardson had been questioned upon the *voir dire* and defendant had offered no evidence, the court found the statement made by defendant was voluntary in nature and admissible in evidence, overruled the defendant's objection to it, and defendant excepted. Whereupon, the judge had the jury return to the courtroom and seated in the box.

Richardson then testified on direct examination by the State in substance as follows: Defendant stated to him that he had left Whiteville by bus early in the day en route to Wilmington; that he was near a public library and saw a lady come out of the library with two small children; that he stuck a gun in her face and told her that if she would cooperate that the children would not be harmed; that he told her to drive him north on U. S. Highway #17; and that later he put her out in Onslow County and proceeded on in the direction of New Bern in her automobile. He said that at times he would run the car 100 miles an hour. The officers asked him where he was going and he replied, "Nowhere in particular, just all over, most anywhere." At this point defendant moved to strike the testimony of the officer as to what he told him. The court denied the motion, and defendant excepted.

When the State rested its case, the jury was asked to leave the courtroom, and in their absence Mr. Rountree stated to the court that the defendant desired to testify with respect to the voluntariness and admissibility of the alleged confession by him which was testified to by Trooper Richardson and was found to be voluntary by the court, and also with respect to whether he was advised of his

constitutional rights "under the case of *Escobedo*." The court granted the request. Whereupon, defendant testified on direct examination by Mr. Rountree in substance as follows: When he was arrested and Trooper Richardson got the pistol, he put him in the patrol car to bring him to the Onslow County authorities, and another trooper got in the patrol car with them. Trooper Richardson asked him, after the car had started, if he knew what they had him for. He asked Richardson what could he get for automobile larceny, and Richardson informed him that he had not arrested him for automobile larceny. He asked Richardson what he was wanted for, and Richardson replied that he had arrested him on a charge of rape and asked him if he knew what he could get for the charge of rape in North Carolina. He told him no, and Richardson said, "Well, you could get the gas chamber." Richardson then said: "But you don't have to tell me anything, because I only arrested you for the Onslow County authorities." He then asked Richardson if he was entitled to a lawyer, and Richardson replied to him: "Yes, you'll be able to get a lawyer. If you can't afford one, they'll appoint you one when you get into Court." That is all Richardson said about that. Then Richardson started asking questions as to where he had been, what he had done, and to whom the car belonged. He only remembers Trooper Campbell as sitting in the car. He and Richardson did the talking. Richardson did not tell him while they were driving towards Onslow County that he had better keep his mouth shut because the charge under which he was held was grave and that he needed a lawyer and ought not to talk before he got one. Richardson told him he did not have to say anything because he had only arrested him for the Onslow County authorities. There was a discussion, that is all. He did not admit anything to anybody at any time, except once and that was when he signed a statement under duress which was proved in the courtroom the last time he was there. The whole time he was having the discussion with Richardson and Campbell he was scared to death. He had just got in an automobile wreck, somebody had told him he was going to die in the gas chamber, and he was not very calm. He does not believe that either Campbell or Richardson told him he had to tell them anything. He was scared. Richardson told him that if he went ahead and told them about it and pleaded guilty, they would give him life but would not give him the gas chamber. As a result of this statement of going light with him, getting life imprisonment instead of the gas chamber, he talked about the charges under which he was then laboring. He testified on redirect examination: "There was no confession, except as to the auto larceny and where I had got hold of the gun, and

that was voluntary." He stated on recross-examination: "I wasn't physically mistreated in any way."

After defendant had finished his testimony, the court found from his sworn testimony that upon his being taken into custody by Richardson and in the presence of Campbell the defendant was advised of the charges preferred against him, and by the statement of defendant himself he was admonished not to talk about it because of the seriousness of the charge; that he was advised that he was entitled to counsel and that counsel would be appointed for him. The court further found from the testimony of defendant that his statement to the officers was made voluntarily, without any fear as a result of threats made against him by Troopers Richardson and Campbell; that no physical violence was exhibited toward him, and that whatever he said during the time he was in the custody of Richardson and in the presence of Campbell constituted a voluntary statement; and the court reaffirmed its finding heretofore made that such statement constitutes a voluntary confession, and therefore admitted it in evidence. The defendant excepted.

After that, defendant by Mr. Rountree moved for a mistrial for the reason that Mrs. Betty Jean Phipps testified on cross-examination by him that during the ride from Wilmington to Onslow County defendant told her that "it didn't make any difference what he done to us, that the law was after him in New Jersey for killing somebody up there"; and that although the court advised the jury to dismiss such a statement from their minds, "it is humanly impossible for a jury to disabuse their minds and forget completely that this testimony was given in their presence, and that to permit it would cause prejudicial error."

Defendant cites and relies upon *S. v. Wyatt,* 254 N.C. 220, 118 S.E. 2d 420, and *S. v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35, as authority in point that the judge committed prejudicial error in denying his motion for a mistrial. The facts in these two cases are entirely different from the instant case, in that the impropriety there was the prejudicial argument to the jury by the solicitor prosecuting for the State, and further the court did not instruct the jury to dismiss from their minds the improper argument.

When Mrs. Betty Jean Phipps testified as to what defendant told her about the law being after him in New Jersey for homicide, defendant moved to strike, and the judge promptly instructed the jury not to consider this evidence and to dismiss such evidence from their minds. At that time it would seem defendant's counsel was of opinion that any prejudicial effect such testimony by Mrs. Phipps had upon the jury had been completely removed from the jury's

minds by the judge's allowing defendant's motion to strike and his instruction to the jury to dismiss such evidence from their minds, because at that time defendant did not move for a mistrial or file any exception.

We have held many times that when any improper arguments or improper remarks are made by counsel, and the transgression is corrected immediately by the court, any prejudicial effect is ordinarily removed from the minds of the jury. 4 Strong's N. C. Index, Trial, pp. 298-99, where some of the cases are cited. In *S. v. Ray,* 212 N.C. 725, 194 S.E. 482, the Court said:

> "Whether impressions received by jurors from the words spoken can be effaced by a mental effort, under the direction of the court, may provoke debate in the realm of psychology, but our system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. *Wilson v. Mfg. Co.,* 120 N.C. 94, 26 S.E. 629."

The judge's denial of defendant's motion for a new trial was proper for two reasons: First, if Mrs. Phipps' testimony of what defendant said to her, "it didn't make any difference what he done to us, that the law was after him in New Jersey for killing somebody up there," was incompetent, which we do not admit, then any prejudice to defendant by such testimony was removed from the minds of the jury by the judge's immediately striking such evidence on defendant's motion, and instructing the jury not to consider it and to dismiss it from their minds. Second, we think the testimony was competent and should not have been stricken. The word "kidnap" in its application to the indictment and to the State's evidence, and as used in G.S. 14-39, means the unlawful taking and carrying away of a person by force and against his will (the common law definition), *S. v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870. The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping, as the word "kidnap" is used in our statute and as it is defined at common law. To hold that the use of actual physical force or violence is necessary would be such a narrow construction of our statute as would render it nugatory in many cases. The crime of kidnapping is frequently committed by threats and intimidation and appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and

are equivalent to the use of actual force or violence. *People v. Hope,* 257 N.Y. 147, 177 N.E. 402; *People v. Hight,* 94 Cal. App. 2d 100, 210 P. 2d 270; *People v. Broyles,* 151 Cal. App. 2d 428, 311 P. 2d 88; *Brown v. State,* 232 Ind. 227, 111 N.E. 2d 808; *State v. Taylor,* 70 N.D. 201, 293 N.W. 219; 1 Am. Jur. 2d, Abduction and Kidnapping, § 13; 51 C.J.S., Kidnapping, p. 435; Stansbury, N. C. Evidence, 2d Ed., § 91.

Defendant further assigns as error the admission in evidence of defendant's confession, "because it clearly violated the defendant's Fifth and Sixth Amendment rights as guaranteed by the Fourteenth Amendment" to the United States Constitution. We have set forth above in minute detail the circumstances under which defendant's confession was made as shown by the State's evidence. We have also set forth in minute detail defendant's testimony in respect thereto and his denial that he confessed kidnapping Mrs. Phipps. This is another in a long line of cases presenting the question as to whether the confession was properly admitted in evidence under the Fourteenth Amendment. It is well settled that "a defendant in a state criminal trial has a right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment to the United States Constitution." *Rogers v. Richmond,* 365 U.S. 534, 5 L. Ed. 2d 760; Stansbury, N. C. Evidence, 2d Ed., § 183. It is well-settled law that we are required to accept the interpretation the United States Supreme Court has placed on the due process clause of the Fourteenth Amendment to the Federal Constitution. *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365. The trial court's minute findings of fact and his conclusion that the confession was voluntarily made and admissible in evidence will not be disturbed on appeal because his findings are supported by competent evidence and his findings of fact support his conclusion. This rule also obtains in the Federal courts. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Davis, supra;* 1 Strong's N. C. Index, Criminal Law, § 71, Confessions, and Supplement to *ibid.,* Criminal Law, § 71, Confessions. Of course, the conclusions of law to be drawn from the facts found by the trial judge are not binding on the reviewing courts. *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. The facts in *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, are entirely different from the facts here, and that case does not control. It seems crystal clear from the court's findings of fact which support his conclusion that defendant's confession was entirely voluntary on his part and was admissible in evidence and that none of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United

States Constitution were violated. The court properly admitted the confession in evidence.

Defendant assigns as error that the judgment entered was "cruel and unusual punishment in sentencing defendant to serve a life term after the expiration of a prior life term imposed in a prior rape trial by Judge Henry L. Stevens, Jr., for the rape of the prosecuting witness occurring during the alleged kidnapping." According to the judgment in the instant case, Judge Stevens sentenced the defendant to imprisonment for life for rape at the December 1964 Session of the Superior Court of Onslow County. Defendant was tried in the instant case for kidnapping at the 7 March 1966 Criminal Session of the New Hanover County Superior Court. It seems manifest from the record before us, and from the statement in defendant's brief above quoted, that defendant raped Mrs. Betty Jean Phipps, and it would also seem that he raped her in the presence of her two little children.

Our former statute, C.S. 4221, provided that any person who forcibly or fraudulently kidnapped any person shall be guilty of a felony, and upon conviction may be punished in the discretion of the court, not exceeding 20 years in the State's prison. As a result of the kidnapping and death in the Lindbergh tragedy, the General Assembly of North Carolina repealed C.S. 4221 by the enactment of Public Laws 1933, Ch. 542, now codified as G.S. 14-39, which reads in pertinent part: "It shall be unlawful for any person . . . , male or female . . . to kidnap . . . any human being. . . . Any person . . . violating . . . any provisions of this section shall be guilty of a felony, and upon conviction therefor, shall be punishable by imprisonment for life." The effect of G.S. 14-39, repealing C.S. 4221, is to increase within the discretion of the court the maximum punishment for kidnapping from 20 years to life, and not to make a life term mandatory upon conviction, the intent of G.S. 14-39 to this effect being shown by the use of the word "punishable" in prescribing the sentence. *S. v. Kelly*, 206 N.C. 660, 175 S.E. 294; *S. v. Lowry, supra.*

We have held in case after case that when the punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense. *S. v. Stansbury*, 230 N.C. 589, 55 S.E. 2d 185; *S. v. Welch*, 232 N.C. 77, 59 S.E. 2d 199; *S. v. Whaley*, 263 N.C. 824, 140 S.E. 2d 305; *S. v. Stubbs*, 266 N.C. 295, 145 S.E. 2d 899; *S. v. Davis*, 267 N.C. 126, 147 S.E. 2d 570.

So far as a diligent search on our part discloses, and so far as appears from the briefs of the State and of the defendant, the ques-

tion presented by this assignment of error has not been passed on by this Court. However, we have found a case directly in point decided by the Supreme Court of Errors of Connecticut, *S. v. McNally,* 152 Conn. 598, 211 A. 2d 162 (25 May 1965), *cert. den.,* 382 U.S. 948; 15 L. Ed. 2d 356. In that case two defendants, McNally and McAlister, were convicted in the Superior Court of Fairfield County of two counts of murder in the second degree, and they appealed. The Supreme Court of Errors of Connecticut held that under the statute the court was warranted in imposing consecutive life sentences on the defendants, and that the imposition of such sentences was neither excessive nor cruel and unusual punishment. In its opinion the Court said:

> "The final argument advanced by the defendants is that the sentences constitute cruel and unusual punishment, which is prohibited under the eighth amendment to the federal constitution. When the objection is to the sentence and not to the statute under which the sentence was imposed, the sentence is not cruel or unusual if it is in conformity with the limit fixed by statute. When the statute does not violate the constitution, any punishment which conforms to it cannot be adjudged excessive since it is within the power of the legislature and not the judiciary to determine the extent of the punishment which may be imposed on those convicted of crime. The imposition of life sentences to run consecutively for two second-degree murders is neither excessive nor cruel and inhuman punishment. [Citing authority.] As the sentences imposed did not exceed the permissible statutory penalties, the punishment cannot be held to be cruel and unusual as a matter of law. [Citing authority.]"

The case of *Chavigny v. State* (Fla. App.), 112 So. 2d 910 *(rehearing denied* 10 June 1959), *cert. den.* (Supreme Court of Florida July 1959), 114 So. 2d 6, *cert. den.,* 362 U.S. 922, 4 L. Ed. 2d 742 (1960), is directly in point and in accord with the Connecticut case of *State v. McNally.* A rehearing of the *Chavigny* case was denied 30 April 1964 by the District Court of Appeals of Florida, 163 So. 2d 47. In the *Chavigny* case reported in 163 So. 2d 47, the Court held that the fact that two consecutive life sentences affected any chance defendant convicted of two second-degree murders might have for obtaining a parole did not make imposition of the second sentence improper. See also *Capone v. United States,* 51 F. 2d 609, 76 A.L.R. 1534, *cert. den.,* 284 U.S. 669, 76 L. Ed. 566.

G.S. 14-21 in pertinent part reads as follows: "Every person who

is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will . . . , shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." The objection here is to the sentence of life imprisonment to run consecutively with a sentence of life imprisonment for rape, and not to the statute of kidnapping under which the sentence in the instant case was imposed. The sentence of life imprisonment for rape before Judge Stevens and the sentence of life imprisonment in the instant case to run consecutively with the sentence of life imprisonment for rape do not exceed the limits fixed by the statutes, and the sentence in the instant case is not cruel and unusual punishment in a constitutional sense. This assignment of error is overruled.

We have discussed every assignment of error brought forward and discussed in defendant's brief. The defendant does not contend that the State's evidence was insufficient to carry its case to the jury. The State had plenary evidence to carry its case to the jury, without introducing into evidence the confession of the defendant. Defendant does not contend there was any error in the charge.

In the trial we find

No error.

TALMADGE ANDREW GIBBS v. CAROLINA POWER & LIGHT COMPANY.

(Filed 28 September, 1966.)

1. Appeal and Error § 41—

It cannot be determined that the exclusion of evidence was prejudicial when the record fails to show what the testimony would have been.

2. Same—

The exclusion of evidence is not prejudicial on review of motion to nonsuit when other witnesses testify fully in regard to the matter.

3. Same—

Permitting an attorney to cross-examine plaintiff when an attorney-client relationship had theretofore existed between them cannot be held prejudicial when none of the evidence elicited by the attorney was relevant to the issues, and therefore could not have affected the judgment.

4. Trial § 21—

On motion for compulsory nonsuit, plaintiff's evidence supported by allegation is to be taken as true and considered in the light most favorable to him, and defendant's evidence in conflict therewith is to be disregarded.

5. Negligence § 11—

A person *sui juris* is under duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided.

6. Electricity § 8— Evidence held to show contributory negligence on part of electrical worker in failing to use available safety devices.

The evidence disclosed that plaintiff was an employee of a subcontractor and that plaintiff was an experienced electrical worker, that in the performance of his work he was in contact with a ground wire less than two feet from a "hot" wire, that employees of the contractor came upon the scene and one of them permitted a loose wire to form a connection between the "hot" wire and the ground wire, resulting in severe injury to plaintiff. The evidence further tended to show that the subcontractor furnished safety equipment, that plaintiff had rubber gloves within his reach, and that the injury would not have occurred had plaintiff worn the rubber gloves. *Held:* The evidence discloses contributory negligence as a matter of law on the part of plaintiff in adopting a dangerous manner of handling a dangerous instrumentality when a safe manner of conduct was known and available to him.

APPEAL by plaintiff from *Martin, S.J.*, March 1966 Session of BUNCOMBE.

Civil action to recover damages for personal injuries alleged to have been caused by the actionable negligence of the defendant's employee.

Plaintiff's evidence tends to show: That on 8 August 1961 he was an employee of Sky-Line Construction Company, was a first class lineman with sixteen years experience, and, on the occasion of the injury, was acting foreman in charge of a 4-man crew; that he and his crew were performing work pursuant to a work order, part of a master contract between defendant as contractor and plaintiff's employer as contractee. The crew was installing a new pole for a new feeder line and running a 26-foot span of wire from a substation structure to the pole. An existing three-phase power line was then connected to the lower crossarms on the new pole. Jumpers were placed on the energized conductors so that the connection on the new pole's crossarms could be done "hot." According to the work order, the work of plaintiff's employer was to be completed after the span wires were run from the substation structure to a cross beam on the new pole. As an "accommodation" to defendant, plaintiff undertook to hook up lightning arrestors and run jump wires to a set of existing switches.

Now coming to plaintiff's injury. According to plaintiff: After dinner on 8 August 1961, he went on the pole and began hooking up the lightning arrestors. When he went on the pole there was nobody there but his crew. The closest hot wire to him was about 12 to 14 feet away. While connecting the lightning arrestors he saw two employees of defendant working below him. When he was injured he was sitting astraddle a lightning arrestor (ground wire) which he knew was a conductor of electricity. His bare hand was on the span wire when he was burned. At the nearest point the unenergized span wire was less than two feet from a hot wire.

Plaintiff further testified that he and his crew brought their own tools and safety appliances, including rubber gloves, rubber blankets, etc. His rubber gloves were in a pouch hanging on a crossarm within his reach. He knew which wires were hot and which were not. Just before he was injured he observed that Mr. Stroupe, an employee of defendant, was doing work on a ladder below him. He testified that rubber is a good insulator and if there had been rubber between him and the current he probably would not have been hurt; he did not need safety appliances *until somebody came out there.* He was severely injured as a result of the burns.

Plaintiff's witness W. T. Downs testified he was a lineman employed by Sky-Line Construction Company on 8 August 1961; that about the time of plaintiff's injury, Dockery and Stroupe, employees of defendant, came to the substation and put up wooden ladders beside plaintiff, who was astraddle the lightning arrestor which was in contact with the ground wire. Stroupe, standing on the ground, handed Dockery, who was on a ladder between the left and middle blade switches, a 10-foot coil of 4/0 copper wire with both ends loose. Dockery was holding the coil of wire in the middle and he sort of bent over to get the wire and "fireworks broke loose." He looked up and saw Gibbs, with one hand on the wire and smoke coming from his left leg. He helped get Gibbs down. Gibbs was seriously injured. He (Downs) had on rubber gloves while working on the pole.

Plaintiff's witness Joe Hensley testified that on the occasion of plaintiff's injury he was a truck driver for Sky-Line Construction Company, and his truck carried safety equipment for Sky-Line employees. One of his duties was to hand up safety equipment to linemen when they asked for it. "In the power construction business you should stay away from any grounds. This is the most dangerous part of the work, that is, when you get near a ground wire. On this occasion Mr. Gibbs was sitting right on a ground wire up there at the substation. . . . He was not seated on a rubber blanket. . . . Mr. Gibbs did not have on his rubber gloves. If there had been

rubber between him and the current, then the current couldn't have gone through him to the ground."

Hensley testified substantially as had other witnesses in respect to other circumstances of plaintiff's injury.

E. B. Clark, who was admitted by the court as an expert witness in electrical construction, testified that he was president and manager of Sky-Line Construction Company on 8 August 1961. He received work order from defendant to install a new feeder line. He went to the substation where work was in progress about 1:30 on 8 August and put plaintiff in charge.

"I have instructed my men as a part of my safety program not to work in or around power construction, when there is another crew from another company working there . . . (A)t no time from a safety standpoint do you want to work two foreign crews together, telephone, power, or what have you . . . Mr. Gibbs was exposed to the day to day dangers of the work, and he knew about rubber gloves and other safety devices. . . . In order to receive an electrical shock and sustain injury it would be necessary to have an electrical voltage or pressure, and secondly a conductor through which electricity would flow, and thirdly a ground which draws the current or permits the current to go through the conductor. . . . Yes, to install the span wire conditions prove that a workman should have had gloves on working with hot wires. A workman should not have been up on top of this creosoted timber in contact with the timber and the ground wire, but should have been working below either on a wooden ladder or wooden platform. One of our standard practices is to keep clear of the ground at all times. At the time, Mr. Gibbs was the foreman on the job. . . .

"Safety equipment was provided by Sky-Line Construction Company for the crew on the job on August 8, 1961. Safety equipment included rubber gloves, rubber hose, hoods, blankets, baker boards, mechanical jumpers, and on occasions, sleeves. The function of rubber gloves is to insulate the man working on power construction from the conductor that he is working on. . . . We are discussing and pointing out safety to our people every day. . . .

"The cardinal rule of safety in electrical construction is to wear rubber gloves first when you are working with wires that are hot; and second when you are working with wires that are dead and not hot but which are near other wires and switches which are hot."

At the conclusion of plaintiff's evidence defendant moved for judgment as of nonsuit. The motion was allowed, and plaintiff appealed.

Riddle & Briggs for plaintiff-appellant.

Sherwood H. Smith, Jr., and Van Winkle, Walton, Buck & Wall, by Herbert L. Hyde for defendant-appellee.

BRANCH, J. Plaintiff's first exception is to the refusal of the trial court to allow plaintiff to describe the manner in which defendant's employees, Stroupe and Dockery, were working. This exception is without merit since, as no part of the record shows what the excluded evidence would have been, we cannot determine whether its exclusion was prejudicial. *Cooperative Exchange v. Scott,* 260 N.C. 81, 132 S.E. 2d 161. Moreover, it appears that other witnesses testified fully as to the manner in which Stroupe and Dockery were working. On review of judgment of nonsuit, any possible error in excluding this evidence was cured by this testimony. *Petty v. Print Works,* 243 N.C. 292, 90 S.E. 2d 717.

Plaintiff assigns as error the trial court's allowing counsel for Sky-Line to cross-examine plaintiff, on the ground that counsel had previously been in an attorney-client relationship with plaintiff. We have examined the record carefully and find no prejudicial error resulting therefrom. None of the evidence elicited by counsel goes to the issue of defendant's negligence nor to plaintiff's contributory negligence, and it is therefore immaterial to the judgment of nonsuit entered by the court below. Plaintiff admits this assignment is not supported by case authority.

We now come to the primary and crucial question presented for decision. Did the trial court err in allowing defendant's motion for judgment as of nonsuit?

In considering this question we recognize the familiar rule that "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." *King v. Bonardi,* 267 N.C. 221, 148 S.E. 2d 32; 4 Strong, N. C. Index, Trial, Sec. 21; Supp. to Vol. 4, *Ibid,* Sec. 21.

It is seriously contended by the defendant that the plaintiff did not offer sufficient evidence to sustain the allegations of his complaint; however, conceding *arguendo,* that there is evidence of negligence on the part of the defendant sufficient to sustain plaintiff's allegations of actionable negligence, the plaintiff's own evidence in-

escapably shows that plaintiff failed to use ordinary care for his own safety and that such want of due care was at least one of the proximate causes of his injury.

"The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided." *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499.

In the case of *Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561, an experienced electrician was employed by an independent contractor to replace poles in an existing line, involving the transfer of wires from the old to the new poles. The lineman knew that two of the wires were light circuit wires and three were high tension wires. One of the high tension wires was fastened to the side of the house with house brackets in a manner usually employed for low tension wires solely. The lineman had rubber gloves which would have protected him from injury. He caught hold of the high tension wire with his bare hand while standing on wet ground, and was electrocuted. Barnhill, J. (later C.J.), speaking for the Court in affirming the judgment entered in the court below, stated: " 'It has been repeatedly held that where one knowingly places himself in a place of danger which he might easily have avoided, he assumes all risks incident thereto.' (Citing cases). Furthermore, in respect to the work being performed by him ordinary care means the highest degree of care (citing cases)."

We observe, parenthetically, that the case of *Deaton v. Elon College, supra,* can be distinguished from the instant case to the advantage of the defendant, in that the *Deaton* case involved latent defects of which contractee knew, or should have known, and of which the contractor had no knowledge and could not have reasonably discovered. The instant case reveals facts that tend to show that the danger was, or should have been, obvious to the plaintiff.

In the case of *Register v. Power Co.,* 165 N.C. 234, 81 S.E. 326, plaintiff sued the electrical company for the wrongful death of her intestate, alleging negligence in not shutting off its current while intestate was engaged in his employment of working upon the wires of the company. It was there held the intestate assumed the risks of all danger necessarily incident to the employment he was engaged in, it appearing from the testimony of his own witnesses that the injury would not have occurred had he used the rubber gloves furnished him, and that he was an experienced person who should have known the danger in thus acting. The Court sustained judgment of nonsuit entered by the lower court.

In the instant case plaintiff was an experienced lineman, and at the particular time was in charge of a work crew. He was familiar

with approved and recognized safety practices and had the necessary safety equipment not only available but within reach. He stated, "(I)f there had been rubber between me and the current I probably would not have been hurt."

Thus it appears that in the face of obvious and recognized danger he turned his back on a known safe course of conduct and embraced a course of danger in handling a dangerous instrumentality.

The evidence elicited from his own witnesses requires the inevitable conclusion that plaintiff's conduct constituted a failure to use ordinary care for his own safety, which, if not the sole proximate cause, was at least one of the direct proximate causes of his own injury.

The judgment of the court below is

Affirmed.

CARLOS F. PELAEZ v. ALLEN CARLAND, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MARK JAMES CARLAND.

(Filed 28 September, 1966.)

1. Appeal and Error § 12; Courts § 7—

Upon the entering of an appeal the trial court is *functus officio* and has no further jurisdiction except to enter orders affecting the judgment during the term when the judgment is *in fieri*, to adjudge an appeal abandoned after notice and on a proper showing, and to settle the case on appeal, which he may do only in the event of timely service of exceptions or countercase to appellant's statement of case on appeal.

2. Appeal and Error § 29—

The inability of appellant to obtain a transcript of the evidence from the court reporter within the time limited does not excuse his failure to make out and serve statement of case on appeal.

3. Same; Courts § 7—

After appeal and the fixing of time for service of case on appeal from a general county court to the Superior Court, the trial court granted successive extensions of time, one with the consent of appellee, and then granted further extension of time without appellee's consent. *Held:* No case on appeal having been served within the time fixed or within the extension agreed upon by counsel, the Superior Court could review only the record proper, and, no error appearing on the face thereof, should have dismissed the purported appeal, and objection that the motion to dismiss was broadside is untenable, the matter being a question of jurisdiction.

APPEAL by plaintiff and defendants from *Martin, S.J.*, February 1966 Civil Session of BUNCOMBE.

PELAEZ *v.* CARLAND.

Plaintiff instituted this civil action in the General County Court of Buncombe County on December 21, 1962, to recover damages for injuries sustained in an automobile collision allegedly caused by the negligence of defendants. The action was tried before a judge and jury in the General County Court at the January 1965 Session. The usual issues were submitted to the jury. The jury answered both the issues of negligence and contributory negligence "Yes."

Judgment was accordingly entered. Plaintiff appealed and was given 90 days within which to prepare and serve case on appeal. On April 12, 1965, plaintiff obtained an extension of time from the judge of the General County Court of Buncombe County until June 21, 1965 to prepare and serve case on appeal, on the ground that he was unable to obtain a transcript of the evidence from the court reporter. Similar extensions of time were granted by the judge of the General County Court on May 14, 1965, extending the time through August 4, 1965, and on June 21, 1965, extending the time through August 19, 1965. The latter extension of time was consented to by the defendants' attorneys. On August 18, 1965 an order was signed by the judge of the General County Court purporting to extend the time to and including the 30th day of August, 1965. Defendants' attorneys did not consent or agree to this extension.

Plaintiff's case on appeal was served on defendants August 30, 1965. It was settled by the judge of the trial court on December 30, 1965, was docketed on the same day and scheduled for hearing at the regular February 14, 1966 Session of the Superior Court of Buncombe County. On February 18, 1966, defendants filed a motion to dismiss plaintiff's appeal, under the provisions of G.S. 1-287.1 and G.S. 7-295. The judge of the Superior Court overruled defendants' motion to dismiss, overruled part of plaintiff's assignments of error, and sustained part of plaintiff's assignments of error.

Both plaintiff and defendants appealed.

Williams, Williams and Morris and J. N. Golding for plaintiff.
Uzzell & Dumont for defendants.

BRANCH, J. At the threshold of this case we are confronted with the question, Did the court err in overruling the defendants' motion to dismiss?

The General County Court of Buncombe County appears to have been established under Chapter 7, Article 30, of the General Statutes. G.S. 7-295 provides, in part, as follows: "Appeals in civil actions may be taken from the General County Court to the Superior Court of the county in term time for errors assigned in matters of law *in the same manner as is now provided for appeals from the*

Superior Court to the Supreme Court, except that the appellant shall file in duplicate statement of case on appeal, as settled, containing assignments of error which, together with the original record, shall be transmitted by the clerk of the General County Court to the Superior Court, as the complete record on appeal in said court . . . The record on appeal to the Superior Court shall be docketed before the next term of the Superior Court ensuing after the case on appeal shall have been settled by the agreement of the parties or by order of the court, and the case shall stand for argument at the next term of the Superior Court ensuing after the record on appeal shall have been docketed ten days, unless otherwise ordered by the court. . . ." (Emphasis ours).

In the case of *Jenkins v. Costelloe,* 208 N.C. 406, 408, 181 S.E. 266, the Court, in passing on an appeal from a general county court to the Superior Court, stated: " 'It is provided by 3 C.S. 1608 (cc) (now G.S. 7-295), that appeals in civil actions may be taken from the general county court to the Superior Court of the county in term time for errors assigned in matters of law "in the same manner as is now provided for appeals from the Superior Court to the Supreme Court"; and from the judgment of the Superior Court an appeal may be taken to the Supreme Court "as is now provided by law." This means that in hearing civil cases on appeal from the general county court, the Superior Court sits as an appellate court, subject to review by the Supreme Court.' "

In this case the defendants' attorneys, following a series of other extensions, consented to an order extending the time to serve the case on appeal through August 19, 1965, a time of approximately eight months. Plaintiff then obtained an additional order from the judge of the General County Court which purported to grant a further extension of time to August 30, 1965. The court, however, was without authority to grant this additional extension. In the case of *Hoke v. Greyhound Corp.,* 227 N.C. 374, 42 S.E. 2d 407, this Court said:

> "An appeal from a judgment rendered in the Superior Court takes the case *out of the jurisdiction* of the Superior Court. Thereafter, pending the appeal, the judge is *functus officio.* (Emphasis ours).
>
> " 'Where there is a controversy as to whether the case on appeal was served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear the motions and enter appropriate orders thereon.' . . . (W)e rest decision squarely on the want of jurisdiction in the court below to enter any order or decree pertaining to the

appeal by the defendants in the absence of a showing that the appeal had been abandoned. . . .

"'. . . "(T)he cause" is by the appeal taken out of the Superior Court and carried up to the Supreme Court' although the cost and stay bonds have not been filed and 'of course a "motion in the cause" can only be entertained by the court where the cause is.'"

"It is axiomatic among those engaged in appellate practice that 'a statement of case on appeal not served in time' may be disregarded or treated as a nullity." *State v. Moore,* 210 N.C. 686, 188 S.E. 421.

The case is controlled by the decision in *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659, in which the Court through Higgins, J., said:

"As a general rule, an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio.* '. . . (A) motion in the cause can only be maintained by the court where the cause is.' Exceptions to the general rule are: (1) Notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal. . . .

"'. . . The right of appeal is not an absolute right, but is only given upon compliance with the requirements of the statute. . . . rules requiring service to be made of case on appeal within the allotted time are mandatory, not directive.' . . .

"When the judge of the county civil court entered his order fixing 60 days as the time for the service of the case on appeal, he exhausted his authority over the case and was thereafter *functus officio,* except to fulfill his statutory obligation to see that a proper record is sent up for review and the obligation to settle the cases devolves *only in the event the appellee serves a countercase or files exceptions.* In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof. . . . The appeal removed the case to the Superior Court for all purposes except the certification of a correct record. Any further extensions of time within which the record was due in the Superior Court could only come from the Superior Court." (Emphasis ours).

In the case of *Pendergraft v. Harris,* 267 N.C. 396, 148 S.E. 2d 272, the judge of a county civil court allowed 90 days for service of

statement of case on appeal to the Superior Court. When appellant failed to serve statement of case within the time allotted, the appeal was dismissed on motion made in the Superior Court notwithstanding the statement of case on appeal was filed prior to the making of appellee's motion to dismiss.

In the instant case the plaintiff based his request for extension of time upon his inability to obtain a transcript of the evidence from the court reporter. It is noted that this condition was alleged to have continued for a period of approximately nine months. This Court has heretofore held that an appellant will not be relieved from serving his case on appeal on excuse that the stenographer was busy and could not transcribe her notes in time, since the stenographic notes are not the supreme authority as to what occurred at the trial. *Rogers v. Asheville,* 182 N.C. 596, 109 S.E. 865.

In *State v. Wescott,* 220 N.C. 439, 17 S.E. 2d 507, it was held that continued illness of the court reporter did not excuse the appellant from making out and serving his statement of case on appeal within the time allowed.

The plaintiff argues in his brief that the defendants' motion to dismiss was "broadside," and excepts to other procedural matters. There was substantial compliance by defendants and this contention is without merit since the court was *functus officio* and therefore without jurisdiction.

"Jurisdiction over the subject matter cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to demur or object to the jurisdiction is immaterial. Indeed, it is the duty of a court to stop the action or proceeding *ex mero motu* immediately it perceives it does not have jurisdiction, and therefore it is its duty to do so on motion or objection made at any stage of the proceedings." 1 Strong, N. C. Index, Courts, Sec. 21, p. 646.

When the judge of the General County Court entered his order fixing 90 days as the time for service of case on appeal, he exhausted his authority over the case except as detailed in *Machine Co. v. Dixon, supra,* and in *Hoke v. Greyhound Corp., supra.* No case on appeal having been served within the time fixed or within the extension agreed upon by counsel, the Superior Court should have reviewed only the record proper to determine whether errors of law are disclosed on the face thereof. *Machine Co. v. Dixon, supra.* The defendants make no contention that such errors appeared on the face of the record. Defendants' motion to dismiss the purported appeal from the Buncombe County General Court should have been granted.

Plaintiff in his appeal noted other exceptions concerning the

trial in Buncombe County General Court, but these do not affect the basis of the decision on this appeal and will therefore not be discussed.

The order of the court below is

Reversed.

IN THE MATTER OF THE CUSTODY OF TONYA CAROL MARLOWE, FOUR YEARS OF AGE, AND EDGAR EARL MARLOWE III, THREE YEARS OF AGE.

(Filed 28 September, 1966.)

1. Divorce and Alimony § 24—

The provision of a final decree of divorce awarding the custody of the minor children of the marriage is subject to modification for subsequent change of condition as often as the facts justify.

2. Constitutional Law § 26—

The Full Faith and Credit Clause of the Federal Constitution does not preclude the courts of this State from modifying the provision of a foreign divorce decree awarding custody of the minor children of the marriage for change of condition subsequent to the entry of the decree, and this case is remanded for determination by the court whether there had been change in the conditions and circumstances since the entry of the decree sufficient to require the modification of the decree in the best interest of the minors.

APPEAL by respondent Dr. E. Earl Marlowe from *Falls, J.*, from hearing in Chambers on 30 April, 1966.

It appears from the record that for some time prior to 11 May, 1966, Earl Marlowe and his wife Nannette Marlowe were living in Escambia County, Florida, with their children, whose custody is sought in this case. On that date they entered into a separation agreement in which the husband agreed that the wife should have the permanent care, custody and control of the minor children subject, however, to rights of reasonable visitation by the husband, and that he would pay $300 a month for their support. On 2 June, 1965, the husband as plaintiff obtained a final decree of divorce, based upon the adultery of the wife, which was the cause of their separation. The decree contained these provisions:

"That the defendant (the mother) is hereby granted the permanent care, custody and control of the minor children of the parties, subject, however, to the plaintiff's rights of visitation as set forth in the agreement entered into by and between the parties.

"That the property settlement and separation agreement entered into by and between the parties is hereby ratified, approved and confirmed, and made a part of this final decree as is fully set out herein."

Both of the parties have married other persons since then. In November, 1965, the children went to the home of their father who had moved to Gastonia and begun the practice of medicine. The wife alleges that she permitted them to go stay with him under the visitation provisions of the agreement and decree while he says she asked him to take them because she was having marital difficulties with her second husband and could not care for them under her then conditions. The mother later sought to obtain the return of the children but the father refused to let her have them. She instituted *habeas corpus* proceedings to obtain their custody and Judge Falls heard the matter on 30 April, 1966.

It appeared at that hearing that the petitioner had become separated from her husband and had gone to live with her parents in Texas.

No evidence was offered before Judge Falls but the respondent took exceptions based upon colloquies between the court and his attorneys.

From the stenographic record of the proceedings he takes exceptions to statements by the court to the effect that (1) he was bound by the Florida decree and to the refusal of the court to hear evidence relating to the alleged unfitness of the mother because of incidents occurring before the decree and which were known to the respondent at the time; (2) that no evidence would be admissible except that bearing upon the fitness and suitability of the petitioner since the date of the divorce decree; (3) that the Florida divorce judgment is a final judgment and is not interlocutory and that it adjudicated the custody of the children and in the absence of a showing that she is not a fit and suitable person at this time, that she is to have the custody of the children; (4) that evidence as to the fitness and suitability of Dr. Marlowe would not be admissible and competent at this time; (5) that the court has no authority to inquire into the custody over and above the unfitness and suitability of the mother since 2 June, 1965; (6) or what would be in the best interest of the children since 2 June, 1965.

Judge Falls signed an order which referred to the agreement and the decree of the Florida court and held "that the courts of this State must give full faith and credit to the divorce decree of the State of Florida for that said decree does not appear to be an interlocutory order but is a final order; that the petitioner (the

mother) herein is a fit and suitable person to have the custody of the said Tonya Carol Marlowe and Edgar Earl Marlowe III; that it would be for the best interest of the said minor children that their custody be awarded to the petitioner."

The court further ordered that the respondent pay the sum of $300 per month for the maintenance of the children and awarded attorneys fees to the petitioner.

Upon Judge Falls filing the decree referred to above the respondent excepted and gave notice of appeal.

M. Roy Short, Jr., Dolley & Katzenstein by Steve Dolley for petitioner appellee.

Horn, West & Horn by C. C. Horn, Davis & White by Jack H. White, Whitener & Mitchem by Basil L. Whitener, by Wade W. Mitchem for respondent appellant.

PLESS, J. Judge Falls was correct in holding that the Florida decree of divorce was final, but the control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify. 27 B C.J.S., Divorce, Sec. 317(1).

This case is quite similar to that of *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744, which was also a case involving the custody of a child then in North Carolina whose custody had been awarded to the mother by a Florida court. The child was brought to North Carolina and the father refused to surrender it to the mother, and a special proceeding was brought in Alamance County by the mother to obtain its custody. Among other things the Court said: "We hold that since the minor child had been a resident of North Carolina for almost a year prior to the institution of this proceeding (in this case it was some 5 months) coupled with the further fact that the petitioner, who had heretofore been given custody of the child by a court of competent jurisdiction in another State, came into this State and invoked the jurisdiction of our courts and instituted this proceeding, the court in which she instituted the proceeding does have jurisdiction of the child and may consider any change or circumstances that have arisen since the entry of the Florida decree on 13 October, 1953, and to determine what is for the best interest of the child and to award custody accordingly. But, in disposing of the custody of the minor child in controversy, the Florida decree awarding her custody to the petitioner is entitled to full faith and credit as to all matters existing when the decree was entered and

which were or might have been adjudicated therein. It is said in 17 Am. Jur., Divorce and Separation, section 688, page 522: '* * * where a decree of divorce fixing the custody of the children of the marriage is rendered in accordance with the laws of another State by a court of competent jurisdiction, such decree will be given full force and effect in other states as long as the circumstances attending the rendition of the decree remain the same. The decree has no controlling effect in another State as to the facts and conditions arising subsequent to its rendition.' *In re Cameron's Guardianship,* 66 Cal. App. 2d 884, 153 P. 2d 385; *Freund v. Burns,* 131 Conn. 380, 40 A. 2d 754; *Boone v. Boone,* 132 F. 2d 14; *Drake v. Drake,* 187 Ga. 573, 1 S.E. 2d 573; *Kniepkamp v. Richards,* 192 Ga. 509, 16 S.E. 2d 24; *Callahan v. Callahan,* 296 Ky. 444, 177 S.W. 2d 565; *Cole v. Cole,* 194 Miss. 292, 12 So. 2d 425; *Hachez v. Hachez,* 124 N.J. Eq. 442, 1 A. 2d 845; *In re Jiranek,* 267 App. Div. 607, 47 N.Y.S. 2d 625; *Miller v. Schneider* (1943 Tex. Civ. App.), 170 S.W. 2d 301; *Sheehy v. Sheehy, supra;* Nelson on Divorce and Annulment, 2nd Ed., section 33.66, page 567, *et seq.;* Anno. 72 A.L.R. 442; 116 A.L.R. 1300; 160 A.L.R. 400.

"The courts of this State will not hesitate to award the custody of a minor child to a nonresident parent if it is found that it will be for the best interest of the minor child to do so. *Griffith v. Griffith,* 240 N.C. 271, 81 S.E. 2d 918."

Following the above ruling the able writer of the opinion, Denny, J., later C.J., entered an order for the Court which is so appropriate here that it is used *verbatim* except for the change of names.

The judgment entered below is set aside and this cause remanded for further hearing to the end that it may be determined whether or not conditions and circumstances have so changed since the entry of the Florida decree that it will be for the best interest of Tonya Carol Marlowe and Edgar Earl Marlowe to be placed in the custody of the respondent. If no change of condition is found to have occurred, justifying the change of custody, the petitioner will be entitled to an order in accord with the Florida decree.

Error and remanded.

STATE v. EDWIN COOKE.

(Filed 28 September, 1966.)

1. Constitutional Law § 37—

A defendant may waive certain constitutional safeguards, including the right to trial by jury, either by express consent or by failure to assert such constitutional rights in apt time, or by conduct inconsistent with a purpose to insist upon such rights.

2. Courts § 7; Criminal Law § 143—

Where, in a prosecution in the recorder's court for wilful failure to support his illegitimate child, defendant complies with the terms of the suspended judgment by making two payments according to its terms, paying the costs of court, and by executing a compliance bond pursuant to the terms of the judgment, he will be deemed to have knowingly and intelligently waived his statutory right to appeal to the Superior Court.

APPEAL by defendant from *Cohoon, J.*, February Mixed Session 1966 of BERTIE.

Defendant was tried at the October Term 1965 of Bertie County Recorder's Court upon warrant charging the defendant with wilful failure to support his illegitimate child, in violation of G.S. 49-2. Defendant entered plea of not guilty. Upon verdict of guilty, judgment was entered imposing an active prison sentence of six months, which was suspended on the following conditions:

> "1. That he pay to the Clerk of Superior Court of Bertie County on or before Dec. 6th, 1965, the sum of $200.00, which shall be paid to Clerk of Superior Court and disbursed to Annie Laura Brown as reimbursement for medical care and hospital expenses incurred in connection with the birth of his child, Angela Brown.
>
> "2. That he pay into the office of the Clerk of Superior Court of Bertie County this day the sum of $15.00 and thereafter the sum of $15.00 per week before Tuesday of each week, until further order of court. Said sum shall be paid by the Clerk to Annie Laura Brown for the support of the child, Angela Brown.
>
> "3. That he give a justified bond in the sum of $750.00 for his appearance in court on the first Monday in Oct., 1966; and the first Monday in October each year thereafter until the further order of court to show that he has complied with the terms of that judgment."

Subsequent to imposition of sentence the defendant and his surety executed compliance bond as required by the judgment of the Recorder's Court. He paid the sum of $15.00 then due for the support

of the illegitimate child pursuant to the terms of the suspended sentence. He also paid the court costs to the Clerk of Court. Thereafter, on October 11, he made a payment of $15.00 into the office of the Clerk for support of said child. Defendant was represented by counsel at the time of his trial in Recorder's Court. On 8 October 1965 defendant gave notice of appeal to the Superior Court by mailing said notice, with request for waiver of service, to the Solicitor of the Recorder's Court of Bertie County. The Solicitor did not accept service but forwarded same to the Sheriff of Bertie County for service. On 11 October 1965 said notice of appeal was served. The Judge of Recorder's Court refused to enter order setting appearance bond for defendant to appear in Superior Court; whereupon, defendant gave notice of and filed motion in Superior Court of Bertie County praying that the court grant his appeal.

On 9 February 1966 defendant, with counsel, appeared before Judge Walter W. Cohoon, Judge of Superior Court, at the February Mixed Term of Bertie County Superior Court, when his motion was heard. Judge Cohoon entered his finding that defendant had waived his right of appeal, denied defendant's motion, and remanded the case to Recorder's Court.

Defendant appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.
Mitchell & Murphy for defendant.

BRANCH, J. "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with right of appeal." Article 1, Section 13, North Carolina Constitution.

Neither appellant nor appellee controverts the fact that right of jury trial is granted by Article I, Section 13 of the North Carolina Constitution. Nor is it controverted that the defendant filed a notice of appeal within the time allowed by statutes controlling the Recorder's Court of Bertie County.

The question squarely presented is: Did the defendant waive his right of appeal?

"In *S. v. Hartsfield,* 188 N.C., p. 360, it is said: 'It is the general rule, subject to certain exceptions, that a defendant may waive the benefit of a constitutional as well as a statutory provision. Sedgewick Stat. and Const. Law, p. 111. And this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *S. v. Mitchell,* 119 N.C. 784.' *S. v. Berry,* 190 N.C. 363.

"In *S. v. Everitt,* 164 N.C. 399, this Court said: 'Where a defendant submits or is convicted of a criminal offense and is present when the judge, in the exercise of his reasonable discretion, suspends judgment upon certain terms, and does not object thereto, he is deemed to have acquiesced therein, and may not subsequently be heard to complain thereof; and in proper instances it will be presumed that the court exercised such discretion.' *S. v. Tripp,* 168 N.C. 153; *S. v. Hardin,* 183 N.C. p. 815." *S. v. Lakey,* 191 N.C. 571, 132 S.E. 570.

In the case of *State v. Canady,* 246 N.C. 613, 99 S.E. 2d 776, our Court held that where suspended sentence is entered and defendant does not except or give notice of appeal during the term, but complies with certain of the terms of suspension, he waives his right to appeal and may not thereafter appeal, even though written notice of appeal is served within ten days from the adjournment of the term.

In the case of *State v. Hairston,* 247 N.C. 395, 100 S.E. 2d 847, our Court stated, *per curiam,* that where defendant evidences his consent to a suspended sentence by making payments in the court in accordance with the terms of the suspension, he waives his right of appeal.

In the instant case the defendant complied with the judgment of the Recorder's Court by making two payments according to the terms of the judgment entered, by paying the costs of court, and by executing a compliance bond pursuant to the terms of the judgment. He was represented by counsel.

By his actions the defendant is deemed to have knowingly and intelligently waived his statutory right of appeal to the Superior Court.

Affirmed.

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 28 September, 1966.)

1. Appeal and Error § 53—

The Supreme Court may grant a petition to rehear in order to clarify a former decision by deleting therefrom words unnecessary to the decision.

2. Utilities Commission § 6—

In reviewing application for increase in charges for switching services at numerous interchange points in this State, it is not required that the switching charges be determined separately for each switching point on the basis of the relationship between the revenue and costs at such switching points, but petitioning carriers have the burden of proving justification for the requested increase in rates and that the proposed rates are just and reasonable.

LAKE, J., did not participate in the consideration or decision of this case.

ON re-hearing.

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. Goodwyn, Assistant Attorney General for North Carolina Department of Agriculture, Appellees.

Edward B. Hipp, Attorney for North Carolina Utilities Commission; Cicero P. Yow, Attorney for City of Wilmington by Edward B. Hipp, plaintiff appellees.

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.

Bryant, Lipton, Bryant & Battle by Victor S. Bryant, Attorneys for Protestant, The American Tobacco Company.

Albert W. Kennon, Attorney for Protestant Appellee, Wm. Muirhead Construction Company, Inc.

PLESS, J. The opinion in this case was filed 25 May, 1966, and is reported in 267 N.C. 317, 148 S.E. 2d 210. In apt time defendant Railroads filed a petition to rehear. The petition was allowed solely for the purpose of clarification as set forth below.

Reference is made to these sentences in the opinion: (1) The sentence reading: "The evidence of the railroads shows that an identical increase at every switching point has to be arbitrary and discriminatory." 267 N.C. at 326; 148 S.E. 2d at 217. (2) The sentence reading: "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 cost and charges under the prevailing conditions.*" 267 N.C. at 327; 148 S.E. 2d at 217.

Upon reconsideration, we are of the opinion the sentence first quoted and the italicized portion of the sentence last quoted are unnecessary to decision and are withdrawn from the opinion.

By way of further clarification, it is noted: (1) In our view, the evidence was insufficient to require a finding by the Utilities Commission that the cost of performing switching would exceed revenue under the proposed increases in all points except one where revenue would exceed costs by a small amount; and (2) in our opinion, it is not required that switching charges be determined separately for each switching point on the basis of the relationship between the revenue and costs at such switching point.

Except as herein modified, we adhere to the decision and opinion heretofore filed herein.

LAKE, J., did not participate in the consideration or decision of this case.

L. J. STAMEY, ADMINISTRATOR OF THE ESTATE OF MARY JOHN BLACK STAMEY, DECEASED, v. SEABOARD AIRLINE RAILROAD COMPANY, JACK HERMAN TERRELL AND ERVIN LEE GRIGG.

(Filed 28 September, 1966.)

Judgments § 6—

Where the trial court, in the exercise of its discretion, enters an oral order during term and after hearing, setting aside the verdict on the ground that it was contrary to the greater weight of the evidence, the court has the power, in signing the minutes of the term some ten days thereafter and out of the county, to incorporate in the minutes his verbal order.

APPEAL by plaintiff from *Houk, J.*, at May 1966 Civil Term of LINCOLN Superior Court.

On 3 November, 1964, Mary John Black Stamey was riding as a passenger in a 1961 Chevrolet driven by Ervin Lee Grigg on rural paved road #1820 in Lincoln County. The car was struck by Seaboard Airline train No. 94 at a crossing, the defendant Jack Herman Terrell being the engineer operating the train. Mrs. Stamey was killed and her Administrator later brought suit against the Railroad and Terrell, as well as Grigg, to recover damages for her death. Upon pleadings filed the cause was tried at the January Term 1966 of Lincoln Superior Court, Hon. W. E. Anglin being the presiding Judge. The plaintiff took a voluntary nonsuit as to the defendant Grigg and used him as witness. The trial took approximately a week, and a verdict in favor of the plaintiff awarding $35,000 as damages was returned by the jury on Friday afternoon, 21 January, 1966. Upon the coming in of the verdict and after having the jury polled, the defendants moved to set the verdict aside as being against the greater weight of the evidence. The motion was fully argued before Judge Anglin, who granted the motion and ordered the verdict set aside. At that time the minutes of the term had not been typed and the order of Judge Anglin was made orally in open court and before its adjournment. Shortly afterwards the Judge adjourned the court for the term. On Wednesday, 2 February, 1966, the minutes of the term were signed by Judge Anglin who at that time was presiding at a term of court in Gaston County. The minutes contained the following entry in regard to this case: "Upon the return of the verdict, in open court, the defense counsel asked that the jury be polled. Each juror answered in the affirmative, whereupon counsel for the defendants Seaboard Air Line Railroad Company and Jack Herman Terrell moved the court to set aside the verdict and order a new trial on the grounds that the verdict was contrary to the greater weight of the evidence, and, after hearing arguments of

counsel for both plaintiff and defendants, the Court in its discretion allowed the motion and set aside the verdict upon the ground that it was against the greater weight of the evidence and ordered a new trial."

At the next (the April) term of the court in Lincoln County, at which Judge G. L. Houk presided, the plaintiff, after notice to the defendant, moved for judgment on the verdict for that no written order setting the verdict aside was signed by Judge Anglin before the adjournment of the January Term. At that hearing Judge Houk found the facts substantially as set forth above, denied the motion, and the plaintiff appealed.

There is no disagreement between the parties as to the above statement. The plaintiff contended that as a matter of law upon these facts he was entitled to judgment on the verdict.

Don M. Pendleton, Sheldon M. Roper for plaintiff appellant.
Childs & Childs, Cansler & Lockhart for defendants, appellees.

PER CURIAM. The only question presented here is whether or not the plaintiff is correct in the following statement from his brief: "It was not only the statutory duty of the Presiding Judge to make a written record of any ruling made orally by him setting aside the verdict of the jury in this case, but to see to it that such record was made during the term the case was tried and before its expiration. Such failure could not be cured by the making of a record out of the county and more than ten days after the term had expired."

We hold that this statement is incorrect, based upon many decisions of this Court, the most recent ones being: *S. v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339; *Trust Co. v. Toms,* 244 N.C. 645, 94 S.E. 2d 806, and *Goldston v. Wright,* 257 N.C. 279, 125 S.E. 2d 462. G.S. 1-207 is not in conflict with this ruling, and G.S. 7-86 is not relevant here.

The following excerpt from *S. v. Broadway,* 259 N.C. 243, 130 S.E. 2d 337, is applicable here: "It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court or to supply defects *or omissions in the record* (italics ours), and no lapse of time will debar the court of the power to discharge this duty."

Judge Anglin was authorized to set the verdict aside and no written order to that effect was required to be signed at the time, and Judge Houk's denial of judgment on the verdict was correct.

Affirmed.

STATE v. FELIX HECKSTALL.

(Filed 28 September, 1966.)

Searches and Seizures § 3—

Efficacy of a valid search warrant is not affected by the fact that service of the warrant is made on the granddaughter of the owner of the premises who was the sole person there at the time, since the warrant gives the officers authority to search the described premises irrespective of anyone's consent, and the duty of the officers to disclose their authority to the owner or the person in charge before beginning the search is solely to show that they are not trespassing.

APPEAL by defendant from *Cohoon, J.*, February, 1966 Session, BERTIE Superior Court.

The defendant, Felix Heckstall, was arraigned, pleaded not guilty, was tried and convicted of the unlawful possession of "Two one-gallon glass jugs, containing two gallons of intoxicating nontaxpaid whisky."

The evidence disclosed that the officers, pursuant to a search warrant, went to the specifically described dwelling house and premises of the defendant and read the warrant to the granddaughter who was the only member of the household present. The officer failed to find any contraband in the house. "Then we went out in the back yard and there was a wash pot sitting 16 steps from the door, turned bottom upwards. . . . There was two gallons of whisky in a burlap bag sitting on the ground . . . These are the same two jugs we found." The State offered the search warrant, the jugs and contents in evidence. The defendant objected and moved to suppress the evidence on the ground the search warrant was defective and the attempted service on the granddaughter was improper; that there was no service on him. The court, over objection, admitted the evidence and overruled the defendant's motion for a directed verdict of not guilty. From a verdict of guilty and judgment thereon, the defendant appealed.

T. W. Bruton, Attorney General, George A. Goodwyn, Assistant Attorney General for the State.

Jones, Jones & Jones; Pritchett, Cooke & Burch by Stephen R. Burch for defendant appellant.

PER CURIAM. The search warrant was based on a proper affidavit of the officer who stated that he had information from three previously reliable sources that on that day Felix Heckstall had whisky in his house and had sold whisky to numerous persons on Friday and Saturday nights; that affiant has "personally seen crowds

accumulating, and numerous vehicles going to and from Felix Heckstall's house on Friday and Saturday nights."

The warrant gave the officers authority to search the described premises. Hence the right to make a reasonable search did not depend on anyone's consent. It was the duty of the officers to disclose their authority to the owner, or to the person in charge, before beginning the search in order that they might escape treatment as trespassers. The officers fulfilled the requirement when they read the warrant to the only member of the household present — the owner's granddaughter.

The evidence discovered as the result of the search was properly admitted. It was sufficient to warrant the verdict and the judgment. The defendant's assignments of error are not sustained.

No error.

STATE v. LLOYD WAYNE SHULL.

(Filed 28 September, 1966.)

Rape § 18—

The State's evidence in this case held sufficient to support the verdict of guilt of assault with intent to commit rape.

APPEAL by defendant from *Anglin, J.*, 28 March 1966 Regular Session of GASTON Superior Court.

Criminal prosecution on indictment charging the defendant with the felony of rape of a female person, Maria Hambright, and drawn in the language of G.S. 14-21. The solicitor placed defendant on trial for assault with intent to commit rape, or assault on a female, as the evidence might warrant. Defendant pleaded not guilty. From a verdict of guilty of assault with intent to commit rape, defendant appealed.

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

Lewis Bulwinkle for defendant appellant.

PER CURIAM. The sole question presented by this appeal is: Did the court err in refusing to grant defendant's motions for judgment as of nonsuit at the conclusion of the State's evidence and at the conclusion of all evidence?

The State's evidence tends to show the following facts: On 22 February 1966, at about 8:30 P.M., defendant, pretending he was going to take prosecutrix to a mill to inquire about employment, induced her to ride with him. Instead, he parked his car, announced his intentions, and put his hands under her clothing. Prosecutrix broke away and ran in the yard of a house. Defendant followed and promised to take her home. However, he once more stopped the car and advanced on her. She again managed to get out of the car. Defendant pursued and caught her, threw her on a ditch bank, and pulled off part of her clothes. He then pushed her in the back seat of the car, held her down so she could not breathe, and finally accomplished his purpose.

In a criminal case, "On motion for nonsuit, it is a question of law for the court to determine, in the first instance, whether the evidence adduced, when considered in its light most favorable to the State, is of sufficient probative force to justify the jury in drawing the affirmative inference of guilt." *State v. Needham,* 235 N.C. 555, 71 S.E. 2d 29.

"To convict a defendant on the charge of an assault with intent to commit rape the State must prove not only an assault but that 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. . . . It is not necessary to complete the offense that the defendant retain the intent throughout the assault, but if he, at any time during the assault, have an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. . . . Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, *i. e.,* by facts and circumstances from which it may be inferred." *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649, and cases cited.

Defendant's motions for judgment as of nonsuit were properly overruled.

Affirmed.

HAZEL JONES BOONE, INDIVIDUALLY; HAZEL JONES BOONE, NEXT FRIEND OF HAZEL JONES, JIM A. JONES, HELEN D. JONES, MINORS; ARTHUR JONES, ELOISE JONES PUGH, LIZZIE HOCKER, ETHEL JONES ARTIS, EDDIE WALTON, JUDY W. CARTER, FLOSSIE W. PARKER, EULAH W. PHILLIPS, MAGGIE W. PARKER AND PEARLIE JONES WATSON, V. J. A. PRITCHETT, COMMISSIONER; B. U. GRIFFIN, AND CHARLES GRIFFIN, SONS AND HEIRS AT LAW OF C. B. GRIFFIN AND L. H. GRIFFIN.

(Filed 28 September, 1966.)

Ejectment § 7—

Demurrer is properly entered in an action in ejectment to a complaint setting forth the plaintiff's claim under a deed void on its face for indefiniteness of description, and the insufficiency of the description cannot be aided by allegations that defendants were in possession under a deed containing sufficient description of the land.

APPEAL by plaintiffs from *Cohoon, J.*, May 1966 Session of BERTIE.

Action to quiet title and to recover land together with its rents and profits.

This particular action was instituted on June 25, 1963. Thereafter plaintiffs filed an amended complaint in which, in brief summary, they allege:

On November 11, 1878, H. Griffin conveyed to Dempsey Walton the following described real estate:

> "(A) certain tract or parcel of land known as a portion of the Smith Tract. Beginning at a Gum on Green Branch thence up Green Branch to a Gum, thence South to a Red Oak on the River Road thence along said Road to the bend thence down said road to the beginning, containing fifty six acres more or less."

Plaintiffs, as the heirs of Dempsey Walton, are the owners of this land. Dempsey Walton died in 1902; his wife, Judy Walton, died in 1933. Thereafter C. B. Griffin qualified as the administrator of Judy Walton and instituted a special proceeding in which, for the purpose of securing the property for himself, he falsely alleged that it was necessary to sell the Dempsey Walton land to make assets to pay the debts of Judy Walton. Pursuant to an order entered in this special proceeding, defendant J. A. Pritchett, acting as commissioner, sold the lands to L. H. Griffin, wife of C. B. Griffin, by deed dated July 29, 1937, which described the property as follows:

> "That certain tract of land in Woodville Township, Bertie County, North Carolina, adjoining the lands of J. O. Earley, William C. Thompson and others, containing 30 acres more or less and known as the 'Julia Walton's home place.' "

Since July 29, 1937, L. H. Griffin and her sons, defendants B. U. Griffin and Charles Griffin, have "claimed and used the property of the heirs of Dempsey Walton and have been receiving the rents and profits from said land."

Defendants moved to strike certain allegations in the amended complaint and demurred on the ground that the complaint failed to state a cause of action. From the court's order allowing the motion to strike in part, sustaining the demurrer, and dismissing the action, plaintiffs appeal.

Conrad O. Pearson and William G. Pearson, II, for plaintiff appellants.

John R. Jenkins, Jr., and Pritchett, Cooke and Burch for defendant appellees.

PER CURIAM. This action is in substance one in ejectment. The same controversy was before us at the Spring Term 1963 when plaintiffs appealed from a judgment sustaining a similar demurrer to a substantially identical complaint. We held then that the 1878 deed from Griffin to Walton was void for vagueness and uncertainty of description and that plaintiffs could base no claim upon it. The judgment sustaining the demurrer was affirmed with permission to plaintiffs to amend. *Boone v. Pritchett,* 259 N.C. 226, 130 S.E. 2d 288. Instead of amending, plaintiffs instituted a new action upon the same, albeit proliferated, allegations.

Plaintiffs, having based their claim to the lands upon a deed which we have declared to be void upon its face, then allege that for more than 25 years defendants have been in possession of the land under a deed containing a description which furnishes means of identifying the land. *Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29. The complaint establishes that plaintiffs have no title or right to the land they seek to recover. The demurrer was properly sustained. *Anderson v. Atkinson,* 234 N.C. 271, 66 S.E. 2d 886; *Carson v. Jenkins,* 206 N.C. 475, 174 S.E. 271; *Leatherwood v. Fulbright,* 109 N.C. 683, 14 S.E. 299.

No error.

MARCUS LEROY COLEMAN v. SAMUEL H. BURRIS AND SAM HATTEN.

(Filed 28 September, 1966.)

APPEAL by plaintiff from *Anglin, J.*, 14 February 1966 Civil Session of GASTON.

Civil action to recover damages for personal injuries and for damage to an automobile allegedly caused by the actionable negligence of defendants.

Defendants filed a joint answer in which they aver that they were not negligent, and as a further defense conditionally plead contributory negligence by plaintiff as a bar to any recovery by him.

The plaintiff offered evidence. At the conclusion of the plaintiff's evidence, plaintiff in open court took a judgment of voluntary nonsuit as to the defendant Samuel L. Burris. The defendant Hatten offered no evidence. The jury found as its verdict that the plaintiff was injured and his property damaged by the negligence of defendant Hatten as alleged in the complaint, and that the plaintiff by his own negligence contributed to his injury and damage as alleged in the answer.

From a judgment that plaintiff have and recover nothing from the defendant Hatten, plaintiff appeals to the Supreme Court.

Frank P. Cooke and Childers and Fowler by Henry L. Fowler, Jr., for plaintiff appellant.

Hollowell & Stott by L. B. Hollowell, Jr., for defendant appellees.

PER CURIAM. This case was first tried at the May 1965 Civil Session of Gaston, and at the close of plaintiff's evidence the court, on motion of defendants, entered a judgment of compulsory nonsuit. On appeal we reversed the judgment of compulsory nonsuit, 265 N.C. 404, 144 S.E. 2d 241. Reference is hereby made to that decision for a detailed statement of plaintiff's evidence.

The jury, under application of well-settled principles of law, found by its verdict that plaintiff was injured and his automobile damaged by the negligence of defendant Hatten as alleged in the complaint, and that the plaintiff by his own negligence contributed to his injury and damage as alleged in the answer. A careful examination of plaintiff's assignments of error discloses no new question or feature requiring extended discussion. Neither reversible nor prejudicial error has been made to appear. All plaintiff's assignments of error are overruled, and the verdict and judgment will be upheld.

No error.

STATE v. GALE FREEMAN MORGAN.

(Filed 12 October, 1966.)

1. Criminal Law § 101—

The trial court is under duty to submit the question of guilt to the jury if there is material evidence of each essential element of the offense charged and that defendant was the perpetrator of the offense; this rule applies whether the evidence is circumstantial, direct, or a combination of both, it being for the jury and not the court in passing upon circumstantial evidence to determine if it excludes every reasonable hypothesis of innocence.

2. Larceny § 7; Burglary and Unlawful Breakings § 4— Circumstantial evidence of defendant's guilt of breaking and entering and larceny held sufficient.

The State's evidence tended to show that a store had been broken into and a clock, flashlight and certain other merchandise taken therefrom. The circumstantial evidence tended to show that defendant had possession of his brother's automobile at the time in question, that the automobile was found with its front wheels in the ditch at the back of the store, that defendant's shoes fitted the tracks plainly visible in the heavy frost at the scene, that the tracks were peculiar in that the right toe turned up, that a crowbar, tire tool, a big screwdriver, a clock and some razor blades were found under a piece of tin roofing at the back of the store, that the crowbar fitted the peculiar indentations where the store door had been broken, that a piece of metal found in another door of the store which had been "jimmied" open fitted the broken place on the screwdriver, together with testimony of witnesses tending to show that defendant had been transported from a place near the store to where defendant had been picked up by officers, that a flashlight of like make with the one from the store was found in defendant's possession, etc. *Held:* The evidence was sufficient to overrule defendant's motion for nonsuit on charges of breaking and entering and larceny.

3. Burglary and Unlawful Breakings § 9—

In a prosecution under G.S. 14-55, the State has the burden of showing defendant's possession without lawful excuse of the items enumerated in the statute or items coming within the generic term "implements of housebreaking," and while gloves, flashlight, socks, a tire tool and small screwdriver are not implements of housebreaking within the intent of the statute, a crowbar and big screwdriver are such implements.

4. Same—

The State's evidence tending to show that defendant had in his possession a big screwdriver and crowbar and that defendant had actually used the big screwdriver and crowbar to break and enter a store building, is sufficient to be submitted to the jury on the question of defendant's guilt of possession of implements of housebreaking without lawful excuse.

5. Criminal Law § 121—

A motion in arrest of judgment must be based on matters appearing on the face of the record proper or on matters which should but do not so appear, and cannot be based on the evidence, which is not a part of the record proper.

6. Burglary and Unlawful Breakings § 9—

An indictment under G.S. 14-55 is not fatally defective because of its failure to enumerate any of the articles specified in the statute as implements of housebreaking when it does specify implements coming within the generic term of "implements of housebreaking."

7. Larceny § 3—

An indictment charging defendant with larceny of goods of a value of $18.00, and failing to charge that the larceny was from a building by breaking and entering or any other means of such nature as to make the offense a felony, charges only a misdemeanor.

8. Criminal Law § 164—

Where defendant is tried under an indictment charging several offenses and the cases are consolidated for the purpose of judgment and but one sentence is pronounced upon verdict of guilty of each offense, any error relating solely to the misdemeanor charged cannot entitle defendant to a new trial when the sentence is within the maximum provided for the felony offenses in regard to which no error was committed in the trial.

APPEAL by defendant from *Bundy, J.,* August 1966 Criminal Session of NASH.

Criminal prosecution upon two indictments which were consolidated for trial. The first indictment charges defendant on 20 February 1965 with unlawfully and feloniously having in his posession, without lawful excuse, implements of housebreaking, to wit, one crowbar, three screwdrivers, one tire tool, gloves, flashlights, and socks. The second indictment, in the first count, charges that the defendant on 20 February 1965, with intent to commit larceny, did feloniously break and enter a storehouse and shop occupied by W. E. Griffin, where merchandise and money of W. E. Griffin were stored; and the second count charges defendant on the same date with the larceny of one Westclock clock, one carton razor blades, one flashlight, and two batteries, all of the value of $18, of the goods, chattels, and moneys of W. E. Griffin.

The defendant, who is an indigent, was represented by court-appointed counsel, Frederick E. Turnage.

Plea: Not guilty. Verdict: Guilty as charged in both indictments.

The two cases were consolidated for the purpose of judgment, and one judgment of imprisonment was imposed. So far as the record before us discloses, defendant did not appeal in open court. On 30 August 1965 defendant wrote a letter from the State prison in Raleigh to the clerk of the Superior Court of Nash County stating that he was in the process of filing notice of appeal to the Supreme Court, and that he was sending along with a copy of his letter a letter to his attorney, Mr. Turnage, asking that he execute the

official notice of appeal. On 3 September 1965 Turnage wrote a letter to the solicitor of the district giving notice of defendant's appeal to the Supreme Court. The solicitor accepted service of the notice of appeal on 6 September 1965. On 1 December 1965 defendant's counsel, Frederick E. Turnage, for good cause shown, was permitted by order of Judge Hubert E. May, presiding over the Superior Court of Nash County, to withdraw as counsel for defendant, and in the same order Judge May appointed R. G. Shannonhouse as counsel for defendant to perfect his appeal and to appear for him in the Supreme Court. On 2 May 1966 R. G. Shannonhouse filed in the Supreme Court a petition for a writ of *certiorari* to bring defendant's case up for review alleging in substance that the delay in perfecting the appeal was due to the fact that he was not appointed as counsel for defendant until 1 December 1965, and his inability to secure a transcript of the evidence and the charge in the case due to prior commitments by the court reporter. The Attorney General filed an answer to the petition for a writ of *certiorari* requesting this Court to grant a writ of *certiorari* and allow the record in this case to come up for review. This Court in conference on 10 May 1966 allowed the petition for writ of *certiorari* and ordered that the appeal be heard at the Fall Term 1966 in its regular order.

Attorney General T. W. Bruton, Deputy Attorney General Harry W. McGalliard, and Assistant Attorney General Millard R. Rich, Jr., for the State.

R. G. Shannonhouse for defendant appellant.

PARKER, C.J. The State offered evidence; defendant offered no evidence. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit as to both cases made at the close of the State's evidence.

The State's evidence, considered in the light most favorable to it, shows the following facts: In February 1965 W. E. Griffin operated and owned a general merchandise business in a building belonging to Mrs. N. E. Bass in Red Oak, Nash County. About 5:30 a.m. on 20 February 1965 Griffin went to his store, and found that its two front doors had been broken open since he left there the night before. He found in his store three boxes, two of which were "about 2-bushel size," filled with his merchandise. He found some Dutch Master cigars on the floor where one would stand to operate his cash register, which were not his, and had not been there the night before.

Deputy Sheriff Fred Wood, in response to a telephone call from

Griffin, arrived at Griffin's store shortly after 5:30 a.m. The store building had two front doors, a side door, and a 12-foot slide door at the rear. The corner front door had been "jimmied" with a heavy crowbar or screwdriver, and was demolished. The other front door had been "jimmied," and was knocked completely open. The big back door was open. The merchandise in the store had been "tangled right bad." In the front of the store Wood saw three cardboard boxes filled with wearing apparel, underwear, socks, shirts, caps, and dry goods. About 55 steps from the back of the store, past a gin house, Wood saw a 1953 Ford automobile with its front in a ditch beside the driveway. One set of automobile tracks was visible from the back of Griffin's store to where the front part of the automobile was in the ditch. There was a heavy frost that morning, and the automobile tracks were as visible as if there had been a snow. The automobile was registered in the name of defendant's brother. Later in the day Wood heard defendant tell his brother in the sheriff's office that he ran the automobile in the ditch and not to pay the bill for towing the automobile in, as it was not bothering anybody.

Elijah Hines carried a white man from Hilliard's store, which is about three-quarters of a mile from Griffin's store, to Rocky Mount between 7 and 8 a.m. on 20 February 1965. This man said he had run his automobile in a ditch down the road "a little ways." On the way to Rocky Mount this man gave Hines a drink of whisky and some Dutch Master cigars. He put this man off at the corner of Church Street and Falls Road.

Between 8:30 and 9:00 a.m. on 20 February 1965 Ernest Lee Jones, a taxicab driver, picked up defendant at the corner of Church and Falls Road in Rocky Mount. He said he wanted to go to the bus station, and then said he wanted to go to Wilson. Defendant told him he had run his automobile in a ditch, and had hurt his knee. In transit to Wilson he was stopped by police officers from Rocky Mount. The officers searched defendant, and found a flashlight on him. Defendant was carried to the sheriff's office in Nashville.

A fingerprint was lifted from the flashlight taken from defendant's person, and in the opinion of Stephen R. Jones of the State Bureau of Investigation, who was held upon competent evidence by the court to be an expert in fingerprint classification and identification, it was the fingerprint of W. E. Griffin. Griffin had in his store flashlights exactly like the flashlight taken from defendant's person. One of these flashlights was missing on the morning of 20 February 1965. Defendant said he had never been in Griffin's store.

Shoe tracks at the front door of Griffin's store and at the back door of the store and where the 1953 Ford automobile was in the

ditch in front of the cotton gin, and shoe tracks from the 1953 Ford automobile leading to the piece of tin roofing on the ground under which a crowbar, a tire tool, a big screwdriver, a clock, and some razor blades were found, were identical. The tracks were easy to follow because the track of the left shoe showed all the way, and the right track did not show a shoe toe, but only the heel and the ball of the foot. Defendant's shoes were placed in the shoe tracks at the front of the store and around the automobile that had run into the ditch, and they were identical. The toe of defendant's right shoe turned up. Defendant is clubfooted. Under the piece of tin roofing were found a crowbar, a tire tool, a big screwdriver, a clock, and some razor blades. The crowbar had some gaps in it which showed up very plain in the wood in the facing of a front door of Griffin's store where it was prized open. The screwdriver had several places on it identical with places at the left front door of the store. A little piece of the screwdriver was broken off, and a little piece of iron was found at the front door which fitted perfectly the place on the screwdriver where a piece was broken off. The tire tool had paint on it, and paint of a similar color was on a door of the store.

Griffin identified the clock found under the tin roofing as his property. He had had it in his store four or five years. The razor blades found under the tin roofing he could not identify as his, though he had similar razor blades in his store the night it was broken into.

The car in the ditch behind the store was searched and in it were found a putty knife, two screwdrivers, two flashlights, a pair of gloves, a map, an extra pair of license plates, clothes, socks, and other things.

Sheriff Womble in his office warned defendant of his constitutional rights. Defendant replied, "Sheriff, I know my rights." Womble testified that defendant told him "he was going to plead not guilty and sit back and wait for the Court to make a mistake and cash in on it." Deputy Sheriff Fred L. Wood talked to defendant in the sheriff's office. Wood testified that defendant told him that "all he wanted was a good lawyer, twelve good men, and a judge," and he said, "And I'll beat the hell out of you." He further said to Wood, "You don't expect me to tell you something and pick up four or five more years for it, do you?" Wood replied, "I sure don't." Defendant then said, "I'd be a damn fool to tell you something and pick up four or five years for it."

The rule in respect to the sufficiency of circumstantial evidence to carry the case to the jury is lucidly stated in an opinion by Higgins, J., in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, as follows:

"We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict."

The above has been quoted with approval in whole or in part in many of our decisions. *S. v. Roux,* 266 N.C. 555, 563, 146 S.E. 2d 654, 660.

Considering the State's evidence in the light most favorable to it, and giving it the benefit of every reasonable and legitimate inference to be drawn therefrom, it is plain that the total combination of facts shows substantial evidence of all essential elements of the offenses charged in the first count in the second indictment and in the second count in the second indictment as to the larceny of the clock and one flashlight, and is amply sufficient to carry the case charged in the second indictment on both counts to the jury. The trial judge properly overruled defendant's motion for judgment of compulsory nonsuit on the case alleged in the second indictment.

The first indictment charges defendant with "unlawfully and feloniously having in his possession, without lawful excuse, implements of housebreaking, to wit, one crowbar, three screwdrivers, one tire tool, gloves, flashlights, and socks." G.S. 14-55, under which the indictment is drawn, provides in relevant part: "If any person . . .; shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking; . . . such person shall be guilty of a felony. . . ." G.S. 14-55 defines three separate offenses, and the part of the statute we have

quoted is a separate offense. *S. v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315.

There is no evidence that on this occasion defendant was in possession of any pick-lock, key, or bit. If the tools enumerated in the indictment are embraced within the general term "other implement of housebreaking," their possession, if they were in defendant's possession, without lawful excuse, is prohibited by G.S. 14-55.

In *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456, there is a most interesting account of the historical background leading up to the enactment by the General Assembly of the statute now codified as G.S. 14-55.

Obviously, gloves, flashlights, and socks are not breaking tools. Burglars may commonly carry them on their burglarious expeditions to furnish light and to avoid leaving fingerprints while they are breaking into buildings, but they do not use them for breaking. A crowbar is clearly a breaking tool. *S. v. Hefflin,* 338 Mo. 236, 89 S.W. 2d 938, 103 A.L.R. 1301, 1308-09. See *S. v. Boyd, supra.* A crowbar is also an ordinary tool used by carpenters and mechanics. *S. v. McCall,* 245 N.C. 146, 95 S.E. 2d 564. We also take judicial notice of the fact that screwdrivers are ordinary tools used by many people for lawful purposes. In *S. v. Garrett, supra,* we expressed some doubt as to whether a tire tool under the *ejusdem generis* rule is of the same classification as a pick-lock, key, or bit, and hence condemned by G.S. 14-55. In that opinion it is said: "A tire tool is a part of the repair kit which the manufacturer delivers with each motor vehicle designed to run on pneumatic tires. Not only is there lawful excuse for its possession, but there is little or no excuse for a motorist to be on the road without one."

In a prosecution under the provisions of G.S. 14-55 quoted above, the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute, and (2) that such possession was without lawful excuse. *S. v. Boyd, supra.*

The jury could find from the State's evidence that on 20 February 1965 the two front doors of Griffin's store were feloniously broken open and entered by defendant, with intent to commit larceny of the merchandise therein, by means of a crowbar and a big screwdriver in his possession at the time; that several hours later defendant, when apprehended by police in Rocky Mount or near it, had on his person a flashlight which he stole and carried from the store bearing the fingerprints of Griffin; and that he had in the store merchandise from Griffin's store which he had packed in three boxes,

which he was unable to carry away due to the fact that defendant had driven his brother's automobile into a ditch and could not get it out. The jury could further find that when defendant realized he could not get his brother's automobile out of the ditch he hid the crowbar, a tire tool, a big screwdriver, a clock, and some razor blades under the piece of tin roofing on the ground in the hope that they would not be found, but which were found by Sheriff Womble in tracing defendant's shoe tracks from the automobile in the ditch to the piece of tin roofing. Bobbitt, J., said for the Court in *S. v. Allison,* 265 N.C. 512, 144 S.E. 2d 578: "If and when it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny *and* of the breaking and entering." It is our opinion that the two small screwdrivers, the tire tool, the gloves, the flashlights, and the socks in defendant's possession at the time Griffin's store was broken into and entered by defendant were not other implements of housebreaking within the intent and meaning of G.S. 14-55. However, it is our opinion, and we so hold, that the State's evidence does show a total combination of facts and circumstances from which a jury could infer that at the time and place in question defendant possessed the crowbar and the big screwdriver, singly and in combination, as implements for housebreaking, with intent to use said crowbar and big screwdriver for the purpose of feloniously breaking into and entering Griffin's store with intent to commit larceny of the merchandise therein; and did *actually* use the crowbar and the big screwdriver feloniously to break into and enter the front doors of Griffin's store, and did actually take, steal and carry away from said store one clock and one flashlight, which flashlight was taken from defendant's person a few hours after the store was broken into and entered and on which appeared the fingerprint of Griffin; and that he was unable to carry away Griffin's merchandise which he had packed in three boxes because the automobile he was driving had been driven into a ditch and he could not get it out; and that under such circumstances the possession of the crowbar and the big screwdriver was without lawful excuse, and said crowbar and big screwdriver were other implements of housebreaking within the intent and meaning of G.S. 14-55. See *S. v. McCall, supra,* p. 151 in our Reports, and p. 568 in the Southeastern Reporter, *supra; S. v. Boyd, supra,* p. 85 in our Reports, and p. 459 in the Southeastern Reporter, *supra; S. v. Hefflin, supra;* Anno.: 103 A.L.R. 1316-25; 2 Wharton's Criminal Law and Procedure by Anderson, 1957, Burglary, § 437. The court properly overruled de-

fendant's motion for a judgment of compulsory nonsuit on the case set forth in the first indictment.

Defendant assigns as error the denial of his motion in arrest of judgment "as to each count." In his brief he contends the first indictment only is fatally defective; he makes no contention that the second indictment is defective. His contention in substance is the first indictment does not charge the defendant with the possession of any of the articles specified in the relevant part of G.S. 14-55, under which this indictment is drawn, and that the articles specified in the first indictment are not other implements of housebreaking within the intent and meaning of G.S. 14-55.

In *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311, Ervin, J., said for the Court: "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. . . . The evidence in a case is no part of the record proper. . . . In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment."

We have held above that the crowbar and the big screwdriver specified in the indictment under the particular circumstances of this case are implements of housebreaking within the intent and meaning of the relevant part of G.S. 14-55 quoted above. Therefore, this assignment of error is overruled.

We have carefully considered defendant's assignments of error to the charge. The second count in the second indictment charges the larceny of property of the value of $18, and does not charge that the larceny was from a building by breaking and entering, or by any other means of such nature as to make the larceny a felony. Consequently, the larceny charged in the second count in the indictment is a misdemeanor. *S. v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36. No separate sentence based on defendant's conviction of larceny as charged was pronounced. Even if we concede that there was error in the charge on the doctrine of recent possession of stolen property as the trial court applied it to the larceny count in the second indictment, the error relating solely to the larceny count is considered immaterial, because the two cases were consolidated for the purpose of judgment, and the court sentenced defendant to confinement in the State's prison for a term of seven years. The conviction of defendant on the first indictment charging him with the possession of implements of housebreaking or the conviction on the first count in the second indictment charging defendant with a felonious breaking into and entering a store with intent to commit larceny supports the judgment. *S. v. Smith,* 266 N.C. 747, 147 S.E. 2d 165; *S. v. Hoover,*

252 N.C. 133, 113 S.E. 2d 281; *S. v. Smith*, 226 N.C. 738, 40 S.E. 2d 363. All defendant's assignments of error are overruled.

No error.

TROY MARSHALL (ADMINISTRATOR OF VETERANS AFFAIRS, INTERVENOR), V. REBERT'S POULTRY RANCH & EGG SALES, NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 12 October, 1966.)

Master and Servant § 76—

The Administrator of Veterans Affairs may recover from the employer and its insurance carrier the cost of treatment in a Veterans Hospital for compensable injuries received by an indigent ex-serviceman in the course of his employment.

APPEAL by defendants from *Fountain, J.*, March 7, 1966 Session, DUPLIN Superior Court.

This proceeding originated as a claim filed by Troy Marshall before the North Carolina Industrial Commission for compensation and medical expenses growing out of an industrial accident. All jurisdictional facts were stipulated. The claimant was employed by Rebert's Poultry Ranch & Egg Sales as a day laborer. Nationwide Mutual Insurance Company was the insurer.

On the morning of February 26, 1962, the claimant suffered an injury by accident while on the job. The injury required immediate medical attention. (The findings and evidence fail to show the employer had any facilities for treating the injury.) Marshall went to his family physician who sent him immediately to the Veterans Hospital at Fayetteville. The employer's foreman was informed of such injury on the day it occurred.

The employee was an honorably discharged Veteran, having served in the Armed Forces from October, 1941 to December, 1945. The physician who referred claimant to the Veterans facility stated the only property he owns is his clothing, "which could all be put in one suitcase."

After Marshall was released from the Veterans Hospital, he received further treatment for the injury. The employer paid for that treatment. The Administrator of Veterans Affairs filed a claim for $672.00 for treatment at the Fayetteville Hospital. It is admitted that the charge is reasonable and that Marshall, on account of indigency, is not liable to the facility for the payment of this bill. The

Industrial Commission approved the bill and ordered it paid by the employer.

On appeal, Judge Fountain affirmed the order of the Industrial Commission. The defendants excepted and appealed.

Robert L. Scott for defendant appellants.

The Veterans Facility did not file a brief and was not permitted to participate in the oral argument. However, the United States Attorney filed a motion to dismiss the appeal.

HIGGINS, J. The defendants admit responsibility for the claimant's injury. They deny, however, liability to the Administrator of Veterans Affairs for the cost of treatment. The sole question presented by the appeal is whether the Administrator is entitled to require the employer and its insurance carrier to pay the bill for treating the indigent veteran's injuries resulting from his accident. The Veteran, being unable to pay for treatment, was entitled to such treatment at a Veterans Hospital free of charge. The claimant was admitted to the hospital upon a proper application.

By Congressional authorization, 38 U.S.C., § 610(a)(1), the Administrator of Veterans Affairs may provide medical care for eligible veterans who are unable to pay for such care. Section 621 authorizes the Administrator to prescribe rules and regulations governing the furnishing of hospital care. Under this authority the Administrator has provided that veterans will *not be* treated free of charge where there is liability: (1) against a third party; (2) against an employer under workmen's compensation; or (3) against an insurer. Veterans Regulation 6047(D), 6048(F)(1), 38 Code of Federal Regulations §§ 17.47 and 17.48(f).

The treatment which the Veterans facility furnished in this case was for a compensable injury — not for a service-connected or any other disability. The treatment began on the day of the injury, which arose out of and in the course of his employment. The bill was duly approved by the medical officer and by the Industrial Commission which ordered it paid to the Administrator of Veterans Affairs who had intervened.

This Court has never passed on the right of the Administrator of Veterans Affairs to require an employer to pay for the medical treatment furnished an indigent veteran for injury resulting from an industrial accident. Other courts, however, have passed on the question and have allowed the Administrator of Veterans Affairs to recover from the employer a reasonable charge for the treatment of an indigent veteran who was the victim of a compensable accident. In such case the Industrial Commission has jurisdiction to allow the

claim and to order it paid as a part of the employer's liability. *Stafford v. Pabco Products, Inc., and United States of America, Intervenor,* 53 N.J.S. 300, 147 A. 2d 286 (1958); *Donald E. Brauer, Veterans Administration, et al v. J. C. White Concrete Co., Employers Mutual Casualty Co., et al,* 253 Ia. 1304, 115 N.W. 2d 202 (1962); *Higley v. Schlessman,* 292 P. 2d 411 (Okla.).

We conclude that the Congress intended to provide free hospital treatment for indigent ex-servicemen who were in need of, but were unable to pay for, hospital treatment. This provision was made in consideration of the Veteran's previous service to his country. It does not, and was not intended to, relieve an employer of his statutory duty to provide medical treatment for his injured employees. In this case the North Carolina Industrial Commission approved the claim and ordered it paid. On appeal, Judge Fountain overruled all exceptions and entered judgment affirming the award. The judgment is

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT D. TURNER, CASE No. 8217

AND

STATE OF NORTH CAROLINA v. ROBERT D. TURNER, CASE No. 8218.

(Filed 12 October, 1966.)

1. Kidnapping § 2—

An indictment charging that defendant "unlawfully, wilfully, feloniously and forcibly did kidnap" a named female person is sufficient, since the word "kidnap" has a definite legal meaning.

2. Indictment and Warrant § 4—

While an indictment will be quashed when the only witness examined by the grand jury is disqualified, as a matter of law, from giving any testimony against the defendant with reference to the matter under investigation, if the sole witness before the grand jury is a competent witness the indictment returned by the grand jury will not be quashed upon a showing that such witness gave testimony which would not be competent at the trial, even though such witness testifies at the trial that his testimony at the trial is based entirely upon what the alleged victim said and did in his presence.

3. Criminal Law § 87—

The consolidation of indictments, charging defendant with rape and kidnapping, based upon a single occurrence, rests within the discretionary power of the trial court. G.S. 15-152.

4. Witnesses § 1—

Whether a child is competent as a witness depends upon the capacity of the child to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters in issue, and is to be determined by the court in its sound discretion in the light of the court's examination and observation of the particular child upon the *voir dire*.

5. Same—

The holding of the trial court that a nine-year old child was competent as a witness, based upon the court's examination of the child upon the *voir dire* with reference to the child's intelligence, understanding and religious beliefs concerning the telling of falsehoods, is upheld.

6. Criminal Law § 160—

The test whether technical error is prejudicial is to be determined upon the basis of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises, and a new trial will not be granted for mere technical error which could not have possibly affected the result.

7. Criminal Law §§ 108, 161—

Defendant was charged with rape of an eight-year old child. The testimony of the child and the child's mother at the trial that at the time of the occurrence she was eight years of age was uncontradicted, and defendant objected to the child's testimony on the ground that she was too young to be a competent witness. *Held:* A statement of the court as to the law applicable to an attack upon a child under the age of 12 years "as is true here" cannot have been prejudicial.

APPEAL by defendant from *Houk, J.*, at the 31 January 1966 Criminal Session of GASTON.

These are two cases consolidated for trial, over the objection of the defendant. In the first, the indictment, which is conceded to be proper in form, charges that the defendant on 15 August 1965 raped a female person named therein and described in the indictment as "a female, eight years of age." The second indictment charges that on the same day the defendant "unlawfully, wilfully, feloniously, and forcibly did kidnap" the same child. The defendant entered a plea of not guilty to each indictment.

The jury returned a verdict of guilty of rape, with the recommendation of life imprisonment, and a verdict of guilty of kidnapping. Upon the first charge, the defendant was sentenced to confinement in the State's Prison for the term of his natural life. Upon the second charge, he was sentenced to confinement in the State's Prison for a term of not less than 10 nor more than 15 years, this sentence to run concurrently with the sentence of life imprisonment. He has appealed to this Court in both cases.

The child, alleged to have been the victim of the kidnapping and rape, testified for the State, over the objection of the defendant. The objection, as is disclosed both in the record and in the defendant's brief, was that due to her age she was not a competent witness. She was examined in the absence of the jury and the court found her to be a competent witness. She thereupon testified that at the time of the trial she was nine years of age. Her mother, also a witness for the State, testified that at the time of the occurrences in question the child was eight years of age, her ninth birthday having occurred between these events and the trial. There was no contrary testimony as to the age of the little girl.

The child testified that as she was walking from her home to Sunday School on 15 August 1965, the defendant, whom she identified positively in the courtroom, stopped the motorcycle on which he was riding and asked her if she wanted to ride. She refused and he picked her up by the arm pits, placed her on the back of the motorcycle and rode off with her, refused to stop and let her off as they passed the church, thereafter turned off of the road and proceeded to a trash dump in an uninhabited wooded area, where he stopped the motorcycle, took her off and, holding her by the hand, told her to "shut up" when she "hollered" and threatened to "take his belt off" to her. She thereupon testified to acts of the defendant, which it would serve no useful purpose to recount, but which testimony, if true, was amply sufficient to support a verdict of guilty of rape. She testified that the defendant held his hand over her mouth and slapped her as she screamed. She testified that upon the completion of such acts, the defendant left her there and rode away on his motorcycle, she finding her way back to the road and thence to her home. Her mother testified that upon her arrival there, approximately one hour after she left to go to her Sunday School, the child was hysterical and out of breath, and that her underclothing was stained with blood, which was not the case when she left her home on her way to the church.

The State introduced testimony of adult witnesses tending to corroborate the child's testimony with reference to her being picked up forcibly and against her will, placed upon the motorcycle and carried away. The State also offered medical testimony tending to corroborate the remainder of her account of her experiences.

The defendant testified in his own behalf and introduced testimony of other witnesses, his defense being an alibi. His testimony was to the effect that at the time of the alleged offenses he was in Gaffney, South Carolina, some 30 miles distant from the scene where these events are alleged to have occurred, and that he was

in Gaffney, or its immediate vicinity, throughout the entire day of 15 August 1965.

Two adult witnesses for the State testified that they knew the defendant and saw him at their home, approximately a quarter of a mile from the scene of the alleged kidnapping, between 8:30 a.m. and 9 a.m. on Sunday, 15 August 1965, this being only a few minutes before the alleged kidnapping occurred. They testified that he left their home riding a motorcycle, which was present in the courtroom, and identified by these witnesses. It was also identified by the child as the vehicle on which she was carried away. The defendant, in his testimony, stated that this motorcycle was in his possession on 15 August 1965.

Prior to entering his plea to either of them, the defendant moved to quash both indictments upon the grounds that they were not sufficient in form to allege the offenses which they sought to allege; and that the only witness who testified before the grand jury was Captain Auten of the Gaston Rural Police, who, when testifying at the trial as a witness for the State, said that all of his testimony so given at the trial was based upon what the little girl said and did in his presence after the alleged occurrences had taken place, and that he, himself, knew nothing about what had actually happened on 15 August 1965 because he was not there and had not seen the occurrence. The motions to quash were overruled. The defendant excepted and now assigns these rulings as error.

The defendant also assigns as error the consolidation of the cases for trial over his objection, the reception of the testimony of the little girl, certain portions of and alleged omissions from the charge of the court to the jury, and other rulings made during the progress of the trial.

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

Hollowell & Stott by J. Ralph Phillips and Grady B. Stott for appellant.

LAKE, J. There was no error in the denial of the motions to quash the indictments. The defendant concedes in his brief that the indictment charging rape was sufficient in form. The indictment charging the offense of kidnapping was likewise in proper form. In *State v. Mallory and Lowry,* 263 N.C. 536, 139 S.E. 2d 870, Moore, J., speaking for the Court, said:

> "The word 'kidnap,' * * * as used in G.S. 14-39, means the unlawful taking and carrying away of a person by force

> and against his will (the common law definition). * * * It is the fact, not the distance of forcible removal of the victim that constitutes kidnapping."

The indictment in the *Mallory* case charged that the defendants "unlawfully, wilfully, feloniously and forcibly did kidnap one Mabel Stegall." The convictions upon this indictment were affirmed.

To the same effect, see *State v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497. There, the indictment, as in the present case, charged that the defendant "unlawfully, wilfully and feloniously did forcibly kidnap and carry away" the designated person against the form of the statute, etc. A new trial was ordered in the *Witherington* case for error in the charge, but there was no suggestion that the indictment was not sufficient.

The indictments in the present case are not shown to be defective by the testimony of Captain Auten at the trial. It does not appear in the record and it cannot be determined what testimony Captain Auten gave before the grand jury. Conceivably, he may have testified there inconsistently with his testimony at the trial. It is also conceivable, though there is nothing to so indicate, that his testimony before the grand jury included statements made to him by the defendant under circumstances making them competent evidence. No such statements were offered in evidence at the trial. Thus, the testimony of the officer that his testimony at the trial was based entirely upon what the little girl said and did in the officer's presence, after the occurrences in question, is not necessarily a showing that all of his testimony before the grand jury was similarly based.

Be that as it may, *State v. Levy,* 200 N.C. 586, 158 S.E. 94, decided the question now raised by the defendant adversely to his contention. There, the defendant moved to quash the indictment on the ground that the grand jury had returned it as a true bill "upon testimony which was incompetent because based entirely upon hearsay, and that no competent evidence had been heard by the grand jury." Adams, J., speaking for the Court, said:

> "So the main contention of the defendant is this: not merely that incompetent evidence was considered, but that no competent evidence was heard by the grand jury, and that for the latter reason the bill should have been quashed. * * *
>
> "The cases to which we have been referred are not authority for the defendant's position. Nor are we inclined to accept his view, although it has the support of writers whose opinions are entitled to great respect. As Underhill remarked, 'It would be intolerable in practice to confine grand juries to the technical rules of evidence.' * * * No error."

For more recent discussions of the question, see *State v. Squires,* 265 N.C. 388, 144 S.E. 2d 49; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334.

In *Costello v. United States,* 350 U.S. 359, 76 S. Ct. 406, 100 L. ed. 397, the Supreme Court of the United States held that a conviction under an indictment "based solely upon the evidence of government witnesses having no first hand knowledge of the transactions upon which they based their computations showing that Costello and his wife had received far greater income than they had reported" did not violate the rights of the defendant under the Fifth Amendment to the United States Constitution.

If the only witnesses examined by the grand jury are disqualified, as a matter of law, from giving any testimony against the defendant with reference to the matter under investigation, an indictment returned a true bill upon such testimony should be quashed. If, however, the witness before the grand jury is a competent witness, the indictment so returned by the grand jury will not be quashed upon a showing that such witness gave testimony which would not be competent testimony at the trial. This is true though such witness be the only witness who appeared before the grand jury and though, at the trial, he gives testimony which he there acknowledges to be based entirely upon what the alleged victim of an attack told him thereafter, and did in his presence. See Watts, *Grand Jury: Sleeping Watchdog or Expensive Antique,* 37 North Carolina Law Review, 290, 309.

The consolidation of the two cases for trial was a matter in the sound discretion of the trial court and in this ruling there was no error. G.S. 15-152; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. White,* 256 N.C. 244, 123 S.E. 2d 483; *State v. Combs,* 200 N.C. 671, 158 S.E. 252.

There was no error in holding that the little girl who was the alleged victim of these offenses was a competent witness. *Artesani v. Gritton,* 252 N.C. 463, 113 S.E. 2d 895; *State v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754; *State v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; Wigmore on Evidence, 3rd ed., § 505. There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. In the present case, the child was examined with reference to her intelligence, understanding and religious beliefs concerning the telling of a falsehood, all of which took place

out of the presence of the jury. The record indicates that she was alert, intelligent and fully aware of the necessity for telling the truth.

In the course of the trial, there was a considerable amount of bickering between the solicitor and counsel for the defendant. Counsel for the defendant objected to portions of the solicitor's argument to the jury. On account of these matters and certain questions propounded to witnesses by the solicitor, the defendant moved for a mistrial. We find no error in the denial of these motions.

In the course of his lengthy charge to the jury, the court below said:

> "The first case, the rape case, is a statutory crime. The crime of rape in the law of North Carolina is codified in our General Statutes as Chapter 14, Section 21, of the General Statutes of this State, and the particular section of that Statute with which we are dealing has to do with carnal connection — sexual intercourse — with a child under the age of twelve years, as is true here. * * * Now, the act of carnally knowing and abusing a female child under the age of twelve years is rape as a matter of law. Consent is no defense. There is no evidence of any consent here, but it wouldn't have been consent if it were offered, since a child of that age is presumed by law to be incapable of consent. Neither is force nor intent on the part of the one charged an element. In other words, the State of North Carolina has to prove beyond a reasonable doubt that this defendant had carnal connection and knowledge — carnal connection with this girl, she being a child of eight years old. It does not have to prove that it was forcible, although it has alleged it in the Bill of Indictment. That is, it's not a necessary element."

The defendant contends that it was reversible error for the court to include in the foregoing statement the words "with a child under the age of twelve years, as is true here." His contention is that this is a violation of G.S. 1-180, which provides:

> "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case."

The evidence of the State was amply sufficient to support a verdict of forcible rape in view of the relative ages, sizes and strengths of the defendant and the child. There was no evidence of consent on her part. However, the charge of the court, above quoted, did not submit the case to the jury on this theory but on the theory of rape

of a child under the age of twelve. Consequently, the age of the child was a material fact.

The insertion in the above portion of the charge of the words "as is true here" undoubtedly suggests that the judge considered the child to be under the age of twelve years. It is error for the judge, whether in his charge to the jury or at any other time during the course of the trial, by direct statement or otherwise, to intimate to the jury his own opinion concerning the sufficiency of the evidence to show the existence of a material fact, but such error is not cause for a new trial if it falls within the category of harmless, nonprejudicial error. The seriousness of the offense charged and the severity of the potential penalty therefor do not constitute or affect the test to be applied in determining whether an error is prejudicial or nonprejudicial. The test is not the possibility of a different result upon another trial. The test is whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. Johnson, J., speaking for the Court, said in *Glenn v. Raleigh,* 248 N.C. 378, 103 S.E. 2d 482:

> "Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial and that a different result likely would have ensued, with the burden being on the appellant to show this."

That the rule is the same in criminal appeals, see *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39, and cases there cited. In *State v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791, Barnhill, J., later C.J., after conceding error in the charge by the trial judge, said:

> "*On this record* he [the defendant] could have no reasonable hope of acquittal in a future trial, for such a verdict would manifest a clear miscarriage of justice. Hence the verdict and judgment must be sustained." (Emphasis added.)

In *State v. Bovender,* 233 N.C. 683, 65 S.E. 2d 323, Devin, J., later C.J., said:

> "Verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial. *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863. An error can not be regarded as prejudicial unless there is a reasonable probability that the result would have been different."

Thus, it is not sufficient that an error crept into the judge's charge unless, upon the entire record of the trial, it appears that there is a reasonable basis for the belief that, had this error not been committed, a different verdict would have been rendered. It is inconceivable that, upon this record, the jury would have acquitted the defendant on the ground that the little girl was twelve years of age or over had the judge omitted from his charge the words "as is true in this case." There was no contradiction of the testimony of the mother and of the child, herself, that at the time of the occurrences she was eight years of age. But the determination of her age was not limited to a conclusion reached on the basis of oral testimony. The child, herself, was present and testified and was observed by the jury. When she took the stand, the defendant objected to the reception of any testimony given by her on the ground that she was too young to be a competent witness. Whatever may be true in another case, where the person in question is nearer to the determinative age or where the age is sought to be established by the testimony of others, without the presence of the person in question in the courtroom, this record indicates no basis for the conclusion that had the objectionable language been omitted from the charge a different verdict would have been reached.

The age of the child is no more material to the proof of the offense than is her sex. Extreme technicality might lead to the conclusion that the judge was expressing an opinion concerning a material fact when, throughout his charge, he referred to this child as "this little girl" or used the feminine pronouns to designate her, but to grant a new trial on that ground would be an absurdity which the law does not require. Upon this record, it appears equally unreasonable to conclude that the defendant was prejudiced by the language of which he complains. We, therefore, conclude that this error in the charge was not prejudicial and is not sufficient to warrant a new trial.

We have carefully considered each other assignment of error and find no merit therein. Other portions of the charge to which exception is taken appear not to be erroneous when read in context and when considered in the light of the charge as a whole.

No error.

STATE OF NORTH CAROLINA EX REL, THE NORTHWESTERN BANK, GUARDIAN FOR MARTHA ROBERTA CROSS, PLAINTIFFS, v. FIDELITY AND CASUALTY COMPANY OF NEW YORK AND MARTHA THELMA CROSS, FORMER GUARDIAN, DEFENDANTS.

(Filed 12 October, 1966.)

1. Appeal and Error § 47—

Since relief is dependent upon the facts alleged and not the pleader's conclusion of law from such facts, the striking from the complaint of plaintiff's averment that the interest recoverable should be compounded cannot be prejudicial.

2. Judgments § 22—

The setting aside of a default judgment upon findings of excusable neglect and a meritorious defense will not be disturbed merely because the order was made upon unverified motion without sworn testimony when plaintiff filed no response to the motion and did not controvert the facts stated therein when the motion was argued.

3. Guardian and Ward § 10; Judgments § 29—

The interest of the successor guardian in regard to the ward's right to recover for misapplications by the original guardian is adverse to the original guardian, and the successor guardian is not in privity with the prior guardian in an action involving such liability.

4. Judgments § 29—

Upon the sustaining of a demurrer and dismissal of the demurring party, such party is no longer a party to the action and is not bound by any judgment subsequently entered therein.

5. Same—

An action was instituted by the surety on the guardianship bond of the original guardian against the guardian and the successor guardian of the same ward. The demurrer of the successor guardian was allowed. Thereafter, judgment was entered that the original guardian had properly expended funds of the estate for the benefit of the ward. *Held:* The successor guardian and the ward are not bound by the judgment, and such judgment does not preclude the successor guardian from thereafter maintaining an action against the original guardian and her surety for asserted misapplication of the funds of the estate by the original guardian.

HIGGINS, J., did not participate in the consideration or decision of this appeal.

Certiorari to review judgment of *Copeland, S.J.*, at the 20 September 1965 Regular Session of BUNCOMBE.

Martha Roberta Cross is a minor. She was beneficiary of a policy of insurance upon her father's life. Upon his death her mother, Martha Thelma Cross, was appointed her guardian and, as such, received the proceeds of the insurance policy. Fidelity & Casualty Company of New York, hereinafter called Fidelity, is the surety

on the bond of Mrs. Cross as such guardian. Mrs. Cross was removed as guardian by order of the Clerk on 14 September 1962, and the Northwestern Bank, hereinafter called the Bank, was appointed as her successor. As guardian, the Bank, on 7 December 1963, instituted this action against Mrs. Cross and Fidelity to recover from her, as guardian, and from Fidelity, as surety on her bond, $4,693.90, alleged to be due the Bank, as guardian, by reason of mismanagement, misuse, misappropriation and dissipation of the estate of the minor by Mrs. Cross while guardian.

The defendants filed answers denying such mismanagement, misappropriation and misuse. Each alleges that Mrs. Cross, while guardian, expended all of the funds of the estate, with the exception of a nominal amount, which she paid over to the Bank when it became guardian, for the support and maintenance of the minor and that such expenditures were proper. Each answer also contains a plea in bar of the right of the Bank to maintain this action by reason of a prior judgment entered by Clarkson, J., in a proceeding in the Superior Court of Buncombe County, originally entitled *"Fidelity & Casualty Company of New York, Plaintiff, vs. Martha Thelma Cross and the Northwestern Bank as Guardian for Martha Roberta Cross, Defendant."*

The matter was heard by Copeland, J., solely upon the defendants' pleas in bar. At that hearing the defendants introduced in evidence, over objection, the record in the former proceeding, which showed:

(1) Fidelity's complaint therein alleged that Mrs. Cross had been removed as guardian and the Bank appointed as her successor; that Mrs. Cross had filed her final account with the clerk, who had disallowed all claimed disbursements; that Fidelity, as surety, was in danger of sustaining loss and was entitled to relief in accordance with G.S. 33-17 and G.S. 33-42, and that all disbursements by Mrs. Cross were proper. It prayed that a hearing be had to determine whether Fidelity was entitled to credit for money "necessarily expended" by Mrs. Cross for the education and maintenance of the ward, and that Mrs. Cross indemnify Fidelity against loss.

(2) The answer of Mrs. Cross admitted the allegations of Fidelity's complaint. Attached to her answer was a "final account," listing certain expenditures and stating, "The remaining $3,581.81 was expended by the Guardian for the support and maintenance of the minor Ward in the home."

(3) The Bank filed a demurrer to Fidelity's complaint for failure to state a cause of action against the Bank.

(4) The demurrer was sustained and thereafter an order was entered dismissing the proceeding as to the Bank.

(5) Subsequent to the dismissal of the proceeding as against the Bank, Mrs. Cross filed an amendment to her answer, alleging that all moneys coming into her hands as guardian had been expended by her for the use and necessary expenses of the minor ward and that she, Mrs. Cross, was not indebted in any amount either to Fidelity or to the Bank. She prayed that neither the plaintiff nor the Bank have or recover anything of her.

(6) The proceeding then came on to be heard before Clarkson, J., Fidelity and Mrs. Cross waiving a jury trial. The Bank was not represented and did not participate in the hearing. The court heard testimony by Mrs. Cross, by Mrs. Cassada, an older daughter, and by the minor ward, who was called as a witness on behalf of her mother. The minor, then seventeen years of age, was not made a party to the proceeding, nor was she represented by counsel. No guardian *ad litem* was appointed for her. She testified, in substance, that her mother was "generous" with her and "bought nothing for herself." Judge Clarkson found that Mrs. Cross, while guardian, had expended the whole of the funds of the ward's estate in good faith, solely for the benefit of the ward and not for herself. He thereupon concluded and ordered that the accounting of Mrs. Cross should be and was approved, and adjudged that Mrs. Cross and Fidelity be "forever discharged and acquitted from any liability" by virtue of the guardianship and bond.

Upon this evidence, Copeland, J., found as a fact that such proceedings were had in the former matter and concluded that the Bank, as successor guardian, had full notice and knowledge of the former proceeding so instituted by Fidelity; that Clarkson, J., had therein "jurisdiction of the subject matter of this controversy, namely, the estate of the minor, Martha Roberta Cross, and of the parties thereto in a proper proceeding before the Court." He further concluded:

"4. That the Findings of Fact, Conclusions of Law and Judgment entered on September 17, 1964, in the action entitled, *'Fidelity and Casualty Company of New York vs. Martha Thelma Cross and the Northwestern Bank as Guardian for Martha Roberta Cross'* are binding and conclusive upon the parties hereto."

Copeland, J., thereupon entered judgment sustaining the pleas in bar in the present action and dismissing the action.

The Bank gave due notice of appeal to this Court. Subsequently, this Court allowed the motion by Fidelity, pursuant to Rule 17, to docket and dismiss the said appeal for the failure of the appellant to docket it within the time allowed by the Rules of this Court. Thereupon, the Bank filed its petition for writ of *certiorari*, which was allowed.

Joseph C. Reynolds for plaintiffs.

Uzzell and Dumont for Fidelity and Casualty Company of New York, defendant.

George Pennell for Martha Thelma Cross, defendant.

LAKE, J. The motion of the appellees to dismiss the present appeal for the failure of the appellant to forward to the appellees copies of its brief, as required by the Rules of this Court, is denied. The alternative motion of the appellees for an extension of time for the filing of their own brief is allowed.

The appellant assigns as error an interlocutory order by Patton, J., at the February 1964 Session striking from the complaint paragraph 13, reading:

> "That there is due the plaintiff by the defendant, in addition to the amount in the preceding paragraph, compound interest on said principal, due from the 11th day of November, 1960 until the final settlement of this action."

and also striking from the prayer for relief the word "compound" preceding the word "interest."

The stricken paragraph stated a mere conclusion without supporting factual allegations. It was, therefore, not error to strike it from the complaint. *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893. Furthermore, such ruling was not prejudicial to the plaintiff since paragraph 14, alleging that "under the terms of the bond * * * set forth in Exhibit A, the plaintiff is entitled to recover * * * $4,693.90 and compound interest," was not stricken.

The striking of the word "compound" from the prayer for relief, so that it is now a prayer that the plaintiff "recover of the defendant * * * $4,693.90 with interest thereon," was not prejudicial to the plaintiff. Relief will be granted to the extent warranted by the allegations in the complaint and by the proof. *Board of Education v. Board of Education*, 259 N.C. 280, 130 S.E. 2d 408. We do not now have before us the question of what relief the plaintiff is entitled to have. The action has not yet been tried on its merits.

The appellant also assigns as error another interlocutory order entered by Martin, J., at the March 1965 Session, vacating a judg-

ment by default against the defendant Martha Thelma Cross and permitting her to file an answer, which she did. This order recites that "the Court having heard arguments of Counsel, * * * makes the following Findings of Fact." These include a finding to the effect that the failure to file the answer within the time allowed was due to excusable neglect on the part of the attorney representing Mrs. Cross, which was not attributable to her, and a finding that her attorney states that she has a meritorious defense in that she expended all of the funds for the exclusive education, maintenance and support of the minor. The appellant contends that it was error to enter the order because the motion was not verified and no sworn testimony was introduced. However, the record does not indicate that the plaintiff filed any response to the motion, or controverted the facts as stated therein when arguing the matter before Martin, J. Upon this record, we are unable to find error in the order.

We come now to the judgment of Copeland, J., sustaining the pleas in bar and dismissing the action. Its validity depends upon whether the plaintiff, or its ward, is bound by the judgment of Clarkson, J., in the former action instituted by Fidelity.

We are not here concerned with the validity and effect of the judgment of Clarkson, J., as between Fidelity and Mrs. Cross and we do not now decide that question.

Similarly, it is not necessary to decide upon this appeal whether G.S. 33-17 and G.S. 33-42, upon which Fidelity relied as the basis for its proceeding, entitle the surety upon the bond of a guardian, who has already been removed from the guardianship, to institute a proceeding to require such former guardian to indemnify the surety against apprehended loss and to obtain therein a judicial determination of the propriety, or lack of propriety, of expenditures made by such former guardian prior to removal.

The question presented by this appeal is whether such a determination in a proceeding between the surety and the former guardian is conclusive as against a successor guardian and the ward, neither of whom was a party to that proceeding when the adjudication was made. The answer to that question is "No."

In *Light Co. v. Insurance Co.*, 238 N.C. 679, 79 S.E. 2d 167, Devin, C.J., speaking for the Court, said at page 689:

> "Estoppel by judgment operates only on parties and their privies. It is a maxim of law that no person shall be affected by any judicial investigation to which he is not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. An adjudication affects only those who are parties to the judgment and their

privies, and gives no rights to or against third parties. 1 Freeman on Judgments, sec. 407. Privies are 'persons connected together or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them.' Black's Law Dictionary. 'To make a man a privy to an action, he must have acquired an interest in the subject-matter of the action, either by inheritance, succession, or purchase of a party subsequent to the action, or he must hold the property subordinately.' Ballentine's Law Dictionary. 'Any of those persons having mutual or successive relationship to the same right of property.' Webster."

To the same effect, see: *Bullock v. Crouch,* 243 N.C. 40, 89 S.E. 2d 749; *Tarkington v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269, 11 A.L.R. 2d 221; *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321, 116 A.L.R. 1083; 30A Am. Jur., Judgments, § 393.

The plaintiff, though successor to Mrs. Cross as guardian of the minor, is not in privity with Mrs. Cross in respect to the proceeding instituted by Fidelity. That proceeding was instituted after Mrs. Cross had been removed from the guardianship and the plaintiff appointed. The interest of the plaintiff with respect to the matters involved is adverse to the interest of Mrs. Cross, not derived from her as her transferee.

It is not necessary for us now to determine whether the judgment of Patton, J., in the former proceeding, sustaining the demurrer of the Bank, and the resulting dismissal of that action as against the Bank were proper. It is sufficient, for the purpose of this appeal, that such judgment was, in fact, entered and the Bank was dismissed as a party to that proceeding. It is immaterial, for the purposes of this appeal, whether the Bank was or was not a proper, or even a necessary, party to the former proceeding instituted by Fidelity, or that its dismissal therefrom was upon its own motion. Be that as it may, the fact remains that, at the time Clarkson, J., entered his judgment in the former proceeding, neither the Bank nor its ward was a party thereto.

The right to become a party to an action does not, in the absence of its exercise, cause one to be bound by a judgment entered therein. *Western Union Telegraph Co. v. Foster,* 247 U.S. 105, 38 S. Ct. 438, 62 L. ed. 1006; *Tutt v. Smith,* 201 Iowa 107, 204 N.W. 294, 48 A.L.R. 394; *O'Hara v. Pittston Co.,* 186 Va. 325, 42 S.E. 2d 269, 174 A.L.R. 945; 30A Am. Jur., Judgments, § 394; 1 Freeman on Judgments, 5th ed., § 411. That one, who might have participated in the former action and there asserted his rights, knew that such action was pending does not make the judgment rendered therein

conclusive as to him. *O'Hara v. Pittston Co., supra.* Even though he was once a party to the action and was permitted to withdraw therefrom, or was dismissed therefrom on his own motion, he is not bound by a judgment entered therein after he ceased to be a party to it.

In *Owens v. Alexander,* 78 N.C. 1, Reade, J., speaking for the Court, said:

> "The defendant Johnston was originally one of the plaintiffs in the cause, but at an early stage of it he was permitted to retreat. Subsequently a decree was made that upon his paying so much money a title to the land should be made to him, of which land he is in possession. And now a notice is served on him to show cause why he should not perform the decree, and why in the meantime a receiver should not be appointed to take possession of the land and the mines thereon. To this the defendant answers that he was not a party in the cause at the time the decree was made, and that therefore the same is a nullity as to him. Unquestionably this is a complete defense."

In *Babcock v. Standish,* 53 N.J. Eq. 376, the Court said:

> "[A]lthough she [the party claimed to be estopped by a judgment] was originally made a party to that suit she was dismissed therefrom. She was not bound by the decree, and its adjudications on the essential facts do not estop her from contesting them and requiring other proof. If she was a proper party in that cause, Standish could have appealed from the order dismissing her therefrom, and by its reversal would have bound her by the decree. But after dismissal, the decree was as ineffective against her as if she had not been originally a party to the suit."

To the same effect, see: *Holt Mfg. Co. v. Collins,* 154 Cal. 265, 97 P. 516, 519; *Miller v. Miller,* 263 Ill. 18, 104 N.E. 1078.

In 1 Freeman on Judgments, 5th ed., § 412, it is said:

> "The fact that a person was a party to an action in its earlier stages does not bind him by the judgment, unless he was also a party when it was rendered. If he, by permission of the court, withdraws from the action or is dismissed from it, so that he is no longer a party, then the power of the court over him terminates, and a judgment subsequently entered cannot affect his interests, though he may be bound by it as to his codefendants, whom he was bound to indemnify. Persons as to whom a nonsuit was granted before a judgment on the merits was rendered are not concluded by it; neither can they claim the benefit of it."

Thus, when Patton, J., sustained the demurrer of the Bank in the proceeding instituted by Fidelity and the Bank was dismissed from that proceeding, the Bank became a stranger to it and could not be bound by any judgment subsequently entered therein.

The fact that the ward testified in the former proceeding as a witness for her mother, the former guardian, would not make the judgment therein a conclusive determination of the rights of the ward, or of those of her present guardian. Even an adult witness is not, for that reason, bound by a judgment in an action to which he or she was not a party. *Lee v. School District,* 149 Iowa 345, 128 N.W. 533; *Wright v. Andrews,* 130 Mass. 149; *Fowler v. Blount,* 191 Mich. 575, 158 N.W. 114; 1 Freeman on Judgments, 5th ed., §§ 410 and 434. Obviously, a minor, called as a witness in a proceeding to which she was not a party and in which she was not represented by a general guardian, a guardian *ad litem* or a next friend, should not be precluded by a judgment entered therein. It is to be noted that the testimony of the minor in the former proceeding was simply to the effect that her mother had been "generous" with her and had not used her funds for the mother's own benefit. This is not even an admission that the expenditures made by the mother were proper expenditures for a guardian.

We do not, of course, suggest that there was collusion between Fidelity and Mrs. Cross in the former action, but to hold that the successor guardian and its ward are bound by the decree entered therein, at a time when neither was a party to that action, would expose estates of minors to the danger of collusive actions. The interests of the guardian alleged to be in default and of that guardian's surety are identical insofar as a determination that there has been no default is concerned.

Since the Bank was not a party to the proceeding instituted by Fidelity at the time of the entry of the judgment of Clarkson, J., that judgment is not binding upon the Bank and the doctrine of *res judicata* has no application. Consequently, it was error to sustain the pleas in bar and to dismiss the present action. The Bank, on behalf of its ward, is entitled to its day in court and to an opportunity to establish its right, if any, to recover of Mrs. Cross and the surety on her bond.

Reversed.

HIGGINS, J., did not participate in the consideration or decision of this appeal.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 October, 1966.)

1. Utilities Commission § 1—

A public utility has the same freedom as any other corporation in the management of its properties and its employees except insofar as regulations in the public interest are authorized by common law and by statute.

2. Same—

The Utilities Commission has no authority of regulation beyond that conferred by apposite statutes, liberally construed to effectuate State policy.

3. Utilities Commission § 7—

A carrier by rail may not substantially reduce the number of hours a day during which an established station should be kept open without first obtaining authority to do so from the Utilities Commission; nevertheless, curtailment of service cannot be denied arbitrarily, but only upon findings supported by competent, material and substantial evidence that the public convenience and necessity require the continuation of the hours of service undiminished and that in rendering such service the carrier will not incur costs out of proportion to any benefit to the public.

4. Same— Application for consolidation of two stations in question should have been allowed upon the evidence.

In this application by a carrier to consolidate two of its freight agencies by having one agent open each for a part of the working day, the evidence tended to show that the full-time agent at one station on the average had nothing to do for more than half of the day and the agent at the other station on the average had substantially less than one shipment per day. *Held:* The findings and conclusions of the Commission that a full-time agent is needed at each station to meet the public convenience and necessity is arbitrary and capricious, since the slight inconvenience to shippers in having to make their shipments during the part of each day the station was open cannot justify precluding the carrier from effecting substantial economies which would result from consolidation.

APPEAL by applicant Railroad from *Cowper, J.*, at the 31 January 1966 Civil Session of PENDER.

For many years the Atlantic Coast Line Railroad has maintained stations at Atkinson and Burgaw, each station being open and attended by an agent eight hours per day, exclusive of Saturdays and Sundays. It applied to the North Carolina Utilities Commission for permission to "consolidate" the agencies. The proposed "consolidation" would not result in the abandonment of either station but would place both under a single agent. It is proposed that this agent keep the Burgaw station open from 8 a.m. to 12 p.m., then go to Atkinson, 15 miles away, and keep that station open from 1:30

p.m. until 2:45 p.m., and return to Burgaw, where he would keep the station open from 3:15 p.m. until 5 p.m.

The Commission denied the application. On appeal, the superior court remanded the matter to the Commission for a further hearing, the taking of additional evidence, and, upon consideration of all the evidence, the entry of such order as the Commission might deem proper. After further hearing, the Commission entered its order, setting forth its findings of fact and conclusions of law, and again denied the application. The Railroad again appealed to the superior court, which affirmed the order of the Commission. From the judgment of the superior court, so affirming the order of the Commission, the Railroad has appealed to this Court.

The Commission made the following findings of fact (summarized):

Burgaw, with a population of 1,700, is also the governing agency for Rocky Point and Watha, nine and six miles distant. Atkinson, with a population of 300, is the governing agency for Currie and Ivanhoe, six and four miles distant. Burgaw and Atkinson are 15 miles apart by highway.

During the calendar year of 1963, 71 carload shipments and 104 less-than-carload (LCL) shipments were received at Atkinson, while no carload shipments and only nine LCL shipments moved from Atkinson, making a total for the year of 175 inbound shipments and nine outbound shipments handled at this station, exclusive of Ivanhoe and Currie, for which no data are shown for this year.

For the 12 months ending 31 January 1964 *(i.e.,* beginning and ending one month later than the above period), at Atkinson, including both Currie and Ivanhoe, 137 carload shipments and 133 LCL shipments were received, while six carload shipments and 43 LCL shipments moved out, making a total of 319 shipments of all kinds handled at Atkinson, including Currie and Ivanhoe, during this period of 12 months.

For the 12 months ending 31 March 1965 at Atkinson, including Currie and Ivanhoe, 107 carload shipments and 40 LCL shipments were received, 50 carload shipments and 20 LCL shipments moved out and 20 more LCL shipments were "handled," the latter group not being broken down between inbound and outbound shipments. Thus, for this period, a total of 237 shipments of all kinds were "handled at or through the Atkinson agency."

For the 12 months ending 31 January 1964, a total of 348 carload shipments and 216 LCL shipments were "handled at the Burgaw station," the Commission making no breakdown between inbound and outbound shipments or between Burgaw, Rocky Point and Watha. For the calendar year of 1963, the Burgaw station

"handled 60 carload shipments and 8 LCL shipments through its governed agency of Rocky Point." No other finding with reference to traffic at or through Burgaw was made. The "out-of-pocket" cost of operating the Atkinson station for the 12 months ending 31 January 1964 was $5,984.08, and at Burgaw the "out-of-pocket" cost was $7,047.51. In the same period, the Atlantic Coast Line's share of the gross freight revenues derived from the handling and transportation of all of the above shipments moving to or from Atkinson was $10,282.99. In the same period, the "gross revenue" (not merely the Coast Line's part) for the handling and transportation of all shipments "handled at the Burgaw station" totaled $33,209.60. During this period, the Burgaw station also received "gross revenue" of $534.42 from a total of 418 inbound and outbound passengers, and "miscellaneous revenue" of $539.32.

Upon these "Findings of Fact," the Commission reached the following "Conclusions":

> The proposal "for all practical purposes amounts to closing of the station [at Atkinson]."
>
> "* * * Applicant should not be permitted to discontinue or to reduce its services to the public except upon a clear showing of lack of public need or a showing that the service rendered is so costly and expensive to applicant with relation to the revenues and earnings realized that it is economically impossible to continue the full service.
>
> * * *
>
> "[T]he public convenience and necessity at the Atkinson station cannot be met and provided by an agent being present at that point only 1 hour and 15 minutes per day. * * * [T]he services of a full time agent are needed and required to meet the public convenience and necessity at Burgaw. * * * [A]pplicant's application to consolidate and dualize these two agencies should be denied."

The Commission also stated, under the heading "Conclusions," that for the 12 months ending 31 March 1965, shipments "handled at Atkinson" resulted in revenues "more than double the amount of revenue received at Atkinson for the calendar year of 1963." It also stated, "Clearly both the number of shipments and the revenue have increased at Atkinson continuously since 1963." However, the Commission's findings, above stated, show that for the 12 months ending 31 January 1964 (which would include 11 months of the calendar year 1963), Atkinson, inclusive of Currie and Ivanhoe, had a total of 319 shipments, as compared with only 237 shipments in the 12

months ending 31 March 1965, though in the latter period there were 14 more carload shipments handled than in the earlier period.

Apparently, there is no passenger traffic at Atkinson.

The Railroad excepted to each of the foregoing conclusions and statements under the heading "Conclusions" on the ground that it is "arbitrary and capricious," being "unsupported by competent, material and substantial evidence" or by any finding of fact which is supported by such evidence. Each such exception was overruled by the superior court and to each such ruling by the court the Railroad excepted, assigning it as error.

Maupin, Taylor & Ellis by Frank W. Bullock, Jr. and Albert B. Russ, Jr., for Atlantic Coast Line Railroad Co.

Edward B. Hipp for North Carolina Utilities Commission.

Vaughan S. Winborne for Transportation-Communication Employees Union, appellee.

LAKE, J. A railroad or other public utility corporation is engaged in the operation of a privately owned business. By virtue of the nature of the services it undertakes to render, certain exceptional duties are imposed upon it by the common law and by statute, and the Utilities Commission is authorized by statute to regulate its activities. In other respects, the company has the same freedom as does any other corporation in the management of its properties and in the employment and assignment of the duties of its employees.

The Utilities Commission has no authority to regulate, or impose duties upon, a railroad company except insofar as that authority has been conferred upon the Commission by Chapter 62 of the General Statutes, liberally construed to effectuate the policy of the State announced therein. With reference to the matters involved in this appeal, that policy is declared as follows in G.S. 62-2:

> "[I]t is hereby declared to be the policy of the State of North Carolina to provide fair regulation of public utilities in the interest of the public, * * * to promote adequate, economical and efficient utility services * * * and *to these ends,* to vest authority in the Utilities Commission to regulate public utilities generally and their rates, services and operations, in the manner and in accordance with the policies set forth in this chapter." (Emphasis added.)

G.S. 62-131(b) provides, "Every public utility shall furnish adequate, efficient and reasonable service." The term "public utility" includes a railroad corporation. G.S. 62-3(23a).

G.S. 62-32(b) provides:

"The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish * * *"

G.S. 62-118 provides:

"Upon finding that public convenience and necessity are no longer served, *or* that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition, notice and hearing, to authorize by order any public utility to abandon or reduce such service. * * *" (Emphasis added.)

G.S. 62-247 provides:

"(a) The Commission is empowered and directed to require, where the public necessity demands, *and* it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations or terminals by any railroad company * * * (Emphasis added.)

"(c) A railroad company which has established and maintained for a year or more a passenger station or freight depot * * * shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains, except by consent of the Commission. * * *"

G.S. 62-75 provides that in all proceedings before the Commission, except those instituted by the Commission, itself, the burden of proof shall be upon "the complainant."

G.S. 62-65(a) provides:

"When acting as a court of record, * * * no decision or order of the Commission shall be made or entered * * * unless the same is supported by competent material and substantial evidence upon consideration of the whole record."

G.S. 62-94(b) provides that upon appeal from an order of the Commission, this Court may reverse or modify the decision if the substantive rights of the appellant have been prejudiced because the Commission's findings, inferences, conclusions or decisions are "unsupported by competent, material and substantial evidence in view of the entire record as submitted," or are "arbitrary or capricious."

A liberal construction of these statutory provisions, so as to effectuate the policy of the State as therein declared, compels the conclusion that when a railroad corporation has established and

maintained a freight depot or passenger station pursuant to the order of the Commission, or has established and maintained for a year or more such depot or station on its own initiative, it may not, without first obtaining an order from the Commission authorizing it to do so, substantially reduce the number of hours per day during which such station shall be kept open for the service of the public and attended by an agent of the railroad. However, when the railroad company applies for such an order, the Commission may not withhold its approval unreasonably and arbitrarily. It may deny such permission only after a hearing and only if it finds and concludes, upon competent, material and substantial evidence in view of the entire record, both that the public convenience and necessity requires the station or depot to be so kept open for a greater portion of the day, and that the railroad, by so doing, will not incur costs out of proportion to any benefit to the public. *Corporation Commission v. R. R.*, 139 N.C. 126, 51 S.E. 793; *Utilities Com. v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272; *Utilities Commission v. R. R.*, 254 N.C. 73, 118 S.E. 2d 21.

A railroad may, of course, be required to keep a station open, with an agent in attendance, if the public convenience and necessity requires such service, even though this can be done only at a loss to the railroad, provided such loss is not so great as to be unreasonable in comparison with the public's benefit from the service. *Utilities Com. v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272. Conversely, a railroad may not be denied the right to curtail, or abandon, a service for which there is no substantial public need, even though, upon its entire business, the company is earning a fair rate of return. Though prosperous, a railroad or other utility company may not be denied the right to effect economies in its operation, so as to increase its earnings, unless it may reasonably be found, upon the evidence before the Commission, that the public convenience and necessity requires the continuation of the service in question. An occasional inconvenience to a shipper, which is trivial in comparison with the saving to the railroad from the elimination of the service, will not suffice to show such public convenience and necessity. See *Utilities Com. v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272. Waste of a utility's manpower, or other resources, with no substantial resulting benefit to the public, is not in the public interest and is not required by these statutes.

The Railroad introduced undisputed evidence that, upon a normal day, the full time agent at Burgaw has nothing to do for more than half of the day and is in communication with members of the public not more than 30 minutes throughout the entire day. Its evidence is also undisputed that at Atkinson, on a normal day, the

agent has nothing to do for more than six of the eight hours when he is on duty, and is in communication with the public no more than 19 minutes throughout the entire day. The evidence shows that in order for a shipper or consignee to deliver to or receive from the depot at Atkinson a less-than-carload shipment, he must, as a practical matter, go to the depot while the agent is present. Obviously, it is somewhat more convenient to make such trip to the depot if it is kept open eight hours a day than if it is kept open only for an hour and a quarter. However, the evidence of the Railroad is undisputed, and the Commission found, that in the entire 12 months ending 31 March 1965 only 20 less-than-carload shipments, inbound and outbound combined, were handled at the Atkinson depot.

The protestants offered evidence showing that the Brown Lumber Company finds it desirable, if not necessary, to make out, itself, the bills of lading covering its carload shipments of lumber from Ivanhoe and to carry them in person to the depot at Atkinson for the signature of the agent. Obviously, this can be done only when the agent is at the depot. However, there is no dispute of the Railroad's evidence showing that in this entire 12 months' period the Brown Lumber Company shipped only eight carloads of lumber. The undisputed evidence shows that in these 12 months the total shipments, inbound and outbound, carload and less-than-carload, handled by the Atkinson depot, including those moving to and from Ivanhoe and Currie, numbered only 237, an average of substantially less than one shipment per day, Saturdays and Sundays excluded. There was no evidence whatever of any protest by any shipper or consignee at Burgaw, or that anyone using that depot would be inconvenienced to any degree whatever by extending the lunch hour absence of the agent from that station to cover the proposed hour and 15 minutes at Atkinson.

The Commission's findings and conclusions that a full time agent is needed to meet the public convenience and necessity at Burgaw and that the public convenience and necessity at Atkinson cannot be met and provided under the proposed plan are not supported by the evidence in the record and are, therefore, arbitrary and capricious. The order based thereon is beyond the statutory authority of the Commission.

The judgment of the superior court is, therefore, reversed, and this proceeding is remanded to the superior court for the entry of its judgment reversing the order of the Utilities Commission and remanding the matter to the Commission for the entry of an order in accordance with this opinion.

Reversed and remanded.

STATE v. CHARLES EDWARD FRAZIER.
AND
STATE v. ARTHUR LEE GIVENS.

(Filed 12 October, 1966.)

1. Criminal Law § 147—

Where two defendants are jointly tried for the same offense upon a joint indictment, only a single transcript should be docketed upon their respective appeals. Rule of Practice in the Supreme Court No. 19(2).

2. Criminal Law § 99—

Where one defendant moves for nonsuit and offers no evidence after the denial of the motion, the sufficiency of the evidence must be determined upon the facts in evidence when the State rested its case against such defendant, and subsequent testimony in the trial of the other defendant may not be considered.

3. Automobiles § 85—

The State's evidence tending to show that an automobile was taken in the absence and without the consent of the owner from its parking place, that in less than ten hours defendants were occupants of the car stopped at a stop light and that both defendants fled from the car precipitously upon the mere approach of officers, is sufficient to support findings by the jury that the vehicle was in the joint possession of both defendants, and that both were guilty of taking the vehicle in violation of G.S. 20-105.

4. Same—

The unlawful and unexplained possession of an automobile recently and unlawfully taken from the actual or constructive possession of the owner gives rise to an inference to be considered with other circumstances disclosed by the evidence in determining the question of guilt, but an instruction that such recent possession raises a presumption justifying a conviction is erroneous.

APPEALS by defendants from *McLean, J.*, June 13, 1966, Regular Schedule "A" Criminal Session of MECKLENBURG.

Defendants were indicted jointly in a bill charging that they, on April 17, 1966, "did unlawfully drive and otherwise take and carry away a vehicle, to wit: 1—1956 Dodge, 4-Door, two-tone Green, Motor Number 35059636 automobile not his own, without the consent of the owner thereof, to wit: Joe Lee Morton, with intent to temporarily deprive said owner of his possession of said vehicle, without intent to steal same," a violation of G.S. 20-105.

Each defendant, represented by his separate counsel, pleaded not guilty.

At the conclusion of the State's evidence, each defendant moved for judgment as in case of nonsuit. The motions were overruled and each defendant excepted.

Givens offered no evidence. Frazier offered evidence, including

his personal testimony. The State offered rebuttal evidence. At the conclusion of all the evidence, Frazier again moved for judgment as in case of nonsuit. Frazier's said motion was overruled and he excepted.

As to each defendant, the jury returned a verdict of "guilty as charged in the bill of indictment"; and, as to each defendant, the court pronounced judgment imposing a prison sentence "for a period of not less than twenty (20) nor more than twenty-four (24) months." Each defendant excepted and gave notice of appeal.

The court, having determined that each defendant was unable by reason of his indigency to employ the services of counsel to represent him in the prosecution of his appeal, entered separate orders designating the attorney who had served as trial counsel for each defendant to prosecute his appeal and providing for the payment by Mecklenburg County of all necessary costs incident to perfecting such appeal. As to each defendant, a separate transcript was docketed in this Court.

Frazier case:
Attorney General Bruton and Staff Attorney Vanore for the State.
Don Davis for defendant appellant.

Givens case:
Attorney General Bruton, Assistant Attorney General McDaniel and Staff Attorney Hensey for the State.
Charles V. Bell for defendant appellant.

BOBBITT, J. Contrary to Rule 19(2) of this Court, two separate transcripts were docketed. The trial was upon a joint indictment of both defendants for the same offense. A single transcript should have been docketed. Rules of Practice in the Supreme Court, 254 N.C. 783, 797; *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740; *S. v. Jackson*, 226 N.C. 760, 40 S.E. 2d 417; *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593.

The appeals must be considered separately. The court's charge to the jury is not included in the transcript docketed by Givens, his sole assignment of error being his exception to the overruling of his motion for judgment as in case of nonsuit at the conclusion of the State's evidence. Frazier's assignments of error are based on exceptions (1) to the overruling of his motion for judgment as in case of nonsuit at the conclusion of all the evidence, (2) to rulings on evidence, and (3) to portions of the court's instructions to the jury.

APPEAL OF GIVENS.

Under G.S. 15-173, Givens, not having offered evidence, is entitled to have his motion for judgment as in case of nonsuit passed upon on the basis of the facts in evidence when the State rested its case. Hence, we do not consider testimony of Frazier tending to show the association of Frazier and Givens prior to the time they were observed by the officers.

The evidence offered by the State, as shown by the Givens transcript, is summarized, except when quoted, as follows:

Joe Lee Morton, the owner of the Dodge described in the indictment, went to work at the plant of his employer, Riegel Paper Company, at East Fourth Street and King's Drive, Charlotte, N. C., at 4:00 p.m. on Saturday, April 16, 1966. He had parked his car, leaving his keys in it, in a parking lot right beside his employer's plant. When he got off work "about twenty minutes of two," he discovered his car was "missing" and called the police. "(A)bout 2 o'clock," unidentified officers took Morton to the corner of Fifth and North Tryon Streets. His car "was in Butler's Shoe Store," the front "through the plate glass, right through the corner of it." He did not see Frazier or Givens. He did not know either of defendants and had not authorized either of them to operate his car.

At 2:05 a.m. on Sunday, April 17, 1966, two uniformed Police Officers, W. C. Cannon and B. W. Gaddy, observed a Dodge car that fitted the description Morton had given. The officers were traveling in an "unmarked police car," Gaddy driving and Cannon seated to Gaddy's right. The officers followed the car as it proceeded east on West Fifth Street, a one-way street for eastbound traffic. The Dodge, upon reaching Tryon Street, was stopped in obedience to a red traffic light. The police car pulled to the left and alongside of the Dodge. Defendant Frazier was the driver of the Dodge. Defendant Givens was seated to Frazier's right on the front seat. When Officer Cannon got out of the police car to talk to defendants, "they started pulling off" and in doing so the front of the Dodge hit the police car. Both Frazier and Givens jumped out of the Dodge and ran. The officers chased them on foot. Cannon caught and arrested Givens. Gaddy caught and arrested Frazier. The Dodge "went on across Tryon Street" and "ran into the front of Butler's Shoe Store."

It is noted that *the State's evidence,* as shown by the Frazier transcript, is in all material respects in accord with that set forth above.

G.S. 20-105, which creates and defines the criminal offense for which defendants were indicted, provides: "Any person who drives

or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving, is guilty of a misdemeanor. A violation of this section shall be punishable by fine, or by imprisonment not exceeding two years, or both, in the discretion of the court."

The State's case is based on circumstantial evidence. It was sufficient to permit a jury to find the basic facts narrated below and to draw inferences therefrom.

At and prior to 2:05 a.m. on April 17, 1966, Frazier and Givens were the occupants of Morton's Dodge. The Dodge had been removed from the parking lot, without the consent of Morton, between 4:00 p.m. on April 16, 1966, and 1:40 a.m. on April 17, 1966. The occupancy and use of the Dodge by Frazier and Givens was unlawful and deprived Morton temporarily of the use thereof. When the Dodge was stopped at Fifth and Tryon Streets, the mere approach of the officers caused both defendants, without explanation of their occupancy and use of the Dodge, to jump out of the moving car and attempt to escape arrest.

Defendants were not indicted for the larceny of the Dodge car. However, certain principles, pertinent in trials for larceny, are relevant.

In 52 C.J.S., Larceny § 107(b), the author, in discussing the significance of proof of possession by the accused of recently stolen property, says: "Possession may be personal and exclusive, although it is the joint possession of two or more persons, if they are shown to have acted in concert, or to have been *particeps criminis,* the possession of one participant being the possession of all."

In our view, the unlawful and unexplained occupancy and use of Morton's Dodge by Frazier and Givens under the circumstances disclosed by the evidence, and the precipitous flight of both defendants when approached by the officers, was sufficient to permit and to support a finding by the jury that the Dodge was in the joint possession of Frazier and Givens.

"Where a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction." Blash-

field, Cyclopedia of Automobile Law and Practice, Volume 8A (Permanent Edition), § 5576 (p. 178).

There is no evidence as to what transpired at the parking lot between the time the Dodge was parked by Morton and the time he quit his work and discovered the Dodge was missing. Although it would seem more likely the Dodge was removed after dark rather than in daylight, only a matter of ten hours or thereabout had elapsed from the time Morton parked his Dodge until the time it crossed North Tryon Street and crashed into the showcase of Butler's Shoe Store.

In our view, the unlawful removal of the Dodge from the parking lot was sufficiently recent to permit an inference, "a permissible deduction from the evidence," Stansbury, North Carolina Evidence (2d Ed.), § 215 (p. 552), that those in unlawful possession thereof, namely, Frazier and Givens, absent explanation, were the persons who removed it unlawfully from the parking lot. This general principle is stated in 1 Wigmore on Evidence, Third Edition, § 153: "Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime."

Here, the State's case does not depend solely on such inference as the jury may draw from defendants' unlawful and unexplained possession of the Dodge. The immediate flight of both defendants, without explanation, at the mere approach of the officers may be considered more than slight corroborative evidence of the relation between their then unlawful possession and the unlawful removal of the Dodge from the parking lot.

After careful consideration of the circumstantial evidence in the light of the rule stated in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, and subsequent cases in accord therewith, the conclusion reached is that the evidence, when considered in the light most favorable to the State, was sufficient to require submission to the jury and to support the verdict as to both defendants. *S. v. Orr,* 260 N.C. 177, 179, 132 S.E. 2d 334, 336.

Since Givens' sole assignment of error is without merit, the result on his appeal is "no error."

APPEAL OF FRAZIER

Although there is no evidence Frazier made any explanation prior to trial of his unlawful possession and use of the Dodge, his testimony at trial included a purported explanation thereof. The credibility of his testimony was for the jury. Suffice to say, there was ample evidence to withstand Frazier's motion at the conclusion of all the evidence for judgment as in case of nonsuit.

According to the Frazier transcript, the court charged the jury as follows: "The Court further instructs you, members of the jury, where an unlawful taking is established, the possession of the thing taken is very generally considered a relevant circumstance tending to establish guilt and when the possession is so recent as to make it extremely probable that the holder is the one who took it; that is where in the absence of explanation he could not have reasonably got possession unless he had taken it himself, there is a presumption justifying and in the absence of such explanation, perhaps requiring, a conviction."

Frazier excepted to and assigns as error the quoted excerpt. The assignment is well taken. With reference to the presumption of fact raised by the possession of goods recently stolen as applied in larceny cases, an instruction quite similar to that challenged by defendant Frazier was held erroneous and entitled the appellant to a new trial. *S. v. McFalls,* 221 N.C. 22, 18 S.E. 2d 700. See also, *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725.

It is more accurate to refer to the unlawful and unexplained possession of an automobile recently and unlawfully taken from the actual or constructive possession of the owner thereof as giving rise to an inference, an evidential circumstance, that the person having such possession thereof had unlawfully taken it into his possession with intent to deprive the owner of the (temporary) use thereof. This evidential circumstance is to be considered by the jury along with all other circumstances disclosed by the evidence in determining whether the defendant be guilty or not guilty of the crime charged. In our view, the court's instruction as to "a presumption justifying and in the absence of explanation, perhaps requiring, a conviction," was erroneous and prejudicial. Hence, Frazier is entitled to and is awarded a new trial.

As to Givens: No error.

As to Frazier: New trial.

DOLLY T. MAUNEY v. DAVID JENNINGS MAUNEY.

(Filed 12 October, 1966.)

1. Contempt of Court §§ 2, 3—

There is a material difference between civil contempt, which is a proceeding to preserve and enforce the rights of private parties by compelling obedience to orders and decrees made for the benefit of such parties, G.S. 5-8, and criminal contempt, which is a proceeding to punish an act already

accomplished which tended to interfere with the administration of justice, G.S. 5-1.

2. Contempt of Court § 6; Divorce and Alimony § 21—

Upon the hearing of an order to show cause why defendant should not be held in contempt for failure to make payments of alimony *pendente lite* as decreed by the court, findings of the court that defendant is healthy and able-bodied, had been employed, and has the ability to earn good wages, without finding that defendant presently possessed the means to comply with the order of the court or that at any time during the period in which he was in arrearage he had been able to make said payments, does not support a sentence of confinement in jail for contempt.

APPEAL by defendant from *Martin, S.J.,* April Civil Session 1966 of GASTON.

This action was instituted by plaintiff against the defendant, her husband, on 7 October 1963 for permanent alimony, counsel fees and alimony *pendente lite.* Motion for alimony *pendente lite* was heard by his Honor Harry L. Riddle, Jr. on 22 January 1964, and on said date order was entered requiring defendant to pay alimony *pendente lite* and attorney's fees. On 30 September 1964 plaintiff filed motion alleging defendant was in arrears in his payments of alimony *pendente lite.* A hearing was held before his Honor James F. Latham on 5 October 1964, and he entered an order adjudging that the defendant was not in contempt and requiring defendant to appear before the court during the first non-jury civil session of the Superior Court of Gaston County in January 1965, to show the amount of his income and payments, if any, that he had made in compliance with the former order. Defendant did not appear and on 15 March 1966 was served with order to appear before the court on 5 April 1966 to show cause, if any, why he should not be punished as for contempt. Defendant failed to appear on 5 April 1966 and his Honor, Harry C. Martin, heard the plaintiff's evidence and entered judgment on that date. On the next day defendant appeared and his Honor Harry C. Martin allowed the defendant to present evidence. Whereupon, Judge Martin found that the defendant "is a healthy, able bodied man, 55 years old, presently employed in the leasing of golf carts and has been so employed for many months; that he owns and is the operator of a Thunderbird automobile; that he has not been in ill health or incapacitated since the date of Judge Latham's order entered on the 5th day of October, 1964; that the defendant has the ability to earn good wages in that he is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the 5th day of October, 1964; that since October 5, 1964, the defendant has not made any motion to modify or reduce the support payments." Upon these findings it

was ordered that the defendant pay into the office of the Clerk of Superior Court $3,000 for the use and benefit of the plaintiff, the sum of $250 attorney's fees, and that the defendant be arrested and confined in the Gaston County jail without bond until such time as he complied with the orders of the court.

The defendant offered evidence tending to show that he was unable to make payments pursuant to the orders of the court. The court did not find as a fact that defendant had at any time during the period in which he was in arrearage been able to make said payments.

From the judgment entered, defendant appealed.

Robert H. Forbes for plaintiff appellee.
Frank P. Cooke and Childers & Fowler for defendant appellant.

BRANCH, J. Civil contempt and criminal contempt are distinguishable. "It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings." *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345.

The case of *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157, held: "Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. . . . Civil contempt is a term applied where the proceeding is had 'to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties.' . . . Resort to this proceeding is common to enforce orders in the equity jurisdiction of the court, orders for the payment of alimony, and in like matters. In North Carolina such proceeding is authorized by statute, C.S. 985 (now G.S. 5-8)."

In reaching decision in this case we need only consider the question, Did the trial court make the necessary findings of fact to support the judgment of imprisonment entered?

"A contempt proceeding is *sui generis.* It is criminal in its nature, and (in) that the party is charged with doing something forbidden, and, if found guilty is punished. Yet it may be resorted to in civil or criminal action. . . . In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the con-

temnor, and the judgment must be founded on these findings." *In re Hege,* 205 N.C. 625, 172 S.E. 345.

A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful, which imports knowledge and a stubborn resistance. "Manifestly, one does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered." *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403.

Hence, this Court has required the trial courts to find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default.

Parker, J. (now C.J.), speaking for the Court in the case of *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867, said: "The lower court has not found as a fact that the defendant possessed the means to comply with the orders for payment of subsistence *pendente lite* at any time during the period when he was in default in such payments. Therefore, the finding that the defendant's failure to make the payments of subsistence was deliberate and wilful is not supported by the record, and the decree committing him to imprisonment for contempt must be set aside." (Citing cases.)

In *Green v. Green,* 130 N.C. 578, 41 S.E. 784, it was held that in proceedings for contempt the facts found by the judge are not reviewable by this Court except for the purpose of passing upon their sufficiency to warrant the judgment. Where the trial judge found that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount.

In the case of *Vaughan v. Vaughan,* 213 N.C. 189, 195 S.E. 351, this Court further stressed the necessity of finding as a fact that the plaintiff possessed the means to comply with the orders for payment. Here plaintiff had been ordered to make certain monthly payments for the support of his wife and child. Upon the hearing of an order directing plaintiff to show cause why he should not be held in contempt for failure to comply with the prior order, the trial judge found only that plaintiff was "in contempt of court because of his willful failure and neglect to comply. . . ." This Court found error and remanded, holding that "the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work — an inventory of his financial condition." The Court has reaffirmed this position as recently as *Gorrell v. Gorrell,* 264 N.C. 403, 141 S.E. 2d 794.

The finding of facts by the trial court in the instant case is not sufficient basis for the conclusion that defendant's conduct was wil-

ful and deliberate, nor for the founding of the judgment entered.

The court entered judgment as for civil contempt, and the court must find not only failure to comply but that the defendant presently possesses *the means* to comply. The judgment committing the defendant to imprisonment for contempt is not supported by the record and must be set aside.

This case is remanded for further hearing and findings of fact.

Error and remanded.

STATE v. SONNY PARKER, JR.

(Filed 12 October, 1966.)

1. Criminal Law § 101—

The duty of the court in passing upon the sufficiency of circumstantial evidence is merely to determine whether there is any substantial evidence of defendant's guilt of every essential element of the offense charged, it being for the jury and not the court to determine whether the evidence establishes defendant's guilt beyond a reasonable doubt and excludes every reasonable hypothesis of innocence; nevertheless, every inference raised by circumstantial evidence must stand upon clear and direct evidence and may not be based on another inference or presumption.

2. Burglary and Unlawful Breakings § 4; Larceny § 5—

Defendant's possession of merchandise which had been taken by the breaking and entering of a store raises a presumption of defendant's guilt of larceny and of breaking and entering.

3. Same— There being no direct evidence that defendant was the possessor of recently stolen property, the circumstantial evidence of guilt was insufficient to be submitted to the jury.

The evidence established that a store had been broken into by the breaking of glass of the door, and that five suits of clothes, established as in the proprietor's possession by inventory some four days prior to the breaking, were missing. There was testimony that a person, apprehended by a railroad agent on railroad tracks on the night shortly after the offense, dropped something, that the agent gave chase but failed to catch such person, that a railroad watchman found one suit of clothes, later identified as one of the five suits taken from the store, on the tracks, that the agent and the watchman then apprehended defendant walking up the tracks from the direction from which the agent had chased the unidentified figure, that defendant had meal and grain on his clothing such as could be found at the place where the unidentified person had eluded the agent, and that defendant had his hand cut and there was blood on the coat hanger found with the suit of clothes. *Held:* There was no direct and clear evidence placing the stolen goods in the possession of defendant, and defendant's motion for nonsuit should have been allowed.

STATE *v.* PARKER.

APPEAL by defendant from *McLean, J.*, March 1966 Criminal Session of MECKLENBURG.

Defendant was tried before a jury on an indictment charging him with breaking and entering a building occupied by Robert Hall Clothing Store, a corporation, in the City of Charlotte, and larceny therefrom of property valued at less than $200, a suit of clothing.

The State offered evidence substantially as follows: An employee testified that on the night of 28 January 1966 he had closed the store at 9:35 and had locked the doors himself. In response to a call from the police, he returned to the store at 3:00 A.M. that same night and found that two of the front glass doors had been broken through; that there was broken glass and spots of blood on the inside floor; and that upon an inventory taken shortly thereafter it was found that five suits were missing. The last regular inventory had been taken four days prior to the date of the breaking and entering.

Another witness for the State, Neal Hartis, testified that he was an agent of Southern Railroad and that on the night of 28 January 1966 at around 11 o'clock he was in his car checking boxcars on the railroad in the vicinity of where the tracks cross 11th Street in the City of Charlotte. While driving across the tracks on 11th Street he looked down the tracks towards 10th Street and noticed a man walking up the tracks towards him, carrying something. When he flashed his light towards the figure, the man dropped what he was carrying, turned, and ran in the direction of 10th Street. Hartis drove around the block and intercepted the man before he reached 10th Street and gave chase up the tracks towards 11th Street. Before he could apprehend him, the man disappeared between two buildings and was thought to have gone down a hole under one of the buildings. Hartis then walked up the tracks to where he first observed the man and found a railroad watchman standing there holding a suit of clothes he had just found on the railroad tracks. This suit was later identified as one of the suits missing from the clothing store. While he and the watchman were standing there talking, he observed the defendant walking up the tracks from the direction in which he had chased the unidentified figure. Hartis at that time apprehended the defendant and found that his hand was cut and that he had meal and grain on his clothing such as could be found on the ground around the building where the unidentified figure had disappeared.

Hartis testified on cross-examination that he could not say beyond a reasonable doubt that the defendant was the man he had previously chased. There was testimony that the coat hanger found

with the suit of clothes had blood on it. There was further corroborating testimony.

No evidence was presented which tended to place defendant nearer than one block to the clothing store, nor was there any direct evidence that defendant ever had control or possession of the suit of clothes.

Defendant offered no evidence.

The jury returned a verdict of guilty as to both counts. Judgment was entered thereon giving defendant nine to ten years on the first count and one year on the second. From said judgment the defendant appeals, assigning as error (1) the refusal of the trial court to grant his motion for judgment as of nonsuit, and (2) the refusal of the trial court to grant his motion to set aside the verdict.

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

W. Herbert Brown, Jr., for defendant appellant.

BRANCH, J. Defendant's principal assignment of error challenges the sufficiency of the evidence to go to the jury and sustain the verdict. This is, admittedly, a case of circumstantial evidence. The rule in respect to the sufficiency of circumstantial evidence to carry a case to the jury has been clearly and succinctly stated by Higgins, J., in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, as follows:

> "We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence

would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. (Citing cases)."

This case was quoted with approval by Parker, C.J., in the case of *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654.

We must simply determine whether there is substantial evidence against the defendant of every essential element that goes to make up the offense charged.

The defendant is charged with breaking and entering with intent to commit a felony and larceny of property of the value of less than $200.

There is ample evidence that the store building occupied by Robert Hall Clothing Store was feloniously broken into and entered on the 28th day of January 1966, and that property was stolen therefrom.

It is a well recognized legal principle in North Carolina that: "If and when it is established that a store has been broken into and entered and that merchandise has been stolen therefrom, the recent possession of such stolen merchandise raises presumptions of fact that the possessor is guilty of the larceny *and* of the breaking and entering." *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578.

In the case of *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725, Chief Justice Stacy, in discussing this principle, stated:

" 'The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law, and is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. The duty to offer such explanation of his possession as is sufficient to raise in the mind of the jury a reasonable doubt that he stole the property, or the burden of establishing a reasonable doubt as to his guilt, is not placed on the defendant, however recent the possession by him of the stolen goods may have been' — Schenck, J., in *S. v. Baker,* 213 N.C. 524, 196 S.E. 829."

In the instant case we have no direct evidence that the defendant was in "recent possession" of the stolen property. A period of four days had elapsed since the stolen property had been definitely placed in the possession of Robert Hall Clothing Store. There was no evidence placing defendant in the store at the time of the breaking and entering. The State relied on the theory of "recent possession" and upon the existence of unidentified and unclassified blood on the suit, the suit hanger, and at the scene of the crime. The strongest evidence revealed in the record placing the alleged stolen property in the possession of the defendant was by a witness who testified, in effect, that he saw "a person who looked just like the defendant drop *something* on the tracks." The witness further said, "I am not for sure that this defendant was the man I shined my lights on," and "(I) cannot say beyond a reasonable doubt that the defendant was the man I shined my lights on on this occasion." Another person later found the suit, which was identified as belonging to Robert Hall Clothing Store. We might here observe that the record shows that five suits were missing from Robert Hall Clothing Store and only one was found in the vicinity where the defendant was apprehended. None of the other suits were accounted for in the record. There was no direct and clear evidence placing the stolen goods in the possession of defendant.

"A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption. (Citing cases)." *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411.

After a careful examination of the record and applying the well established rules of law, we conclude that the evidence is insufficient to support the indictments, and that the defendant's motion for nonsuit should have been allowed.

We deem it unnecessary to consider the defendant's other assignment of error.

Reversed.

YANCEY *v.* HEAFNER.

W. HARRELSON YANCEY, JOHN C. BODANSKY, ROY E. CRAFT, MAXIE BRUNNEMER, BETTY F. HERMAN, HEBER K. BRUNNEMER, BERTHA P. PARKER, LESLIE O. McCOLLUM, OTIS L. PEACH, CHARLES P. LYTTON AND JOHN R. FALLS, PETITIONERS, v. RONALD M. HEAFNER, CHIEF BUILDING INSPECTOR, AND W. R. HUSKINS, W. D. LAWSON, III, DAN CRAIG, C. P. FALLS AND C. P. NANNEY, MEMBERS OF THE BOARD OF ADJUSTMENT FOR THE CITY OF GASTONIA, RESPONDENTS.

(Filed 12 October, 1966.)

1. Municipal Corporations § 25—

A municipal board of adjustment has authority to permit the construction of a football stadium, with lights and a seating capacity having reasonable relationship to the size of the student body, ancillary to a high school built in a residential zone permitting schools and colleges.

2. Municipal Corporations § 34; Administrative Law § 4—

A municipal board of adjustment, when sitting as a body to review a decision of the city building inspector, is vested with judicial or quasi-judicial powers, and a decision of the board, while subject to review by the courts upon *certiorari*, will not be disturbed in the absence of arbitrary, oppressive or manifest abuse of authority or disregard of law.

APPEAL by Petitioners from *Jackson, J.*, at 18 July, 1966, Civil Session of GASTON Superior Court.

In 1961 the Hunter Huss High School was constructed upon a 54.51-acre tract of land owned by the Gaston County Board of Education. The land on which the school is situated lies almost in the center of a modern residential subdivision, known as Wesley Park. This subdivision contains numerous residences in the $25,000 to $45,000 class. Both the school and the subdivision are located in an R-12 Single Family Residential Zone which permits schools and colleges, kindergartens and day nurseries, municipal, county, state and federal uses not involving the outdoor storage of equipment or materials.

On 1 March, 1966, the County Board of Education made application with the Building Inspector for the City of Gastonia to construct a 4,000-seat, concrete, lighted athletic stadium, as an ancillary athletic playing field of Hunter Huss High School.

The petitioners, residents of Wesley Park whose residences almost "ring" the proposed stadium, protested to the Building Inspector and a hearing was held. After hearing the evidence the Building Inspector issued a permit for the construction of the stadium and from his order the aggrieved property owners appealed to the Board of Adjustment of the city.

On 7 April, 1966, the Board of Adjustment, after a public hearing, unanimously affirmed the Building Inspector.

Subsequently the petitioners filed a petition in the Gaston Su-

perior Court for review by writ of *certiorari.* This writ was granted on 22 April, 1966.

On 20 July, 1966, the matter came on for review before Judge Jackson. After reviewing the record and hearing arguments of counsel, his Honor signed a judgment on that day affirming the action of the Board of Adjustment.

The petitioners excepted to the signing of the judgment and appealed to the Supreme Court.

Frank P. Cooke for Petitioners, Appellants.

Garland & Alala by James B. Garland, Gaston, Smith & Gaston by Willis C. Smith for Respondents, Appellees.

PLESS, J. The plaintiffs concede that education not only includes improvement of the mind but also improvement of physical faculties of students. The use of an athletic playing field in our modern day educational system has become an integral part of the school curriculum. In fact, we can find no authority which holds that athletic facilities, including stadia, are forbidden in zones where schools are permitted.

"The proposed condemnation of certain land to provide an athletic field for a high school was held not to violate the provisions of the zoning ordinance under which institutions of an educational character were permitted in a residential district on the ground that education was not a matter confined to the improvement of the mind, but might involve the development of a person's physical faculties, the grounds used for such purpose in connection with an educational institution becoming a part of the institution itself. *Commrs. of Dist. of Columbia v. Shannon & L. Constr. Co.* (1927) 57 App. D.C. 67, 17 F. 2d 219." 36 A.L.R. 2d 664.

"The ordinance provides that this zone where the stadium (high school) is located may be used for high schools, and this should, we believe, be interpreted to mean any part of a high school, whether its gymnasium, class room building, athletic stadium or library. In the absence of a clause in the ordinance specifically rejecting high school stadia from this zone, we consider it proper to include them as logical parts of the high schools that have been specifically approved for this district by the terms of the ordinance. In the light of all the circumstances, the court is unable to discern any unlawful thing * * * in the operation of this stadium for night high school football games." *Bd. of Education of Louisville v. Klein, et al,* 303 Ky. 234; 197 S.W. 2d 427.

The "little red school house" is a thing of the past, and today's modern schools have cafeterias, gymnasiums, laboratories, and other

facilities that were unheard of until recent times. Now, they are regarded as usual and necessary, and it is naturally to be expected that land appurtenant to a school building not now in use would be made serviceable in some manner. To establish extra baseball and football fields, tennis courts, etc., for a student body of 1,200 on its 54 acres would not be unexpected nor a violation of the zoning ordinances under consideration here. A grandstand to seat the spectators of a football game or baseball game is a natural adjunct to the ball field itself, and we do not interpret the plaintiffs' position as being of the opinion that the above acts and developments would be illegal. It then resolves itself into a question, as stated in the plaintiffs' brief, as to whether or not a stadium that would seat 4,000 people and which is lighted and the use of which may depreciate property values of the plaintiffs is a violation of the ordinance. It is a matter of common knowledge that a student body almost unanimously attends the athletic events where their teams are participating, and that their parents, too, become interested. With a student body of 1,200 and many of the parents attending, it would require almost the 4,000 seats to take care of them, and if the public generally and students of the opposing schools and their parents are to be seated, the capacity of 4,000 seats could not be held to be excessive. It is a rare thing when a football game or baseball game between high schools is played in the daytime. Practically all of them are played at night and, necessarily, lights are used. While the noise from the crowds and the lights will be disturbing to the people living close by, it must be recognized that when they purchased their property that a school, together with its attendant and necessary adjuncts, was permitted within the zoning ordinance. They can take some comfort from the fact that athletic seasons are short, contests will not be held every night, and most games will be completed by the ordinary hour for retiring. Considering the above, we cannot hold that the Board of Adjustment nor the lower court was in error in granting the permit.

We have found no North Carolina case that is applicable, but in *Property Owners Assn. of Garden City Estates, Inc., v. Board of Zoning App.,* 123 N.Y.S. 2d 716, it was held that a Zoning Board should have granted a permit to erect permanent stands in connection with an athletic field without limitation on the number of seats. From it we quote: "It is customary, whenever space is available, for colleges, and schools generally, to use a portion of their property for athletic contests, commencement exercises and other activities of like nature. The parties to these proceedings do not question the right of Adelphi (College) to make such use of its property but the property owner-petitioners and the Board seek to deny

Adelphi that which public schools concededly may do without permission — provide seats as an accessory use."

Also in *S. ex rel Tacoma School District v. Stojack,* 53 Wash. 2d 55, 71 A.L.R. 2d 1064, it was held that in the selection of a site for a senior high school the directors have authority to determine the area of land reasonably necessary to accommodate suitable buildings, playgrounds, student and related activities to establish an adequate school in accordance with present day educational requirements. 47 Am. Jur. Schools, Sec. 75, cites the above case, and also says: "The power of school authorities to provide gymnasiums and athletic fields and playgrounds has been sustained in a number of places."

"Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the Ordinance as a whole. * * * Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property." Yokley, Zoning Law and Practice, Second Edition (1962 supplement), Vol. 1, Section 184.

This Court has held in several cases that a Board of Adjustment when sitting as a body to review a decision of the Building Inspector is vested with judicial or quasi-judicial and discretionary powers.

"The decisions of the Board of Adjustment are final, subject to the right of courts on *certiorari* to review errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority. *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1; *Chambers v. Bd. of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211; *In re Appeal of Hasting,* 252 N.C. 327, 113 S.E. 2d 433; *Jarrell v. Bd. of Adjustment,* 258 N.C. 476, 128 S.E. 2d 879. The cited cases refer to an identical provision (G.S. 160-178) in the enabling act applicable to 'cities and incorporated towns'." *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600.

The court found no error in the decision of the Board of Adjustment, and we agree with its action. The decision is

Affirmed.

STATE v. JAMES EDWARD DOUGLAS.

(Filed 12 October, 1966.)

1. Assault and Battery § 4—

It is not required in order to constitute the offense of assault that actual force be used, it being sufficient if defendant evinces violence sufficient to put a reasonable man in fear which coerces him from pursuing lawful conduct.

2. Assault and Battery § 14— Evidence of guilt of assault with deadly weapon sufficient to be submitted to jury.

The State's evidence tended to show that the prosecuting witness apprehended defendant and a companion with goods which the witness had seen them take from the store of the witness, and that defendant pulled a knife from his back pocket and used abusive and threatening language, causing the prosecuting witness to abandon his attempt to recover the goods. *Held:* The evidence is sufficient to be submitted to the jury on a charge of assault with a deadly weapon, notwithstanding the absence of evidence that defendant, in advancing upon the prosecuting witness, had the knife open, since the evidence discloses that the prosecuting witness had no alternative but to encounter an unequal conflict or to abandon his goods.

3. Criminal Law § 154—

The rules of court governing appeals are mandatory and are as binding upon an indigent defendant as any other.

4. Criminal Law § 156—

An assignment of error to the charge should set forth in the assignment that portion of the charge defendant contends was erroneous. Rule of Practice in the Supreme Court No. 19(3).

5. Criminal Law § 108— Statement of contentions held expression of opinion by court in ridiculing defendant's plea of not guilty.

In this prosecution involving the taking of a suit of clothes in the view of the proprietor from the proprietor's store, the court, in stating defendant's contentions, not only stated that defendant contended he was not at the scene and did not take any suit of clothes, but went further and stated that defendant contended the proprietor was just imagining things, and that the proprietor had never lost a suit of clothes and that the proprietor did not even sell suits of clothes. There was no suggestion in the entire record that the prosecuting witness did not run a clothing store. *Held:* The overstatement of the contentions tends to ridicule and impair the effect of defendant's plea of not guilty and constitutes an expression of opinion by the court in violation of G.S. 1-180.

APPEAL by defendant from *Campbell, J.*, July 11, 1966 Conflict Schedule C Criminal Session of MECKLENBURG.

Defendant was first tried and convicted in the Recorder's Court of the City of Charlotte upon warrants charging him with an assault with a deadly weapon upon Louis Lipinsky and the larceny of a suit coat valued at $45.00, the property of Lipinsky. Upon con-

viction and sentence of imprisonment, defendant appealed to the Superior Court where he was tried *de novo* upon a plea of not guilty.

The State's evidence tends to show: The prosecuting witness, Lipinsky, operates Louis & Sons, a clothing store in the city of Charlotte. On November 20, 1964, as he and his wife returned from lunch, they stopped to observe the front show window, which had just been redecorated. Looking through the window they saw defendant remove a suit of clothes worth $75.00 from a rack inside the store and hand it to a woman, who put it under her raincoat. Without paying for the suit, defendant and the woman went out by a side door which led to a parking lot. Lipinsky and his wife immediately went to that door, stopped the pair, and asked for the suit. Defendant and the woman ran, and the trousers to the suit fell from her raincoat. As Lipinsky reached to grab the woman, defendant swung at him with his fists. Lipinsky then started for defendant, who immediately pulled a knife from his back pocket, used abusive language, and said, "If you come closer, I will kill you." Lipinsky, fearing that he might get his throat cut, backed away. Defendant and the woman escaped with the suit coat, which was worth $45.00. Lipinsky later identified defendant in a police lineup.

At the close of the State's evidence, defendant moved to nonsuit the assault charge. The motion was denied. Defendant offered no evidence and renewed his motion, which was again overruled. The verdict was guilty as charged in both warrants. From a sentence of imprisonment, defendant appeals.

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

Plumides & Plumides; Jerry W. Whitley for defendant appellant.

SHARP, J. The motions for nonsuit were properly overruled. "The principle governing this case has been decided by several adjudications on the subject by this Court. The principle is that no man by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be." *State v. Martin,* 85 N.C. 508, 510. The evidence does not disclose whether the knife with which defendant threatened Lipinsky was open or shut, nor does it reveal that defendant actually swung the knife at the prosecuting witness. As the Court pointed out in a similar case, however, under the circumstances this was immaterial. *State v. Shipman,* 81 N.C. 513. Defendant was so near the unarmed Lipinsky that the latter would have been at his mercy had he opened the knife and taken one step forward, "the work of but a moment." Lipinsky had no alternative but to encounter an unequal conflict or

to abandon the goods taken from his store. In *State v. Shipman, supra,* the defendant, after using threatening language with reference to the prosecuting witness within his hearing, advanced upon him with a knife, continuing the use of violent and menacing expressions. The evidence left it doubtful as to whether the knife was open, but when the defendant got within 5-6 feet of the witness, the latter retreated. It was held that defendant was properly convicted of an assault. *Accord, State v. Martin, supra; State v. Allen,* 245 N.C. 185, 95 S.E. 2d 526; *State v. McIver,* 231 N.C. 313, 56 S.E. 2d 604. See Note, 36 N.C.L. Rev. 198 (1957) and *State v. Daniel,* 136 N.C. 571, 48 S.E. 544.

Defendant makes six assignments of error. Only the two relating to the court's refusal to allow the motions for nonsuit purport to comply with the rules of this Court, which are fully set out and annotated in 254 N.C. 783-824 (1961). Subsequent amendments appear in 259 N.C. 753 (1963) and 264 N.C. 757 (1965). "We have time and time again called attention to the Rules of Practice in this Court. They are mandatory." *Walter Corporation v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313. A failure to comply with the rules may result in a dismissal of the appeal. *Trust Co. v. Henry,* 267 N.C. 253, 148 S.E. 2d 7; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. Counsel representing an appellant should familiarize himself with the rules of this Court as well as the substantive law of his case.

The Rules of Practice in the Supreme Court of North Carolina apply to indigent defendants and their court-appointed counsel as well as to all other appellants. *State v. Price,* 265 N.C. 703, 144 S.E. 2d 865. The purpose of Rule 19(3), which requires that each assignment of error itself disclose with particularity the specific matters alleged as error without requiring "a voyage of discovery" through an often voluminous record, is twofold: (1) to enable the members of the Court, in their pre-argument examination of the record, to ascertain the questions involved in the appeal and thus to obtain maximum benefits from the arguments; (2) to reduce the possibility that an error in the trial below will escape detection. "The assignments of error, when properly prepared, pinpoint the controversy." *State v. Wilson,* 263 N.C. 533, 534, 139 S.E. 2d 736, 737; *State v. Dishman,* 249 N.C. 759, 107 S.E. 2d 750. Today, no court to which all litigants can appeal as a matter of right can hope to cope with its burgeoning calendar without the full cooperation of its bar. As Chief Justice Clark said in *McDowell v. Kent,* 153 N.C. 555, 558, 69 S.E. 626, 627, and as Stacy, C.J., repeated in *Greene v. Dishman,* 202 N.C. 811, 812, 164 S.E. 342, 343:

> "What the Court desires, and indeed the least that any appellate court requires, is that the exceptions which are *bona*

fide be presented to the Court for a decision, as the points determinative of the appeal, shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance (as the case may be) as shall be necessary to present clearly the matter to be debated.

"This requirement of the Court is not arbitrary but has been dictated by its experience and from a desire to expedite the public business by our being enabled to grasp more quickly the case before us and thus more intelligently follow the argument of counsel. In this practice we have followed what has long been adopted by other courts."

Defendant's assignments of error 5 and 6 relate to portions of the judge's charge, but those portions to which exceptions were taken are not recopied in the assignment as required by Rule 19(3). *Hill v. Logan,* 262 N.C. 488, 137 S.E. 2d 822. Defendant's sixth assignment of error is as follows:

"EXCEPTION No. 6 (R p 25): The defendant maintains that this statement by the court goes beyond the mere statement of the defendant's position, and that, in fact, it amounts to a slander or ridicule of the defendant's position. The defendant excepts to this and assigns this as his Assignment of Error #6."

This will not do. The correct way to have presented this exception would have been in a form substantially as follows:

No. 6. Defendant assigns as error the following portions of his Honor's charge:

"The defendant says and contends in the first place that he wasn't even out there, that he's never been out there, and that he's never been out there by himself, or with anyone else, and he didn't take any suit of clothes, that he never saw a suit of clothes in the place of business and that he didn't walk out with any suit of clothes. He had no companion with him who walked out with any suit of clothes. Not having ever been there he couldn't possibly have taken a suit of clothes off a rack, and he had nothing in the world to do with it at all, and that Lipinsky was just imagining things if he thought this man was out there; that Lipinsky never lost a suit of clothes. He didn't have any suit of clothes out there on a rack. He doesn't even sell suits of clothes." (R 24-25).

EXCEPTION No. 6; R p 25.

Although it is sometimes necessary to do so, we are always reluctant to dispose of any appeal otherwise than upon its merits. For that reason, we have considered assignment of error No. 6, which, in our opinion, has merit.

The defendant's plea of not guilty controverted and put in issue the existence of every fact necessary to constitute the offense charged in the two warrants upon which he was tried. *State v. Mitchell,* 260 N.C. 235, 132 S.E. 2d 481. This legal principle, intended to protect an accused, was turned against defendant by that portion of the judge's charge quoted above. It tended to ridicule, and thus impair, the effect of defendant's plea of not guilty. It therefore constituted a violation of G.S. 1-180, which forbids a judge to express to the jury his opinion on the facts of the case he is trying. *Power Company v. Black,* 263 N.C. 811, 140 S.E. 2d 540. The Attorney General, in his brief, concedes that this particular portion of the charge "appears to be an overstatement of defendant's contentions," and that "nothing would have been lost had the court omitted the statement." He contends, however, that when the charge is considered as a whole, defendant has not been prejudiced. We do not agree.

There is no suggestion in the entire record that Lipinsky does not run a clothing store. When the judge charged that defendant contended that Lipinsky, "doesn't even sell suits of clothes," the jurors, recognizing the absurdity of such a contention, likely understood that the judge considered the rest of defendant's contentions to be on a par with that one. *State v. Dooley,* 232 N.C. 311, 59 S.E. 2d 808.

A trial judge is not required to state to the jury the contentions of either the State or the defendant. In a case where the State's evidence seems to establish defendant's guilt conclusively, and the judge must strain credulity to state any contrary contention for defendant, his obvious solution is to state no contentions at all. A simple explanation of the effect of the plea of not guilty will fulfill the requirement. As every trial lawyer knows, a judge can indicate to the jury what impression the evidence has made on his mind and what deductions he thinks it should draw from it without expressly stating his opinion in so many words. If, however, the judge intimates an opinion by his manner of stating the evidence, "by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial," he violates G.S. 1-180 no less. *State v. Simpson,* 233 N.C. 438, 442, 64 S.E. 2d 568, 571. "Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This

right can neither be denied nor abridged." Walker, J., in *Withers v. Lane,* 144 N.C. 184, 192, 56 S.E. 855, 858.

Applying this principle to exception No. 6, there must be a New trial.

EARL OGLESBY v. DAVID A. ADAMS, COMMISSIONER OF COMMERCIAL AND SPORTS FISHERIES OF THE STATE OF NORTH CAROLINA; DAN E. STEWART, DIRECTOR OF THE DEPARTMENT OF CONSERVATION & DEVELOPMENT OF THE STATE OF NORTH CAROLINA; AND THOMAS WADE BRUTON, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA.

(Filed 12 October, 1966.)

Constitutional Law §§ 23, 25—

While there is no vested right in the provisions of a statute, where a person has leased the bottom of waters from the State for oyster beds pursuant to G.S. 113-176 *et seq.*, the lease constitutes a contract between the lessee and the State, and the State may not by subsequent statute abrogate the terms of the contract, either as to duration and renewals or the amount of rent.

APPEAL by defendants from *Parker, J.,* at June 1966 Civil Session of CARTERET Superior Court.

In 1933 the Legislature enacted several statutes which authorized the leasing of oyster beds by the Board of Conservation & Development to citizens of the State. Those pertaining to this action were G.S. 113-176, 181, 182, 183 and 184. They provided in substance that the Board should have power to lease to any citizen of the State "any bottom of the waters of the State not a natural oyster bed" for 20 years, the rental to be at the rate of 50 cents per acre per year for the first 10 years, and one dollar per acre per year for the next 10 years of the lease, payable annually. The leases were to be heritable and transferable and were to be for a period of 20 years. At the expiration of the first lease the lessee was entitled to successive leases on the same terms as applied to the last 10 years of the first lease, for a period not exceeding 10 years.

On 20 January, 1953, the plaintiff Earl Oglesby leased a 10-acre section of the bottom of Newport River, Carteret County, for a 20-year period, with the right of renewal referred to in the statute. The plaintiff complied with his responsibilities under the lease, paying the lease price each year and cultivating the river bottom in appropriate manner. Prior to April 1st, 1965, he offered the sum of $10 as rental for the succeeding year. This was declined by the

State under the authority of legislation enacted by the 1965 General Assembly which amended part of the statutes referred to above and added other provisions, among which was one that anyone who deemed himself damaged may apply to the Industrial Commission for the award of such damages as he may prove. The 1965 act permitted a charge of five dollars per acre per year for the lands in question, and the Board required payment of that amount, or a total of $50 instead of the $10 tendered. Plaintiff refused to pay the larger amount and brought this action to obtain a declaratory judgment to the effect that the 1965 act was unconstitutional in that it impaired his contractual rights and also sought an injunction to prevent the Board from cancelling his lease.

The Superior Court upheld his position, declared the act unconstitutional as it relates to the plaintiff, and required the Board to "comply and abide by said lease to the same extent as if the 1965 legislation had not been enacted."

The defendants appealed, assigning errors.

Wheatly & Bennett for plaintiff appellee.

Attorney General T. W. Bruton, Assistant Attorney General Millard R. Rich, Jr., for defendants appellants.

PLESS, J. "Contracts to which a State is a party are within the constitutional prohibition against the impairment of the obligation of contracts. An act of a legislature may be an obligation of the State within the constitutional prohibition, and whatever rights are created by such act a subsequent legislature cannot impair. It is a well established principle that a contract to which a State, or a subdivision thereof, is a party is as much within the constitutional prohibition of statutes impairing the obligation of contracts as a contract between individuals, particularly with respect to contracts previously entered into by the State in its proprietary capacity." 16 C.J.S. 1301, Constitutional Law, Sec. 285.

Also it is said in 16 Am. Jur. 2d 791, Constitutional Law, Sec. 443: "The general principle is established in American jurisprudence that a legislative grant under which rights have vested amounts to a contract and that a subsequent statute attempting to impair or annul such grant is unconstitutional because it is a law impairing the obligation of contracts. Thus, if a State makes a grant absolute in terms and without any reservation of a right to alter, modify, or repeal it, this constitutes an executed contract, and the State is forbidden to pass laws impairing the obligation arising therefrom." And "it is a matter of established law that a legislative enactment in the ordinary form of a statute may contain provisions which,

when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations; rights may accrue under a statute or even be conferred by it, of such character as to be regarded as contractual, and such rights cannot be defeated by subsequent legislation. When such a right has arisen, the repeal of the statute does not affect the right or an action for its enforcement." *Ibid* 790.

The case of *State v. Spencer,* 114 N.C. 770, 19 S.E. 93, is quite similar to the one under consideration. In that case Spencer entered an oyster bed in Hyde County and held a grant therefor under the authority of Chap. 119, Laws 1887. Six years later the Legislature made the same lands not subject to entry, and in the contest resulting from the two conflicting statutes, the Court said:

> "When the State comes into its courts seeking their aid in annulling a contract it is governed in general by the same rules as a citizen. It has provided its own tribunal with full powers and a system by which its decisions may be reviewed. These laws are binding upon us. Aware as we are, of the importance of preserving these public grounds for the common benefit, we are not permitted to provide another way when the legislature has marked out the course to be pursued by those who have been injured by the action of commissioners.
>
> "In the absence of any allegation of fraud or mistake in the complaint there was no cause of action stated. If grants have been issued under the provisions of and in strict accord with the law, rights of property have been acquired which the State itself cannot take away *except* after compensation and under the principle of eminent domain."

We are aware of the case of *Pinkham v. Mercer,* 227 N.C. 72, 40 S.E. 2d 690, in which it is said: "No person has a vested right in a continuance of the common law or statute law. It follows that, generally speaking, a right created solely by the statute may be taken away by its repeal or by new legislation." The distinction is that here the plaintiff is relying not upon a statute but upon a contract duly and legally executed by the State, and the State is not at liberty to violate the rights conferred upon the plaintiff by a solemn agreement.

The order of Judge Parker is

Affirmed.

DUFF-NORTON COMPANY, A CORPORATION, v. E. PAT HALL, A. ALEX SHUFORD, JR., INDIVIDUALLY AND TRADING UNDER THE PARTNERSHIP NAME OF ARROWOOD, AND THEIR WIVES, HOPE P. HALL AND ALICE G. SHUFORD; ARROWOOD, INC., A CORPORATION, AND SOUTHERN RAILWAY COMPANY, A CORPORATION.

(Filed 12 October, 1966.)

1. Bill of Discovery § 2—

Motion and affidavit disclosing that plaintiff had given defendant a preferred right to buy at the market price certain lands whenever defendants desired to sell, and that defendants had sold the optioned property to a third person without giving plaintiff an opportunity to purchase, *held* sufficient to invoke the discretionary power of the court to grant an inspection of documents to disclose the purchase price of the tract of land, which included the parcel of land in question, which defendants had sold to the third person, for the purpose of enabling plaintiff to prepare its complaint. G.S. 8-89.

2. Vendor and Purchaser § 1—

An option giving lessee of a tract of land a preferred right to purchase a contiguous tract at the market price whenever lessor desired to sell does not violate the rule against perpetuities notwithstanding the lease, with renewals, might extend forty years, and, the option being registered, the lessee may maintain an action for specific performance.

APPEAL by defendants from *Clarkson, J.*, at January 10, 1966, Non-Jury Term of MECKLENBURG Superior Court.

Prior to 5 November, 1959, the individual defendants, Hall and Shuford, owned a certain tract of land in Mecklenburg County containing approximately 2,000 acres now known as the Arrowood Development. On that date the plaintiff leased from the individual defendants, for 20 years, a part of that tract containing some 26 acres. The lease contained an option to renew for four periods of five years. By agreement dated 8 June, 1960, the individual defendants granted, among other things, the plaintiff a pre-emptive right to purchase a certain 13.5512-acre tract of land adjoining the 26 acres that plaintiff had leased from the defendants. One of the provisions of the Option Agreement, which was duly recorded, provided that if the individual defendants decided to sell that tract, it would be "for the same price for which the parties of the first part (the individual defendants) would be willing to sell to any other person."

Subsequent to the above Option Agreement, the individual defendants, on 1 December, 1960, conveyed this 13.5512-acre tract of land, as part of the larger tract of 2,000 acres, to the defendant Arrowood, Inc., without first offering the tract to the plaintiff as provided by the Option Agreement. This corporation was wholly owned by Hall and Shuford.

On 30 June, 1965, the individual defendants sold all of the stock of Arrowood, Inc., to defendant Southern Railway Company.

The plaintiff then began proceedings against the defendants to obtain specific performance of the Option Agreement. In order to prepare its complaint the plaintiff filed a verified motion for an order pursuant to G.S. 8-89 for inspection and production of certain writings and documents in the possession and control of the defendants. The facts stated herein were set forth in the motion. Judge Clarkson heard the motion and in his discretion ordered that the individual defendants and the defendant Arrowood, Inc., produce for inspection such paperwritings as would disclose (1) the amount of consideration attributable to the 13.5512-acre tract when it was conveyed to the defendant Arrowood, Inc., or if none was allocated to this specific tract, the dollar amount of consideration paid for the entire tract known as Arrowood Development; (2) the price paid by Southern Railway Company, or its subsidiary, for the stock of Arrowood, Inc.; and (3) an agreement between the individual defendants and the Southern Railway Company, or its subsidiary, as to what part of the purchase price paid for the stock was allocated to the 13.5512-acre tract should Arrowood, Inc., fail to have clear title to it.

The defendants appealed.

Moore & Van Allen by John T. Allred for plaintiff appellee.

Clayton & London for defendants E. Pat Hall, A. Alex Shuford, Jr., and Arrowood, Inc.

Jones, Hewson & Woolard for Southern Railway Company.

PLESS, J. G.S. 8-89 specifically provides that a Judge has discretion to make orders with reference to the inspection of documents. To reverse Judge Clarkson the defendants would have to establish an abuse of discretion on his part.

In view of the affidavit and motion which sets forth: (1) an option for the benefit of the plaintiff; (2) a sale by the defendants of the optioned property; and (3) the failure of the optionors to give plaintiff an opportunity to purchase the property, it could hardly be said the plaintiff's motion was without foundation. That being true, the court was justified in affording it access to information upon which to prepare its complaint.

In defendants' brief the argument is made that information as to the purchase price of 2,000 acres of land would give no substantial basis for determining the price or value of a small fraction of the boundary. This contention may or may not be well founded, but the plaintiff is entitled to the information in order to determine its

course. The location, accessibility and advantages of the small tract will undoubtedly enter into its value, but the litigation has not yet proceeded to the point where this feature is to be determined.

The proposition that an action for specific performance will lie under the facts alleged herein is hardly debatable. " 'A contract, whereby one party, for a valuable consideration, grants to another an option on terms, conditions, and for a time, specified, to call for the doing of a certain act, constitutes an irrevocable offer which, on acceptance in accordance with its terms, gives rise to a contract that may be specifically enforced,' " *Byrd v. Freeman*, 252 N.C. 724, 114 S.E. 2d 715, and other authorities there cited.

The defendants invoke the rule against perpetuities, since the option of the plaintiff could extend for a total period of 40 years. However, at this stage of the proceedings we are of opinion that this position is premature. *Mercer v. Mercer*, 230 N.C. 101, 52 S.E. 2d 229. *Weber v. Texas Co.*, 83 Fed. 2d 807, where it is said: "* * * This is not an exclusive option to the lessee to buy at a fixed price which may be exercised at some remote time beyond the limit of the rule against perpetuities, meanwhile forestalling alienation. The option simply gives the lessee the prior right to take the lessor's royalty interest at the same price the lessor could secure from another purchaser whenever the lessor desires to sell. It amounts to no more than a continuing and preferred right to buy at the market price whenever the lessor desires to sell. This does not restrain free alienation by the lessor. He may sell at any time, but must afford the lessee the prior right to buy. The lessee cannot prevent a sale. His sole right is to accept or reject as a preferred purchaser when the lessor is ready to sell. The option is therefore not objectionable as a perpetuity."

We have considered the other contentions made by the appellants but are of the opinion that the order of Judge Clarkson was proper, and it is hereby

Affirmed.

IN THE MATTER OF THE WILL OF J. G. SIMMONS, DECEASED.

(Filed 12 October, 1966.)

Wills §§ 20, 21—

The burden of proof on the issue of undue influence is upon the caveator, and when no evidence with reference thereto is introduced a peremptory instruction to answer the issue in the negative is proper.

APPEAL by the caveator from *Fountain, J.*, April-May 1966 Session of SAMPSON.

A document purporting to be the will of J. G. Simmons, attested by two witnesses, was probated in common form before the Clerk, 21 June 1965. Thereafter, Seymour Walker Simmons filed a caveat upon the grounds of undue influence and lack of testamentary capacity, alleging that he is the son and sole heir of J. G. Simmons.

Upon the trial in the superior court, the jury returned a verdict finding that the document was signed and executed according to law; that J. G. Simmons had the mental capacity to make a will; that the execution of the document was not procured by undue influence; and that it and every part and clause thereof is his last will and testament. From judgment upon the verdict the caveator appeals.

The propounders offered evidence sufficient to support findings that the document was duly executed by Simmons and attested by two witnesses; that he was a successful farmer and businessman; that at the time of the execution of the paper, he had sufficient mental capacity to know the nature and extent of his property, the natural objects of his bounty, who would inherit his property if he left no will, and the force and effect of making a will; that the document was prepared by his attorney, who read it to Simmons and discussed it with him item by item, along with a discussion of the estate and inheritance taxes to be paid; and that about six months thereafter Simmons had a stroke, whereupon the court appointed his attorneys as trustees of his property, he being unable to speak and get about. The document was thereupon introduced in evidence. It contained substantial bequests and devises to Simmons' brothers, sisters, nephews and nieces and to charities and a bequest of one dollar to the caveator.

Witnesses for the caveator testified in substance that they were acquainted with the alleged testator and that, in their respective opinions, he did not, at the time of the execution of the document, have sufficient mental capacity to know the nature, extent and value of his property, the natural objects of his bounty, and the nature and effect of making a will.

Neither the caveator nor the propounders offered any evidence with reference to the existence or absence of undue influence and duress.

The court instructed the jury that the burden of proof was upon the propounders to show the execution of the document, upon the caveator with reference to the issues of mental capacity and undue influence, and upon the propounders with reference to the issue as to whether the document, and every part thereof, was Simmons' will.

The court then instructed the jury that if they found, from the evidence and by its greater weight, the facts to be as all the evidence tended to show, they would answer the issue as to undue influence "No." The court also instructed the jury that if the jury so found that the document was executed and signed according to law (as to which the jury was previously instructed), that Simmons had the mental capacity to make a will (as to which the jury was previously instructed) and was not subjected to undue influence, then the document, and each part thereof, would, as a matter of law, be his will and the jury should so find, otherwise not. To all of these instructions the caveator excepted.

Mitchell E. Gadsden and Mitchell & Murphy for appellant.
Warren & Fowler for appellees.

PER CURIAM. We have examined carefully the assignments of error with reference to the admission and exclusion of evidence. We find no merit therein.

There was no error in the instructions to the jury, above mentioned, nor in the instruction with reference to the test of mental capacity to make a will, to which the caveator also excepted. *In Re Craven,* 169 N.C. 561, 86 S.E. 587. The burden was upon the caveator to prove that, at the time the will was executed, Simmons did not have the mental capacity required for the execution of a will. *In Re Will of Isley,* 263 N.C. 239, 139 S.E. 2d 243; *In Re Will of Brown,* 200 N.C. 440, 157 S.E. 420; *In Re Thorp,* 150 N.C. 487, 64 S.E. 379. The burden was also upon the caveator to show undue influence. *In Re Will of West,* 227 N.C. 204, 41 S.E. 2d 838. Since there was no evidence offered to show the existence of undue influence, it was not error to instruct the jury peremptorily upon that issue.

No error.

STATE v. MONTA OLIVER, JR., JAMES HAMBRIGHT, ROBERT STEWART, JR.

(Filed 12 October, 1966.)

1. Criminal Law § 154—

An assignment of error should show within itself the error relied upon. Rule of Practice in the Supreme Court No. 19(3).

2. Conspiracy § 6; Robbery § 4—

The direct and circumstantial evidence in this case *held* sufficient to sustain an inference that defendant shared in the common purpose or design to rob a filling station with his confederates, and assisted, encouraged, and rendered aid to them in the armed robbery, and therefore is sufficient to sustain conviction of defendant of criminal conspiracy and armed robbery.

APPEAL by defendant Monta Oliver from *McLean, J.*, 14 February 1966 Criminal Session of MECKLENBURG.

Criminal actions upon indictments charging defendant with conspiracy to commit armed robbery and armed robbery. The cases were consolidated for trial.

The State offered evidence which tended to show: On 30 January 1966 James Hambright, Robert Stewart, Jr., and Dwight Jordan were with defendant Monta Oliver in his home. Jordan and Oliver were talking about robbing a service station on Monroe Road. Later Oliver drove the four of them to a place near the Coliseum where Jordan and Hambright left Oliver and Stewart and went to a service station on Monroe Road. Because there were people in the station, they returned to Oliver's home. About an hour and a half thereafter Oliver again drove them near the service station, and they again returned to Oliver's home as people were still in the service station. Later, Oliver drove the same four near the service station, and Jordan told Oliver to wait. Jordan and Hambright went to the service station. There Jordan held a pistol on the attendant and took money from the cash drawer and the person of the attendant. Jordan and Hambright returned to Oliver's automobile and Oliver drove to his home, where Oliver and Jordan counted the money. The defendant Oliver received "some bills and change." There was also evidence that police officers followed footprints and tire tracks in the snow which led them to Oliver's automobile and apartment. In the apartment they found Oliver, Hambright, Stewart and Jordan.

There was a verdict of guilty in both cases. From judgment imposing prison sentence defendant Oliver appealed.

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

Joel L. Kirkley, Jr., for defendant appellant.

PER CURIAM. There are nineteen assignments of error, most of which do not comply with the requirements of Rule 19(3), Rules of Practice in the Supreme Court. 221 N.C. 543. "'. . . (T)he very error relied upon should be definitely and clearly presented and the Court not compelled to go beyond the assignment itself to learn what the question is.' *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 849." *State v. Reel,* 254 N.C. 778, 119 S.E. 2d 876. We have, however, examined the record carefully and find no prejudicial error in those assignments.

The question of nonsuit *is* properly presented. "In passing upon a motion for judgment of nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable inference which may fairly be drawn from the evidence. . . . If there is more than a scintilla of competent evidence to support the allegations in the warrant or bill of indictment, it is the court's duty to submit the case to the jury." *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241.

"'A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means.' . . . Direct proof of the charge of conspiracy is rarely obtainable. But to establish such charge, the evidence or acts relied upon, when taken together, must point unerringly to the existence of a conspiracy." *State v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389.

In the instant case there was not only circumstantial evidence of a conspiracy to commit armed robbery, but there was also direct proof of the existence of the conspiracy by an accomplice.

"'Everyone who does enter into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design.' *S. v. Jackson,* 82 N.C. 565." *State v. Kelly, supra.*

". . . (I)n order to render one who does not actually participate in the commission of the crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrators of the crime, or by his conduct made it known to such perpetrators that he was standing by to render assistance when and if it should become necessary." *State v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54.

The series of events disclosed by the evidence was sufficient to sustain the inference that defendant shared in the common purpose or design with the actual perpetrators, assisted, encouraged and rendered aid to them in the armed robbery.

The motions for nonsuit were properly overruled in both cases.

No error.

STATE v. MARION IRA ROSS.

(Filed 12 October, 1966.)

1. Robbery § 5—

In a prosecution for robbery by use of a knife, an instruction to return a verdict of guilty "as charged", without any reference to a knife or other weapon whereby the life of the victim was endangered or threatened, is erroneous.

2. Same—

Where the State's evidence is to the effect that defendant's companion held a knife to the victim's throat in perpetrating a robbery, and that the victim received a cut on his neck, and that defendant and his companion attacked and beat their victim and took money from his person, but no knife is introduced in evidence or described by any witness, it is error for the court to fail to submit the question of defendant's guilt of the lesser crime of common law robbery.

APPEAL by defendant from *McLean, J.*, March 7, 1966, Regular Schedule "A" Criminal Session of MECKLENBURG.

Criminal prosecution on an indictment charging that defendant, on the 18th day of February, 1966, "unlawfully, willfully and feloniously, having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: A knife, whereby the life of T. W. Welch was endangered and threatened, did then and there, unlawfully, willfully, forcibly, violently and feloniously, take, rob, steal, and carry away $59.00 in lawful money of the United States, the property of T. W. Welch of the value of less than $200.00, to wit: $59.00, from the presence, person, place of business, and residence of T. W. Welch," a felony punishable as provided in G.S. 14-87.

Plea: Not guilty.

Verdict: "Guilty of Armed Robbery."

Judgment: Imprisonment for not less than fifteen nor more than seventeen years.

Defendant appealed, assigning errors.

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

Carson & Schwartz for defendant appellant.

PER CURIAM. Evidence was offered by the State and by defendant. Both relate to what occurred in the rest room of a cafe (Eatwell Cafe) on West Trade Street in Charlotte, North Carolina, between 9:00 and 10:00 p.m. on Friday, February 18, 1966.

The State's evidence, in brief summary, tends to show: Defendant and "another guy" followed Welch into the rest room. The "other guy" held a knife to Welch's throat and "said something about money." Welch received a cut on his neck. Both men attacked Welch and beat him. Defendant held Welch while "this other one" took Welch's billfold out of his pocket and left the premises. Welch's billfold contained "about $49.00."

Defendant's evidence, in brief summary, tends to show: Welch and one "Butch" Gordon were sitting together in the Eatwell Cafe drinking and "matching for dollars." Welch refused to pay Gordon what he had won. Gordon followed Welch into the rest room and, after "wrestling around," Gordon got Welch's billfold and left. The billfold contained $13.00. Defendant came into the rest room while Welch and Gordon were scuffling and tried to "break (them) up."

No knife was offered in evidence or described by any witness.

In the beginning of the charge, the court instructed the jury: "(U)nder the charge as laid in this bill of indictment and under the evidence as offered by the State, you may return either one of three possible verdicts: robbery as charged in the bill of indictment, common law robbery, or not guilty of either offense." The court's instructions contain no further reference to common law robbery.

The court's final instructions were as follows: "So the Court instructs you that if you should find from this evidence beyond a reasonable doubt that on the 18th day of February 1966, that the defendant, Marion Ira Ross, was present in the toilet or rest room of the Eatwell Cafe here in the City of Charlotte, together with T. W. Welch and Gordon, and while there he — that while Ross was there, together with Gordon, that he held Welch and that Gordon took his money and ran off with it, the Court instructs you that it would be your duty to return a verdict of guilty as charged in this bill of indictment. If you do not so find, you would return a verdict of not guilty. Or if, upon a fair and impartial consideration of all the facts and circumstances in the case, there should arise in your minds a reasonable doubt as to either element of this offense upon that theory of the case, it would be your duty to return a verdict of

not guilty."

The last quoted instructions are defective with reference to the crime charged in the bill of indictment in that they contain no reference to a knife or other dangerous weapon, implement or means, whereby the life of Welch was endangered or threatened. The findings referred to in these instructions would not warrant a verdict of guilty as charged in the bill of indictment.

Moreover, the court's specific and final instructions restricted the jury to one of two verdicts, namely, a verdict of guilty as charged in the bill of indictment or not guilty. There was evidence tending to show commission by defendant of an included crime of lesser degree, namely, common law robbery. Hence, whether defendant was guilty of common law robbery should have been submitted. *S. v. Holt,* 192 N.C. 490, 135 S.E. 324; *S. v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545; *S. v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582.

It is unnecessary to consider whether other included crimes of less degree should have been submitted *e. g.*, larceny from the person, assault with a deadly weapon, simple assault. At the next trial, these questions will be for determination in the light of the evidence then presented.

For indicated errors in the charge, defendant is entitled to a new trial.

New trial.

CORTEZ SMART v. WILLIAM HILLARD FOX.

(Filed 12 October, 1966.)

1. Trial § 33—

It is the duty of the trial court to explain the law and apply it to the evidence on every substantial feature of the case arising upon the evidence, even in the absence of request for special instructions.

2. Automobiles § 25—

The operation of a truck in excess of 45 miles per hour on a public highway in violation of G.S. 20-141(b)(3) is negligence *per se.*

3. Automobiles §§ 41b, 46—

Where plaintiff introduces evidence that defendant was operating his truck at a speed in excess of 45 miles per hour and swerved to his left in an attempt to avoid plaintiff's truck which was parked as far as possible on the right shoulder with some two feet on the paved portion of the highway, and that the impact was entirely between the front of defendant's truck and the left side of plaintiff's truck, *held* whether defendant's ex-

cessive speed was a proximate cause of the collision is a question for the jury, and it was error for the court to fail to charge the jury upon plaintiff's evidence of defendant's excessive speed.

APPEAL by plaintiff from *Jackson, J.,* March 7, 1966, Schedule "B" Civil Session of MECKLENBURG.

Plaintiff's action is to recover damages on account of personal injuries and property damage he sustained on May 28, 1964, about 7:30 p.m., when defendant's one and one-half ton Studebaker truck collided with plaintiff's one-half ton Chevrolet truck. The collision occurred approximately four miles south of Charlotte, N. C., on N. C. Highway # 160, a two-lane paved highway, 18-20 feet wide, having a marked center line.

Issues of negligence, contributory negligence and damages, raised by the pleadings, were submitted. The jury answered the negligence issue, "No," and the court, based on said verdict, entered judgment for defendant.

Plaintiff excepted and appealed, basing all of his assignments of error on exceptions to the charge.

Thomas H. Wyche and J. Levonne Chambers for plaintiff appellant.

J. Donnell Lassiter and Kennedy, Covington, Lobdell & Hickman for defendant appellee.

PER CURIAM. Although defendant offered evidence in sharp conflict therewith, a review of certain of plaintiff's evidence will suffice to point up the basis of decision. There was evidence which, considered in the light most favorable to plaintiff, tended to show the facts narrated below.

Plaintiff's truck was parked on the right shoulder of #160, headed north, with not more than two feet of the truck on the paved portion of the highway. The width of the shoulder was "about 4½ feet at the most," and beyond the shoulder there was "a small ditch." Plaintiff's truck had been so parked "a few minutes — three or four at the most," when the collision occurred.

Plaintiff, accompanied by two helpers, had gone to this location to pick up ten or fifteen bales of hay which, earlier that day through mishap, had fallen from another vehicle by which plaintiff was hauling hay to his farm home.

Plaintiff's truck had a flat bed, "with small sides about two feet." The tail gate was level with the bed of the truck. Plaintiff was standing on the bed of the truck. The two helpers were loading the

hay "over the side of the truck." Plaintiff was placing it at the front behind the cab.

It was "dusk dark." The motor on plaintiff's truck was running and the parking lights and left turn signal were "on." A car proceeding south had passed "probably a minute or so before the defendant came on the scene."

Defendant's vehicle, a one and one-half ton Studebaker truck pulling a "Low Boy trailer," was proceeding north on #160. Plaintiff, while standing on the bed of his truck, observed defendant's said vehicle when it was some 300 yards away. The lights on defendant's truck were "burning dim." As defendant's truck approached, there was no other traffic on the road. Defendant's truck, which was traveling "at a speed of 50 to 60 mph," approached plaintiff's truck "in one steady direction" until, about 125 feet therefrom, defendant swerved to his left. During the process of swerving to the left and putting on brakes, defendant's truck-trailer combination jackknifed.

The whole front of defendant's truck struck plaintiff's truck. The left side of plaintiff's truck was damaged, particularly the left tail light, left fender and left door. The impact was entirely between the front of defendant's truck and the left side of plaintiff's truck. The rear (tail gate) of plaintiff's truck was not hit.

The collision knocked plaintiff from the bed of his truck into the ditch along the east side of the highway.

"It is the duty of the court, without request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case and to apply the law to the various factual situations presented by the conflicting evidence." 4 Strong, North Carolina Index (Supplement), Trial § 33; G.S. 1-180. Plaintiff, by proper exceptions and assignments of error, challenges the charge for failure, in specified respects, to comply with these requirements. Discussion is limited to a consideration of one material omission.

Under G.S. 20-141(b)(3), the maximum legal speed limit applicable to a one and one-half ton truck is 45 miles per hour. The operation of such a truck at a speed in excess of 45 miles per hour is negligence *per se*. *Rudd v. Stewart*, 255 N.C. 90, 98, 120 S.E. 2d 601, 607.

Plaintiff alleged and offered evidence tending to show that defendant's truck approached the point of collision at a speed of from 50 to 60 miles per hour. Without special request therefor, the court should have instructed the jury that, if they found from the evidence and by its greater weight that defendant was operating his one and one-half ton truck at a speed in excess of 45 miles per hour, such conduct would constitute negligence on the part of defendant.

Failure to so instruct the jury was prejudicial error. *Bulluck v. Long,* 256 N.C. 577, 586, 124 S.E. 2d 716, 723.

Although full consideration has been given defendant's contention that the negligence, if any, of defendant in respect of speed did not proximately cause the collision, the conclusion reached is that this question was for submission to and determination by the jury under appropriate instructions.

For the indicated error in the charge, plaintiff is entitled to a new trial.

New trial.

STATE v. JACOB VANCE, JR.

(Filed 12 October, 1966.)

Robbery § 4—

The evidence in this case is *held* amply sufficient to sustain a conviction of defendant of armed robbery, G.S. 14-87, notwithstanding defendant's evidence in conflict with that of the State.

APPEAL by defendant Vance from *McLean, J.,* 7 March 1966 Regular "A" Criminal Session of MECKLENBURG.

Criminal prosecution on an indictment charging defendant and one Levi Mixon with armed robbery in the language of G.S. 14-87.

Plea: Not guilty by each defendant. Verdict: Guilty as to Vance. The record before us does not disclose whether Mixon was convicted or acquitted.

From a judgment of imprisonment, defendant Vance appeals.

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

William G. Robinson for defendant appellant.

PER CURIAM. From the record before us it appears that William G. Robinson, a member of the Mecklenburg County Bar, represented defendant Vance, and that T. O. Stennett, a member of the Mecklenburg County Bar, represented defendant Mixon. The State and defendant Vance introduced evidence; defendant Mixon, according to the record before us, introduced no evidence.

The State's evidence shows these facts: On 20 January 1966 O. D. Ferrell was manager of a general merchandise store operated by S. W. & C. W. Davis Company on Highway #115 about eight miles

from the city of Charlotte. About 2 p.m. of that day Ferrell was standing behind a counter in the store, and defendants Vance and Mixon came in and proceeded to the counter. Ferrell walked towards them, and Mixon threw a pistol in his face and said, "This is it, you so and so." Ferrell dropped behind the counter. Mixon came around the counter, threw the pistol in his face, and said, "You g . . d . . . so and so, if you put your hands on anything, I will blow your brains out." He got up. Vance had stepped up to the end of the counter with his pistol on Ferrell, and told him to open the cash register and give him the money. Ferrell did so, giving him $138. Then one of them said to Ferrell, "Now empty your g . . d . . . pockets," but before he had a chance to get any of his money out of his pocket, one of them gave him a shove and told him to get down behind the counter, which he did. Then they ran out and one of them fired a shot.

Joseph B. Whitener had stopped at the store to make a purchase. As he was getting out of his car he saw two colored men "barrelling out of the door of the store." He went into the store, and Ferrell told him he had been held up.

Mr. and Mrs. J. R. Dutton were passing the Davis store in an automobile. Joseph Whitener flagged them down, and told them of the robbery of Ferrell and that the two colored men were going down the road and to watch them. They did so, and further down the road they saw these two colored men get into a late model white Pontiac, license No. DR-1030. Two men were already in the car. They went back to the Davis store and gave Ferrell the license number of this automobile.

An investigation by the Mecklenburg County police showed that license plate No. DR-1030 was issued in the name of Frank Porter, 1112 Winifred Street, Charlotte. The car was a 1963 white Pontiac. Frank Porter informed the police that he had loaned the car to defendant Vance on 20 January 1966 and that Vance returned the car to him on 21 January 1966.

Defendant's evidence shows the following: He is 32 years old. On 20 January 1966 he was driving Frank Porter's Pontiac automobile in the vicinity of the Davis store on Highway #115. Junior Gills, Florence Massey, and another nicknamed "Skeets," whose name he does not know, were in the automobile with him. Vance was going to the Florida Steel Company to pick up his pay check. The three passengers in his car were having a conference about a cash register and a game played by two or more men where one man buys an item and distracts the attention of the cashier while the other man walks up and takes the money from the cash register. At a service station near the Davis store he stopped to get some soft

drinks, and Skeets and Gill got out of the automobile. They started across the highway toward the Davis store. He hollered to them to see if they wanted him to wait. They replied, "No, go down to Florida Steel. We will be down there." He did so. About ten minutes later he saw Skeets running down the highway with Gill behind him. Skeets was sweating when he got in the automobile. About ten seconds later Gill with a pistol "drawed up in his hands" jumped in the car. He asked them, "What is this?" They said, "Take off." He drove the car away. He had nothing to do with the robbery. He had "a million different things going through my mind at the time." He had been tried and convicted of common law robbery and armed robbery, and was on parole. He did not want to get involved in what they had done. Vance denied at all times that he had anything to do with this particular robbery.

The State's evidence was amply sufficient to carry the case to the jury as to Vance, and to sustain the verdict of the jury as to him. We have carefully examined all defendant's exceptions and assignments of error, and all are overruled. No prejudicial error has been shown. Defendant Vance's counsel candidly states in his brief that after a diligent search of the record by him he is unable to find any prejudicial error which would warrant the Court in disturbing the trial below.

In the trial below we find

No error.

CORNELIA NOWELL DOSS v. STEPHEN C. NOWELL, III.

(Filed 12 October, 1966.)

1. Venue § 7—

Where the court finds, upon supporting evidence, that neither plaintiff nor defendant is a resident of the county to which defendant seeks removal on the ground of his residence therein, the court properly denies the motion, G.S. 1-82, and retains jurisdiction even though the evidence would support a finding that neither party is a resident of the county in which the action was instituted, since such fact would be merely grounds for removal to a proper county upon motion duly made, G.S. 1-83, and it is not required that the court, in denying the motion for removal, determine the proper county for trial.

2. Appeal and Error § 10—

An appeal from the denial of a motion in proper form for change of venue is not subject to dismissal as frivolous. Rule of Practice in the Supreme Court No. 17(1).

APPEAL by defendant from *Bundy, J.*, at the 25 April 1965 non-jury Schedule D Session of MECKLENBURG.

This is an action by the alleged accommodation co-maker of two promissory notes against the alleged accommodated co-maker to recover, with interest, payments which the plaintiff was compelled to make upon the notes. The action was instituted 28 December 1965, in the Superior Court of Mecklenburg County. Summons was issued to Catawba County and was there served upon the defendant the next day.

The complaint, as amended, alleges that the plaintiff is a resident of Mecklenburg County and the defendant is a resident of Woodstock, Virginia.

In due time, the defendant filed a motion that the action be removed to the Superior Court of Catawba County for trial, alleging that the plaintiff is, and at the time of the institution of the action was, a resident of New Hanover County and that the defendant is a resident of Catawba County.

In support of his motion to remove, the defendant filed his affidavit stating that the plaintiff was married to a resident of New Hanover County in November, 1965 and had moved her residence from Mecklenburg County to New Hanover County prior to the institution of this action. The affidavit so filed by the defendant does not state the residence of the defendant.

The plaintiff filed a counter-affidavit in opposition to the motion to remove. Therein she alleges: That she and the defendant were husband and wife prior to their divorce on 23 August 1965, which divorce was granted by the Superior Court of Mecklenburg County; that since their separation the defendant has occasionally visited their children at the plaintiff's home and has written to the children, so that the plaintiff has been and is informed as to his whereabouts; that the defendant has not resided in Catawba County since August, 1963, or been a resident of North Carolina since June, 1964, but, after removing to Washington, D. C., became and now is a resident of the State of Virginia, their children having visited him at such residence therein; that she and her present husband resided in Mecklenburg County following their marriage until their home in Mecklenburg County was sold on 28 December 1965, the date on which this action was instituted; and that at the time she verified the complaint in this action she was a resident of Mecklenburg

County, but following the sale of her home she has moved her residence to New Hanover County, where she presently resides.

The court found as a fact that neither the plaintiff nor the defendant is a resident of Catawba County, and denied the motion for change of venue to that county.

Kenneth D. Thomas for defendant appellant.
C. Orville Light of Counsel.
Harry A. Berry, Jr. and Jack L. Lawing for plaintiff appellee.

PER CURIAM. The finding of the trial judge that neither party is a resident of Catawba County is supported by the evidence and is, therefore, binding upon this Court. Upon that finding, Catawba County is not a proper venue for the trial of this action. G.S. 1-82. If it be assumed that, prior to the institution of this action, the plaintiff ceased to be a resident of Mecklenburg County and became a resident of New Hanover County so that Mecklenburg County is not a proper venue, this would not deprive the Superior Court of Mecklenburg County of jurisdiction to try the action. It is ground only for removal to a proper county, if motion therefor is made in due time and in the proper manner. G.S. 1-83; *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E. 2d 54; McIntosh, North Carolina Practice and Procedure, 2d ed., § 833. In order to deny a motion for removal to a county which is not a proper venue, it is not required that the court determine what is the proper county for trial. See *Crain and Denbo, Inc. v. Construction Co.*, 250 N.C. 106, 108 S.E. 2d 122.

The motion by the plaintiff that the appeal be dismissed under Rule 17(1) as frivolous and taken for the purpose of delay is denied, but upon consideration of the appeal we find no merit therein.

Affirmed.

JACOB OSWELL LEGGETTE, JR. AND WIFE, BEULAH MURRAY LEGGETTE, v. CLAUDE C. PITTMAN.

(Filed 12 October, 1966.)

Contracts §§ 29, 34—

Provisions of a contract relating to the measure of damages for breach are as binding as any other of its terms, and where a construction contract provides that any defects in materials or workmanship would be repaired, replaced, or adjusted by the contractor at no cost to the owner, the measure of damages for defective workmanship or materials is limited to the cost of making the work conform to the contract, and the owner may not maintain that he is entitled to recover the difference between the value of the house as contracted for and the value of the house as built.

APPEAL by defendant from *Peel, J.*, April 1966 Session, WILSON Superior Court.

Civil action to recover damages for breach of warranty.

Plaintiffs and defendant entered into a contract wherein defendant agreed to build a house for plaintiffs according to certain plans and specifications. The defendant executed a warranty dated June 6, 1963, as follows: "I, CLAUDE PITTMAN, warrant the materials and workmanship performed under construction contract dated 1-18-63 and any defects arising within a period of one year will be repaired, replaced or adjusted at no cost to the owner, JACOB OSWELL LEGGETTE, JR."

Within the warranty period plaintiffs noticed defects in the flooring in the nature of cracks and squeaks, and that the flooring in parts of the house was not properly secured. Plaintiffs continued to live in the house. Defendant's carpenter made some attempts at correction. The corrections were not made to plaintiffs' satisfaction and suit was instituted May 10, 1965, to recover $2,339. Verdict was returned by the jury for plaintiffs in the amount of $1,300. To the judgment entered, the defendant excepted and appealed, assigning errors.

Wiley L. Lane, Jr., for plaintiffs, appellees.
Kirby & Webb for defendant appellant.

PER CURIAM. One of defendant's principal assignments of error was to the following portion of the judge's charge:

> "The Court charges you, in a case of this nature, that the rule of damages is as follows: When defects appearing in a building result from failure to perform the work in a workmanlike manner, or from the use of improper materials, the measure

of damages is the cost of the labor and materials necessary to make the building conform to the contract."

Our Court has held in the case of *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884:

> " 'The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have *what he contracts for or its equivalent.* What the equivalent is *depends upon the circumstances of the case.* In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value.' 9 Am. Jur., Building and Construction Contracts, sec. 152, p. 89; *Twitty v. McGuire,* 7 N.C. 501, 504. The difference referred to is the difference between the value of the house contracted for and the value of the house built — the values to be determined as of the date of tender or delivery of possession to the owner." (Emphasis ours.)

In the contract of warranty the defendant warranted the materials and workmanship performed under construction contract dated 1-18-63 and agreed that any defects arising within a period of one year would be repaired, replaced or adjusted at no cost to the owner. By this agreement the defendant by necessity agreed to furnish the cost of the labor and materials necessary to make the building conform to the contract. This is, in effect, the judge's charge.

"Provisions of a contract clearly expressed do not cease to be binding upon the parties because they relate to the measure of damages." 15 Am. Jur., Damages, sec. 49, p. 448.

The defendant by his contract and warranty removed himself from those provisions of the general law on which he relies, and the trial judge correctly related his charge to the circumstances of the case.

The exception of the defendant to the testimony of a contractor who was admitted as an expert is without merit. Considering his

testimony in its full context, it appears to be well within the rules of evidence approved by our Court.

No error.

STATE OF NORTH CAROLINA v. MACK PAUL BAUGH.

(Filed 12 October, 1966.)

Criminal Law § 131—

If defendant believes that the sentence imposed upon his plea of guilty, understandingly and voluntarily made, is excessive, his sole recourse is to executive clemency, the sentence being within the statutory maximum.

APPEAL by defendant from *McLean, J.*, at the 7 March 1966 Regular "A" Session of MECKLENBURG.

The defendant was indicted for robbery with the use of firearms. He was represented by counsel and entered a plea of guilty as charged. He was sentenced to confinement in the Central Prison for a period of not less than 28 nor more than 30 years.

Prior to the entry of his plea, the defendant was examined by the court under oath. Upon such examination, he stated that he was not under the influence of any alcohol, drug, narcotic, or other pill; that he heard and understood the statements and questions of the court; and that he understood the charge and understood that upon a plea of guilty he could be imprisoned for as much as 30 years. He further stated that neither the solicitor, his counsel, any policeman nor any other person had made any promise to him or subjected him to any threat to influence him to enter a plea of guilty; that he had conferred with his counsel and had instructed his counsel to enter a plea of guilty. Thereupon, the plea was entered, the court finding that it was freely, understandingly and voluntarily made, without any undue influence, compulsion, duress or promise of leniency.

The defendant having expressed his desire to appeal, and it appearing to the court that the defendant is an indigent person, the court appointed counsel to represent him in perfecting his appeal to this Court, and directed that the county bear the cost of the transcript and of the record and briefs required to be filed.

The appeal was duly filed, no error being assigned.

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

E. Clayton Selvey, Jr., for defendant appellant.

PER CURIAM. Notwithstanding the failure of the defendant to assign any ruling or action of the trial court as error, we have carefully examined the entire record and find therein no error of law. There is no suggestion in the record that the defendant, who was represented by counsel, did not understand the charge against him, the nature and effect of his plea of guilty and the maximum sentence which might lawfully be imposed if he entered such plea. It clearly appears from the record that he entered the plea of guilty to the offense charged voluntarily, without threat or inducement, and with full understanding of its effect and possible consequences. The sentence imposed does not exceed the maximum authorized by the statute. G.S. 14-87. The judgment of the court below is, therefore, free from error of law. If the defendant believes that the punishment imposed is unduly severe in fact, his recourse is to seek action by the Board of Paroles or other exercise of the power of executive clemency.

No error.

STATE v. JAMES L. WILLIAMS.

(Filed 12 October, 1966.)

Criminal Law § 154—

In the absence of assignments of error in the record or brief, the judgment below will be sustained in the absence of error appearing on the face of the record proper.

APPEAL by defendant from *Morris, E.J.*, at April 1966 Special Criminal Session, NASH Superior Court.

This is a criminal action in which the defendant James L. Williams was charged in a bill of indictment with armed robbery.

On 8 April, 1965, two men entered Murray's Esso Station in Sharpsburg just after midnight. The attendant, William Hatch, was in the station alone at the time. One of the men got behind Hatch and pushed what Hatch assumed to be a gun in his back and proceeded to go through the station and the cash register, taking all of the money out of the cash register and also taking Hatch's wallet. After the men left Hatch saw a 1959 Oldsmobile drive away from the trailer park across the street from the station. He could not tell how many men were in the car at that time. He immediately notified the Rocky Mount police by telephone. A few hours later the

police apprehended defendant and three other men in a black 1959 Oldsmobile near the city limits of Rocky Mount. In the automobile the officers found a loaded .38 caliber pistol, several cartons of cigarettes and some money. The defendant was shortly afterwards identified by Hatch as the man who held the gun on him at the time of the robbery. During the Sheriff's subsequent investigation, the defendant admitted his participation in the robbery and went with the Sheriff to show him where various items taken from the station had been thrown from the car.

Counsel for this indigent defendant was appointed, and when the case was called the defendant pleaded not guilty. The jury returned a verdict of guilty, and from a sentence of imprisonment the defendant appealed.

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

R. G. Shannonhouse for defendant appellant.

PER CURIAM. No assignments of error appear in the record or briefs filed in this Court 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." *Trust Co. v. Henry,* 267 N.C. 253, 148 S.E. 2d 7. See *Bank v. Bryant,* 257 N.C. 42, 125 S.E. 2d 291; *Milling Co. v. Laws,* 242 N.C. 505, 87 S.E. 2d 925; *Smith v. Smith,* 242 N.C. 646, 89 S.E. 2d 255; *Hobbs v. Hobbs,* 218 N.C. 468, 11 S.E. 2d 311.

We have examined the record proper, and find

No error.

STATE v. ROBERT LEE GRIER, JR.

(Filed 12 October, 1966.)

Arrest and Bail § 3—

Where it is made to appear that the arresting officer knew that a robbery had been committed by one who had fled, that the officer found defendant at the location described in the officer's information, that defendant fitted the general description of the felon and had property on his person similar to that taken at the robbery, the circumstances justify the arrest of defendant by the officer without a warrant. G.S. 15-41(2).

STATE *v.* GRIER.

APPEAL by defendant from *Clarkson, J.*, at May 9, 1966, Session of the Criminal Superior Court of MECKLENBURG County.

The State's evidence tends to show that the defendant went to a grocery store operated by Clyde A. Thompson, whom he pushed down and threatened to kill. They struggled, and the defendant received a cut on the back of his leg from a piece of glass. Thompson was stabbed in the back with a knife by the defendant. Thompson had two packages of money containing approximately $260 each in his pocket. He had written his name or initials on one or more of the bills and the figures "260" on another. The money fell from his pocket and the defendant picked it up and ran. Thompson was unable to catch the robber, and was shortly afterwards taken to the hospital to receive treatment for the cut on his back.

The officer who arrested Grier testified that he had received a description of Thompson's assailant and his clothing, that he had a cut on the rear of his right leg, and that he was at a house on Steven Street. Upon arriving at this address, defendant was found there and his appearance in all respects coincided with the officer's information. A search of the defendant revealed he had $480 in money; that one bill had on it the initials "C A T" and another one "C. A. Thompson", and another the figures "260". The defendant was taken to the hospital for treatment of the cut on his leg, and was there identified by Thompson as his assailant. Thereafter a warrant charging the defendant with the robbery was issued.

The defendant sought to establish an alibi, which was not accepted by the jury, and upon conviction and judgment he appealed.

Thomas Wade Bruton, Attorney General, Bernard A. Harrell, Assistant Attorney General for the State.

Mercer J. Blankenship, Jr., for defendant appellant.

PER CURIAM. On appeal the defendant abandoned all exceptions taken at the trial except the question of whether the defendant was lawfully arrested without a warrant within the purview of the statute.

G.S. 15-41(2) provides: "A peace officer may without a warrant arrest a person: * * * (2) when the officer has reasonable grounds to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

In *S. v. Egerton*, 264 N.C. 328, 141 S.E. 2d 515, the Court upheld an arrest by a peace officer without a warrant stating: "The officers were called and arrived at the scene of the crime within ten minutes after its commission. They had a description of the men and

the peculiar weapon used. * * * The description of the men and the weapon and the information from the 'reliable informer' resulted in the morning visit of the officers to 214 Heck Street in Raleigh. * * * The officers were in possession of such facts to justify taking the three into custody until they could be identified by Brooks and Marcum. G.S. 15-41; *S. v. Brown,* 264 N.C. 191."

In this case the arresting officer knew that a robbery had been committed by one who had fled. He had a general description of the felon, of his checkered pants, and of the cut on the rear of his right leg. The defendant was found at the location described in the officer's information and had property on his person similar to that taken in the robbery.

In view of the above, we think the information in possession of the officers was amply sufficient to authorize the arrest without a warrant.

No error.

STATE OF NORTH CAROLINA v. IVEY BROOME, SR.

(Filed 12 October, 1966.)

Criminal Law §§ 107, 113—

A request not in writing and first made after the court had concluded its charge that the court define "reasonable doubt" is addressed to the sound discretion of the trial court, and the refusal of the court to recall the jury and give the requested instruction is not error.

APPEAL by defendant from *McLean, J.,* July 11, 1966 Regular Schedule B Session of MECKLENBURG.

Defendant was tried upon a bill of indictment charging him with the felonious taking of $9.00 from the person of Brooks Robinson by threatening his life with a knife (G.S. 14-87).

The State's evidence tends to show: On the evening of February 15, 1963, Brooks Robinson, aged 62, was walking from his brother's house to a nearby grocery store in the company of one T. Tillman. They were joined by defendant, whom Robinson did not know. At the store Robinson purchased groceries and a jug of wine, and the three men started back toward Robinson's home. En route, defendant "put a knife around Robinson's neck," demanded his money, took $9.00 and some change from him, and left. Later in the evening, defendant appeared at the home of Robinson's brother, threat-

ened to kill Robinson with a pistol, and took the groceries — including the jug of wine — which Robinson had purchased earlier.

Defendant did not testify, but he offered evidence contradicting that of the State. The verdict was "guilty of armed robbery as charged in the bill of indictment." Defendant appeals from a judgment of imprisonment.

Attorney General T. W. Bruton, Assistant Attorney General James F. Bullock, and Staff Attorney Leon H. Corbett, Jr., for the State.

Peter H. Gerns for defendant appellant.

PER CURIAM. At the completion of the judge's charge, and after the jury had been instructed to retire in order to consider its verdict, counsel for defendant requested the court to define "reasonable doubt." The failure of the judge to elaborate further upon that term constitutes defendant's only assignment of error supported by an exception in the record.

The judge submitted the case to the jury without stating the contentions of either the State or defendant. A careful examination of the charge discloses that he fairly and impartially recapitulated *all* the evidence, and that he correctly applied the law to the facts.

This Court has said many times that, in the absence of a request, trial judges are not required to define the term "beyond a reasonable doubt" in charging the jury in criminal cases. *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133; *State v. Lee,* 237 N.C. 263, 74 S.E. 2d 654; *State v. Steadman,* 200 N.C. 768, 158 S.E. 478. "When instructions are prayed as to 'presumption of innocence' and to enlarge on 'reasonable doubt', it is in the sound discretion of the court below to grant the prayer." *State v. Herring,* 201 N.C. 543, 551, 160 S.E. 891, 895. "The failure to define the words 'reasonable' and 'doubt' does no violence to G.S. 1-180." *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295. These words are as nearly self-explanatory "as any explanation that can be made of them." *State v. Wilcox,* 132 N.C. 1120, 44 S.E. 625. *Accord, State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386.

Here, counsel's request that the judge define "reasonable doubt" was not in writing and was first made after the court had concluded its charge to the jury. G.S. 1-181; *State v. Rose,* 200 N.C. 342, 156 S.E. 916. Whether to comply with the request was a matter resting in the sound discretion of the judge. Although he might well have complied with the request and given the jury one of the definitions approved in *State v. Hammonds, supra,* and other decisions of this

Court, his refusal to do so was not error. The record discloses no reason for disturbing the verdict; it leaves the conviction that defendant has had a fair trial.

No error.

STATE v. JACK LEE NEWELL.

(Filed 12 October, 1966.)

1. Criminal Law § 139—

An appeal from a sentence imposed upon defendant's plea of guilty, voluntarily and understandingly made, presents only the face of the record proper for review.

2. Criminal Law § 131—

Where the sentence imposed on defendant's plea of guilty, understandingly and voluntarily made, is within the statutory maximum, such sentence cannot be considered cruel or unusual in the constitutional sense.

APPEAL by defendant from *McLean, J.*, April 4, 1966, Regular Criminal Session of MECKLENBURG.

Defendant was indicted on a bill containing two counts, the first charging the forgery of a $65.00 check, a violation of G.S. 14-119, and the second charging the uttering of said forged check, a violation of G.S. 14-120.

Upon arraignment, defendant, represented by counsel, pleaded not guilty. A jury was selected, sworn and empaneled, and defendant was placed on trial. During the progress of the trial, defendant, through his said counsel, withdrew his said original pleas and pleaded guilty to both counts in said indictment. The court, after interrogation of defendant in open court, determined that said pleas of guilty were made "freely, understandingly and voluntarily . . . without any undue influence, compulsion or duress, without promise of lenience by the Court or anyone else."

After inquiry in open court as to defendant's prior criminal record, the court pronounced separate judgments, imposing on each count a prison sentence of not less than three nor more than five years, the sentences to run consecutively. Defendant excepted and appealed.

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

T. O. Stennett for defendant appellant.

PER CURIAM. Defendant having pleaded guilty, his appeal presents for review only whether error appears on the face of the record proper. *S. v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800. Suffice to say, the record proper does not show error.

The record on appeal, prepared by defendant's court-appointed counsel, contains one assignment of error, namely, that "(t)he Court erred in pronouncing an excessive, cruel and unreasonable punishment." The sentences are well within the limits prescribed by G.S. 14-119 and G.S. 14-120. Hence, they cannot be considered cruel and unusual in a constitutional sense. *S. v. Bruce, ante,* 174, 150 S.E. 2d 216, and cases cited. The judgment of the court below is affirmed.

Affirmed.

STATE v. JOE DUNLAP.

(Filed 12 October, 1966.)

1. Homicide § 20—

Evidence that a nephew badly beat his uncle with a stove-lid lifter and, at the instance of a third person, desisted and left, that the uncle stated that if the nephew came back he was going to shoot him, and that when the nephew returned the uncle shot the unarmed nephew as the nephew stepped in the door, inflicting fatal injury, *held* sufficient to sustain conviction of manslaughter.

2. Criminal Law § 162—

Where defendant himself testifies he shot the deceased, the admission of the declaration of deceased that defendant had shot him cannot be prejudicial even though proper predicate for the admission of the declaration as a dying declaration was not made.

3. Same—

The withdrawal by the court of evidence competent for the purpose of corroborating a State's witness cannot be prejudicial to defendant.

APPEAL by defendant from *McLean, J.,* March 7, 1966 Regular Schedule A Criminal Session of MECKLENBURG.

Defendant, indicted for second-degree murder in the death of James Dunlap, was convicted of manslaughter. James Dunlap died on November 28, 1965, as a result of gunshot wounds inflicted by defendant, his uncle, on November 24, 1965.

The testimony of Thomas Hunter, the State's witness who was present at the shooting, tended to show: James Dunlap, without defendant's permission, took defendant's shotgun from the possession

of Thomas Hunter with whom defendant had left it. Shortly thereafter defendant and Hunter located James and the gun at the home of a certain Oakes. Defendant hit James "beside the neck with his pocket knife," took the gun from him, and he, James, and Hunter went to defendant's home. As soon as defendant put the gun down, James said to him, "Joe, why did you cut me?" James then knocked defendant down and beat him with a stove-lid lifter for about three minutes. At the instance of Hunter, James desisted and left. When defendant got up, he told Hunter that if James came back there he was going to shoot him. In about twenty minutes James returned. As he stepped in the door, defendant shot him in the left chest with his shotgun. James had nothing in his hand at the time, and no weapon was found on him.

When the police arrived, they found James face down on the living room floor. In great pain, he was clutching his chest with his hands and saying "My uncle, my uncle shot me." Defendant's motion to strike this statement was denied.

Defendant, the only witness to testify in his behalf, said: "I shot him when he came in the door to keep him from whipping me again, because he is a better man than me. . . . When James Dunlap came back in, he said, 'I am going back in and finish killing me *(sic).*'" Defendant denied that he had cut James when he took the gun from him. He conceded that he had cut him on the jaw during the time James had him down beating him.

Defendant appeals from the prison sentence.

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

T. O. Stennett for defendant appellant.

PER CURIAM. The evidence was sufficient to sustain the verdict of manslaughter, and defendant's motions of nonsuit were properly overruled. The statements of James Dunlap to the officers that his uncle shot him were incompetent as dying declarations because the State had failed to show that at the time of making them James Dunlap "had full apprehension of his danger (of death), . . ." Stansbury, N. C. Evidence, 2d Ed., § 146 (1963). Although erroneously admitted, the statements do not entitle defendant to a new trial since they were in nowise prejudicial to him. The identity of the man who shot deceased was never in doubt or dispute. Defendant himself testified that he shot James Dunlap. "The admission of testimony cannot be held prejudicial when defendant thereafter makes an admission of the same import." 1 Strong, N. C. Index, Criminal Law § 162 (1962 Supplement).

Defendant's third assignment of error relates to a written statement signed by the witness Hunter, which the State offered in evidence to corroborate him. The statement was admitted over defendant's objection, but the judge later struck it and told the jury not to consider it. This statement was competent for the purpose for which it was admitted. The court's instruction to the jury not to consider it cannot be held to be prejudicial.

In the trial below, we find

No error.

STATE v. EUGENE SPEARS, JR., BOBBY HUBERT, WALTER LOUIS BIDGOOD, JR., AND BERT PARTLOW, JR.

(Filed 19 October, 1966.)

1. Criminal Law § 71—

Where the court finds upon competent supporting evidence that defendants' statements were made freely and voluntarily after they had been fully advised of their constitutional rights, such findings are conclusive and the admission of the statements in evidence will not be disturbed.

2. Criminal Law § 159—

Exceptions not discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Criminal Law § 9—

Where the perpetration of a felony has been entered upon, a person who, with full knowledge of the purpose of the actual perpetrators, aids and encourages the commission of the offense is guilty as a principal, and the effect of his acts in aiding and encouraging continues until he renounces the common purpose and makes it plain to the others that he does not intend to participate further.

4. Criminal Law § 99—

On motion to nonsuit, the evidence must be taken in the light most favorable to the State, and defendant's evidence is not to be considered except so much of defendant's evidence which is not in conflict with the State's evidence may be considered when it tends to explain or make clear the State's evidence.

5. Safecracking § 2— Evidence held sufficient to sustain conviction of defendant as abettor of offense of attempted safecracking.

The State's evidence tended to show that a safe had been removed from a building and was inside the fence surrounding the premises, that when defendant, in consequence of an invitation of a codefendant and a promise of a "cut", went to the scene with the others he knew that the safe had been stolen and that the parties intended to break open the safe and secure the contents, that defendant aided them in their common pur-

pose by helping to push the safe a distance of some 40 yards from the premises, that the efforts to break open the safe being unsuccessful, defendant and the others left, but that the next morning defendant and another walked down to the creek bed and looked at the safe, permitting an inference that defendant still expected to get a "cut" of the contents. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant's guilt as an aider and abettor. G.S. 14-89.1.

6. Criminal Law § 96—

Upon objection of one defendant, the court properly refuses the jury's request to take with them into the jury room a typewritten statement introduced in evidence, and such action by the court is not grounds for objection by another defendant, even though such other defendant consented that the jury might take such statement into the jury room.

7. Criminal Law § 156—

An assignment of error to the charge which assignment contains nothing but a reference to the page of the record where the portion of the charge objected to was set forth, is broadside and ineffectual.

APPEAL by defendant Walter L. Bidgood, Jr., from *McLean, J.*, 4 April 1966 Criminal Session of MECKLENBURG.

Criminal prosecution upon two indictments which were consolidated for trial. The first indictment charges that Eugene Spears, Jr., Bobby Hubert, Walter Louis Bidgood, Jr., and Bert Partlow, Jr., on 13 February 1966 did wilfully and feloniously by the use of an acetylene cutting torch, an axe, and a pick, attempt to unlawfully force open a safe used for storing valuables and $800 in money, the property of F & R Coal and Oil Company, a corporation. The second indictment charges that the same defendants on the same day did wilfully and feloniously by the use of an acetylene cutting torch, an axe, and a pick, force open a safe used for storing valuables and $800 in money, the property of F & R Coal and Oil Company, a corporation.

Each defendant was represented by separate counsel.

Pleas: Not guilty by all defendants. Verdicts: As to Eugene Spears, Jr., guilty of the charge of attempt to force open a safe, as charged in the bill of indictment; as to Bobby Hubert, not guilty; as to Walter Louis Bidgood, Jr., guilty of the charge of attempt to force open a safe, as charged in the bill of indictment; as to Bert Partlow, Jr., guilty of the charge of attempt to force open a safe, as charged in the bill of indictment. (The verdicts here set forth are taken from a copy of the minutes of the court certified by the assistant clerk of the Superior Court of Mecklenburg County, which is filed as an addendum to the record in this case.)

Judgments of imprisonment were imposed by the court on defendants Spears, Bidgood, and Partlow. From a judgment that he

be imprisoned for a term of not less than ten nor more than fifteen years, defendant Bidgood appeals to the Supreme Court.

Attorney General T. W. Bruton, Assistant Attorney General William W. Melvin, and Staff Attorney Donald M. Jacobs for the State.

E. Clayton Selvey, Jr., for defendant Walter L. Bidgood, Jr., appellant.

PARKER, C.J. The State and defendants put on evidence. Defendant Bidgood assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence. The State's evidence, considered in the light most favorable to it, shows the following facts:

The F & R Coal and Oil Company had in its front office in a building located in the city of Charlotte a Class E Mosler burglary resistant type safe. All the daily receipts of this corporation for Friday, 11 February 1966, and Saturday, 12 February 1966, consisting of between $800 and $1,000 in cash money and about $3,600 in checks, were placed in this safe on Saturday night, 12 February 1966, and the safe and office were locked. About 7:15 a.m. on Sunday, 13 February 1966, J. E. King, a vice president of this corporation, went to the office of the corporation. Upon arrival he saw the safe had been removed. Small pieces of the concrete cap of the safe and small metal pieces of its top were scattered about on the ground about 100 yards behind the office. After the police came, King saw the safe which had been taken from the office of F & R Coal and Oil Company about 300 yards from the office on the bank of a creek behind the Queen City Foundry building which is across the street from the F & R Coal and Oil Company's office. The metal part of the safe had been cut up, it had been broken into, and the money and checks locked in it on the previous night had been taken and carried away. Defendant Partlow was an employee of F & R Coal and Oil Company, and came into its front office several times a day.

The State offered in evidence statements made by defendants Spears, Bidgood, and Partlow in each other's presence to police officer J. C. Wilkins. Defendants objected. The trial judge, in the absence of the jury, conducted a long preliminary inquiry as to the admissibility in evidence of these statements. The State presented the evidence of a number of police officers, and the above-named three defendants testified themselves and presented the testimony of Minnie Partlow and Joe Alice Partlow. The evidence was conflicting. The trial judge found as facts that the three above-named defendants had been fully advised of their constitutional rights be-

fore any of them made any statement, and concluded that the statements made by each defendant in each other's presence were freely and voluntarily made and were admissible in evidence, but were not admissible in evidence against defendant Hubert who was not present when the statements were made. The judge's findings of fact are amply supported by competent evidence, and his findings of fact support his conclusion and his ruling that the statements were admissible in evidence against the three above-named defendants, and, consequently, his ruling will not be disturbed on appeal. *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *S. v. Outing,* 255 N.C. 468, 121 S.E. 2d 847, *cert. den.* 369 U.S. 807, 7 L. Ed. 2d 555. Defendant Bidgood has not brought forward and discussed in his brief his assignment of error to the admissibility in evidence of these statements, and this assignment of error is taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

The testimony of police officer J. C. Wilkins is in substance as follows: Defendants Spears, Bidgood, and Partlow made statements in each other's presence and in his presence. The statements were typed, signed by each defendant, and are in substance: On Saturday night, 12 February 1966, Walter Weddington and an unknown boy were at Partlow's house. The three of them left his house and went to the building of the F & R Coal and Oil Company, they climbed over the fence, and Walter Weddington cut open with an axe the door of the building. They went in and pushed the safe in the front office down the steps to the outside. Then the three of them went across the street to the Queen City Foundry building, got some hand trucks, brought them back to the premises of the F & R Coal and Oil Company, and put the safe on these hand trucks. The three of them then left and went back to Partlow's house. In his house were defendants Spears and Bidgood. Weddington told Spears and Bidgood they had a safe and wanted them to help. Whereupon, Spears, Bidgood, Partlow, and Weddington went down to the building of the F & R Coal and Oil Company. Spears, Weddington, and Partlow went in the gate, and Bidgood stayed on the outside of the gate. Weddington took an axe and tried to beat the lock off the front gate. Partlow went inside and got the keys to unlock the gate. Spears pulled and Bidgood, Partlow, and Weddington pushed the safe to the edge of the railroad near the building of the Queen City Foundry. Then all of them left and went to defendant Hubert's house. Bidgood left and went to work. Spears, Partlow, Hubert, and Weddington then went to Partlow's house and took a drink of whisky. Then all of them left, accompanied by an unknown boy, and went back to where they had left the safe. The five of them pushed the

safe on the railroad down on a creek bank. Weddington tried to cut the safe open with an axe, and the boy was using a pick on it. They could not get in the safe. Weddington said they needed some torches. Partlow said there were some torches in the back of the Queen City Foundry. Partlow, Weddington, and the unknown boy went to the Queen City Foundry building, got some torches, and came back. This unknown boy told them to be careful with the tanks, they might blow up. Then Spears grabbed an axe and on the third blow the axe glanced off and hit his toe. He left and went home. They left at the safe Partlow, Weddington, Hubert, and this unknown boy. They kept beating on the safe. Weddington tried to cut it open with the torches, but he could not do so because of cement on it. Partlow left and went home. Later that night the unknown boy came to his house and gave him some money. He told him that was his part, about all the money was burned, and the police got it. The following morning Bidgood came by the house as he got off work. Later, Partlow and Bidgood left and walked down and looked at the safe. Bidgood and Spears did not get any of the money.

Defendants offered evidence. Defendant Hubert testified in substance as follows: On Saturday night, 12 February 1966, he was home in bed. Partlow, Spears, Bidgood, Weddington, and another boy came to his house and woke him up. Weddington asked him if he wanted to make some money, saying they had a game down at Partlow's house. He got his dice and cards and went there. When he arrived, he looked around and there was not any money there, so he told Partlow, "Ain't no money down here," and said, "I am going back home." The unknown boy said, "The money is down the street." They walked down the street, turned down the railroad, walked down the railroad, and there was a safe sitting beside the bank. They rolled it down the hill. Partlow said there were some torches in a building across the street. Hubert said he and Spears were not going to get any torches. He and Spears walked down the railroad, went up Graham Street, and came back down the railroad. By that time they were back with the torches. Spears walked down the hill to where they were working on the safe with torches and beating on it. He came back and said he had cut his foot. At that time, he, Partlow, and Weddington left and went up the street. He never placed his hand on the safe, and had nothing to do with trying to break it open.

Bidgood, testifying in his own behalf, stated in substance: He, Spears, and Hubert were at Partlow's house. There was some conversation about money. They said they had some money. Walt Bellamy approached him about this. His cuff links were messed up, and he asked him where he had been. Hubert told them to go with him.

They left and went to the F & R Coal and Oil Company. He never went inside the building or its enclosure. When they reached the premises of the F & R Coal and Oil Company, he saw a safe inside the fence. Bellamy pointed to the safe and said, "We have got it out this far and if you will push it up the street, I will give you a cut." He replied, "No, I am not going to get involved." Bellamy said, "If you don't get in and help, I am going to get you in it anyhow." As a result of this conversation, he helped. When they got the gate open, the safe was pushed out in front of the premises, and he helped push it down by the paper house. He said he was not going to help any further, and that he was going. All of them left the place where the safe was. He never went back that night to where the safe was. He never opened the safe and he did not get any of the materials to open the safe. He said on cross-examination that he helped roll the safe about 40 or 50 yards before leaving. He did not know exactly what was meant by giving him a cut, and his intention was not to get a cut; he pushed the safe because of Bellamy's threat.

Defendant Partlow testified in his own behalf in substance as follows: He, Spears, and Bidgood were at a house and Weddington and another guy came in. They told Spears, Bidgood, and him to come with them. They started down the street, and when they got down the street they saw a safe on a hand truck. They asked him to help push it up the street, but he refused to do so. They left and went back to the house. They left his house and went to Hubert's house. After awhile Weddington and another guy came in and asked where Hubert was. They said he was upstairs in bed. After awhile Hubert came downstairs with some cards and dice. They then went to Partlow's sister's house. They left there and he, Bidgood, Spears, Hubert, and Weddington went on up the railroad. A guy with them said, pointing to the safe, "There is where the money is at. . . . You come and help us." Spears went down to the bank of the creek, and after awhile he came back and said he had cut his foot. He never placed his hands on the safe. He said on cross-examination in substance: One of the men who had been rolling the safe down the track gave him a bunch of money amounting to $191. This man told him this money was no good and that he was going to flush the money down the stool, and he told him to give it to him. He denied that he was at his sister's home early one morning washing some of this money off and hanging it on a line to dry. He does not know whether the money was burned or not. He had seen Weddington have this money before. He did not burn the pocketbook.

It seems from reading the record that Walter Weddington is also called Walter Bellamy. We are confirmed in our belief by the fol-

lowing statement in the defendant's brief: "There were two of the participants named 'Walter,' Walter L. Bidgood, Jr., and another fellow named Walter Weddington (also referred to as 'Walter Bellamy')."

Defendant Bidgood states in his brief: "The evidence presented by both the State and the defendant is basically the same." Defendant Bidgood further states in his brief: "There is never any evidence to the effect that Walter L. Bidgood, Jr., had anything to do with the opening of the safe, that his participation was limited to the extent that he helped move the safe from one spot to another, and that at most would be guilty of larceny of the safe and not as *(sic)* safe cracking or attempted safe cracking."

The two indictments here charge a violation of G.S. 14-89.1, which reads:

> "Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary."

In *S. v. Hart,* 186 N.C. 582, 120 S.E. 345, Stacy, J. (later C.J.), speaking for the Court, said:

> "An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense."

In *S. v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54, Denny, J. (later C.J.), said:

> "In 22 C.J.S., Criminal Law, section 79, page 143, it is said: 'A person is a party to an offense if he either actually commits the offense or does some act which forms a part thereof, or if he assists in the actual commission of the offense or of any act which forms part thereof, or directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. To constitute one a party to an offense it has been held to be essential that he be concerned in its commission in some affirmative manner, as by actual commission of the crime or by aiding and abetting in its commission and it has been regarded as a general proposition that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent.' "

The *Burgess* decision was filed 11 January 1957. The statement quoted in that opinion appears in 22 C.J.S., Criminal Law, § 79, pp. 237-8, in the volume of C.J.S. copyright 1961. The opening sentence of § 79, p. 237, in the 1961 edition of 22 C.J.S. is as follows: "It is a general rule under the common law that one is not liable for the criminal acts of another in which he did not participate directly or indirectly."

In 21 Am. Jur. 2d, Criminal Law, § 120, it is stated:

> "A principal in a crime must be actually or constructively present, aiding and abetting the commission of the offense. It is not necessary that he do some act at the time in order to constitute him a principal, but he must encourage its commission by acts or gestures, either before or at the time of the commission of the offense, with full knowledge of the intent of the persons who commit the offense. He must do some act at the time of the commission of the crime that is in furtherance of the offense."

Where the perpetration of a felony has been entered on, one who had aided or encouraged its commission cannot escape criminal responsibility by quietly withdrawing from the scene. The influence and effect of his aiding or encouraging continues until he renounces the common purpose and makes it plain to the others that he has done so and that he does not intend to participate further. *People v. Brown,* 26 Ill. 2d 308, 186 N.E. 2d 321; *Karnes v. State,* 159 Ark. 240, 252 S.W. 1; 22 C.J.S., Criminal Law, § 89; 21 Am. Jur. 2d, Criminal Law, § 120; 1 Wharton's Criminal Law and Procedure, by Anderson, 1957, § 110, pp. 238-9.

This is said in 22 C.J.S., Criminal Law, § 89, p. 268: "Where nonliability as aider and abettor is based on the ground that accused had no prior knowledge of any plan to commit a crime and that his assistance after acquiring such knowledge was under duress, it is essential that he cease to act in complicity with others as soon as he acquires knowledge of the criminal character of their actions."

It is familiar learning that on a motion for judgment of nonsuit the State is entitled to have the evidence considered in its most favorable light, and defendant's evidence, unless favorable to the State, is not to be considered, except when not in conflict with the State's evidence it may be used to explain or make clear the State's evidence. *S. v. Roop,* 255 N.C. 607, 122 S.E. 2d 363. Applying this rule to the evidence here, it would permit a jury to find the following:

Defendant Partlow, Walter Weddington (also called Walter Bel-

lamy), and an unknown boy went to the building of the F & R Coal and Oil Company, climbed over the fence, and Weddington cut open with an axe the door of the building. The three went inside and pushed the safe in the front office down the steps outside the building. The three of them then went across the street to the Queen City Foundry building, got some hand trucks, brought them back to the premises of the F & R Coal and Oil Company, and put the safe on these hand trucks. The safe was inside the fence surrounding the F & R Coal and Oil Company's premises. The three then left and went back to Partlow's house. In Partlow's house were defendants Spears and Bidgood. Weddington told Spears and Bidgood they had a safe and wanted them to help. Spears, Bidgood, Partlow, and Weddington went to the building of the F & R Coal and Oil Company. When they reached the premises of the F & R Coal and Oil Company, Bidgood saw the safe inside the fence. Bellamy pointed to the safe and said, "We have got it out this far and if you will push it up the street, I will give you a cut." Weddington took an axe and tried to beat the lock off the front gate. Partlow went inside and got the keys and unlocked the gate. Spears pulled and Bidgood, Partlow, and Weddington pushed the safe to the edge of the railroad near the building of the Queen City Foundry. All of them left and went to defendant Hubert's house. Bidgood left and went to work. Spears, Partlow, Hubert, and Weddington then went to Partlow's house and took a drink of whisky. Then all of them left, accompanied by an unknown boy, and went back to where they had left the safe. The five of them pushed the safe on the railroad down on a creek bank. Weddington tried to cut the safe open with an axe, and the boy was using a pick on it. Partlow, Weddington, and the unknown boy went to the Queen City Foundry building, got some torches, and came back to the safe. These people kept beating on the safe with an axe, and Weddington tried to cut it open with the acetylene cutting torches. Finally, they got the safe open and took out of it its contents consisting of money and checks. When Bidgood went to the scene with the other men, he knew that the safe had been stolen and that the purpose of these other men was not to steal the safe, but to break open the safe and secure the contents therein. The reasonable inference is that when Bidgood went to the scene he entered into the common purpose or design of these men to break open the safe and secure the contents thereof, and aided them in their common purpose or design by helping push the safe 40 or 50 yards from the premises of the F & R Coal and Oil Company, and expected to get a "cut" of the contents of the safe when it was broken open. It appears that he left Hubert's house and

went to work, but a jury could find that he did not renounce the common purpose and make it plain to the others that he had done so and did not intend to participate further. The next morning Partlow and Bidgood walked down to the creek bank and looked at the safe. It is a reasonable inference that a jury can draw that by going to the scene the next morning where the safe had been broken into he still hoped by reason of his help in pushing the safe 40 or 50 yards to get a "cut" of the contents of the safe after it had been broken into. The evidence was sufficient to carry the case to the jury, and the judge properly overruled defendant's motion for judgment of nonsuit at the close of all the evidence.

After the court's charge, the jury retired to their room. Later they returned to the courtroom and asked the court to permit them to take into the jury room with them the typewritten statement made by defendants Spears, Bidgood, and Partlow to police officer J. C. Wilkins, which had been introduced in evidence, and marked State's Exhibit #2. Defendant Partlow objected to the jury's request being granted. Defendant Spears said he put on no evidence, and he thought the granting of the jury's request "might be prejudicial to" him. Defendant Bidgood said he had no objection. The court refused the jury's request, and defendant Bidgood assigns this as error. This assignment of error is overruled on authority of *S. v. Caldwell,* 181 N.C. 519, 106 S.E. 139.

Defendant has five assignments of error to the charge. All of these are identical, except each one has a different numbered exception and a different numbered page of the record. Assignment of error No. 7 is typical of the other four, and reads: "7. The action of the court in charging the jury. (DEFENDANT'S EXCEPTION No. 7) (R p 89)." The assignments of error to the charge are broadside and ineffectual, and are overruled. *S. v. Douglas, ante,* p. 267, 150 S.E. 2d 412; 1 Strong's N. C. Index, Appeal and Error, § 24.

All defendant's assignments of error are overruled. In the trial we find

No error.

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

(Filed 19 October, 1966.)

1. Appeal and Error § 49—

Findings of fact by the trial court which are supported by evidence are conclusive on appeal.

2. Process § 13— Cause of action must arise from business done in this State by foreign undomesticated corporation in order for it to be subject to service under G.S. 55-144.

This action was instituted by a nonresident corporation against a nonresident corporation, which had not domesticated or qualified to do business in this State, for breach of contract by the defendant to purchase the controlling stock in a domestic carrier. The findings were to the effect that pursuant to the terms of the contract an agent of defendant came into the State and took complete management of the domestic carrier, and the contract provided that the defendant would assume deficits in the domestic carrier's operations in excess of a specified amount. *Held:* While defendant was doing business in this State during the time its agent was here managing the domestic carrier, the cause of action did not arise out of business so transacted in this State, and therefore service of process under G.S. 55-144 by service on the Secretary of State, is a nullity. This result is not affected by the joinder of a domestic bank having funds of defendant in escrow, no relief being sought from the bank except to require it to pay over the amount held by it in escrow and there being no order of attachment or garnishment of the funds.

APPEAL by defendant Tri-State Motor Transit Company from *Jackson, J.*, at the 13 June 1966 Regular Schedule "B" Civil Session of MECKLENBURG.

This is an action for damages for breach of an alleged contract by Tri-State to purchase shares of stock owned by the plaintiff in Kilgo Motor Freight, Inc. The North Carolina National Bank is alleged to hold $25,000, deposited with it by Tri-State in escrow, pending consummation of the stock transfer whereupon it was to be applied to the purchase price. The complaint alleges that the plaintiff is a corporation of the State of South Carolina and has its principal office therein, and that Tri-State is the corporation of "some state other than North Carolina," having its principal office in Missouri. It alleges that Tri-State, at the time of the events alleged in the complaint, was transacting business in North Carolina. The prayer is for judgment for damages against Tri-State, and for an order directing the Bank to pay over the escrow deposit to the plaintiff for application upon such judgment.

Summons for Tri-State was served upon the Secretary of State. Summons was served upon the North Carolina National Bank in Mecklenburg County by the Sheriff thereof.

Tri-State moved to dismiss the action on the following grounds: (1) The court has no jurisdiction over the person or property of Tri-State; (2) the action does not arise out of business transacted or activities performed in this State and, being an action by a nonresident against a foreign corporation, the Superior Court of Mecklenburg County should not be called upon to entertain it, and the defendant should not be required to defend in this jurisdiction; (3) this being an action which does not arise in North Carolina, and all of the parties being nonresidents, the maintenance of the action in the Superior Court of Mecklenburg County is contrary to the interests of justice and to the convenience of the parties and witnesses. In support of its motion, the defendant alleges that it is a corporation of the State of Delaware, having its principal office in Joplin, Missouri, and that at and after the time this action was instituted it had not engaged in business or transacted business in North Carolina, has not been domesticated in North Carolina, and is not subject to service of process in this State.

The motion to dismiss was first heard by Walker, J., who allowed the motion. From that order the plaintiff appealed to this Court. Upon that appeal the judgment of this Court, reported in 265 N.C. 61, 143 S.E. 2d 235, was:

> "Judge Walker's order dismissing plaintiff's action is not supported by determinative findings of fact on the crucial questions presented for decision and it must be vacated, and the cause is remanded for further specific findings of fact, and then for the entry of an order based upon the findings of fact and the conclusions of law made from such findings of fact in accordance with law."

The motion then came on for further hearing before Jackson, J., who entered an order setting forth his findings of fact and conclusions of law, and dismissing the motion of Tri-State. From this order the present appeal is taken.

The findings of fact by Jackson, J., summarized except as indicated, are as follows:

1. The plaintiff is a foreign corporation with its principal office and place of business in South Carolina.

2. Tri-State is a Delaware corporation with its principal place of business in Missouri.

3. Tri-State was a common carrier of explosives in interstate commerce, holding operating rights from the Interstate Commerce Commission in the Middlewest and Southwest, but not operating in or having any place of business in North Carolina, except as otherwise set forth below.

4. Tri-State was authorized by its charter to acquire stock of other corporations.

5. On and prior to 17 August 1960, the plaintiff owned 35 shares of the stock of Kilgo.

6. Kilgo, a North Carolina corporation, was a common carrier, holding operating rights issued by the Interstate Commerce Commission and a certificate of public convenience and necessity from the North Carolina Utilities Commission.

7. Tri-State desired to acquire controlling interest in other common carriers in order to diversify and expand its operations.

8. George F. Boyd, President of Tri-State, was acting at all times within the scope of his authority.

9. Boyd negotiated in South Carolina with one Johnson, attorney in fact for the plaintiff and other stockholders of Kilgo, to purchase their stock, a majority interest.

10. A written contract was executed in South Carolina between Tri-State and Johnson, as such attorney in fact, whereby Tri-State agreed, subject to the approval of the Interstate Commerce Commission, to purchase the stock and to seek from the Commission authority to assume temporary management control of Kilgo. Subject to such authorization by the Commission, the selling stockholders granted and Tri-State accepted the management of the operation of Kilgo. This included general supervision of Kilgo's business, "it being intended that for all practical intents and purposes Buyer (Tri-State) shall be substituted for Kilgo's Board of Directors in the management and control of Kilgo's business affairs, including the specific right to execute checks, notes and commercial instruments in the name of Kilgo." The contract further provided that Tri-State would arrange for sufficient funds to enable Kilgo to prosecute its business in an efficient and profitable manner and that if, during such temporary management by Tri-State, the net deficit of Kilgo increased beyond a specified limit, such additional deficit would be paid by Tri-State to Kilgo.

11. The only other stockholder of Kilgo consented to this contract.

12. The parties thereupon entered into an escrow agreement with the Bank. For purposes and upon terms therein stated, the sellers undertook to deposit their stock certificates in escrow and Tri-State undertook to deposit $25,000 in escrow.

13. The Interstate Commerce Commission granted Tri-State authority "to assume temporary control of Kilgo through management for a period not exceeding 180 days."

14. Thereupon, Tri-State "assumed management control of

Kilgo pursuant to authority of the Interstate Commerce Commission and the terms of the Buy-Sell Contract."

15. Tri-State "sent Boyd to North Carolina to take over active management and control of Kilgo." From then until 2 May 1961, "Boyd spent most of his time managing Kilgo," making his headquarters at its offices in Charlotte. His salary was paid by Tri-State.

16. From 28 September 1960 until 2 May 1961, Tri-State "regularly and systematically managed and controlled the internal affairs and transacted the business of Kilgo, through its officer and agent Boyd."

17. "Tri-State did not domesticate or qualify to do business in North Carolina," but, pursuant to the provisions of the Interstate Commerce Act, "did file with the North Carolina Utilities Commission a 'Designation of Agent for Service of Notices, Orders and Process.' "

18. On 1 February 1961 the Interstate Commerce Commission granted the application of Tri-State to acquire control of Kilgo through the purchase of a majority of its capital stock, this authority to be exercised within 90 days.

19. "On or about 2 May 1961 Boyd left the offices of Kilgo in Charlotte, North Carolina, and did not thereafter return to them. On the same date, an attorney for Tri-State wrote to Johnson in Spartanburg, South Carolina, that Tri-State would not consummate the transaction for the purchase of the Kilgo stock. Tri-State did not make payment for the Kilgo stock * * * and has never done so."

20. This action was instituted as to Tri-State by the issuance of summons with an extension of time for the filing of the complaint on 30 April 1964, which summons was served upon the Secretary of State and was thereafter received from the Secretary of State by Tri-State via registered mail. In due time the complaint was similarly served and forwarded by the Secretary of State to Tri-State.

Upon these findings of fact Jackson, J., concluded:

1. Tri-State was present in and transacting business in North Carolina during the period 28 September 1960 until on or about 2 May 1961.

2. The cause of action alleged by the plaintiff in its complaint arises out of such business transacted by Tri-State in North Carolina.

3. The court has jurisdiction over the person of Tri-State in this action.

Jackson, J., therefore, ordered and adjudged that the motion of

Tri-State be dismissed and that it be granted 45 days from the date of his order to answer or otherwise plead in the action.

Tri-State excepted to and assigns as error the above findings of fact 8, 15, 16 and 17 on the ground that they are unsupported by the evidence in the record. It also excepted to and assigns as error each of the foregoing conclusions, and the failure of the court to make findings of fact and draw conclusions of law tendered by it.

Blakeney, Alexander & Machen for defendant appellant.

Of Counsel: Linde, Thomson, Van Dyke, Fairchild & Langworthy.

Ervin, Horack, Snepp & McCartha for plaintiff appellee.

LAKE, J. The findings of fact to which the defendant excepts are each supported by evidence in the record and are, therefore, conclusive. *Stewart v. Rogers,* 260 N.C. 475, 133 S.E. 2d 155; *Hodges v. Hodges,* 257 N.C. 774, 127 S.E. 2d 567; *Gasperson v. Rice,* 240 N.C. 660, 83 S.E. 2d 665. These exceptions are, therefore, without merit.

Since, as the trial court found, "Tri-State did not domesticate or qualify to do business in North Carolina," G.S. 55-143(b) has no application. Since, as the court below also found, the plaintiff is a foreign corporation with its principal office and place of business in South Carolina, G.S. 55-145 has no application. Thus, the service of the summons for Tri-State upon the Secretary of State did not give the Superior Court of Mecklenburg County jurisdiction over the person of Tri-State unless this action falls within the limits of G.S. 55-144, which reads:

> "Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served."

When the principles stated in the opinion of Parker, J., now C.J., in the former appeal of this case to this Court, 265 N.C. 61, 143 S.E. 2d 235, are applied to the findings of fact made by the trial court, which findings are amply supported by the evidence, it is apparent that there was no error in the conclusion of the trial court that Tri-State transacted business in North Carolina.

Tri-State was authorized by its own charter to acquire shares of stock in Kilgo. It contracted to do so and, pending the consumma-

tion of the purchase, Tri-State was authorized by the contract to manage Kilgo's affairs to such an extent as to substitute, for all practical purposes, the judgment of Tri-State for the judgment of the Board of Directors and officers of Kilgo. Tri-State sent its president to North Carolina to exercise this power granted to it. While he was in this State he exercised Tri-State's right and power to hire and fire the personnel of Kilgo, to select the banks in which Kilgo was to carry its accounts, to issue checks and negotiable instruments in the name of Kilgo, and to purchase equipment for Kilgo and dispose of equipment owned by Kilgo. He testified that he did these things while on loan to Kilgo, but Tri-State paid his salary and Tri-State was obligated by its contract to reimburse Kilgo for any deficit in Kilgo's operations during this period in excess of a specified amount. In so managing the prospective subsidiary of Tri-State, President Boyd was acting as Tri-State's agent for the protection and promotion of Tri-State's interest in such prospective subsidiary. It was Tri-State who had the right to manage the affairs of Kilgo. President Boyd's management of those affairs was Tri-State's management of those affairs. That was the transaction of business in North Carolina by Tri-State. See: *Lambert v. Schell,* 235 N.C. 21, 69 S.E. 2d 11; *Harrison v. Corley,* 226 N.C. 184, 37 S.E. 2d 489; *Commercial Trust v. Gaines,* 193 N.C. 233, 136 S.E. 609.

Nevertheless, the service of summons upon the Secretary of State did not give the superior court jurisdiction over the person of Tri-State unless the cause of action upon which the plaintiff sues arose out of the business which Tri-State transacted in North Carolina. *R. R. v. Hunt & Sons, Inc.,* 260 N.C. 717, 133 S.E. 2d 644. The cause of action stated in the complaint is the alleged breach of the contract to purchase the plaintiff's shares of stock in Kilgo. The cause of action is not one "arising out of" the business so transacted by Tri-State in North Carolina unless there is a causal connection between what Tri-State did in North Carolina, through its president, and the plaintiff's cause of action.

The plaintiff does not sue for any act or omission by Tri-State, acting through its president, in the management of the affairs of Kilgo. If Tri-State had never exercised any power to manage the affairs of Kilgo, but in all other respects the facts were as they appear upon this record, the right of the plaintiff to sue for damages for breach of the promise to buy the shares of stock would be the same as it now is. Consequently, the right of action, alleged in the complaint, did not arise out of the actions done for Tri-State by its president in North Carolina in the management of the affairs of Kilgo. Tri-State has transacted no other business in North Carolina.

We may speculate as to whether, in the course of his management of the affairs of Kilgo, the president of Tri-State acquired an insight into the condition of Kilgo which contributed to the decision by Tri-State to break its contract to purchase the plaintiff's shares of stock. If so, the relation between the business transacted in North Carolina and the breach of the contract is too remote to permit the conclusion that the breach arose out of the transaction of the business done in North Carolina.

Consequently, the court below erred in its conclusion that the cause of action alleged by the plaintiff in its complaint arises out of the business transacted by Tri-State in North Carolina. It follows that the court below also erred in its conclusion that it had jurisdiction over the person of Tri-State in this action. The purported service of summons upon Tri-State by leaving a copy thereof with the Secretary of State was a nullity because such service is not authorized by the statute.

The defendant North Carolina National Bank was properly served with summons, but no cause of action is alleged against it and no relief is sought from it except an order that it pay over the deposit now held in escrow for application upon such judgment as the plaintiff may obtain in this action against Tri-State. Since the plaintiff can not obtain a personal judgment against Tri-State in this action, and since the record does not disclose any order of attachment or garnishment of the deposit made by Tri-State in the Bank so as to bring the interest of Tri-State in such deposit within the jurisdiction of the court, the motion of Tri-State to dismiss this action for want of jurisdiction should have been granted.

It is immaterial whether the contract to purchase the stock was to be performed by payment to the plaintiff in South Carolina or by deposit at the North Carolina Bank in Charlotte. If the breach of the contract upon which the plaintiff relies occurred through the failure of Tri-State to make a payment in Charlotte, the cause of action arose in North Carolina, but it did not arise out of business transacted by Tri-State in North Carolina but out of Tri-State's failure to act here as it contracted to do. G.S. 55-144 does not authorize service of summons upon the Secretary of State in all cases where the cause of action arose in this State.

Reversed.

STATE v. THURLOW BELK

AND

STATE v. CURTIS PEARSON, JR.

AND

STATE v. FRED BERRY, JR.

(Filed 19 October, 1966.)

1. Searches and Seizures § 1—

Evidence upon the *voir dire* tended to show that the owner and operator of an automobile, in response to an officer's request to be allowed to take a look in the vehicle, stated that he would get the key and let the officer look in the trunk. *Held:* The consent to search that part of the automobile beyond the vision of the officers reasonably included parts of the vehicle readily observable, and the order of the court allowing introduction in evidence of the incriminating contents of a paper bag observed between the legs of one of the passengers was not error.

2. Same—

Passengers in an automobile may not object to evidence tending to incriminate them found in the vehicle upon a search without a warrant when the person having possession and control of the vehicle consents to the search.

3. Constitutional Law § 30—

Every person charged with crime is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.

4. Criminal Law § 108—

The trial judge is forbidden by G.S. 1-180 to express an opinion upon the evidence in any manner during the course of the trial or in his instructions to the jury.

5. Same—

Reference by the trial court to defendants as "three black cats in a white Buick" must be held for prejudicial error as affecting the credibility of the defendants as witnesses and injecting a prejudicial opinion of the court into the court's instructions.

APPEAL by defendants from *McLean, J.*, 23 May 1966 Criminal Schedule A Session of MECKLENBURG.

Criminal prosecutions on bills of indictment charging the defendants, Thurlow Belk, Curtis Pearson, Jr., and Fred Berry, Jr., with the crime of common law robbery. The cases were consolidated for trial. The evidence pertinent to the questions presented for decision being the same, all three cases will be considered in this opinion.

Elbert Jarrett, the prosecuting witness, testified substantially as follows: That during the evening of 9 April 1966 he and some friends, Kenneth Herndon and Robert Nixon, came from Lincolnton to a place called "Babe's and Reece" in Charlotte. After eating there,

Jarrett drove with his friends to the corner of Graham and Ninth Streets searching for a girl for Jarrett. They observed Curtis Pearson and Thurlow Belk on the corner. After some conversation, Jarrett, Pearson and Belk went to a house two or three blocks away. A short time later Pearson, Belk, Berry and Jarrett came out of the house, and Jarrett told his original companions that he would ride with Belk, Pearson and Berry and said they would all meet at Babe's and Reece. Jarrett got in the car with the three defendants, and, instead of returning to Babe's and Reece's, they drove him out in the country. He was snatched out of the car, Belk and Pearson beat him, took his property, including money, driver's license, billfold, glasses and receipt for insurance, threw him on the ground and left him there. He walked to a house where he later met police officers William Stegall and I. N. Dennis.

Officer Stegall testified, in substance, that Jarrett told him he had been "robbed" by "three guys in a 1959 white Buick," and described the vicinity where he was robbed. As a result of the conversation he and officer Dennis stopped a 1959 Buick driven by Fred Berry. Thurlow Belk was in the right rear seat and Curtis Pearson was in the right front seat. There was a brown paper bag between the legs of Thurlow Belk, which was later found to contain the property of Jarrett.

The defendants objected to the introduction into evidence of the items found in the bag and in the car, and motions were made to suppress. The jury was excused and *voir dire* was held to determine whether or not there was a lawful search. In the absence of the jury, officer Stegall testified that officer Dennis had asked permission of Berry, the driver of the automobile, to take a look in the vehicle and that Berry said "he would get the key and let them look in the trunk." He testified that he could see the bag from outside the automobile. In the paper bag were found driver's license, billfold, glasses, and receipt for insurance belonging to Jarrett. The officer further testified that when the car was originally stopped, he asked the occupants to step out and furnish him with some identification. He did not actually place anyone under arrest until after he had found the contents of the bag, just before they were taken to the station.

The trial judge ruled the evidence admissible, and it was presented to the jury upon their return.

Officer Dennis also identified the exhibits and testified to substantially the same facts as did officer Stegall.

Kenneth Herndon and Robert Nixon testified, corroborating some of the facts testified to by Jarrett, and Nixon identified the three defendants as being in the presence of Jarrett on the night of April 10, 1966.

The defendant Pearson offered evidence tending to show that he had not seen the prosecuting witness at any time until he was stopped by the officers; that he did not rob the prosecuting witness, nor was he identified by Jarrett.

The defendant Thurlow Belk offered evidence tending to show that he and his sister picked up the defendant Pearson early in the evening and returned to Belk's home. The defendant Berry arrived later and had a drink with Belk and Pearson, and Berry agreed to give them a ride to Charlotte. He had never seen Jarrett before they were stopped by police. He offered further witnesses to corroborate his testimony.

The defendant Berry offered testimony tending to show that he had gone to the Belk home about 2:00 o'clock A.M., had had a drink, and when he was about to leave the defendants Pearson and Belk requested a ride back to town. He had gone to the Belk home to see Thelma Belk, and he did not know Pearson and Belk, and had never seen them before. On the way back to town the officers stopped the automobile. Berry did not know Jarrett and had never seen him until he was stopped by the officers.

The jury returned a verdict of guilty of common law robbery as to all three defendants. Judgments were entered by the court sentencing each defendant to not less than nine nor more than ten years. The defendants appealed, assigning errors.

Attorney General Bruton and Assistant Attorney General George A. Goodwyn for the State.

Charles B. Merryman, Jr., for defendant Thurlow Belk.

James J. Caldwell for defendant Curtis Pearson, Jr.

Francis O. Clarkson, Jr., for defendant Fred Berry, Jr.

BRANCH, J. Defendants contend that the trial court erred in denying their motions to suppress the evidence derived from the search of the automobile and in allowing testimony in reference thereto. In considering this contention it becomes necessary to first consider the case against defendant Fred Berry, Jr., the driver in possession and control of the automobile.

As to defendant Berry: In the case of *State v. Moore,* 240 N.C. 749, 83 S.E. 2d 912, Denny, J. (later C.J.), speaking for the Court, stated: "It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether. (Citing cases)." This therefore poses the question

of whether the defendant Fred Berry, Jr., consented to a search of his automobile. On this question the court, in the absence of the jury, heard testimony as to whether the search of the defendant's automobile was made with his consent. The evidence taken by the court on *voir dire* was to the effect that when one of the officers asked for permission to take a look in the vehicle, Berry replied that he "would get the key and let us (the officers) look in the trunk." It would not seem reasonable that this answer was a limitation as to where the officers might search. The record reveals that the officers were able to observe all of the defendants sitting in the automobile and had seen the paper bag in the possession of one of the defendants. Hence, it would seem reasonable that when the owner and operator of the automobile made accessible to the officers that portion of the automobile which was beyond their vision and to which they did not have ready physical access, he gave consent that any part of the automobile might be searched. This is buttressed by the fact that the record does not reveal any objection or protest by any one of the defendants when the search was conducted.

In the case of *State v. Moore, supra,* the facts show that officers, without search warrant, went to the premises of the defendant, which was a one-story wooden building. The front room of the house was being used as a dance hall and for the sale of canned goods, cigarettes and soft drinks. There was a hall or bedroom between the front room and the kitchen. The kitchen was part of defendant's living quarters. The officers in this case requested permission to look around the premises for stolen goods, to which the defendant replied, "Go ahead, it is not around here, but you are welcome to search." The store room or dance hall was searched, and then the officers went through an open door into the kitchen, where they found a tea kettle full of nontaxpaid whiskey. At the trial the defendant objected and moved to strike evidence with reference to liquor found in his kitchen, on the ground that the officers did not have a search warrant and therefore the evidence was incompetent. There was squarely presented the question whether the defendant consented to the search of the whole premises, including his kitchen. The Court answered this question in the affirmative, and held that "The ruling of a trial judge on *voir dire,* as to the competency or incompetency of evidence, will not be disturbed if supported by any competent evidence. (Citing cases) Just as the voluntariness of a confession is the test of admissibility, . . . so is the consent of the owner or person in charge of one's home or premises essential to a valid search thereof without a search warrant."

In the instant case the judge, after conducting a *voir dire* as to

the competency of the evidence, ruled that the evidence was admissible. Certainly the record reveals some competent evidence to support the judge's finding on *voir dire*. It is our opinion, and we so hold, that the search was valid and that the trial court did not commit error in denying defendants' motions to suppress the evidence.

As to the defendants Thurlow Belk and Curtis Pearson: Our conclusion as to defendant Fred Berry, Jr., would equally apply to both of these defendants. Moreover, these defendants were passengers in the automobile which was in the possession and control of Fred Berry. This Court clearly held in the case of *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506, that passengers in a car may not object to incriminating evidence found in the car upon search without a warrant when the person having possession and control of the car consents to the search. Therefore, the contentions of Thurlow Belk and Curtis Pearson as to this assignment of error are without merit.

The defendants contend that the court, purporting to quote from testimony, committed error in its charge to the jury by using the term "three black cats in a white Buick" when referring to the defendants, and that this reference unduly influenced the jury and was an expression of opinion by the court, in violation of G.S. 1-180. We have carefully reviewed the record and we cannot find that any witness used the term "three black cats in a white Buick."

"Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173.

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

Both the courts and those engaged in the active trial practice recognize the strong influence a trial judge may wield over the jury. "The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. G.S. 1-180." *State v. Carter,* 233 N.C. 581, 65

S.E. 2d 9. This principle was also enunciated by Walker, J., in the case of *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855, in these words: "The Judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged."

It becomes necessary for us to consider the probable effect upon the jury of the use of the term "three black cats in a white Buick."

Webster's Seventh New Collegiate Dictionary defines "cat" as "a carnivorous mammal *(Felis catus)* long domesticated and kept by man as a pet or for catching rats and mice." In the Dictionary of American Slang: Wentworth & Ferner, ed., Thomas Y. Crowell Co., N. Y., 1960, we find this definition of "cat": "A man who dresses in the latest style and pursues women; a dude, a sport; one who tomcats; one who is worldly, wise, or hep."

We doubt that the jury would accept the judge's phrase as describing the defendants as *"felis catus"* but would more likely associate this phrase with the words used in the slang and everyday vernacular. Whichever connotation the jury might accept would not be complimentary, but, at best, would tend to be derogatory and prejudicial.

In the instant case the expression used in the judge's charge might well have affected the credibility of the defendants as witnesses and injected a prejudicial opinion of the court into the instructions given by the court. This entitles the defendants to a new trial.

We find no prejudicial error in the other assignments of error brought forward by the defendants.

New trial as to each defendant.

NATIONWIDE MUTUAL INSURANCE COMPANY, A CORPORATION, AND JAMES A. QUEEN, PLAINTIFFS, v. AUBREY MCABEE, D/B/A PINE GROVE SERVICE STATION, IRA EARL BEACH, WILLIAM RAY ROBERTSON AND FEDERATED MUTUAL IMPLEMENT AND HARDWARE INSURANCE COMPANY, A CORPORATION, DEFENDANTS.

(Filed 19 October, 1966.)

1. Insurance § 54—

In an action on an automobile liability policy, the burden is upon insured to show coverage, and, if insurer relies upon a clause excluding coverage, the burden is on insurer to establish the exclusion.

2. Same— Accident occurring while employee of garage was returning vehicle to owner after repairs held covered by garage liability policy.

The stipulations and findings disclosed that the owner arranged with a repair garage to pick up the owner's car for the purpose of repairs and return it after repairs were made, that the garage sent its employee who took charge of the vehicle and drove it to the repair shop and after the repairs were made, undertook to return the vehicle to the owner's home, and that the collision occurred as the garage employee was on his way to deliver the vehicle to the owner. *Held:* Under the agreement of the garage not only to do the repair work but to pick up and return the vehicle after the repairs, the garage employee was operating the vehicle in the garage business so that liability for his negligence was covered by the garage liability policy, and came within the exclusion clause of the owner's liability policy.

APPEAL by plaintiffs from *Hasty, J.*, January 31, 1966 Regular Schedule D Civil Session, MECKLENBURG Superior Court.

Nationwide Mutual Insurance Company [Nationwide] and James A. Queen [Queen] instituted this civil action, asking the court by declaratory judgment to determine the respective obligations of the parties to defend and indemnify Ira Earl Beach, Aubrey McAbee d/b/a Pine Grove Service Station, against the personal injury and the property damage claims of William Ray Robertson and Emily Jean Perkins growing out of a collision between the Queen automobile and the Robertson motorcycle. The facts are stipulated.

On March 4, 1961, Queen owned a 1959 Chevrolet automobile. Nationwide's policy of liability insurance provided the owner coverage against claims growing out of the use of the vehicle. On the same date Aubrey McAbee operated Pine Grove Service Station. Federated Mutual Implement and Hardware Insurance Company's garage policy provided coverage for McAbee's Pine Grove Service Station.

According to the stipulations and findings, on March 4, 1961, Queen, by telephone, arranged for McAbee's to pick up Queen's Chevrolet automobile at the owner's home for the purpose of repairs. McAbee's sent its agent, Ira Beach, who took charge of and drove the automobile to the repair shop. After the repairs, which were completed at the garage, Beach undertook to return the Chev-

rolet to Queen's home. On the way, a collision occurred between the Chevrolet and a motorcycle operated by Robertson, on which Emily Jean Perkins was a passenger. As a result of the collision, Robertson and Emily Jean Perkins, a minor, were injured.

Emily Jean Perkins, by her Next Friend, instituted an action for personal injury against Queen, Beach and McAbee's. Nationwide defended for Queen but refused to defend for Beach or McAbee's. Federated defended for both Beach and McAbee's but contended its policy did not cover the accident for that Beach was the agent of Queen in picking up the Chevrolet and returning it after the repairs. Federated compromised and settled the Perkins claim. Robertson instituted an action against Queen and Beach for his personal injuries. Federated undertook the defense of Beach and McAbee's. Nationwide undertook the defense of Queen but refused to participate in the defense of Beach or McAbee's, alleging Beach was the agent of McAbee's at the time of the accident and injury. Nationwide's policy issued to Queen contained this clause:

> "1. This policy does not apply under Coverages D and E; (g) to an owned automobile while used in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner agent or employee of the named insured, such resident or partnership; [automobile business being defined in the Nationwide policy as 'the business or occupation of selling, repairing, servicing, storing or parking automobiles']."

The court held both Nationwide and Federated were liable within the limits of their respective policies for the injuries resulting from the negligence of Beach in the operation of Queen's automobile; that Nationwide is liable to Federated for the proportionate part of the expenses and amount paid in settlement of the Perkins claim. The court further held that both Nationwide and Federated are legally obligated under their policies to indemnify the insureds against claims growing out of the accident.

To the judgment entered, Nationwide excepted, and from it, appealed.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr., for plaintiff appellants.

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

HIGGINS, J. The court held both Federated and Nationwide liable within the limits of their respective policies for the personal injuries and property damages proximately caused by the negligence of Beach in the operation of Queen's Chevrolet on March 4, 1961. Federated did not appeal. Nationwide did appeal, contending that Beach was not Queen's agent, but was the agent of McAbee's at the time of the accident, and was using Queen's Chevrolet in McAbee's automobile business. If the contention is correct, the court committed error in holding Nationwide liable.

In construing insurance policies, the burden is on the insured to show coverage. If the insurer relies on a clause of the policy which excludes coverage, the burden is on the insurer to establish the exclusion. *Fallins v. Ins. Co.*, 247 N.C. 72, 100 S.E. 2d 214; *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742; *Pearson v. Pearson*, 227 N.C. 31, 40 S.E. 2d 477. Unquestionably Queen called McAbee's Service Station, stating his Chevrolet needed repairs. McAbee's agreed to send for, repair, and return the vehicle to Queen's home. McAbee's sent its employee, Beach, for the vehicle, repaired it, and while Beach was returning it the accident occurred as a result of Beach's negligence. Beach at all critical times was McAbee's employee. Queen had an agreement with McAbee's not only for the actual repair work but to pick up and return the vehicle after the repairs. Queen was responsible to McAbee's for the repair bill, including the movement to and from the garage. There is nothing in the record to indicate the agreement between Queen and McAbee's that the latter should pick up the vehicle, repair and return it, was other than a regular and customary part of the repair service. Beach, at all times was under the control and direction of his employer, McAbee's. At no time was he under Queen's control. Beach's acts are covered by McAbee's garage policy. From that holding McAbee's and Beach did not appeal.

In a similar situation the Court of Appeals of Virginia has held: "Obviously, if the operation of the car by Perdue [dealer's employee] was a use in the automobile business [insured by garage policy] . . . within the meaning of the insuring clause . . . it was a use in such automobile business within the meaning of the exclusion clause of United's policy." *Universal Underwriters Ins. Co. v. Strohkorb*, 205 Va. 472, 137 S.E. 2d 913 (1964).

When McAbee's contracted to pick up the Chevrolet at Queen's home, service it, and return it to the owner, the custody and control of the vehicle passed from the owner to the garage at the time Beach took charge. During all the time involved, McAbee's agents were in control. The control began with the movement, continued through the repairs, and likewise was continuing at the time of the

accident. In *Karner v. Maynor,* 415 P. 2d 998 (Okla.) (1966) the Court held: "It seems clear from the questioned provision . . . that the insurer does not . . . provide liability insurance for any person or organization . . . employees or agents who operate any of the . . . businesses specified [automobile business]. The reason for refusing to extend insurance coverage to such persons and organizations is obvious. When the named insured places his automobile in the custody of any . . . repair shop, service station . . . the insured has no knowledge as to who will be entrusted with the operation . . . while it is in the control of such person or organization. Since the risks involved in the operation . . . by the agents or employees of such businesses is great, the [owner's] insurance company refuses to extend coverage . . ."

The appellees cite cases holding the transportation to and from a garage for repairs is not using the automobile in the garage business. Among the cases is *Goforth v. Allstate Ins. Co.,* 220 F. Supp 616, a District Court decision. On appeal the Fourth Circuit, by *per curiam* decision, 327 F. 2d 637, said: "We agree with the District Court that a private automobile being driven from the place of business of the owner by a garage keeper for the purpose of repairs . . . was not being used in the automobile business within the meaning of the exclusion clause in the owner's liability insurance policy." The court attempted to justify the reasoning by saying the business of the man driving the car did not determine the business in which the car was being used while he drove it. The decision has been soundly criticized. The Fifth Circuit, in *Sanders v. Liberty Mutual Co.,* 354 F. 2d 777, rejected the theory advanced by the Fourth Circuit and held the exclusion does apply. The *Goforth* decision holds the use was not in the automobile business, therefore not insured by the garage policy but by the owner's policy.

In this case the use in the automobile business was found by the court and neither Beach nor McAbee's appealed. The judgment of the Superior Court on that question, therefore, becomes the law of the case as to them. *Goforth* does not fit the case before us.

The appellees cite *Insurance Co. v. Insurance Co.,* 266 N.C. 430, 146 S.E. 2d 410, as authority sustaining Judge Hasty's decision in this case. In that case William Clark Hamrick, the driver of the automobile belonging to Tedder Motor Company was in sole possession of and was driving the vehicle to determine whether he would purchase it. He was a textile worker living in the home of his father whose liability policy covered the members of his household. The policy contained an exclusion clause the same as Queen's in this case. Hamrick was not engaged in the automobile business. He had

permission of the dealer to drive the vehicle but in doing so he was acting on his own. He was neither the agent nor was he working for Tedder Motor Company. The court properly held Hamrick was not using the vehicle in the automobile business. Hence the exclusion clause would not exempt Hamrick's insurance carrier from liability. Such was our holding in the *Jamestown* case. The holding, in so far as applicable, accords with our present decision.

We have considered the authorities cited in the appellees' excellent brief. However, upon the admitted facts we think sound reasoning compels the legal conclusion that McAbee's was using Queen's automobile in its automobile business as defined in Nationwide's policy. Under the stipulations it appears as a matter of law that Nationwide is not liable for the personal injury or property damage, or expenses of defending claims against Beach and McAbee's resulting from Beach's negligence. The judgment as to Nationwide is

Reversed.

STATE OF NORTH CAROLINA v. JAMES WEAVER CASE, JR.

(Filed 19 October, 1966.)

1. Habeas Corpus § 4; Criminal Law § 149—

The denial of *certiorari* in a *habeas corpus* proceeding imports no expression of opinion upon the merits.

2. Criminal Law §§ 26, 122, 173; Habeas Corpus § 2— Plea of former jeopardy is valid upon second trial ordered over defendant's objection.

Where defendant files a petition in *habeas corpus* attacking the validity of the indictments under which he had been convicted (even though on feckless grounds) and does not seek to set aside the verdict or allege facts pertinent to the granting of a new trial, the court is without authority to force a new trial upon him over his objection, and upon appeal from denial of defendant's plea of former jeopardy, the cause will be remanded with instructions to reinstate the prior sentence to the end that defendant may complete the unexpired portion of it. Constitution of North Carolina Art. I, § 17.

3. Criminal Law § 151—

The record imports verity and the Supreme Court is bound thereby.

APPEAL by defendant from *Falls, J.*, February 7, 1966 Session of BUNCOMBE.

At the February 1965 Session, in cases numbered 65-99, 65-100, and 65-100A, defendant was indicted in three separate bills, each

charging him with forging and uttering a specific check. When these cases were called for trial at the April 1965 Session before Campbell, J., defendant, through his court-appointed counsel, Melvin K. Elias, entered a plea of guilty to the charges contained in each indictment. The cases were consolidated for judgment and defendant was sentenced to a term of 18-24 months in the State's Prison. Thereafter, without advising Mr. Elias of his intentions, defendant, *in propria persona,* filed a paper writing which he labeled "Petition for Issuance of Writ of Review in Forma Pauperis Under N. C. General Statutes 15-217 through 15-222." This petition was mainly a collection of the assorted phrases which have become a part of prison vernacular — and which the inmates hope will have the magical effect of open sesame — but it also contained an allegation that defendant first saw his attorney, Mr. Elias, at the time his case was called for trial. Defendant's prayer for relief was that he be given an opportunity to prove that "his trial was both unfair and unconstitutional." He did not specifically request either that he be granted a new trial or that he be released from imprisonment.

On September 27, 1965, Martin, J., "after considering said petition and the record in this case," found that defendant's plea of guilty was voluntarily made with full knowledge of its possible consequences, and dismissed his petition. Defendant was not present and was not represented by counsel at the time the judge considered and dismissed his petition. Almost immediately thereafter, defendant wrote out a "Petition for Writ of Habeas Corpus" in which he alleged that the indictments upon which he had been tried were illegal because they (1) were not numbered, (2) failed to cite the section number of the statute he was alleged to have violated, and (3) failed to allege "any facts or circumstances concerning any statutes of law." His prayer for relief was that he be released from "illegal imprisonment." This petition also came on to be heard before Judge Martin, who reappointed Mr. Elias to represent defendant. Judge Martin treated the second petition as also having been filed under G.S. 15-217 *et seq.* On October 29, 1965, Judge Martin vacated the judgment that defendant be imprisoned for 18-24 months and ordered a new trial in each of the three cases upon the ground that defendant had not had the timely assistance of counsel at the preliminary hearing before the magistrate — an averment not contained in the petition for *habeas corpus.* Within the time permitted by G.S. 15-222, defendant, again *in propria persona,* petitioned this Court for *certiorari* to review the order of October 29, 1965. He alleged that the judge erred (1) in not ordering his release upon the grounds set out in the petition and (2) in ordering a new trial when he

sought only his discharge from imprisonment. On November 9, 1965, we denied *certiorari.*

On February 8, 1966, the solicitor put defendant on trial again in Case No. 65-100. Before the jury was impaneled, defendant objected to a retrial on the ground (1) that he had never requested a retrial but, on the contrary, had objected to the order directing a new trial and had attempted to appeal from it; and (2) that a retrial would violate his constitutional right not to be twice put in jeopardy for the same offense. He entered a formal plea of former jeopardy, which the court overruled. Defendant excepted, and the trial proceeded upon his plea of not guilty. The State offered evidence; defendant offered none. The verdict was guilty of uttering a forged instrument and not guilty of forgery. From the judgment that he be confined in the State's Prison for not less than three nor more than five years, defendant appeals.

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

Melvin K. Elias for defendant appellant.

SHARP, J. When, in either a post-conviction hearing or a *habeas corpus* proceeding, *at the prisoner's request,* the court vacates a judgment against him and directs a new trial, the prisoner waives his constitutional protection against double jeopardy, and he may be tried anew on the same indictment for the same offense. In such case, a plea of former jeopardy will avail him nothing. *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Gainey,* 265 N.C. 437, 144 S.E. 2d 249; *State v. Merritt,* 264 N.C. 716, 142 S.E. 2d 687; *State v. White,* 262 N.C. 52, 136 S.E. 2d 205. In this case, however, the new trial was not granted at defendant's request; on the contrary, it was ordered and conducted over his protest. It is quite clear that in his second petition defendant based his claim to relief upon the ground that the indictments upon which he had been tried were fatally defective and that the judgment against him was void because the court lacked jurisdiction. This time he made no attack upon the constitutionality of his trial, or — if he did — the record does not disclose it, and there was no amendment to the petition. In other words, here defendant sought to use the writ of *habeas corpus* for the purpose for which it was originally designed. 25 Am. Jur., *Habeas Corpus* § 2 (1940). No doubt defendant had concluded that a new trial in each case — as subsequent events proved — would be a Pyrrhic victory. *State v. Gainey, supra; State v. White, supra.* In the three cases in which defendant had received one sentence of only

18-24 months, he was charged with six felonies for which the law would permit a total maximum punishment of sixty years.

In his brief, counsel for defendant states that at his trial before Judge Campbell in 1965, defendant "had ample time to confer and did confer with his counsel." If, however, we assume the truth of defendant's allegations in his first petition, the only relief to which defendant was entitled under the facts averred was a new trial. Upon the allegations contained in the second petition, defendant was entitled to no relief whatever. Yet, after having dismissed the first petition, thirty days later — upon the second petition — the court vacated the sentence and ordered a new trial, which defendant had not requested. When this occurred, defendant, without the assistance of his counsel, filed with us a handprinted, artlessly drawn petition for *certiorari* in which he asked us to reverse this order. His petition featured his fatuous contentions that he was entitled to immediate release. In consequence, we inadvertently overlooked his second contention that the court had erred in ordering a new trial over his protest. However, as Mr. Justice Frankfurter said in *Daniels v. Allen*, 344 U.S. 443, 491-493, 73 Sup. Ct. 437, 439, 97 L. Ed. 469, 507-508:

> "The denial of a writ of *certiorari* imports no expression of opinion upon the merits of the case. . . . These petitions for *certiorari (habeas corpus* proceedings) are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work."

Without doubt, it was our denial of *certiorari* that caused Judge Falls to overrule defendant's plea of double jeopardy.

Had defendant secured a new trial upon his first petition, he would have voluntarily placed himself again in jeopardy and thereby would have waived the constitutional guaranty against double jeopardy. An accused, however, will be protected from a subsequent prosecution for the same offense where a valid judgment is set aside by the court on its own motion or upon application of the prosecuting attorney — unless, of course, the accused acquiesces in the action. *People ex rel Ostwald v. Craver*, 272 App. Div. 181, 70 N.Y.S. 2d 513; *State v. Oglesby*, 164 La. 329, 113 So. 865; *People v. McGrath*, 202 N.Y. 445, 96 N.E. 92; 22 C.J.S., Criminal Law § 271 (1961).

In *People v. McGrath, supra*, the defendant, charged with murder in the first degree, was convicted of murder in the second degree. Immediately upon making a motion to set aside the verdict on the ground that it was against the weight of the evidence, counsel

for defendant attempted to withdraw the motion before the judge ruled upon it. The judge, being of the opinion that defendant should have been convicted of murder in the first degree, refused to permit counsel to withdraw the motion and allowed it instead. Defendant excepted. When the case came on for trial a second time, defendant entered a plea of *autrefois convict*. The plea was overruled. Defendant was convicted of murder in the first degree and judgment of death pronounced. Upon appeal, the Court of Appeals of New York held the second trial invalid, vacated the death sentence, and remanded the case to the Supreme Court of New York County with directions "to proceed and pronounce judgment against the defendant upon the previous conviction of murder in the second degree." In doing so, the court said:

> "In a criminal case, it is only where the accused has brought about the destruction of the first verdict that he can again be put upon trial for the same offense. This defendant seasonably abandoned his attempt to destroy the verdict which has pronounced him guilty of murder in the second degree. A new trial could not lawfully be forced upon him after such abandonment." *Id.* 202 N.Y. at 455, 96 N.E. at 95.

As the record in this case comes to us, it seems that defendant had a new trial forced upon him. In the petition for *habeas corpus* upon which Judge Martin acted, defendant sought only his release; he alleged no grounds for a new trial. If not entitled to the relief sought, he wanted no other, for he had no intention of risking a longer sentence in a new trial. Under these circumstances, Judge Martin had no authority to vacate the 1965 sentence and to order a new trial, and his order purporting to do so is void.

The second trial, therefore, violated defendant's constitutional guaranty against being twice put in jeopardy for the same offense and was a nullity. N. C. Const., Art I, § 17; *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838; *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243. His plea of former jeopardy should have been allowed. The judgment of 3-5 years pronounced at the February 1966 Session in Case No. 65-100 is vacated, and this case is remanded to the Superior Court of Buncombe County with instructions to reinstate the sentence of 18-24 months imposed at the April 1965 Session in cases numbered 65-99, 65-100, and 65-100A to the end that defendant may complete the unserved portion of it. The records of the Prison Department disclose that at the time Judge Martin purported to vacate defendant's 18-24 months' sentence he had served only five months and fifteen days of it.

It was suggested upon the oral argument that defendant did, in

fact, request Judge Martin to order a new trial after he had denied defendant's petition for his immediate release. The record, however, does not bear this out. It imports verity and we are bound by it. 1 Strong, N. C. Index, Appeal and Error § 35 (1957). In any event, however, this case demonstrates the necessity that, in all post-conviction hearings, the record clearly show defendant's consent to the order awarding him a new trial. If he asks for a new trial in his petition or alleges facts which, if true, would entitle him to nothing else, he gives consent, which continues unless the court permits him to withdraw the petition. G.S. 15-220. If, during the hearing upon the petition, defendant should assign grounds for relief which he had not alleged, and these grounds are considered, the petition should be amended to show that they were. G.S. 15-218. In no other way can the integrity of post conviction hearings and the trials which they challenge be maintained.

Reversed and remanded.

STATE v. FREDERICK E. HANES.

(Filed 19 October, 1966.)

Criminal Law §§ 101, 139—

The victim's positive identification of defendant as the person who had robbed her, such identification being made some four days after the offense, is sufficient to take the issue to the jury, notwithstanding discrepancies in the victim's testimony as to identity and the fact that defendant did not fit the description given by the victim immediately after the offense, and the Supreme Court must perforce sustain the conviction in the absence of error of law in the trial, it not being the function of the Supreme Court to pass on the credibility of witnesses or to weigh the testimony.

APPEAL by defendant from *McLean, J.*, April 4, 1966, Regular Criminal Session of MECKLENBURG.

This is a criminal prosecution on a bill of indictment charging that defendant on January 26, 1966, "unlawfully, willfully and feloniously did make an assault on Rebecca Wallace and him in bodily fear and danger of his life did put, and $15.00 in lawful money of the United States, the property of Rebecca Wallace, of the value of less than $200.00, to wit: $15.00 from the person and possession of the said Rebecca Wallace, then and there did unlawfully, willfully, feloniously, forcibly and violently take, rob, steal, and carry away against the form of the Statute," etc.

Plea: Not guilty.

Verdict: Guilty as charged.

Judgment: Imprisonment in the common jail of Mecklenburg County for a period of not less than seven nor more than ten years.

Defendant excepted and appealed.

Attorney General Bruton and Staff Attorney White for the State.

J. M. Scarborough for defendant appellant.

BOBBITT, J. When first examined, Rebecca Wallace, on whose testimony the State's case is based, testified:

Direct examination: She is forty years old. On January 26, 1966, and prior thereto, she lived at 819 East Hill Street, Charlotte, N. C. She worked "every day" for Edgar Hazel Alexander at the Launderette at 808 East Hill Street. On January 26, 1966, as usual, she got off from work about 7:30 p.m. She went to her home, about a block from where she worked. She had $15.00 of her employer's money in her pocketbook. After she got home, "a little after 8:00 when the big snow was," the knob on her front door turned. Thinking it was one of her boys, she opened the door. Defendant came in and told her if she screamed he would blow her "g . . d . . . brains out." Her pocketbook containing the $15.00 was "right by (her) big chair in (her) bedroom." Defendant took "(her) pocketbook and money" and "took off out the (front) door." She could not tell "where he went." She went back to the Launderette, told her employer, Alexander, what had happened and he "called the law." She "hadn't been knowing the defendant too long." She had "(s)een him a lot, but didn't know his name."

Cross-examination: Defendant "had a knife open in his hand," but she "didn't see no pistol." Defendant "lives up the street from (her). (She) saw him every day." She had "been knowing him a year." She told the police at the Launderette that night "who it was." Defendant was not arrested that night. He was arrested four or five days later.

At the conclusion of the foregoing testimony, the solicitor announced: "That is the case for the State."

The court, in the absence of the jury, made inquiry concerning the whereabouts of Alexander and of police officers who had investigated the matter. No further evidence was heard that day *in the presence of the jury.* It was learned that the "boss-lady" was present. She (Mrs. Edgar Hazel Alexander) was sworn as a witness and examined by the court *in the absence of the jury.* The record indicates that she testified in part as follows: "Becky ought to know because *they* came to her house. She had just left our place

and Winky and this other boy watched her and she was unlocking her door on the porch and he pushed her in her house and had a knife on her and she had our sack and our money, and he cursed and told her he would cut her and she went on through the room by herself and he ran out the door with her pocketbook." (Our italics.) This testimony was not heard by the jury.

When court resumed the following morning, Edgar Hazel Alexander testified: He runs the McDowell Street Launderette. Rebecca Wallace is his employee. When she left the Launderette on the night of January 26, 1966, he, as usual, gave her $15.00 in change for use when she came to work "at one o'clock" the next day. She left and went home. In a short time she came back and told him "somebody" had come in her house and had taken her pocketbook. He called the police. He testified: "She didn't tell me the person's name that night, but said she would know him if she saw him."

Officer Samuel H. Kellman, a patrolman, testified he went to the Launderette on McDowell Street in response to the call; that he talked with Rebecca Wallace; that she did not give him the name of any person but described him as being "about 5 feet 10 inches tall, 160 pounds, approximately 20 years of age," and as having "a dark cap on and a dark coat." He testified that "(they) cruised around in the patrol car," searching the area in an effort "to find a subject fitting this description." They did not go to any house. They turned over their report to the Detective Department about 10:45 p.m. when they went off duty.

Officer W. O. Holmberg, a detective, testified he talked with Rebecca Wallace on February 1, 1966, at her home. He had tried to contact her on other occasions but had been unable to do so. She told him that "she knew the man by the name of Frederick and that he lived up the street" and pointed to the house. Holmberg and his associate (Detective Europa) went to the house and talked with defendant's brother. They did not search the house. They saw defendant at the Second Ward High School the same day they talked with Rebecca Wallace. Later, when defendant and Rebecca Wallace were present, "Rebecca pointed an accusing finger at Frederick" and stated "she wanted a warrant signed against him."

At the beginning of the cross-examination of Detective Holmberg, the following occurred:

"Q. What other investigation did you make?

"A. We investigated the matter further and learned that Frederick Hanes was not the one.

"SOLICITOR: Objection.

"COURT: Sustained."

Defendant excepted to this ruling.

Holmberg testified: "She (Rebecca Wallace) told me that she knew his name, been knowing him for some time. She lived on the corner of Hill and McDowell Streets and he lives approximately four to five doors up west on East Hill Street, on the opposite side. He lives on the south side and she lives on the north side of Hill Street." He testified Rebecca Wallace told him the man "was wearing a coat and hat."

Rebecca Wallace, when recalled, testified: In addition to the $15.00 that belonged to the Launderette, there was another $15.00 in her pocketbook that belonged to her, $30.00 in all. When she stated at the Detective Bureau defendant was the one who had robbed her, defendant "told the detective that (she) didn't know what (she) was talking about." Her testimony on cross-examination, as shown by the record, includes the following: "He didn't wear no cap. I told the detective he did have on a cap. I say yes, he did have on a dark cap. He was dressed in black. He had on a coat. It shore was bitter cold. It was not an overcoat he was wearing, it was a short coat. It was black."

Defendant, a witness in his own behalf, testified in substance, except when quoted, as follows: He is nineteen years old. He goes to Second Ward High School. He has never been indicted or charged with anything in his life. He has not had a cap in his life. He remembers the night in question. It was cold. He lives with his grandmother and brothers. He got out of school that day about 3:15 p.m., went to his home and did not leave until the next day. Between 7:30 and 8:30 that night he was at home cooking for the family. He is 6 feet 1½ inches tall and weighs 195 pounds. Prior to January 26, 1966, he had seen Rebecca Wallace around the McDowell Street Launderette and she had seen him.

Defendant's testimony was corroborated by the testimony of three brothers and his grandmother.

After the jury had returned its verdict and judgment was pronounced, defendant was granted an opportunity to offer additional evidence before the commitment was issued. This additional evidence consisted of the testimony of the following witnesses: W. T. Newton, a teacher at Second Ward High School; Ernest A. Stanberry, Assistant Principal at Second Ward High School; Marjorie Bilton, in charge of scholarships at Second Ward High School; and Detective W. O. Holmberg. Those connected with Second Ward High School testified that they knew defendant well; that his general reputation was good; that he played basketball and football; and that athletic scholarships had been offered to him. According to Holmberg, the statements made by defendant when first ap-

proached by the detectives at Second Ward High School were in accord with defendant's testimony at the trial. Holmberg testified: "(H)e didn't know he was going to be arrested until we walked in the school and asked the principal to call him to his office that we wanted to talk with him." Again: "I know another boy whose name is Freddy, nicknamed Freddy, a Peter Barber. He used to live in the 700-block of South McDowell Street. It's approximately a block from her house."

We have read the record again and again. Frankly, we have been unable to detect any error of law deemed a sufficient basis for a new trial. The brief filed by defendant's counsel does not point to such error. It was not competent for Detective Holmberg to testify during the trial that he and his fellow-detective had "investigated the matter further and (had) learned that Frederick Hanes was not the one." The record does not show the nature and results of their further investigation. The impression prevails that these detectives were of opinion the other "Freddy" was involved, not this defendant.

If the defendant had entered Rebecca Wallace's home, it would seem that she would be much impressed by the height of a young man who was 6 feet and 1½ inches tall. Defendant lived on the same block with Rebecca Wallace. She knew him by sight if not by name. Nothing in the record indicates he was not at home or in the neighborhood or at the Second Ward High School during the period from January 26, 1966, until February 1, 1966, when the detectives approached him while he was in school at Second Ward High School. The testimony of witnesses to whom Rebecca Wallace related the details of the alleged robbery tends to corroborate her in some respects and to contradict her in other respects. The testimony of Mrs. Alexander, given in the absence of the jury, recounts a factual situation radically different from that recounted in Rebecca Wallace's testimony.

The State's entire case depends on the accuracy of Rebecca Wallace's testimony. No pocketbook was traced to defendant. No money was traced to defendant. There is no evidence, other than the testimony of Rebecca Wallace, that defendant was seen at any place outside his home on the night of January 26, 1966. In short, the testimony of Rebecca Wallace is not corroborated by any objective evidential fact.

It is not the function of this Court to pass on the credibility of witnesses or to weigh the testimony. The jury, under a charge free from prejudicial error, returned a verdict of guilty as charged. We are well aware that often the cold record does not reflect the whole picture. However, on the record before us, there seems to be grave doubt as to the guilt of this defendant. We commend the case to the

Board of Paroles for immediate investigation. It would be a tragedy indeed if the life of a young man of good general reputation whose record is entirely clear of law violations, and who is currently pursuing his education, were to be blighted by a long imprisonment for a crime he did not commit.

This Court finds no error in law sufficient to constitute a basis for awarding a new trial.

No error.

HOWARD J. DUCKWORTH, PLAINTIFF, v. JAMES P. METCALF AND WILLIAM L. COURTNEY, DEFENDANTS.

(Filed 19 October, 1966.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him, and defendant's evidence tending to contradict or rebut plaintiff's evidence must be disregarded.

2. Automobiles § 41d—

Evidence tending to show that the driver of a car attempted to pass a preceding vehicle when the left side of the highway was not clearly visible and free of oncoming traffic for a sufficient distance to permit him to pass in safety, and that such violation of G.S. 20-150(a) was a proximate cause of the injury when the driver lost control of the vehicle in attempting to avoid a head on collision with a third vehicle approaching from the opposite direction, is sufficient to be submitted to the jury on the issue of the driver's negligence.

3. Automobiles § 54f—

Proof that the vehicle negligently operated by the driver was owned by and registered in the name of another makes out a *prima facie* case against the owner under G.S. 20-71.1 and requires the submission of the issue of *respondeat superior* to the jury, but such *prima facie* case does not compel a verdict against the owner on that issue.

4. Master and Servant § 32—

The employer is not liable for an injury due to the negligence of his employee when the employee has departed from the course of his employment and embarks on a mission or frolic of his own, and when there has been a total departure from the course of the employment, the employer is not liable even though, at the time, the employee has turned back from his private venture to the direction of the course of his employment.

5. Automobiles § 44f— Uncontradicted evidence that driver was on personal mission entitles owner to peremptory instruction notwithstanding G.S. 20-71.1.

The uncontradicted evidence tended to show that the owner of a vehicle entrusted the vehicle to another for the sole purpose of transporting a third person to a designated destination and returning the vehicle promptly to the owner, that the driver after taking the third person to his home, proceeded to drive the automobile here and there for his own personal enjoyment for some six hours beyond the time he had been directed to return the vehicle to the owner, and that the accident in suit occurred while the driver was returning from the unauthorized personal mission. *Held:* The owner was entitled to a peremptory instruction that if the jury found the facts as all the evidence tended to show, to answer the issue of *respondeat superior* in the negative.

APPEAL by the defendant Metcalf from *Froneberger, J.*, at the May 1966 Mixed Session of BURKE.

This is an action for personal injuries. The complaint alleges that the plaintiff was riding as a passenger in an automobile owned by and registered in the name of the defendant Metcalf, and driven by the defendant Courtney, who was acting in the course and scope of his employment as the servant of Metcalf and with his consent. It is alleged that the plaintiff's injuries were proximately caused by the negligent operation of this vehicle by Courtney in that he drove it at an excessive speed, without keeping a lookout, and, without reducing his speed, passed another vehicle when approaching a curve in the road, whereupon, being faced with an oncoming car, he increased his speed, cut back sharply and lost control of the automobile so that it ran off of the road and was wrecked.

The defendants filed a joint answer denying all material allegations of the complaint except that the automobile was owned by and registered in the name of Metcalf. As a further answer, they alleged contributory negligence.

The jury found that the plaintiff was injured by the negligence of both defendants and awarded damages in the amount of $12,500. No issue as to contributory negligence was submitted, there being insufficient evidence thereof. Judgment was entered upon the verdict.

In addition to evidence relating to the extent of his injuries, the plaintiff offered evidence tending to show:

The plaintiff was a passenger in the automobile driven by Courtney. The vehicle was owned by and registered in the name of Metcalf. Courtney attempted to pass another vehicle over the objection of the plaintiff, the reason for the objection being that one could not see whether any other vehicle was coming. As he started to pass, a third car, meeting him, came in view out of a dip in the road. Court-

ney turned back to his right quickly, lost control, and the car ran off the road, as a result of which it was wrecked and the plaintiff was injured.

The accident happened at approximately 4 p.m. When Courtney picked the plaintiff up about two hours before the accident, he told the plaintiff that he, Courtney, had borrowed the car. They drove over to a junk yard in Hickory, approximately 22 miles from Morganton. There, Courtney purchased a bumper guard for the Metcalf car but did not put it on the car. Up to the time of the accident he was driving all right.

Metcalf testified that he was the owner of the automobile. The last time he saw it, prior to the accident, it was at his home about 9 a.m., seven hours before the accident occurred. Courtney and one Denton Anderson were there, both having spent the night with Metcalf. Metcalf asked Courtney to drive the car to take Anderson to his home in Rutherfordton County, telling him to bring the car back within an hour. Courtney said he would come straight back. Metcalf then went on to his work. When he returned to his home at 2:30 p.m. and discovered that the car had not been brought back, he went to various places looking for it and reported it to the Chief of Police as having been temporarily stolen. He did not authorize Courtney to drive the car to Hickory and knew nothing about any purchase of a bumper guard. His car still had its bumper guards on it.

Courtney testified that Metcalf told him to take Anderson to his home and bring the car back in about an hour. Instead of doing so after taking Anderson home, he just kept on driving around for his own pleasure until approximately noon, when he went to his sister's home where he picked up the plaintiff and another man. From there he drove to Hickory where they drank some beer and started back to Morganton. As he started to pass the vehicle which was proceeding in the same direction, he "took a blackout spell" and then the wreck occurred. The plaintiff was injured in the wreck.

The appellant Metcalf assigns as error the denial of his motion for judgment of nonsuit and alleged errors in the charge of the court to the jury.

Patton, Ervin & Starnes for defendant appellant.
Byrd, Byrd & Ervin for appellee.

LAKE, J. There was no error in the denial of the motion by Metcalf for a judgment of nonsuit. Upon such motion, the evidence offered by the plaintiff must be taken to be true and considered in

the light most favorable to him and evidence offered by the defendant tending to contradict or rebut the plaintiff's evidence must be disregarded. *Bennett v. Young,* 266 N.C. 164, 169, 145 S.E. 2d 853, and cases there cited. So interpreted, the plaintiff's evidence is sufficient to show that the proximate cause of the plaintiff's injuries was the act of Courtney in undertaking to pass another vehicle proceeding in the same direction when the left side of the highway was not clearly visible and free of oncoming traffic for a sufficient distance ahead to permit him to pass in safety. This, if true, showed a violation of G.S. 20-150(a) and such evidence was sufficient to require the submission to the jury of the issue of negligence by Courtney. *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292; *Funeral Service v. Coach Lines,* 248 N.C. 146, 102 S.E. 2d 816; *Cole v. Lumber Co.,* 230 N.C. 616, 55 S.E. 2d 86. Proof that the automobile was owned by and registered in the name of Metcalf, which is admitted in his answer and in his testimony, is *prima facie* evidence that it was being operated with his authority and knowledge at the time of the accident, and that Courtney was driving the vehicle within the course and scope of his employment by Metcalf. G.S. 20-71.1. The evidence of Metcalf to the contrary could not be considered upon his motion for judgment of nonsuit. Consequently, there was evidence which would support a verdict that the plaintiff was injured by the negligence of Metcalf and it was proper to submit that issue to the jury. *Johnson v. Thompson,* 250 N.C. 665, 110 S.E. 2d 306; *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309.

G.S. 20-71.1 does not, however, abrogate the well settled rule of law that mere ownership of an automobile does not impose liability upon the owner for injury to another by the negligent operation of the vehicle on the part of a driver, who was not, at the time of the injury, the employee or agent of the owner or who was not, at such time, acting in the course of his employment or agency. The burden of proof continues to rest upon the plaintiff to prove such agency relationship between the driver and the owner at the time of the driver's negligence which caused the injury. The statute merely creates a rule of evidence. Proof of ownership of the automobile by one not the driver makes out a *prima facie* case of agency of the driver for the owner at the time of the driver's negligent act or omission, but it does not compel a verdict against the owner upon the principle of *respondeat superior. Chappell v. Dean,* 258 N.C. 412, 128 S.E. 2d 830; *Osborne v. Gilreath,* 241 N.C. 685, 86 S.E. 2d 462.

It is elementary that a principal or employer is not liable for injury due to a negligent act or omission of his agent or employee

when such agent or employee has departed from the course of his employment and embarked upon a mission or frolic of his own. *Travis v. Duckworth, supra,* and cases there cited. It is, of course, not sufficient to take the servant out of the course of his employment, and thus to relieve the employer from responsibility for the negligent act or omission of the servant, that the servant at the time of such act or omission was violating an instruction or rule of the employer or principal. *West v. Woolworth Co.,* 215 N.C. 211, 1 S.E. 2d 546. The test is whether the employee or agent was, at the time of the negligent act or omission, about his master's business. If there has been a total departure from the course of the master's business, the employer or principal is not liable for the negligent act or omission of the employee during such departure from the employment relation. *Hinson v. Chemical Corp.,* 230 N.C. 476, 53 S.E. 2d 448.

The testimony of both Metcalf and Courtney is that Courtney was requested, *i.e.,* "employed," to drive Metcalf's automobile to the home of Anderson in Rutherford County for the sole purpose of transporting Anderson thereto and returning the automobile promptly to the home of Metcalf, and that Courtney, after taking Anderson to his home, proceeded to drive the automobile here and there for his own personal enjoyment for some six hours beyond the time when he had been directed to bring it back to Metcalf's residence. The plaintiff offered no testimony to the contrary. He relies solely upon the provision of the statute insofar as proof of the agency relationship between Courtney and Metcalf is concerned.

If it be assumed from the fact that, at the time of the accident, Courtney was headed back toward Morganton, and thus toward the residence of Metcalf, the mere turning back in the direction of the course of his employment does not return the employee to the master-servant relationship so as to impose liability upon the employer for the employee's act or omission. *Hinson v. Chemical Corp., supra; Parrott v. Kantor,* 216 N.C. 584, 6 S.E. 2d 40.

Thus, the undisputed evidence tends to show that at the time of the negligent driving by Courtney, which was the proximate cause of the injury to the plaintiff, Courtney had stepped aside from the course of his employment. Upon this evidence, Metcalf was entitled to have the court instruct the jury that if they believed the evidence and found the facts to be as all the evidence tended to show, that is, that Courtney was on a mission of his own, they should answer the issue as to whether the plaintiff was injured by the negligence of Metcalf "No." *Chappell v. Dean, supra; Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295. The failure of the court be-

low to give such instruction, even without a request therefor, was prejudicial error as to Metcalf and for that reason there must be a new trial upon the second issue, which reads, "Was the plaintiff Howard J. Duckworth injured by the negligence of the defendant James P. Metcalf, as alleged in the complaint?" The appropriate instructions upon such new trial must, of course, depend upon the evidence introduced at that trial.

New trial.

REV. JAMES R. WALKER, JR., v. CITY OF CHARLOTTE AND WILLIAM H. JAMISON, SUPERINTENDENT OF BUILDING INSPECTION OF THE CITY OF CHARLOTTE.

(Filed 19 October, 1966.)

1. Declaratory Judgment Act § 2—

If the complaint in a proceeding under the Declaratory Judgment Act alleges facts disclosing a justiciable controversy, a demurrer should be overruled, notwithstanding that plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint, since the demurrer merely challenges the sufficiency of the complaint to state a cause of action cognizable under the statute, and does not present the merits of the controversy for decision.

2. Same; Municipal Corporations § 34—

Where plaintiff has made repairs to his condemned house without first making written application and obtaining a permit therefor, and institutes a proceeding under the Declaratory Judgment Act seeking to have those portions of the municipal ordinance prohibiting alterations or repairs without a written permit declared unconstitutional, and seeks to restrain the city from demolishing the structure until a final declaration of the matter, it is error for the trial court to sustain a demurrer to the complaint, and the cause will be remanded to the end that defendant be allowed time to file an answer, so that the questions presented may be properly adjudicated by appropriate decree.

BOBBITT and SHARP, J.J., concur in the result.

APPEAL by plaintiff from *Jackson, J.*, at February 21, 1966, Schedule "B" Term, MECKLENBURG Superior Court.

The plaintiff is the owner of a house and lot at 1449 S. Church Street, in the city of Charlotte. In his complaint he describes it as a one-story frame duplex house, with electricity, two bathrooms, connected to City sewer system, with hot and cold running water and gas heat. He claims it was re-roofed in 1960, and was at all

times maintained up to the existing standards for housing and repaired as authorized by building permits issued by the defendants.

Needless to say, as appears in the complaint, the City does not accept the above as an accurate description, but describes it as in a "dangerous condition * * * open and unoccupied * * * dangerous to the health or lives of the general public and persons passing near or living in the vicinity * * * (it) presents a hazard to children who may play in and around it and endangers the security of adjoining property by being open to vagrants." It is in an area which has been set aside for redevelopment, and on 12 April, 1963, the building inspector of the City of Charlotte notified the plaintiff that the house was in a dangerous condition that required correction.

On 24 March, 1964, the defendants notified the plaintiff that since the house was dangerous to the health or lives of the general public, and represented a hazard to children, and that nothing had been accomplished toward correcting the dangerous defects and to render the building safe, it was declared unsafe and condemned and the plaintiff was ordered to remove it within 30 days from the date of that letter. Having failed to comply with the orders of the city, the defendant Jamison swore out a warrant against the plaintiff on 23 June, 1964, charging him with wilfully violating Sec. 5-4(c) of the Code of the City of Charlotte by renovating and repairing his residence located at 1449 S. Church Street without first making application and obtaining a written permit therefor from the building inspection department of the city. He was convicted on this charge in the City Recorder's court, appealed to the Superior Court of Mecklenburg County, where he was again convicted, and from a 30-day sentence suspended upon certain conditions, he appealed to this Court. No error was found and the opinion was recorded in 265 N.C. at page 482. The plaintiff further appealed from that decision to the Supreme Court of the United States, where the matter is now pending as far as the record discloses.

On 23 July, 1964, the plaintiff instituted an action similar to this and against the same parties, in which he sought to have ordinances of the city of Charlotte which provide against alteration or repairs of structures without first obtaining a written permit from the inspection department declared unconstitutional, and for a perpetual injunction against the city to enforce said ordinances.

Judge Clark of the Superior Court restrained the city from demolishing the building until the final determination of the action but refused to issue a temporary restraining order against the enforcement of the provisions of the building code. The plaintiff appealed from that decision, which was affirmed by this Court at the

Fall Term, 1964. *Walker v. City of Charlotte,* 262 N.C. 697, 138 S.E. 2d 501. That litigation was later terminated — this record shows no more.

The present action was instituted by the plaintiff against the City of Charlotte on 19 November, 1965, in which he seeks to have the Court declare (1) that those parts of the Charlotte City Charter referred to above are void and unconstitutional and in conflict with and an abridgement of his rights under the North Carolina Constitution and of the Fourth and Fourteenth Amendments of the U. S. Constitution; (2) that G.S. 160-151 referred to in his complaint should be declared unconstitutional; (3) that the Court declare portions of the building code of the City of Charlotte unconstitutional; (4) that the Order of 24 March, 1964, directing him to remove his residence be declared void and of no legal effect; (5) that a perpetual injunction issue enjoining and restraining the defendants from enforcing the provisions referred to above. The City demurred to the plaintiff's complaint on the grounds that it does not state facts sufficient to constitute a cause of action in that the plaintiff has completely failed to show such circumstances as to warrant the exercise by equity of its injunctive power, and in that it is manifest that a court of law in a criminal prosecution can and will afford an adequate legal remedy to test the constitutionality of the State statutes and municipal ordinances challenged in the complaint.

Upon the hearing, Judge Jackson held that the complaint does not state facts sufficient to constitute a cause of action for the reasons sought, sustained the demurrer and dismissed the action.

The plaintiff appealed.

James R. Walker, Jr., for plaintiff appellant.
J. W. Kiser, Henry W. Underhill, Jr., for defendants appellees.

PLESS, J. Where a justiciable controversy is alleged — as is the case here — the authorities are unanimous that demurrer does not lie in a case brought under G.S. 1-253-267, the Declaratory Judgment Act. With her usual thoroughness, Sharp, J., speaking for this Court in *Ins. Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654, deals with this subject. In that opinion an excerpt from *Cabell v. Cottage Grove,* 170 Ore. 256, 130 P. 2d 1013, 144 A.L.R. 286, concisely states this rule:

> "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."

We find no exceptions to the above rule. Based, of course, on the premise that a justiciable controversy is stated, the authorities hold:

"A demurrer is rarely an appropriate pleading for a defendant to file to a petition for declaratory judgment. Where the plaintiff's pleading sets forth an actual or justiciable controversy, it is not subject to demurrer since it sets forth a cause of action, even though the plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint; that is, in passing on the demurrer, the court is not concerned with the question whether plaintiff is right in a controversy, but only with whether he is entitled to a declaration of rights with respect to the matters alleged," 22 Am. Jur. 956, Declaratory Judgments, Sec. 91.

And in 26 C.J.S. 334, Declaratory Judgments, Sec. 141, we find:

"The general rule is that where plaintiff's pleading, in an action for a declaratory judgment, sets forth an actual or justiciable controversy, or a bona fide justiciable controversy, it is not subject to demurrer, since it sets forth a cause of action. This is true even though plaintiff is not entitled to a favorable declaration on the facts stated in his complaint, or to any relief, or is wrong in his contention as to his ultimate rights, since, in passing on the demurrer, the court is not concerned with the question whether plaintiff is right in the controversy, but is only concerned with whether he is entitled to a declaration of rights with respect to the matters alleged."

The cause is hereby remanded to the Superior Court of Mecklenburg County and the defendant is allowed 30 days from the filing of this opinion in which to answer the Complaint. The Court will thereupon adjudicate the questions presented by appropriate decree.

Error and remanded.

BOBBITT and SHARP, J.J., concur in the result.

MR. AND MRS. DONALD SHACKLEFORD v. MRS. LENORA B. CASEY AND HUSBAND, DAVID R. CASEY.

(Filed 19 October, 1966.)

1. Parent and Child § 5—

The surviving parent has the natural and substantive right to the custody of his infant children, which right the courts may disregard only in the event the welfare of the children requires.

2. Same—

Where the father of minor children is in military service and the mother of the children is dead, the father has the right to make arrangements for the actual custody of the children in a person selected by him so long as such custody is proper and does not place the welfare of the children in jeopardy, the welfare of the children being paramount as in all other cases.

3. Habeas Corpus § 2— Findings held to support order awarding custody to persons selected by father for care of children during his absence in military service.

The maternal grandparents, the mother being dead, instituted *habeas corpus* proceedings for the custody of the infant children from the paternal grandparents, the father being in military service overseas. The youngest child was in the home of the paternal grandparents and the other two children were in a home for children at the expense of the father. Both of the paternal grandparents worked and it was necessary to place the youngest child during the working day in the custody of a neighbor. The court found that the children's home is a suitable institution for the care of the children, that the paternal grandparents and the father are of good character and suitable persons to have custody of the children, and that the arrangements of the father for custodial care were sufficiently satisfactory in view of the welfare of the children. *Held:* The court's findings support its order awarding the exclusive custody and control to the father.

4. Same—

In determining the right of the maternal grandparents to have the custody of the minor children against the father and the custodians selected by him, the fact that the petitioners' child had been committed as a psychopathic personality and, after treatment, might be returned to the household, and that petitioners, nonresidents, might surrender the children to yet another jurisdiction, are properly considered in determining their right to custody.

APPEAL by petitioners from *Peel, J.*, January 1, 1966 to June 30, 1966 Sessions, NASH Superior Court.

The petitioners, residents of the State of Texas, by *habeas corpus*, seek to have the Superior Court of Nash County award to them the custody of their three granddaughters, Christina Lenora Ward, age 4, Merlena Beatrice Ward, age 3, and Diana Faye Ward, age 2. They allege, and the court found, they, as maternal grandparents,

are suitable persons for such custody and financially able to care for the children.

The respondents are the paternal grandmother and step-grandfather. They reside in Rocky Mount, Nash County, North Carolina.

The father of the little girls, Nelson Ward, is a resident of Nash County and is now and has been for the past 12 years serving in the Armed Forces of the United States. He is presently stationed at Fort Bliss, Texas. The writ of *habeas corpus* in this case was served on him. He appeared and made demand of the court that the custody of the children be awarded to him.

The mother, Barbara Shackleford Ward, obtained a Mexican divorce from Nelson Ward in June, 1965. In the divorce decree the Mexican court purported to give the father custody of the children for two months each year, and the mother the custody otherwise. Soon after obtaining the divorce, the mother married LeRoy Sanford. She was killed in an automobile accident on October 8, 1965. The children resided with LeRoy Sanford and his parents in Douglas, Wyoming, from the mother's death until December 15, 1965.

On that day, by agreement in writing, LeRoy Sanford permitted Nelson Ward, the father, to have the temporary custody of the children during his army training period at Fort Bliss, Texas, and thereafter they were to be returned to LeRoy Sanford. The father placed the children in the custody of his mother and step-father in Rocky Mount.

Upon the return of the writ, Judge Peel conducted a number of hearings covering a period of 45 days. During the period Judge Peel requested and received from the Welfare Department of North Carolina a detailed report on the suitability of the father for the custody of the children and the suitability of their present surroundings. Likewise, he obtained from the Welfare Department of Texas a similar report relating to the petitioners. The evidence disclosed that the respondents, grandmother and step-grandfather of the children, have jobs that require their absence from home. The two older children have been placed in the Falcon Children's Home, Falcon, North Carolina. The father pays the expenses incident to their care. The youngest child is not yet old enough for admission to the Home. She lives in the home of the respondents who take her to Duke Hospital for the treatment of disfiguring scars which resulted from the automobile accident in which the mother was killed. During work days she is left in the custody of a neighbor between the hours of 7:00 a.m. and 3:00 p.m. while the grandmother is at work.

At the conclusion of the hearings, Judge Peel, on competent evidence, found (1) that the respondents and the father, Nelson Ward, are of good character and suitable persons to have the custody of

the children; (2) that Falcon Children's Home is a suitable institution for child care.

"52. That the two children who have been placed in the Falcon Children's Home are being brought up in a wholesome Christian atmosphere."

That after Diana Faye completes her treatment at Duke and becomes eligible for admission to the Falcon Children's Home, she will probably join her two sisters there. Until that time it is to her best interest to remain as she is now.

Findings Nos. 33 and 34 are to the effect that the petitioners are suitable persons and have a suitable home for raising the minor children *at the present time*. The court further finds:

"35. That, irrespective of the findings of paragraphs 33 and 34, the Court has reservations concerning the desirability of placing the said minor children in the care, custody and control of the petitioners, Mr. and Mrs. Donald Shackleford, and the reasons for the Court's reservations are more fully set out in paragraphs 36 through 38.

"36. That the minor children are ages 2, 3 and 4, and that the petitioner, Mr. Donald Shackleford, is 49 years of age and that the petitioner, Mrs. Donald Shackleford, is 45 years of age.

"37. That the petitioners asked for custody of the children themselves and now say they desire custody for themselves; however, there is unrebutted evidence before the Court that shortly before the case was started, Mrs. Donald Shackleford told Lenora B. Casey that the petitioners wanted to get the children for LeRoy Sanford.

"38. That Mr. and Mrs. Donald Shackleford have a 17-year old son who quit school in the eighth grade and was committed to the State Training School at Gatesville, Texas in August, 1965, for attempted rape, and is still committed to said institution, and that their said son, Jack Shackleford, has been diagnosed 'as a psychopathic personality disturbance antisocial type,' but that said son is reported to be showing improvement.

"39. That it is undisputed, that the petitioners would remove the minor children from the jurisdiction of the Courts of North Carolina if they are awarded custody of the said minors."

The court concluded that notwithstanding the father of the children, because of his military service, is not in a position to exercise personal supervision and control of the children, the present arrangements are sufficiently satisfactory to justify the court in awarding exclusive custody and control to the father. By proper

order the court made the award. The petitioners excepted and appealed.

Fields & Cooper by Leon Henderson, Jr., for petitioner appellants.
T. A. Burgess, John E. Davenport for respondent appellees.

HIGGINS, J. As a general rule at common law and under our decisions, parents have the legal right to the custody of their infant children. This natural and substantive right the courts may not lightly disregard. ". . . (A) natural parent, father or mother, as the case may be, who is of good character and a proper person to have the custody of the child and is reasonably able to provide for it ordinarily is entitled to the custody as against all other persons, . . . such as other relatives, including grandparents . . ." *Spitzer v. Lewark,* 259 N.C. 50, 129 S.E. 2d 620.

In this case the father of the children is in the military service. His opportunity to have the active physical custody of the children is limited by reason of the duties required in that service. Necessarily, he must arrange for the actual custody to be lodged in someone whom he selects to act for him. This he has a right to do so long as the custodian he selects is a proper custodian and does not place the welfare of the children in jeopardy. The welfare of the children always comes first. The rule applies where the only living parent is in the military service. *In Re DeFord,* 226 N.C. 189, 37 S.E. 2d 516; *In Re Custody of Bowman,* 264 N.C. 590, 142 S.E. 2d 349; *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871.

The evidence offered supports the detailed findings of Judge Peel. They in turn support the award of custody to the father. The court properly considered the situation which will likely prevail if and when the petitioners' minor son is returned to the petitioners' home. Likewise, Judge Peel was properly reluctant to send the children to Texas where the court which now has jurisdiction of them would surrender them to another jurisdiction. *In Re DeFord, supra.* The judgment entered in the court below gives first consideration to the welfare of the children and is supported by the court's conclusions, which in turn are justified by the evidence. The judgment entered in the court below is

Affirmed.

STEVE FERGUSON v. ROBERT G. PHILLIPS AND WIFE, LEONA CRAIG PHILLIPS.

(Filed 19 October, 1966.)

1. Vendor and Purchaser § 2—

Options must ordinarily be construed strictly in favor of the optionor, and when a definite day and hour is stipulated as the limit of the duration of the option, time will ordinarily be held of the essence, and payment or tender within the time limited is necessary to bind the optionor to sell.

2. Same—

Where the optionee requests an extension of the option upon specific conditions and the optionor counters with an agreement to extend the time upon different specified conditions, there is no valid extension agreement when the optionee fails to accept the conditions as prescribed by the optionor.

3. Same—

The option in suit provided for the exercise of the option by a designated hour on a specified date. The optionee appeared at the office of the optionor's attorney before the hour specified, but was unable to tender the purchase price until some seven hours thereafter. *Held:* The optionor was entitled to refuse the tender.

APPEAL by plaintiff from *Jackson, J.*, at "B" Session (Civil) MECKLENBURG County Superior Court.

The defendants are the owners of a corner lot at 1601 N. Independence Boulevard in Charlotte and of another near by. In June, 1965, for valuable consideration, they gave the plaintiff a written option to purchase these two lots for $22,500.

The option contained, among others, the following provisions: "Expiration Date. This option shall expire at 10:00 A.M., on 22 November, 1965.

> "Notice of Exercise. This option is to be exercised by the Optionee by written notice signed by the Optionee and sent by mail, prior to the expiration date, to the Optionors at their home address.
>
> "Warranty Deed. At any time within the period above limited, but not thereafter, Optionors will make, execute and deliver to said Optionee a good and sufficient deed for said land in fee simple with general warranty and free from incumbrances upon the payment by said Optionee of the said purchase price in the sum and manner herein set out."

Another provision authorized the plaintiff to move a building onto the corner lot, and he agreed that if the tenants then occupying another building on the lot moved out that he would indemnify

defendants for any loss of rental at the "rate of $90.00 per month for the time expiring before he notifies the optionor of his election to exercise this option, which said sum shall in no case exceed $450.00."

The plaintiff offered evidence tending to show that on 16 November, 1965, he learned from C. D. Thomas, Vice-President of First Federal Savings & Loan Association, that he could not obtain a loan with which to exercise the option but that he could probably get the money within 60 days. He got Mr. Thomas to call the defendant Phillips about extending the option but no definite arrangement was made. The plaintiff also had some telephone conversations with defendant and pursuant to them went to the office of Mr. John D. Shaw, attorney for defendant, on 20 November, 1965, but no extension agreement was worked out at that time. The plaintiff mailed a letter to the defendants that same day in which he stated that he was exercising the option and thanked the defendants for extending it for an additional 60 days. On 22 November about 9:45 A.M., the plaintiff Ferguson and his attorney again went to Mr. Shaw's office, at which time a new option agreement was offered the plaintiff, but it contained provisions unsatisfactory to plaintiff and was never delivered to him. The plaintiff testified that he did not have the money with which to complete the trade at that time and that he did not get it until that afternoon. At 5:05 P.M., the plaintiff offered a cashier's check to Mr. Shaw in the amount of $22,500, and demanded a deed for the property, which was refused.

On cross-examination the defendants elicited from the plaintiff and his witnesses evidence to the effect that the terms of an extension of the option were discussed but never agreed to; that an unequivocal acceptance of the sale was not made by the plaintiff prior to 10 o'clock A.M., 22 November, 1965, and that tender of the purchase price was not made to the *defendants* on that date; although it was offered to Mr. Shaw who wrote plaintiff's attorney next day that he had no authority to receive tender; also that the letter of 20 November was not delivered to the defendants at their home; that they were away from Charlotte until Monday, 22 November; and that since the letter was not "sent by mail, prior to the expiration date, to optionors at their home address * * * that no notice to exercise the option as required by the option (was given) and that the deal is off, and in addition your clients owe the rent money".

At the close of plaintiff's evidence the court allowed the defendants' motion for judgment as of nonsuit, and the plaintiff appealed.

W. Faison Barnes, Carl W. Howard for plaintiff appellant.
John D. Shaw for defendants appellees.

PLESS, J. Options "being unilateral in their inception are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy. It is generally held that time is of the essence in such contract, and the conditions imposed must be performed in order to convert the right to buy into a contract for sale." *Carpenter v. Carpenter,* 213 N.C. 36, 195 S.E. 5.

"Where an option stipulates a definite time for performance it is generally held that time is of the essence, and that payment or tender of the amount agreed within the time specified is necessary to convert the right to buy into a contract of bargain and sale." Strong, Vendor and Purchaser, Sec. 2, and cases there cited.

"Ordinarily time is of the essence of an option under contract relating to land, whether or not so expressed. The optionor being bound only during the time specified for the election to accept the option." * * * "So acceptance must be made and conditions performed within the time limited by the option in order to constitute a contract of sale."

"Time is likewise of the essence of an agreement for the extension of the time for acceptance which must be supported by a consideration, whether made before or after the time limited for the exercise of the original option, and which may be withdrawn before acceptance unless made on a consideration." 91 C.J.S. 862, Vendor and Purchaser, Sec. 11.

While the plaintiff mailed his "exercise" of the option within the time, it was conditioned upon an extension which was never granted by the defendants, and in which he stated his lack of available funds.

"If the acceptance contains material conditions not included in the offer, such purported acceptance constitutes a counter proposal which the other party is not bound to accept." 1 Strong 573; Contracts, Sec. 2.

The plaintiff testified that he went to Mr. Shaw's office on the morning that the option was to expire at 10 o'clock, arriving about 9:45 and staying until about noon. He testified further that he was not in position at that time to pay the defendant $22,500 plus the rents, but that he did make arrangements to obtain the money that afternoon. While there had been some discussion between the parties regarding a proposed extension of the time of the option, it was never executed and, in fact, the exact terms were never agreed upon. Consequently, this case falls within the rules stated above, *i.e.,* the vendor did not within the time permitted by the contract make an unequivocal acceptance of it. He was not in position within that time to pay the purchase price and he made no tender on that date

to the *defendants*. He did tender the purchase price late that afternoon to the attorney for the defendants, who stated that he had no authority to accept the tender. It appears that the plaintiff just waited too late to begin his preparations to take up the option. Under his evidence he first approached Mr. Thomas of the First Federal Savings & Loan Association to borrow the amount of the purchase price on 16 November, just six days before the time of the option to expire. Apparently he had known for several weeks that he intended to exercise his rights under the option, but for some reason failed to act promptly. The defendant has a right to rely upon the terms of the option and the action of the court in sustaining the motion for judgment of nonsuit was correct.

The plaintiff excepted to the exclusion of the evidence of Mr. C. D. Thomas, Vice-President of the First Federal Savings & Loan Association. However, Mr. Thomas did not purport to testify to any fixed or valid agreement for an extension of the time although he did engage in conversations with Mr. Phillips in regard to it. In view of our ruling on the motion for nonsuit and the vagueness of Mr. Thomas' testimony, it is not pertinent to this appeal.

The order of Judge Jackson is

Affirmed.

MRS. DOROTHY J. GRAVES v. CHARLOTTE LODGE NO. 392 BENEVOLENT AND PROTECTIVE ORDER OF ELKS.

(Filed 19 October, 1966.)

1. Negligence § 37a—

A patron at a bingo parlor is an invitee of the proprietor.

2. Negligence § 37b—

The proprietor is not an insurer of the safety of his patrons.

3. Negligence § 37f—

No inference of negligence arises from the injury of an invitee from a fall on the premises.

4. Same—

The evidence disclosed that the screws holding the backs of the wooden chairs used at a bingo parlor were covered with wooden plugs glued into the recesses in order to hide the screws and to make the surface smooth, that one of the plugs was on the floor, and that when plaintiff invitee stepped on the plug she fell to her injury. There was no evidence as to how long the plug had been on the floor before the accident. *Held:* The

evidence is insufficient to be submitted to the jury on the issue of the proprietor's negligence.

APPEAL by plaintiff from *Hasty, S.J.*, May 2, 1966 Schedule "C" Civil Session of MECKLENBURG.

Action for personal injuries.

On the evening of December 12, 1963, as it had done every Thursday for about thirteen years, defendant was operating a Bingo game, open to any member of the public who paid the $3.00 admission fee, in a large room on the third floor of its lodge building. On Bingo night, 25 standard 8-foot tables and 200 chairs, distributed 8 to a table, were set up in this room. Approximately 90% of these chairs were metal; the balance were the conventional wooden folding type — "the type of chair that you use with a bridge table." Plaintiff, a lady weighing 265 pounds and wearing 2½-inch high heels, had been playing Bingo. During an intermission she got up and started a walk around her table. In doing so, the heel of her left shoe came in contact with a brown wooden "button" or plug, which had come out of a chair, and she fell flat on her face. The plug was one-half inch in diameter and about one-fourth of an inch thick. In her fall, plaintiff "sustained a sprained injury of her back and knee" from which, according to her physician, she will probably suffer for "an indefinite period of time."

When not in use, the chairs were folded and stacked against the wall. They were moved about five times a week, and the janitor had instructions from the club manager, whose responsibility it was "to keep everything in repair and good shape," to remove to a storeroom any chairs having "a piece of splintered wood or anything like that." The backs of the wooden chairs were attached to the seats by four recessed screws. Wooden plugs were then glued into the recesses in order to hide the screws and to make a smooth surface. It was upon one of these plugs that plaintiff had stepped.

Examined as an adverse witness, the manager of defendant's building testified that he inspected the Bingo room every Thursday morning after it was set up for the evening's game; that he could "pretty well tell the condition (of the chairs) by looking at them"; that he had never had any problem with the chairs, and that their appearance and stability were good. Prior to plaintiff's fall, he had not been aware that any of the wooden plugs had ever become detached from them. Plaintiff described the wooden chairs in the Bingo room as "real old," and "weak and unstable." She said she had been seeing these chairs for thirteen years, and "they are the same now as they were when I first started playing." She testified, without objection, that the plug she stepped on had come from the chair at

the end of her table. There was a plug missing from that chair and from several of the others. Plaintiff had not seen the plug, nor any other object on the floor, at the time she fell. A number of people were seated at her table and at adjoining tables.

At the conclusion of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed. From the judgment dismissing her action, plaintiff appeals.

Grier, Parker, Poe & Thompson by Gaston H. Gage for plaintiff appellant.

Wardlaw, Knox, Caudle & Wade by Lloyd C. Caudle for defendant appellee.

PER CURIAM. Plaintiff, as a patron of defendant's Bingo game, was an invitee to whom it owed a duty to exercise ordinary care to keep its premises in a reasonably safe condition. It was not an insurer of her safety. *Case v. Cato's, Inc.*, 252 N.C. 224, 113 S.E. 2d 320. No inference of actionable negligence on the part of defendant arose from the mere fact that plaintiff fell on its premises as a result of stepping on a plug which had fallen from one of its chairs. *Fanelty v. Jewelers*, 230 N.C. 694, 55 S.E. 2d 493. The transcript discloses no fact or circumstance suggesting that the plug had been on the floor for any appreciable period of time before plaintiff's heel encountered it, or that plugs had fallen from the chairs in such numbers or at such intervals that defendant, in the exercise of due care, should have known that its wooden chairs created a hazard to its patrons. *Revis v. Orr*, 234 N.C. 158, 66 S.E. 2d 652; *Schwingle v. Kellenberger*, 217 N.C. 577, 8 S.E. 2d 918. Nor does the evidence tend to show that a closer inspection by defendant's manager or janitors would have revealed that a plug, glued into a recess at the time the chair was made, was about to come out. *Leonard v. Shoe Co.*, 261 N.C. 781, 136 S.E. 2d 102.

It is noted that this case does not involve the collapse of a chair. Although plaintiff characterized the chairs as "shabby" and "unsteady," they were capable of supporting considerable weight. Plaintiff's injuries did not result from the collapse of a chair. The function of the plug which came unglued was to hide a screw, not to add strength to the chair.

Defendant's motion for nonsuit was properly sustained, and the ruling of the court below is

Affirmed.

STATE v. YANDLE J. CALLOWAY.

(Filed 19 October, 1966.)

Criminal Law § 83—

Where defendant on cross-examination has admitted indictment, trial and conviction in nine other prosecutions of like nature, it is error for the court to exclude defendant's testimony in explanation that upon appeal in all of the convictions they were reversed or the charges dropped.

APPEAL by defendant from *McLean, J.*, March 7, 1966 Regular A Session, MECKLENBURG Superior Court.

The defendant, Yandle J. Calloway, was indicted, tried and convicted of the crimes of purse snatching and assaults on the arresting officers. The victim of the larceny testified that she stopped at the Toddle House for coffee on her way home from work on July 27, 1965. The time was approximately 3:30 in the morning. After she left the Toddle House to go to her automobile, she saw a man standing by the end of the building. "I stopped, turned around, and started to run back inside. He grabbed my bag and went across Independence Boulevard." The bag contained eight or nine dollars in money and "other things of value to me. . . . It was returned to me next day at the Police Station."

From the Toddle House she called the police, giving a description of the purse snatcher. Police headquarters immediately gave the description over the radio. The patrolling officers began an immediate search. After some difficulty in which the defendant assaulted the officers with a piece of brick, striking another on the chin with a piece of concrete, and throwing sand in the eyes of another, the officers completed the arrest.

The defendant, on cross-examination, admitted he had been tried, convicted, and sentenced in nine cases of purse snatching. By way of explanation he attempted to testify that in each case he obtained a new trial, was either acquitted or the prosecution was abandoned. On the solicitor's objection, the court excluded this explanatory testimony. The exclusion is the subject of Exception No. 6. On the purse snatching charge the court imposed a prison sentence of not less than nine nor more than ten years. On one of the assault charges he imposed a sentence of one year to begin at the expiration of the 9-10 years sentence. The defendant excepted and appealed.

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

Wm. H. Abernathy for defendant appellant.

PER CURIAM. The defendant's pleas of not guilty cast upon the State the burden of proving guilt beyond a reasonable doubt. The State's evidence was amply sufficient to go to the jury and to support the verdicts. The court was correct in overruling the motions to dismiss. The defendant pleaded not guilty and testified, contradicting the State's evidence on the essential elements of all the charges. This conflict in the testimony was for jury resolution.

On cross-examination, the defendant had admitted indictment, trial, and conviction in nine cases of purse snatching. After these damaging admissions he offered to testify that in all cases he appealed, obtained new trials, and was subsequently acquitted or the charges were dropped. On the solicitor's objection, Judge McLean excluded this testimony. The court committed prejudicial error in excluding the explanation that upon appeal all convictions were reversed and verdicts of not guilty entered or the cases dropped. For this error the defendant is entitled to a new trial on all charges.

New trials.

STATE v. RAY THOMAS HAGLER.

(Filed 19 October, 1966.)

Larceny § 3—

An indictment charging larceny of goods by means of feloniously breaking and entering, charges a felony regardless of the value of the articles stolen.

APPEAL by defendant from *McLean, J.*, March 7, 1966 Regular Criminal Session, MECKLENBURG Superior Court.

This criminal prosecution was based upon a bill of indictment containing two counts. The first count charged the defendant and two others with the felonious breaking and entering into the dwelling house of Fred Parker with the intent to steal, take and carry away the merchandise, chattels, money, valuable securities of the value of more than $200.00 being kept therein. The second count charged that as a result of the felonious breaking and entering the three defendants did unlawfully and feloniously steal, take and carry away one 22-caliber rifle, model 66; one 22-caliber pistol, one Swift ham, two plaid shirts (Arrow), one pair gray pants size 32-32, one green top coat, one blue top coat, size 36, one Westinghouse iron, eight children's game sets, three sirloin steaks of the value of less than $200.00.

The State introduced evidence of the felonious breaking and entering into the Parker residence, the larceny of the specified articles therefrom, their return to the owners by the officers the day following the night of breaking. One of the neighbors saw a Chevrolet truck parked at the Parker home and three persons carrying bundles of clothing hurriedly enter the truck and drive away. The defendant Hagler was the driver. The officers went to the home of one of the other defendants the next morning and found the stolen articles. The defendant Hagler was in the house asleep.

Hagler, the other defendants, and Hagler's sister testified for the defendants. The jury returned this verdict:

> "The jury herein recorded find the defendant Ray Thomas Hagler Guilty of the charge of breaking and entering with intent to commit a felony therein, and Guilty of the charge of larceny of property resulting from breaking and entering as charged in the bill of indictment."

From a sentence of 9-10 years on each count, to run consecutively, the defendant Hagler appealed.

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

T. O. Stennett for defendant appellant.

PER CURIAM. The evidence for the State was sufficient to go to the jury on both counts in the indictment and to sustain the verdict. The second count in the bill charged the larceny of goods of the value of less than $200.00. However, the bill charged, and the jury found the larceny resulted from the felonious breaking. Hence the larceny under such conditions is a felony regardless of the value of the articles stolen. The maximum sentence on each count is ten years. The sentences did not exceed that maximum.

No error.

STATE v. FLOYD DILLARD DYE.

(Filed 19 October, 1966.)

1. Criminal Law § 131—

After a plea of guilty knowingly and voluntarily entered it is not error for the court, in fixing punishment, to permit the introduction of a record compiled by the Federal Bureau of Investigation concerning the defendant, the record being received in open court in the presence of defendant and there being no suggestion that the contents of the report were withheld from him or were not correct.

2. Criminal Law § 24—

A plea of guilty knowingly and voluntarily entered obviates the necessity of proof of the offense by the State, and defendant may not assert variance between the bill of indictment and the proof as to the ownership of the property stolen.

APPEAL by defendant from *Clarkson, J.*, at the August 1966 Criminal Session of CALDWELL.

The defendant was indicted for the larceny of an automobile of the value of more than $200. When the case was called for trial, he entered a plea of guilty through his counsel. Before the plea was accepted, the court examined the defendant under oath. Upon such examination, the defendant stated that he was 35 years of age, and was not under the influence of any alcohol, drugs, narcotics or other pills; that he heard and understood the questions and statements of the court; that he understood the offense with which he was charged; that he understood that upon the entry of a plea of guilty he could be imprisoned for as much as ten years; that no one had made any promise or threat to him to influence him to enter such plea; that he had had sufficient time to confer with his counsel and had done so; and that he had authorized and instructed his counsel to enter a plea of guilty.

After the plea of guilty was so entered and accepted by the State, the solicitor introduced in evidence testimony of a police officer to the effect that the automobile exceeded $200 in value, and also introduced a record compiled by the Federal Bureau of Investigation concerning this defendant. According to this record, the defendant had previously been convicted of numerous and varied criminal offenses for which he had been sentenced to and had served terms of imprisonment in this State and elsewhere. The record also showed that he had been previously arrested on other charges, the disposition of which charges does not appear.

The court sentenced the defendant to imprisonment in the State's Prison for a term of not less than 8 nor more than 10 years.

The defendant assigns as error the admission into evidence of

the record of the Federal Bureau of Investigation, and the refusal of the court to set aside the judgment because of an alleged fatal variance between the allegation of ownership of the automobile in the indictment and proof of ownership thereof.

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

Paul L. Beck for defendant appellant.

PER CURIAM. The record does not show any exception by the defendant when the F.B.I. record was offered and received in evidence. The assignment of error with reference to the reception of this report in evidence is, therefore, ineffectual. *State v. Mallory,* 266 N.C. 31, 145 S.E. 2d 335; *State v. Maness,* 264 N.C. 358, 141 S.E. 2d 470. In any event, it was not error for the court, following the defendant's plea of guilty, to receive this record in evidence in open court and consider it in determining the sentence to be imposed. See *State v. Pope,* 257 N.C. 326, 126 S.E. 2d 126. There is no suggestion that the defendant and his counsel were not present, or that the contents of the report were withheld from them or were not correct.

There is no merit in the assignment of error relating to an alleged variance between the allegation in the bill of indictment and the proof concerning the ownership of the automobile. The plea of guilty entered by the defendant made it unnecessary for the State to offer evidence to prove the offense charged in the bill of indictment. 21 Am. Jur. 2d, Criminal Law, § 495. The indictment was sufficient in form and the sentence imposed does not exceed the maximum permitted under the statute. G.S. 14-70.

No error.

C. W. TAYLOR v. DONALD S. GIBBS.

(Filed 19 October, 1966.)

1. Agriculture § 7—

Where an agriculture lease provides for a specified rental, with the sole provision for the reduction of rent in the event the tobacco acreage should be reduced over five per cent, the putting into effect of the "acreage-poundage control" cannot entitle lessee to a reduction in rent, it being admitted that the parties did not anticipate the putting into effect of the "acreage-poundage control" and that the lease contained no provision in regard thereto.

2. Contracts § 12—

The courts must construe an unambiguous contract as written and may not under the guise of construction insert therein or delete therefrom any material provision.

APPEAL by defendant from *Bone, E.J.*, in Superior Court of LENOIR on 9 August, 1966.

The following appears from the record: On 31 August, 1964, the plaintiff Taylor "sure-rented" to Donald Gibbs, the defendant, for the year 1965, certain tobacco allotments and also sub-leased a tobacco allotment on the Maxine Quinn farm which he, the plaintiff, had on lease. The defendant agreed to pay $2,100 for the lease "providing the tobacco acreage is not reduced over 5 per cent". The defendant paid $1,785 to apply on the lease but declined to pay the remaining $315. Plaintiff brought suit to recover this balance, and the defendant admitted plaintiff's allegations but offered as a defense that since the execution of the lease agreement the "acreage-poundage control" was put into effect, and that because of it he was unable to sell all the tobacco raised on the leased premises. He says that he tendered the plaintiff a check for the $315 if the latter would sign an agreement that it would allow him (the defendant) to sell 15 per cent in excess of the poundage allotment as by law provided; that plaintiff refused and that he had to destroy in excess of $400 worth of tobacco. He contends that the acreage-poundage control development is comparable to a tobacco acreage reduction which is a condition of the lease, and denies liability on that ground.

The plaintiff moved for judgment on the pleadings and Judge Bone being of the opinion that the position of the defendant was not well taken, allowed the motion and entered judgment against him for $315 with interest, etc.

The defendant appealed.

Aycock, LaRoque, Allen; Cheek & Hines for plaintiff appellee.

George R. Kornegay, Jr., Douglass P. Connor for defendant appellant.

PER CURIAM. The contract provides for the payment of "sure-rent" by the defendant, — that is, certain and unconditional payment. It provides only one event that might relieve him: the reduction of the tobacco acreage. The defendant admits that this did not occur, but contends that putting acreage-poundage control into effect has the same result and that he should be absolved. However, in his Answer the defendant says that it was not anticipated by the parties and in his brief says "it was totally unanticipated by the parties at the time the contract was made." In substance he asks

that the plaintiff be affected by an event that was totally unanticipated by him and by the defendant. If the parties had anticipated a development or government action similar to the acreage-poundage control, it should have been inserted as a part of the agreement. Since they did not, the law cannot bind the plaintiff to an unforeseen and unexpected eventuality not within the contemplation of either party.

The case of *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539, refers to several decisions in which the position of the lower court is upheld. From it we quote: "When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit. *Indemnity Co. v. Hood,* 226 N.C. 706, 710, 40 S.E. 2d 198. It is the province of the courts to construe and not to make contracts for the parties. *Williamson v. Miller,* 231 N.C. 722, 727, 58 S.E. 2d 743; *Green v. Ins. Co.,* 233 N.C. 321, 327, 64 S.E. 2d 162. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense. *Bailey v. Ins. Co.,* 222 N.C. 716, 722, 24 S.E. 2d 614."

Judge Bone's ruling is

Affirmed.

STATE v. JAMES MACK WILLIAMS.

AND

STATE v. GEORGE KELLY BOULWARE.

(Filed 19 October, 1966.)

APPEAL by defendants from *McLean, J.*, April 4, 1966 Regular Schedule Criminal Session, MECKLENBURG Superior Court.

The indictment charged that the defendants, on the 5th day of March, 1966, with force and arms unlawfully, wilfully, and feloniously made an assault upon Sherman Hickman, putting him in bodily fear and danger of his life; did unlawfully, wilfully, and feloniously take and steal from him one gold watch of the value of $15.60 in money.

Upon arraignment each defendant, through counsel, entered a plea of not guilty. The prosecuting witness immediately notified Mr. Henderson of the Charlotte Police Department of the assault and robbery and pointed out the two defendants as the perpetrators.

As Officer Henderson approached the defendants they started to separate. Williams threw away the gold watch which the officer recovered and which the owner identified as the one taken from him. Each defendant testified in his own defense, denying any participation in the assault. Each defendant called other witnesses tending in minor detail to corroborate parts of his story.

The jury returned verdicts of guilty as to each defendant. Judge McLean imposed prison sentences of not less than nine nor more than 10 years. From the judgments and sentences, the defendants appealed.

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

William G. Robinson for defendant Williams.

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

Stagg & Reynolds by William L. Stagg for defendant Boulware.

PER CURIAM. The evidence of the robbery was positive. The identity of the defendants as the perpetrators was equally positive. The victim notified the officers immediately after the assault. They arrested the defendants near the scene. Williams threw away the gold watch which was taken from the prosecuting witness. The officer recovered it. Both defendants had served prison sentences for crimes of violence. The sentences approached but did not exceed the maximum permitted by law. In the trial, we find

No error.

MILLARD F. WOOTEN, ADMINISTRATOR OF THE ESTATE OF MILLARD JAMES WOOTEN, DECEASED, PLAINTIFF, v. LARRY GENE CAGLE, DEFENDANT.

(Filed 2 November, 1966.)

1. Appeal and Error § 20—

Error in the admission or exclusion of evidence relating to an issue answered in appellant's favor *held* not to be prejudicial to appellant.

2. Automobiles § 46—

The court's instruction to the jury in this case *held* to have properly placed the burden of proof on the plaintiff upon the issue of negligence and on the defendant upon the issue of contributory negligence.

3. Trial § 32—

In instructing the jury that it was the sole judge of the credibility of the witnesses and the weight, if any, to be given their testimony, it will not be held for prejudicial error that the court further charged the jury that it was its duty to reconcile conflicts in the testimony, if possible, but that if this could not be done the jury might believe or disbelieve any witness; the instruction as to reconciling the conflicting testimony refers only to the reconciliation of apparently conflicting testimony accepted by the jury as credible.

4. Negligence § 16—

The legal significance of the presumption that a minor between the ages of seven and fourteen is incapable of contributory negligence is that the burden is upon defendant to satisfy the jury from the evidence and by its greater weight that such minor did not in fact use that care which a child of its age, capacity, discretion, knowledge and experience would ordinarily have exercised under the same or similar circumstances, and an instruction substantially applying this rule to the facts in evidence will not be held prejudicial for technical error which could not have misled the jury. A finding of contributory negligence of such minor necessarily includes a finding that the child was capable of contributory negligence.

5. Negligence § 28—

Where the instruction of the court on the issue of contributory negligence of a twelve year old boy properly places the burden upon defendant to prove that the boy failed to exercise that degree of care which a child of his physical and mental attributes, as disclosed by the evidence in the case, would have exercised under the circumstances, the charge will not be held for prejudicial error, in the absence of request for special instructions, in failing to relate the question of the contributory negligence of such boy to the particular circumstances disclosed by the evidence.

6. Negligence §§ 10, 28—

Plaintiff may not object to the failure of the trial court to instruct the jury on the doctrine of last clear chance when plaintiff has neither *allegata* nor *probata* sufficient to require the submission of the issue to the jury.

7. Appeal and Error § 25—

Where there is no objection or exception in the lower court to the issue submitted or the court's refusal to submit an issue tendered, appellant may not challenge the issues for the first time on appeal in his assignments of error.

APPEAL by plaintiff from *Houk, J.*, May 30, 1966, Regular Civil Session of GASTON.

Millard James Wooten, hereafter referred to as James or as plaintiff's intestate, died May 19, 1965. On September 17, 1965, Millard F. Wooten, who had qualified as administrator of James's estate, instituted this action to recover damages for the alleged wrongful death of his intestate. Millard F. Wooten died April 11, 1966. Thereafter, Ruby Lee Wooten (1) qualified as administratrix

de bonis non of James's estate, (2) was substituted as party plaintiff and (3) adopted the complaint.

James died from injuries he received on Wednesday, May 19, 1965, about 7:45 a.m., when struck by a Ford car operated by defendant. This occurred on Rural Paved Road 2085, also known as Lane Road, in Gaston County. Defendant's car was proceeding in an easterly direction on Lane Road. James was attempting to cross from the north side to the south side of Lane Road.

Lane Road was 19 feet wide, having one lane for eastbound traffic and one lane for westbound traffic. There was a curve two-tenths of a mile west of the point of collision. Proceeding east from this curve the road was straight and level. There were no obstructions along either side of the road. The houses were back "a good hundred feet" from the highway.

James, a twelve-year-old boy, was about five feet, seven inches tall, weighed about 180 pounds, and was in the sixth grade. He and others boarded the school bus from the south side of Lane Road, at a neighbor's driveway.

Prior to the fatal accident on May 19, 1965, James and eight other children had gathered on the south side of the road in the area of the bus stop. While waiting for the bus, James and his friend, Randy Galloway, also twelve years old, were playing with a golf ball. In the course of their play, the ball landed on the north side of the road. Thereupon, James and Randy crossed to the north side "to retrieve the lost ball." While there, James said, "(T)here comes the school bus," and started running. Those who boarded the school bus first were more likely to get a seat or a choice of seats.

In approaching the point of collision, defendant was following at a distance of about one hundred yards a Chevrolet car operated by Oscar Sisk. The Sisk car and defendant's car had passed, and were in front of, the school bus. The school bus was at said curve, two-tenths of a mile west of the point of collision, when defendant's car struck James.

Plaintiff alleged James's fatal injuries were proximately caused by defendant's negligence in the operation of his car in these respects, *viz.:* (1) Excessive speed; (2) failure to keep a proper lookout; (3) failure to give warning of his approach by horn or other signal; (4) failure to turn left into the north traffic lane; and (5) failure to reduce speed notwithstanding the existence of a special hazard, to wit, the presence of school children waiting to board the approaching school bus.

Answering, defendant denied all of plaintiff's allegations as to his alleged actionable negligence; and for a further answer and defense, pleaded conditionally the contributory negligence of James.

Defendant's allegations as to James's (contributory) negligence may be summarized as follows: James failed to use due care for his own safety in that he failed to yield the right of way when he saw or should have seen defendant's approaching car and, in attempting to cross the highway, ran directly across the path of defendant's approaching car.

Plaintiff, by reply, denied defendant's allegations as to James's negligence, and renewed her original prayer for relief. The reply contains no allegation pertinent to the doctrine of last clear chance.

Evidence was offered by plaintiff and by defendant.

According to Randy, a witness for plaintiff: Randy stayed on the north side of the road. After the Sisk car passed, James "started on across and the 1956 Ford (defendant's car) came down and struck him." Randy first saw defendant's car when it was "just about a hundred feet away." Randy called to James, "(H)old it," when James was "just about in the middle of the road." Defendant "cut the automobile sharply to the right." James was "around a foot from the south edge of Lane Road when he was struck." Randy, on cross-examination, testified: "I would have run across myself if I had not seen the automobile."

According to defendant's evidence: Both Sisk and defendant saw Randy and James on the north side of the road as they approached. Both boys stopped and stepped back when Sisk blew his horn. The Sisk car passed without mishap. When defendant "got up about thirty feet from them," James "just ran across in front of (him)." Defendant cut to his right in an attempt to avoid striking James. However, defendant's car struck James when he "was four or five feet from the southern edge of the road."

The respective parties offered conflicting evidence as to the speed of defendant's car and as to other controverted evidential facts.

The issues submitted, and the jury's answers to the first and second issues, are as follows: "(1) Was the plaintiff's intestate killed as a result of the negligence of the defendant as alleged in the Complaint? ANSWER: Yes. (2) If so, did the plaintiff's intestate, by his own negligence, contribute to his death as alleged in the Answer? ANSWER: Yes. (3) What amount of damages, if any, is the plaintiff entitled to recover from the defendant? ANSWER: ....."

The court, based on said verdict, entered judgment "that the plaintiff have and recover nothing of and from the defendant" and "that the plaintiff be taxed with the costs."

Plaintiff excepted and appealed.

Joseph B. Roberts, III, for plaintiff appellant.
Frank P. Cooke for defendant appellee.

BOBBITT, J. The record shows twenty assignments of error based on fifty exceptions. Discussion will be limited to those constituting the basis for principal contentions set forth in plaintiff's brief.

Plaintiff assigns as error, based on exceptions duly noted, the admission or exclusion, over plaintiff's objections, of evidence relating to the speed of defendant's car as it approached the scene of collision. This evidence was pertinent to the first (negligence) issue. Since this issue was answered in favor of plaintiff, error, if any, in the rulings challenged by these assignments is harmless. *Coach Co. v. Fultz,* 246 N.C. 523, 526, 98 S.E. 2d 860, 863; *Hodgin v. Implement Co.,* 247 N.C. 578, 101 S.E. 2d 323; 1 Strong, N. C. Index, Appeal and Error § 20.

The remaining assignments of error brought forward and discussed in plaintiff's brief are based on exceptions to the charge.

Assignments directed to asserted errors in the instructions relating to burden of proof are without merit. When the charge is considered contextually, it appears clearly the court properly instructed the jury that the burden of proof was on plaintiff on the first (negligence) issue and on defendant on the second (contributory negligence) issue.

Plaintiff stresses her assignment relating to the portion of the charge quoted in the following paragraph.

The court charged the jury: "It is the duty of the jury to look at all the material evidence in this case in order to determine what the real true state of facts was at the time and to that end, (C) it is your duty to weigh all the evidence so as to reconcile it where it can be reconciled if it seems to conflict, if it can be reconciled. (D) You should not capriciously reject any testimony but, (E) as I said, reconcile all of it that can be reconciled, but if this cannot be done, (F) you may believe or disbelieve any witness, according as you Members of the Jury may or may not consider the testimony of that witness entitled to credit or worthy of belief. Again I say to you that you are the sole judges of the credibility of the witnesses, what weight that should be given their testimony. With that the court has nothing whatever to do." Plaintiff excepted to and assigns as error the portions of the quoted excerpt between (C) and (D) and between (E) and (F).

Plaintiff contends the references to reconciling seeming conflicts in the evidence, if possible, tended to confuse the jury in respect of its duty to resolve contradictions and discrepancies in the evidence.

Although no decision of this Court bearing directly thereon has

come to our attention, there is authority in other jurisdictions for the quoted instructions. In 53 Am. Jur., Trial § 817, it is stated: "If there is a conflict in the evidence, a court may properly instruct the jury that it is their duty to reconcile, if possible, all of the evidence, without arbitrarily imputing perjury to any of the witnesses, or that it is their duty to reconcile conflicts, or seeming conflicts, in the evidence, if possible." *Accord:* 88 C.J.S., Trial § 359; 127 A.L.R. 1406.

Although instructions relating to reconciling conflicting evidence are neither required nor encouraged, we perceive no prejudicial error in the quoted instructions. The judge emphasized that the jurors were the sole judges of the credibility of the witnesses and of the weight, if any, to be given the testimony of the witnesses. Obviously, the instructions with reference to reconciling conflicting testimony referred only to the reconciliation of apparently conflicting testimony accepted by the jury as credible.

Plaintiff assigns as error, based on exceptions duly noted, numerous excerpts from the portion of the charge relating to the contributory negligence issue. Her brief does not single out for discussion any particular one or more of these excerpts. Her general attack is expressed as follows: "The Court below not only did not define the presumption or explain it, the Court did not explain to the jury the amount of evidence needed to rebut the presumption. Appellant has been unable to determine from the cases dealing with this subject by what amount of evidence the presumption may be rebutted. To require the defendant to prove the contributory negligence of the seven- to fourteen-year-old boy by the greater weight of the evidence is to require nothing more than what is already demanded of the defendant on the issue of contributory negligence. The presumption must first be rebutted, and then, and only then, should the jury consider the question of contributory negligence."

Apparently, plaintiff contends it was incumbent upon defendant to establish two separate and distinct propositions, *viz.:* First, to establish by a degree of proof not heretofore determined that James was *capable* of contributory negligence; and second, to establish by the greater weight of the evidence that James was in fact contributorily negligent. We find no support in our decisions for this contention.

Applicable legal principles are well summarized in *Weeks v. Barnard,* 265 N.C. 339, 143 S.E. 2d 809, as follows: "Between the ages of 7 and 14, a minor is presumed to be incapable of contributory negligence. (Citations) This presumption, however, may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circum-

stances. (Citations) A child 'must exercise care and prudence equal to his capacity.' (Citations). If it fails to exercise such care and the failure is one of the proximate causes of the injuries in suit, the child cannot recover. (Citations)"

Under our decisions, a person between the ages of seven and fourteen may not be held guilty of contributory negligence as a matter of law. "Whether he (is) capable of contributory negligence presents an issue for a jury, because there is a rebuttable presumption that he (is) incapable." *Hamilton v. McCash,* 257 N.C. 611, 619, 127 S.E. 2d 214, 219. *Accord: Wilson v. Bright,* 255 N.C. 329, 331, 121 S.E. 2d 601, 603, and cases cited.

Under our decisions, the legal significance of the presumption that a minor between the ages of seven and fourteen is *incapable* of contributory negligence is that such minor cannot be held guilty of contributory negligence unless the defendant satisfies the jury from the evidence and by its greater weight that such minor did not in fact "use the care which a child of its age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances." A finding to this effect necessarily includes a finding the child was *capable* of contributory negligence. As stated by Professor Stansbury: "The presumption is rebuttable by evidence that the child in fact had sufficient capacity to understand and guard against danger, and its principal effect seems to be that of cautioning the jury to apply a standard of care commensurate with the plaintiff's age and intelligence." Stansbury, North Carolina Evidence, Second Edition, § 248. See also *Williamson v. Garland,* 402 S.W. 2d 80 (Ky. 1966), and Annotation, 77 A.L.R. 2d 917 *et seq.*

The court instructed the jury substantially in compliance with the law as declared in the cited decisions. See *Phillips v. R. R.,* 257 N.C. 239, 243, 125 S.E. 2d 603, 606, and cases cited. Although the court's instructions include statements which, if considered alone, would be considered incomplete or inexact, the following excerpt from the charge fairly represents the gist of the court's instructions: "Now, of course, as I have already told you, there is a difference between care required of a child and the care required of an adult but yours is the burden to determine from this evidence and by its greater weight as to whether or not there was contributory negligence. Contributory negligence in this case would be the failure on the part of the plaintiff's intestate to exercise the care which a person of average intelligence and of physical competency and of the age of twelve years under the facts and circumstances should have exercised. The test is this: Has the defendant satisfied you from the evidence and by its greater weight that the plaintiff failed to exer-

cise that degree of care which an ordinarily prudent person of the age of twelve years and of the physical and mental attributes as found from the evidence here should have exercised under the circumstances and, if so, did his failure to do so become one of the proximate causes of the plaintiff's injury?" There is no reasonable ground to believe that technical error in the charge misled the jury or otherwise prejudiced plaintiff.

Plaintiff contends the court should have called to the attention of the jury particular circumstances disclosed by the evidence bearing upon whether under the circumstances a twelve-year-old boy ordinarily would act impulsively rather than with caution. Presumably, all such circumstances deemed favorable to plaintiff's position were the subject of the argument of plaintiff's counsel to the jury. In the absence of special request, the court was not required to review the contentions of the respective parties with reference to particular circumstances pertinent to whether James used the care "which a child of (his) age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances."

Plaintiff excepted to the charge on the ground it failed to relate the law to the evidence as required by G.S. 1-180 "in that it did not relate the law of the doctrine of last clear chance to the evidence of the case." The assignment of error based on this exception is without merit. "To submit an issue of last clear chance there must be both *allegata* and *probata*." *Phillips v. R. R., supra,* and cases cited. Here, there is neither *allegata* nor *probata* sufficient to require or justify the submission of such issue. Moreover, plaintiff did not tender an issue as to last clear chance or object to the issues as submitted by the court. "Where there are no objections or exceptions in the lower court to the issue submitted, or to the court's refusal to submit issues tendered, appellant may not challenge the issues for the first time on appeal in his assignments of error." 1 Strong, N. C. Index, Appeal and Error § 25.

We have considered each of the assignments of error brought forward in plaintiff's brief. Further discussion is unnecessary. Suffice to say, none discloses error of such prejudicial nature as to warrant a new trial.

The jury resolved the controverted and crucial second (contributory negligence) issue in favor of defendant. Plaintiff has failed to show prejudicial error in the conduct of the trial. Hence, the verdict and judgment will not be disturbed.

No error.

S & R AUTO & TRUCK SERVICE, INC., v. CITY OF CHARLOTTE, STANFORD R. BROOKSHIRE AS MAYOR OF CITY OF CHARLOTTE, CLAUDE L. ALBEA, FRED D. ALEXANDER, SANDY R. JORDAN, MILTON SHORT, JOHN H. THROWER, JERRY TUTTLE AND JAMES B. WHITTINGTON, AS MEMBERS OF CITY COUNCIL.

(Filed 2 November, 1966.)

1. Appeal and Error § 49—

Findings of fact by the trial court which are supported by competent evidence are conclusive on appeal.

2. Municipal Corporations § 28—

A municipal corporation is authorized to make provision for the removal of motor vehicles abandoned or disabled on its streets so as to promote the free flow of traffic, and to this end may designate towing services which will be called by its officers to render such service. G.S. 160-200(7), (10), (11), (31), (35), (43).

3. Same—

Where a municipality has divided the city into zones and designated a towing service to be called upon to remove abandoned or disabled vehicles within each of such zones in those instances in which the owners of such vehicles fail to designate or call upon a towing service, and the towing services selected by the city adequately meet the needs of the city, the city may refuse to "license" another service to perform such towing operations for the city without a hearing. The rule proscribing discrimination in licensing concerns offering services to the public is not applicable to the selection by the city of the concerns which it will use in the discharge of its public functions.

APPEAL by plaintiff from *Jackson, J.*, at the 14 February 1966 "B" Civil Session of MECKLENBURG.

The individual defendants are the mayor and members of the City Council of Charlotte. All defendants are hereinafter referred to as the city.

Section 20-20 of the ordinances of the City of Charlotte provides that whenever a police officer finds a motor vehicle abandoned, wrecked or unlawfully parked on the streets of the city, he shall have the vehicle removed "by a properly licensed wrecker." Sections 20-125 to 20-134, inclusive, relate to the granting of a "license" to a "wrecker," to the duties imposed upon the holder of such "license," and to the charge which may be made for his services. Section 20-135 provides that the Chief of Police shall adopt "reasonable rules and regulations for wreckers, including establishing zones for the operation of wreckers for city tow-in," which rules shall be effective upon approval by the City Council. For the purpose of all of these provisions, Section 20-125 defines a "wrecker" to be "a person engaged in a business, or offering the services of tow-in service,

whereby disabled motor vehicles are towed * * * from the place where they are disabled * * * upon call by the city * * * other than upon direction by the owner of the vehicle involved."

These ordinances provide for application for "license" to the Chief of Police, investigation by him of the applicant and of his proposed operation, a recommendation by the Chief of Police to the City Council and the issuance of a license by the Council "after approval by the Chief of Police," and after determination by the Council that "the public convenience and necessity" requires the proposed service. It is provided that the Chief of Police "shall recommend" the issuance of a license when he "finds" that required insurance policies have been procured, that the applicant and his employees are fit and proper persons, that the requirements of the Article and all other applicable laws have been met, and "that the public convenience and necessity require the wrecker service for which application has been made."

The ordinances make no provision for a hearing, and contain no standards by which the Chief of Police or the Council shall determine whether the "public convenience and necessity" requires the proposed service.

In this action, the plaintiff seeks a writ of *mandamus* requiring the city to issue to it a "license for wrecker and tow service." The complaint alleges that the plaintiff applied to the city for a license, that its application was denied, and that the denial was arbitrary, capricious and unreasonable, the last allegation being denied by the city.

By consent the matter was heard by the judge without a jury. Evidence was offered by the plaintiff. The city offered none. The trial judge made numerous findings of fact and drew conclusions of law, upon the basis of which he adjudged that the plaintiff is not entitled to the issuance of a writ of *mandamus* and dismissed the action.

Without setting forth in full the findings of fact so made, the material portions thereof may be summarized as follows:

The plaintiff has been for many years and is now engaged in a general automobile repair business. In connection therewith it has operated one or more tow-in vehicles. Prior to the adoption of the present ordinances, certain operators of tow-in vehicles, including the plaintiff, agreed with the then Chief of Police to divide the city into zones, one zone being assigned to each operator participating in the agreement. Prior to the adoption of the present ordinances, the plaintiff relinquished the zone assigned to it. Following the adoption of the present ordinances, the Chief of Police promulgated certain rules and regulations pertaining to the operation of "wreckers li-

censed." These rules are not shown to have been reduced to writing and have not been approved by the City Council. The Chief of Police has divided the city into four zones and has assigned each zone to an operator licensed under these ordinances.

When the plaintiff filed its application, it was informed by the Director of the Traffic Division of the Police Department, to whom its application was referred by the Chief of Police, that "the wrecker service now existing was working better than it ever had before and that the Police Department was satisfied with it and there wasn't any use to apply for a license." The application and the plaintiff's facilities and equipment were, however, investigated by a police officer. His report shows that the plaintiff did not at that time have in effect policies for the full amount of liability insurance required by the ordinances. However, the plaintiff stated to the officer that these would be obtained immediately upon the approval of his application. (This intent and ability appear not to be in dispute.) During the course of the investigation, the plaintiff was not requested or advised to produce and deposit with the Chief of Police any policies of insurance. The investigating officer found the plaintiff's facilities and equipment to be adequate and the employees of the plaintiff to be fit and proper persons to supply the proposed service.

The Chief of Police transmitted the report of the investigating officer to the City Council with the Chief's recommendation that the application be denied. The significant portions of the report of the Chief of Police are as follows:

> "It is the opinion of this department that should the application of S & R Auto and Truck Service, Inc., be approved it will endanger the existing operation of the four wrecker companies presently engaged in tow-in service for the City of Charlotte.
>
> "Approval of this application will necessitate awarding S & R Auto and Truck Service, Inc. a portion of the existing wrecker zones. * * *
>
> "The police department is satisfied with the four wrecker companies now operating within the city and sincerely believe that any additional companies operating will endanger the existing conditions, and will cause dissension and unrest among the four companies now licensed to operate."

Thereupon the City Council denied the application.

The service presently rendered by the four wrecker companies, now operating within their respective zones, is adequate to meet the needs and requirements of the city. There is no evidence that the service so rendered is not good or that there have been com-

plaints concerning it. There is no evidence that the actions of the defendants or of the Chief of Police were malicious, arbitrary, capricious or unreasonable.

Clayton & London for plaintiff appellant.
J. W. Kiser and Paul L. Whitfield for defendant appellees.

LAKE, J. It is to be noted that the plaintiff is permitted by the city to carry on and does carry on, within the city, the business of towing disabled or other automobiles when requested to do so by the owners of the vehicles. We, therefore, do not have before us and we express no opinion as to the authority of a city to regulate or restrict the right to engage in such business or the charges to be made for such service. The "licensing" provisions of the ordinances now before us relate solely to towing service supplied upon the call of a police officer when the owner (or his representative) does not designate the "wrecker" to be called by the officer.

The plaintiff excepts to the court's finding that the service supplied by the four "wreckers" now "licensed" is adequate to meet the needs of the city and that there is no evidence to show that such service is not good or to show complaints with reference to it. This finding is supported by evidence in the record and is conclusive upon appeal. *Abney Mills v. Motor Transit Co.*, 268 N.C. 313, ... S.E. 2d .....; *Stewart v. Rogers*, 260 N.C. 475, 133 S.E. 2d 155. The plaintiff's exception thereto is, therefore, not sustained.

The trial court concluded that the City Council has no authority under the ordinance to issue a "license" until the application has first been approved by the Chief of Police and that the Chief of Police has no authority to approve the application until liability insurance policies required by the ordinance have first been procured. In our opinion, this is too strict and literal a construction of the provisions of these ordinances. Clearly, they require that the specified insurance contracts be in effect prior to the issuance of the "license." However, the evidence shows and the court found, that upon the filing of its application the plaintiff made it clear that it was ready, able and willing to procure the requisite insurance as soon as its application was approved. This is not questioned by the city in this record. It is quite clear that the sole reason for the denial of the application was that the service rendered by the four "wreckers" previously "licensed" was adequate, and to grant an additional "license" to the plaintiff would endanger the ability of the four companies already operating to continue to supply such service upon call by a police officer.

Upon this record the plaintiff must be and is deemed by us to

have adequate facilities and equipment, together with competent, trustworthy personnel, and to be ready, able and willing to supply prompt, efficient and reliable tow-in service for disabled automobiles within the area it proposes to serve.

The plaintiff is not seeking to compel the issuance to it of a license to do business with the public. That which is called a "license" in the ordinance, and by the plaintiff in this action, is not a permit to do business with whomsoever may seek or accept the licensee's services. It is simply a designation by the city of the "licensee" as the towing service operator to be called by the city's own police officer when the owner of the disabled vehicle cannot or does not select a towing service operator. It is nothing more than a determination by the city that the person or firm so designated is the person or firm it will employ to remove a vehicle from its street.

By statute all incorporated cities and towns of this State are empowered:

> "To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, * * * and for the performance of all municipal functions."
>
> "To make and enforce local police * * * regulations."
>
> "To * * * adopt such ordinances for the regulation and use of the streets * * * as it may deem best for the public welfare of the city."
>
> "To provide for the regulation, diversion and limitation of * * * vehicular traffic upon public streets."
>
> "To license and regulate all vehicles operated for hire in the city."
>
> "To * * * provide by ordinance that whenever any motor vehicle is abandoned upon the public streets * * * such vehicle may be removed * * * by or under the direction of a police officer * * *."

G.S. 160-200 (7), (10), (11), (31), (35), and (43). Unquestionably, a city may make provision for the removal of motor vehicles abandoned or disabled in its streets so as to promote the free flow of traffic therein. McQuillan, Municipal Corporations, 3rd Ed., §§ 24.618 and 24.628.

The record shows that each year approximately 8,000 automobile accidents occur on the streets of the City of Charlotte. It is a matter of common knowledge that a large number of the vehicles involved in these accidents are damaged to such an extent that they cannot be moved from the scene under their own power. In many instances, the owner or driver of the damaged automobile is a stranger

in the city or is injured so that he cannot promptly select and obtain the services of an operator of a tow-in vehicle. In all such cases, it is necessary that the vehicle be moved promptly from the street to an appropriate place for the safekeeping of the vehicle and its contents until the owner is in a position to make necessary arrangements for the care of his property. When the owner or driver of the disabled vehicle cannot or does not select a towing service, the city police must do so in order to facilitate the safe and ready flow of traffic along the city's streets. The police officer called to the scene of the accident must be able to obtain prompt towing service by one to whose care and custody the automobile and its contents may be entrusted. Such service must be available to the police officers at all hours and its availability must be assured for the future.

A city may, if it so desires, acquire and operate its own tow-in vehicles. In such case, it may direct its police officers to call city owned tow-in vehicles exclusively, where, as here, the owner of the disabled automobile makes no selection himself, and it may, in the interest of safety, forbid privately owned tow-in vehicles to go to the scene of an accident without first having been called by the owner of a disabled vehicle or by the police. *Hempstead T-W Corp. v. Town of Hempstead,* 13 Misc. 2d 1054, 177 N.Y.S. 2d 445; *Chattanooga v. Fanburg,* 196 Tenn. 226, 265 S.W. 2d 15, 42 A.L.R. 2d 1200; *Liegl v. San Antonio* (Tex. Civ. App.), 207 S.W. 2d 441; *City of Dallas v. Harris* (Tex. Civ. App.), 157 S.W. 2d 710.

In lieu of using its own vehicles for this purpose, a city may instruct its police officers to call a privately owned towing service. It may, no doubt, leave the selection of such service to the discretion of the officer at the scene of the accident, but the chaotic and dangerous conditions which may develop around the scene of an accident when the city elects to proceed in this matter are well portrayed in the opinions of the New York and Texas courts above cited. It is surely not unreasonable for the city to elect to relieve the officer investigating the accident from this further harrassment by designating the towing service which he is to call in all such cases.

In regulating the use of its streets for the conduct of its business, and in the issuance of true licenses permitting the holder to transact business thereon, it is well settled that a city may not discriminate between persons similarly situated in the absence of express statutory authority to do so. See *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650. This rule, however, has no application where the city is not issuing a true license but is merely selecting the person who is to be called upon by the city's own representative to render a service to the city; that is, to do an act which the city itself must do if it cannot obtain a satisfactory performance of it by another. It

is immaterial whether the service is to be paid for by the city or by some individual for whose benefit the city has the act done. In either event, where the city has an interest of its own in the performance of the service, the city may select the person who is to render the service. It is not required to parcel out such business among all who are ready, able and willing to perform such service adequately and thus spread its calls for assistance so thinly that it is not profitable for anyone to remain ready and able to respond. Indeed, this record shows that the plaintiff gave up its participation in the plan formerly in operation because the city did just that.

Thus, it is not unreasonable for the City of Charlotte to provide that a "license" shall not be issued for the service here in question unless the "public convenience and necessity" requires the service proposed by the applicant. In the absence of any indication to the contrary, this term, as used in the ordinance, must be held to have the same meaning as it has in the regulation of public utilities under Chapter 62 of the General Statutes. So interpreted, public convenience and necessity does not require a new supplier of a service in a field in which the existing suppliers are rendering adequate service which will be jeopardized by an additional competitor.

It does not follow, however, that the procedural requirements of Chapter 62 of the General Statutes for a determination of public convenience and necessity must be read into the ordinance here in question. This ordinance does not require the City Council to conduct a hearing in order to determine whether the public convenience and necessity requires the proposed service of the plaintiff.

We need not and do not now pass upon the question of what kind of a hearing, if any, must be held by a city in passing upon an application for a license or franchise to serve the public within the city. We hold only that there is no requirement that the city hold a hearing to determine that the city, in its corporate capacity, is now receiving adequate service from "wreckers" with whom it has made arrangements to respond to calls by its police officers and that it is not in the public interest to use the plaintiff's services. The Chief of Police and the City Council may reach such conclusion solely upon the experience and wisdom of the Chief and his staff if he and the Council so elect. If that decision be deemed to result in undue preference, the remedy is at the polls, not in the courts.

We have examined each of the plaintiff's assignments of error and we find therein no basis for disturbing the judgment rendered below. The court properly denied the writ of *mandamus* requested by the plaintiff.

Affirmed.

LUCILLE C. JONES v. ROBERT LEE HOLT AND ORVIS ELWOOD CARROLL.

(Filed 2 November, 1966.)

1. Automobiles § 44—

The burden is upon defendants upon the issue of contributory negligence and defendants must allege and prove facts sufficient to raise the inference of contributory negligence as a reasonable conclusion and not a mere conjecture in regard thereto.

2. Negligence § 25—

In determining the sufficiency of the evidence of contributory negligence to require the submission of that issue to the jury, defendant's evidence must be considered in the light most favorable to him, giving him the benefit of all reasonable inferences in his favor and disregarding plaintiff's evidence except insofar as plaintiff's evidence tends to show negligence on the part of the plaintiff as alleged in the answer as a contributing cause of the injury.

3. Automobiles §§ 9, 17—

Where the intersection of streets in a municipality has authorized electric traffic signals, requirements in regard to stopping are controlled by the traffic lights and not by G.S. 20-154(b).

4. Same—

When a motorist is faced by an amber light it cautions him that the red signal is about to appear and that it is hazardous to enter, and he may proceed into the intersection only if a stop at the stop line cannot be made in safety, and a provision of an ordinance that the driver of a vehicle faced with the amber light must stop before the nearest crosswalk if indicated by a stop line, but if the stop cannot be made in safety the driver might proceed cautiously across the intersection, will not be construed to require a driver "to run on the yellow" even though he may not be able to stop before encroaching upon the crosswalk when this may be done in safety.

5. Automobiles § 44—Evidence held insufficient to raise issue of contributory negligence in stopping suddenly when faced with amber traffic signal.

Defendant's evidence tended to show that plaintiff's automobile was at least 80 feet from the curb line when plaintiff was faced with a yellow traffic light, that she was moving 15 miles per hour, that at that speed it would have taken her nearly four seconds to clear the six-lane intersection, that the yellow light remained on for three seconds only, that if she had looked in her rear view mirror she would have seen defendant truck driver moving slowly upgrade some 20 feet behind her vehicle, and that she stopped suddenly without signal, bringing her vehicle to rest beyond the stop line but before its front reached the curb line of the intersecting street. *Held:* The evidence is insufficient to warrant the submission of the issue of contributory negligence to the injury in plaintiff's action for injury sustained when the truck crashed into the rear of her vehicle.

APPEAL by plaintiff from *Patton, E.J.,* at the 2 May 1966 Schedule "D" Session of MECKLENBURG.

This is an action for personal injuries alleged to have been received when the rear end of the automobile driven by the plaintiff was struck by a truck owned by the defendant Holt and driven by the defendant Carroll. Both vehicles were proceeding northwardly on South Cedar Street in the City of Charlotte toward the intersection of that street with West Trade Street. At the intersection a traffic light had been erected by the City of Charlotte pursuant to an ordinance. Carroll was driving the truck in the course of his employment by Holt and was following the automobile driven by the plaintiff.

The complaint alleges that the plaintiff brought her vehicle to a stop at the intersection in obedience to a red signal by the traffic light and that, after coming to a stop, her vehicle was struck in the rear by the truck, knocking it forward and causing her to sustain injuries. The plaintiff alleges that Carroll, and so Holt, operated the truck without maintaining a proper lookout, at a speed which was in excess of that which was reasonable and prudent under the prevailing conditions, followed the automobile of the plaintiff too closely, and failed to obey the traffic light. The answer denies negligence on the part of the defendants and pleads contributory negligence by the plaintiff in that she stopped suddenly and without warning, giving no signal of her intention to do so, and blocked the street in front of the truck.

The defendants moved in this Court for permission to amend their further answer, which motion is allowed. The amendment alleges that the ordinance of the City of Charlotte provides, as to a driver faced with a yellow light:

> "Yellow or 'caution.' A person driving a vehicle approaching the signal must stop before the nearest crosswalk at the intersection or at another point if indicated by a stop line, but if the stop cannot be made in safety, a vehicle may be driven cautiously through the intersection."

The amendment further alleges that the city had erected, pursuant to such ordinance, a traffic signal at the intersection which emitted red, yellow and green signals; and that the plaintiff violated the ordinance by failing to stop at the stop line marked on the pavement 20 feet back from the intersection, by making a stop which could not be made in safety, and by failing to drive into or through the intersection, which at the time was clear of traffic.

The plaintiff offered evidence tending to show:

Trade Street is 60 feet wide and has three lanes of traffic in each

direction at this intersection. The yellow signal remains on at this traffic light for three seconds. On Cedar Street, the edge of the pedestrian crosswalk, first reached by these vehicles, is marked by a white line 13 feet from the curb line of Trade Street, and the stop line is 7 or 8 feet further from the intersection.

The collision occurred about 10 a.m., the weather being clear and the pavement dry. The investigating police officer found the plaintiff's automobile in the crosswalk with its front end almost to the curb line of Trade Street, and debris at the rear of her vehicle 20 feet from the Trade Street curb line. There were no tire marks on the pavement.

The plaintiff drove along Cedar Street at a speed of 20 to 30 miles an hour in the block next preceding this intersection. The light was on the right hand side of the street. It turned yellow when the plaintiff was two car lengths or more from it. A car in front of her proceeded on through the intersection. When she got to the point where she was supposed to stop, the light was red and she stopped. She had been fully stopped for a second before her car was struck in the rear by the truck. At some point in the block preceding the intersection, she had seen the truck in her rear view mirror. It was then two car lengths behind her. She gave no hand signal of her intent to stop but applied her brakes.

The ordinance of the City of Charlotte was introduced in evidence and contains the provision above quoted.

The defendants offered evidence tending to show:

The truck was an International tandem dump truck with eight rear wheels. It was empty. It was following the plaintiff's car at a distance of about a truck length. Carroll saw the light turn to yellow. At that time the automobile was "past the stopping zone." (This evidently relates to the front end of the automobile.) Carroll intended to stop and applied his brakes when the light turned to yellow. The truck was then 20 feet behind the plaintiff's car and 40 feet from the intersection. It was going not over 10 miles an hour and its air brakes were in "working order."

The plaintiff began to stop when she was "right on" the pedestrian crosswalk. She was then past the stop line. When she came to a stop, the front of her car was "about even with the curb on Trade Street." The front wheels of the truck stopped on the stop line, just where Carroll expected to stop. The tail lights and one bumper guard were knocked off the plaintiff's automobile by the force of the collision but it was not knocked forward.

The plaintiff brought her car to a sudden stop. There was no indication that she was going to stop until her automobile had gotten "to or past" the stop line. There was traffic on Trade Street but at

the moment of the collision this traffic in all six of the traffic lanes was stopped for the lights facing it.

Over the objection of the plaintiff, the trial judge submitted to the jury the issue of contributory negligence.

The jury answered both the issue of negligence and the issue of contributory negligence in the affirmative. From the court's judgment denying recovery to the plaintiff, in accordance with the verdict, the plaintiff appeals, assigning as error the submission of the issue of contributory negligence and the court's instructions thereon.

Warren C. Stack for plaintiff appellant.
Helms, Mulliss, McMillan & Johnston for defendant appellees.

LAKE, J. A defendant, relying upon contributory negligence for his defense, must allege in his answer facts which, if true, constitute negligence by the plaintiff and must prove the negligence so alleged. G.S. 1-139; *Moore v. Hales,* 266 N.C. 482, 146 S.E. 2d 385. The burden of proof being upon the defendant, the issue of contributory negligence should not be submitted to the jury if the evidence is not sufficient to support an affirmative finding.

In determining the sufficiency of the evidence to justify the submission of this issue to the jury, we must consider the defendant's evidence in the light most favorable to him, draw therefrom all reasonable inferences in his favor, and disregard the evidence of the plaintiff except insofar as it tends to show negligence by the plaintiff as alleged in the answer. *Butler v. Wood,* 267 N.C. 250, 148 S.E. 2d 10; *Moore v. Hales, supra; Howell v. Lawless,* 260 N.C. 670, 133 S.E. 2d 508; *Kennedy v. Smith,* 226 N.C. 514, 39 S.E. 2d 380. However, the issue may not properly be submitted to the jury unless there is evidence from which the inference of contributory negligence may be drawn by men of ordinary reason, evidence which merely raises a conjecture being insufficient. *Bruce v. Flying Service,* 234 N.C. 79, 66 S.E. 2d 312. That is, the test is the same as that which is applied in passing upon a motion for judgment of nonsuit on the ground of the failure of the plaintiff's evidence to show negligence by the defendant, except with reference to the matter of causation, it being sufficient that negligence by the plaintiff be merely a contributing cause of the injury.

The material allegations of the answer are that the plaintiff "suddenly and without warning and without first seeing that she could do so in safety, and without giving any signal of her intention, and in violation of Section 20-154 of the General Statutes of North Carolina, stopped her car without giving the defendant Carroll the two or three extra steps of stopping distance that he needed to come

to a complete stop, and blocked the highway * * * unnecessarily, and * * * failed to keep a proper lookout."

The evidence, interpreted in the light most favorable to the defendants, shows: Trade Street is 60 feet wide from curb to curb and has six lanes of traffic, three in each direction. The yellow traffic light remains on at this intersection for three seconds. The stop line for vehicles on Cedar Street is 20 feet south of the curb line of Trade Street. The length of the plaintiff's car was 18 feet. Before reaching the intersection, the plaintiff had observed the truck in her rear view mirror, it then being two car lengths back of her. The defendant Carroll had a clear view of the traffic light and of the rear of the plaintiff's automobile. The truck was 40 feet south of the intersection when the light turned to yellow, and 20 feet behind the plaintiff's automobile, thus putting the front of her car virtually at the curb line of Trade Street. The air brakes of the truck were in good condition. It was empty. The plaintiff was then driving 15 miles per hour and the truck 10. Both were going slightly upgrade. The plaintiff stopped her car suddenly. It was not knocked forward, and its front wheels were practically at the curb line of Trade Street following the collision. The front wheels of the truck came to rest on the stop line painted on the pavement, but the front end of the truck protruded beyond that line and struck the rear of the plaintiff's automobile. The city ordinance with reference to the duty of a driver faced with a yellow light is as above quoted.

White v. Cothran, 260 N.C. 510, 133 S.E. 2d 132, dealt with a factual situation similar to the present except that in that case the municipal ordinance involved was not put in evidence. Denny, C.J., speaking for the Court, said:

> "In a factual situation like that presented on this appeal, the right of the plaintiff to enter the intersection involved and her duty to stop before entering such intersection, were controlled by the electrically operated traffic signal and not by G.S. 20-154(b).
>
> "* * * The meaning and force to be given to electrically operated traffic control signals, in the absence of a statute or ordinance, 'is that meaning which a reasonably prudent operator of an automobile should and would understand and apply. *Coach Co. v. Fultz,* 246 N.C. 523. Traffic signals of the kind here described are in such general use that it is, we think, well known by motor vehicle operators that a red traffic light is a warning that the highway is closed in order to permit those using the intersecting highway safe passage through the intersection. Hence, prudence dictates that he should stop. The mean-

ing of the amber light is likewise recognized. It cautions but not in the positive tones of the red light. It warns that red is about to appear, and that it is hazardous to enter. It affords those who have entered on the green light the opportunity to proceed through the intersection before the crossing traffic is invited to enter.' * * * *Wilson v. Kennedy,* 248 N.C. 74, 102 S.E. 2d 459."

The ordinance of the City of Charlotte does not change this meaning of the yellow traffc light except to the extent of permitting a driver faced with a yellow light to proceed into and through the intersection "cautiously," if, but only if, a stop at the stop line cannot be made in safety. The ordinance cannot fairly be construed to require the driver to proceed into a busy intersection when it would be dangerous to do so. A driver is not thus compelled by it to endanger himself, his passengers, and occupants of other vehicles merely to avoid encroachment upon the then unoccupied pedestrian crosswalk. In the absence of the most compelling language, an ordinance should not be construed to require a driver to "run on the yellow."

The defendants' evidence, itself, shows the rear end of the plaintiff's automobile was at least 80 feet from the far curb line of Trade Street when the yellow light appeared. She was moving 15 miles an hour. At that speed it would have taken her nearly four seconds to clear Trade Street, but the yellow light remained on only three seconds. To cross in safety she would have been obliged to increase her speed. The question is not whether it would have been negligence for the plaintiff to embark upon a crossing of Trade Street with its six lanes of traffic poised to move when the light facing them turned to green. The question is whether it was negligence for the plaintiff to hold back from such a venture.

At 15 miles per hour, the plaintiff could and did bring her vehicle to a complete stop before reaching the intersection, without injury to her passengers from the stop itself. No pedestrian was then upon the crosswalk. There was, therefore, no foreseeable risk of injury to anyone in the course of action which the plaintiff pursued, unless she should have foreseen that if she stopped she would be struck by the truck which was following her. The testimony of the defendant Carroll is that this truck was then proceeding 10 miles an hour upgrade, and 20 feet behind the rear end of the plaintiff's automobile, with the yellow traffic light plainly visible to its driver. The plaintiff's evidence is that at some point within the last block traversed by these vehicles, she looked in her rear view mirror and saw the truck following her "a couple of car lengths back."

The lookout she was required to maintain as she approached this

intersection was a lookout in the direction in which she was traveling, not a look into her rear view mirror. However, according to the defendants' evidence, if she had looked into her rear view mirror, she would have observed a very slowly moving truck 20 feet behind her automobile. At the most, she can only be held to the exercise of reasonable care in the light of what she would have seen if she had looked to her rear. Had she done so, she would have seen nothing to cause a reasonable person in her position to believe that the driver of this truck could not bring his vehicle to a stop in time to avoid colliding with her car. She was entitled to assume that the driver of the truck behind her had observed the yellow light, would see her brake light and would exercise reasonable care to bring his own vehicle to a stop. *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211. Denny, C.J., also said in *White v. Cothran, supra:*

> "When a motorist approaches an electrically controlled signal at an intersection of streets or highways, he is under the legal duty to maintain a proper lookout and to keep his motor vehicle under reasonable control in order that he may stop before entering the intersection if the green light changes to yellow or red before he actually enters the intersection. Likewise, another motorist following immediately behind the first motorist, is not relieved of the legal duty to keep his motor vehicle under reasonable control in order that he might not collide with the motor vehicle in front of him in the event the driver of the first car is required to stop before entering the intersection by reason of the signal light changing from green to yellow or red."

In view of the defendants' evidence with reference to the speed at which the two vehicles were traveling, the distance between them, the color of the traffic light, and the nature of the intersection facing the drivers, we find no evidence of negligence by the plaintiff in stopping her automobile rather than venturing forward into the intersection. It was, therefore, error to submit to the jury the issue of contributory negligence.

By reason of this error, the verdict and judgment must be vacated and the plaintiff awarded a new trial. The issues to be submitted at that trial and the instructions then to be given to the jury must, of course, depend upon the evidence then introduced. Since there must be a new trial, it is not necessary to consider the remaining assignments of error as the questions involved therein may not arise upon such new trial.

New trial.

HARVEL'S, INC., v. FRANK L. EGGLESTON.

(Filed 2 November, 1966.)

1. Damages § 12; Contracts § 26—

Ordinarily, a party's financial ability to respond in damages or pay an alleged debt is totally irrelevant to the issue of whether such party entered into the alleged contract for the purchase of goods, and the admission of evidence of such financial responsibility ordinarily will be held prejudicial except in cases warranting an award of punitive damages.

2. Same; Sales § 10—

Where plaintiff sues on a contract for the purchase and delivery of goods in a large sum, and defendant denies the contract, plaintiff is entitled to testify that defendant represented to him that he had a large monthly income and produced his bankbook in substantiation of the statement, since such testimony tends to show that defendant thus induced plaintiff to extend him credit and is a relevant circumstance in the negotiation of the contract as alleged by plaintiff.

3. Same—

Where plaintiff sues on an alleged contract of defendant to purchase furnishings for a house which he was providing for the benefit of his daughter, and that defendant constituted his daughter his agent for the selection of the furnishings, defendant's denial that he had ever told his daughter he was giving her a home and furnishings renders competent testimony by the daughter that defendant had told her he intended to remarry and that he and his prospective bride would occupy a certain bedroom in the house, since such testimony tends to establish the circumstances surrounding the negotiation of the alleged agreement.

4. Appeal and Error § 41—

Exception to the admission of testimony is waived when testimony of the same import is thereafter admitted without objection.

5. Evidence § 58—

Where defendant denies many of the conversations asserted by plaintiff in the negotiations which plaintiff asserts resulted in the contract in suit, plaintiff is entitled to ask defendant on cross-examination in regard to an incident occurring at the time of one of the conversations in order to refresh defendant's memory.

6. Trial § 40—

The form and sufficiency of the issues is largely in the discretion of the trial court, and when the issues submitted bring into focus each defense alleged by defendant and allow him to present his contentions fully, and embrace all of the essential questions in controversy, defendant's objection that the court submitted improper issues cannot be sustained.

7. Principal and Agent § 4—

When plaintiff introduces evidence tending to establish the agency and that the agent was authorized to execute the contract in suit in behalf of the principal, the burden devolves upon the principal to show that he thereafter terminated the agency or limited the agent's authority.

APPEAL by defendant from *Gwyn, J.*, March 21, 1966 Civil Session of FORSYTH.

Action to recover $9,125.05 with interest from June 5, 1965, the balance allegedly due on an account for goods sold and delivered upon defendant's order.

Plaintiff's evidence tends to show the following facts: In February 1965, defendant came to plaintiff corporation's retail furniture store and informed Claude C. Harvel, its president and manager, that he had determined to give his daughter, Mrs. Frances Carter, a house in Greensboro and to furnish it completely. Mr. Harvel agreed with defendant that plaintiff would provide an interior decorator to assist Mrs. Carter in selecting furnishings of her choice, and—if all purchases were made from plaintiff—to allow defendant a 25% discount from the retail price on the total bill. Defendant told Harvel that he had an income of $32,500.00 a month and was financially able to do "whatever he needed to do for Mrs. Carter." In corroboration, he exhibited to Harvel a bankbook showing monthly deposits. In his presence, defendant called Mrs. Carter and told her of the arrangements which he had just made with plaintiff. Defendant told Harvel to keep the bill "as low as he could," and Harvel promised defendant an estimate in a few days.

On the next day, defendant returned to the store with a lady named Lucy and requested Mr. Harvel to purchase two English bicycles for them. (This purchase was made and defendant paid for the bicycles.) At that time, Harvel told defendant that a "quick analysis" showed it would cost between $15,000.00 and $16,000.00 to furnish Mrs. Carter's house. Defendant told him to proceed but to hold the cost down as low as possible. He added, however, that he wanted the house to be a showplace and one of the finest homes in Greensboro. Several days later, defendant returned to inform plaintiff that he had instructed his daughter to furnish a basement playroom, two outside porches, and a patio—areas which had not been included in the estimate. Harvel informed defendant that the cost of furnishing these additional areas would be over and above the estimate. Defendant said that he understood this and that Harvel should go ahead, that he would pay whatever it cost—but to keep the cost as low as possible.

As a result of this conversation, plaintiff furnished, upon Mrs. Carter's orders, merchandise in the total amount of $26,008.37. This sum was reduced by credits to $25,589.59, as shown by the itemized bill which plaintiff rendered defendant. Defendant expressed satisfaction with the furniture and plaintiff's charges for it. On April 5, 1965, defendant gave plaintiff his check for $15,589.59 and the following statement (plaintiff's Exhibit 41), which he wrote out in

Harvel's presence, "Bal. due $10,000.00 to be paid on or before June 5, 1965." At that time, all the furnishings purchased had not been delivered, and defendant instructed plaintiff to complete delivery as quickly as possible.

Thereafter plaintiff heard nothing further from defendant until the latter part of May 1965, when he came to the store with his attorney and told Harvel that he had had a disagreement with his daughter; that he was not going to allow her to remain in the home he had provided for her; and that he had no further need for the furnishings. He requested plaintiff's assistance in disposing of the merchandise already delivered, instructed him to make no more deliveries, and asked him to cancel all orders for undelivered merchandise and to credit his account with those charges. The undelivered merchandise represented special orders which plaintiff declined to cancel. Later, however, plaintiff was able to cancel one order and to credit defendant with $199.95. Upon the instructions of defendant's attorney, plaintiff sold for $675.00 a pool table which Mrs. Carter had purchased at $1,174.20. The sum of these two items, $874.95, reduced the balance to $9,125.05 for which it sues.

Mrs. Carter testified as a witness for plaintiff, against her father. She stated, *inter alia,* that during the time plaintiff was furnishing the house, defendant frequently urged her to hurry the job, saying, "I want to come in with you." Early in April, after an argument with his son-in-law, defendant went to Florida, where his daughter was unable to reach him. She moved out of the house after "getting a notice from a justice of the peace."

Defendant alleged that he had authorized no purchases in excess of $15,000.00; that he had paid plaintiff $15,589.59; and that he owed it nothing more. His testimony tended to show:

About March 31, 1965, as an investment, he purchased a house in Greensboro in his own name and made a contract with plaintiff to furnish it *for him* at a cost not to exceed $10,000.00. This sum included the services of an interior decorator as well as the cost of curtains and draperies, and plaintiff agreed to sell defendant all items at cost plus 15%. Defendant told his daughter that Mr. Harvel would know the kind and price of the furniture which she should get. He "left it all up to Mr. Harvel and not to Frances," and told them both that he was not going to spend over $10,000.00 to furnish the house. He never said that he wanted a showplace; he did not give his daughter the furniture in question, nor did he tell her he was giving her the house. He never had an income of $32,500.00 a month and made no such statement to Mr. Harvel; he was not separated from his second wife.

After defendant made the contract with plaintiff, he went to

Pennsylvania on business. When he returned, he found that Harvel had "overloaded Frances with furniture." She had purchased two television sets and a pool table, and the house was crowded with furniture which it did not need. As a result of his protest, his daughter's husband "blew up" and "went to cursing," and he told defendant that if he never again put his foot back in the house he would be happy. Although Harvel had exceeded his authorization by more than 50%, defendant paid plaintiff $15,589.59, and gave it another check in the amount of $2,600.00, payable to the interior decorator. He paid these sums because he felt "like it was that much furniture in the house. . . ." but he still wanted plaintiff to take back the furniture which Mrs. Carter did not need to keep house and to settle with him on the basis of cost, plus 15%, according to their original agreement. When Mr. Harvel attempted to get him to sign a note for the $10,000.00 balance he claimed defendant owed, he refused. Plaintiff's Exhibit 41 was not intended as an acknowledgment of indebtedness; on the contrary, it was merely defendant's notation that plaintiff claimed a balance due of $10,000.00, and that it had requested payment by June 5th. Defendant either left this paper on Mr. Harvel's desk by mistake or dropped it before leaving.

Plaintiff and defendant each tendered issues, but the court formulated its own, which the jury answered as follows:

"1. Did the defendant, Frank Eggleston, authorize and empower Frances Eggleston Carter to act as his agent and did she act within the scope of her authority in selecting and purchasing the furniture, furnishings, wares, merchandise and services, as alleged in the complaint?

ANSWER: Yes.

"2. Did the plaintiff, Harvel's, Incorporated, enter into an agreement with the defendant, Frank Eggleston, under which the defendant purchased, by and through his agent, Mrs. Frances Eggleston Carter, goods, wares, household furnishings, services and accessories, as alleged in the complaint?

ANSWER: Yes.

"3. Did the defendant, Frank Eggleston, limit the authority of his agent, Mrs. Frances Eggleston Carter, and the plaintiff, Harvel's Incorporated, to the sum of $15,000.00 in price for the purchase and deliveries of the goods, wares, merchandise, furniture, furnishings and services, as alleged in the answer?

ANSWER: No.

"4. What was the contract price of the goods, wares, merchandise, furnishings, furniture, accessories and services actually delivered?

ANSWER: $21,477.62.

"5. What was the contract price of the goods, wares, merchandise, furniture, furnishings, services and accessories purchased by the defendant but which were not delivered?

ANSWER: $4,275.72.

"6. Did the defendant wrongfully refuse to accept delivery of the goods, wares, merchandise, furniture and furnishings purchased in excess of $15,000.00, as alleged in the complaint?

ANSWER: Yes.

"7. Did the defendant, Frank Eggleston, authorize the sale of the pool table for the sum of $675.00 and the crediting of his account with that amount?

ANSWER: Yes.

"8. What credits, including any payments of money, are the defendant entitled to have applied in reduction of his account?

ANSWER: $16,464.54.

"9. What amount, if anything, is the plaintiff entitled to recover of the defendant?

ANSWER: $9,288.80."

The court entered judgment upon the verdict and defendant appealed.

Booe, Mitchell and Goodson by William S. Mitchell for plaintiff appellee.

Block, Meyland & Lloyd by A. L. Meyland and Henry H. Isaacson for defendant appellant.

SHARP, J. The testimony of Mr. Harvel, plaintiff's president and manager, that defendant told him he had a monthly income of $32,500.00, and was well able to pay for the furniture he had ordered, was admitted over defendant's objection and exception. He assigns its admission as error, contending that Harvel's testimony, together with the cross-examination which resulted from defendant's contradiction of it, presented him to the jury as a rich man, able to indulge an extravagant daughter, and that such testimony was fatal to his defense.

Certainly, standing alone, evidence that an individual is financially able to make a specified purchase is not evidence tending to show that he made it. Ordinarily, a party's financial ability to respond in damages, or to pay an alleged debt, is totally irrelevant to the issue of liability; and the admission of evidence tending to establish such ability is held to be prejudicial, except in cases warranting an award of punitive damages. See *Electric Company v. Dennis,* 259 N.C. 354, 130 S.E. 2d 547; *Edwards v. Finance Com-*

pany, 196 N.C. 462, 146 S.E. 89; *Shepherd v. Lumber Co.,* 166 N.C. 130, 81 S.E. 1064. Here, however, the testimony that defendant told plaintiff he had a specified monthly income was not offered to establish defendant's financial worth. Defendant's production of his bankbook and representation that he had a monthly income of $32,500.00 was intended to induce plaintiff to extend him credit. The incident was an integral part of the negotiations which culminated in the contract in suit. Ordinary business prudence would have required plaintiff to ascertain defendant's financial condition before undertaking his commission to furnish Mrs. Carter's house according to her taste, and to make it a showplace. When defendant denied the contract upon which plaintiff sues, plaintiff was entitled to show the relevant circumstances and negotiations which resulted in the alleged agreement. Other evidence pertaining to defendant's financial worth was elicited without objection, and defendant testified that his annual income was less than $20,000.00.

Defendant also assigns as error the refusal of the court to strike testimony by Mrs. Carter that defendant, in April 1965, intended to marry Lucy and that he had told his daughter they would occupy a certain bedroom in the new house. Counsel's basis for the motion to strike the first statement was, "How does she know what he intended?" — a question directed to the court. Mrs. Carter answered by saying that defendant had told her. The basis of the motion to strike the second statement was that it was not responsive to the question. Notwithstanding, defendant's denial that he ever told Mrs. Carter he was giving her a home and furnishing it for her made this evidence relevant to the inquiry. Furthermore, in view of the other testimony relating to Lucy and defendant's separation from his second wife which was admitted without objection, it cannot reasonably be asserted that these two items prejudiced defendant's defense. Mrs. Carter testified, without objection, that defendant was separated from his second wife, who had not been friendly with her; that he was going to marry Lucy, who, along with defendant, had visited her for a week during the first of April when they had all been happy in the new house; and that his purpose in buying Mrs. Carter a house was to enable him and Lucy to visit her and all his grandchildren together. Mrs. Carter had seven children. Six by a former marriage were in the custody of her first husband. She also testified, without objection, that it was after defendant had given Lucy a "Stingray" (Corvette automobile) that he gave her permission to buy the pool table for her husband. Defendant did object, however, to questions put to him on cross-examination which suggested that Lucy had expressed a desire for a Corvette when she saw one in front of plaintiff's store when she accompanied defend-

ant on one of his trips there while plaintiff was furnishing the house. Defendant had denied many of the conversations which Mr. Harvel testified he had had with him, and he was indefinite as to the number of times he went to plaintiff's store. The questions with reference to the Corvette were an attempt by plaintiff's counsel to refresh defendant's recollection as to one of the visits he had made to plaintiff's store. The court was careful to instruct the jury that this evidence related "only to the circumstances under which the defendant is alleged to have contacted and dealt with Mr. Harvel with relation to the matters set forth in the complaint." The evidence was competent for that purpose.

The second question which defendant discusses in his brief is whether the court submitted improper issues to the jury. Defendant excepted to the court's issues, but he did not include in his case on appeal those which he had proposed. Neither does he, in his brief, suggest the proper issues. The ultimate question posed in this action is, "In what amount, if any, is the defendant indebted to the plaintiff?" Obviously, however, the disputed facts upon which plaintiff's right to recover depends could not be resolved upon that one issue. *Yates v. Body Co.*, 258 N.C. 16, 128 S.E. 2d 11. The detailed issues which the court submitted brought into focus each defense which defendant had alleged and allowed him to present his contentions fully. The court is not required to adopt any particular form of issues; it is only required that those which are submitted embrace all the essential questions in controversy. *O'Briant v. O'Briant*, 239 N.C. 101, 79 S.E. 2d 252. Defendant's assignment of error relating to the issues is not sustained.

The third question presented—did his Honor err in charging the jury that the burden of proof upon the third issue was upon defendant?—is answered No. It is often said that it behooves one who deals with a purported agent to ascertain correctly two things: (1) that he actually is an agent, and (2) the extent of his authority. *Edgewood Knoll Apartments v. Braswell*, 239 N.C. 560, 80 S.E. 2d 653. Wherever the existence of the relationship of principal and agent is denied, the burden of proof is upon the party asserting the existence of the relationship. 3 Am. Jur. 2d, Agency § 348 (1962). Once the existence of the agency and the extent of the authority is established, however, the burden devolves upon the principal to show that he thereafter terminated the agency or limited the authority —and this is true whether the agency be general or special. *Research Corporation v. Hardware Co.*, 263 N.C. 718, 140 S.E. 2d 416; *Bank v. Howell*, 200 N.C. 637, 158 S.E. 203. See 3 Am. Jur. 2d, Agency § 349 (1962). Here, the jury's answers to the first two issues established Mrs. Carter's authority to purchase from plaintiff such fur-

niture as she should select for her house. The burden then passed to defendant to show that he thereafter limited her authority and notified plaintiff of the limitation.

> "In an action against a principal for the purchase price of goods sold and delivered to his agent, the seller has the burden of proving the authority of the agent to bind the principal; but after such authority has been sufficiently proved or admitted, the principal has the burden of proving that the authority had been limited or revoked and that the limitation or revocation had been brought to the attention of the seller." 3 C.J.S., Agency § 317(2) (1936), p. 261.

It is noted, however, that the judge placed the burden of proof upon the sixth issue on plaintiff. We perceive no material difference between these two issues, both of which were answered against defendant.

Our consideration of this case was rendered more laborious by appellant's failure to comply with Rule 28 of the Rules of Practice in the Supreme Court of North Carolina. His brief contains no reference to the exceptions upon which the assignments of error discussed therein were based, and no reference to the printed pages of the transcript on which those exceptions appear. Notwithstanding, we have considered each assignment of error brought forward and discussed in defendant's brief. Each is overruled.

In the trial, we find

No error.

FAY HOLBROOK BASS v. JOHN OLIVER McLAMB AND MARILYN S. McLAMB.

(Filed 2 November, 1966.)

1. Automobiles § 41e—

Evidence that defendant was sitting in his car in a snow storm, that the car was standing in the ruts in the snow for traffic going in his direction and was covered with snow, and that defendant took no precaution to warn travelers of the presence of his car, *is held* sufficient to be submitted to the jury on the issue of negligence proximately causing an accident when plaintiff's vehicle collided with the rear of defendant's vehicle.

2. Automobiles § 10—

Where a motorist is traveling within the statutory speed limit, G.S. 20-141(b), his failure to stop his vehicle within the radius of his lights or the range of his vision will not be held for negligence or contributory negligence *per se*, but is only evidence to be considered with other circumstances in the case. G.S. 20-141(e).

3. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom.

4. Automobiles § 42d— Evidence held not to show contributory negligence as matter of law in hitting rear of vehicle covered with snow stopped on highway.

Plaintiff's evidence tending to show that she was driving in a snow storm in ruts made by other vehicles on the highway, that she could see a distance of from one to four car lengths, depending on the wind, that her maximum speed was 20 miles per hour, that her windshield wipers were operating and her lights were on, and that she suddenly came upon a vehicle standing in the ruts and covered with snow three or four car lengths in front of her, and was unable to stop before colliding with the rear of the vehicle, *is held* not to disclose contributory negligence as a matter of law, it being for the jury to determine whether plaintiff operated her automobile at a speed greater than was reasonable under the circumstances, failed to keep the vehicle under proper control, or failed to maintain a reasonable lookout.

APPEAL by plaintiff from *Peel, J.*, January 19, 1966 Civil Session of WILSON.

Plaintiff instituted this action to recover compensation for personal injuries resulting from a collision between the motor vehicle operated by her and a 1959 Plymouth automobile owned by Marilyn S. McLamb, which was operated by and in the control of the defendant John Oliver McLamb.

The plaintiff offered evidence tending to show that on 26 February 1963, plaintiff was employed at the Wilson Clinic, Wilson, North Carolina. Snow started to fall about noon on that date, and she left work at about 4:00 o'clock P.M. in order to return to her home at Lucama at an earlier hour than usual because of the inclement weather. She proceeded toward her home in a southerly direction on Highway 301. The highway was covered with snow, and she traveled in "ruts" made by other automobiles. Her visibility was such that she could see a distance of from one to four car lengths, depending on the wind. Her maximum speed was 20 miles per hour; her windshield wipers were operating; and either her headlights or parking lights were on.

Plaintiff testified in pertinent part as follows: "All at once this outline of a car loomed up in front of me and about that time a gust

of wind blew the snow in front of me. I tried to turn out. The car would not turn. I applied my brakes and the car would not stop. The car I saw was covered with snow and had no burning lights. It was stopped in the ruts of other cars right where I had been traveling. I drove slow and easy. I took my foot off the accelerator when the gust of snow came up and traveled three or four car lengths before I saw the car. My car was slowing down. When I applied brakes the car skidded and hit the parked automobile."

There was testimony from the highway patrolman who investigated the accident that he drove from Wilson to the scene of the accident in the late afternoon shortly after it occurred. He did not need or have chains on his car at that time. He drove about 20 to 25 miles and hour and "wouldn't want to go much faster than 25 miles an hour as the top safe speed." The patrolman testified that although it was darker than usual, it was not dark enough to require headlights. He further stated that when he arrived at the scene, the defendant was sitting in his automobile; he had the odor of alcohol about him; and in his opinion the defendant was intoxicated. At the point where he found the automobiles involved in the collision, the road was straight for some distance, traveling north and south, and there was a dip at a point just before the place of the collision.

Other evidence showed there were no lights or other means of warning to indicate the defendant's car was stopped in the ruts of the road, and that the car was covered with snow.

At the conclusion of plaintiff's evidence the trial court allowed defendants' motion for judgment as of nonsuit. The plaintiff appealed, assigning error.

Gardner, Connor & Lee, by David M. Connor for plaintiff, appellant.

J. R. Barefoot and Lucas, Rand, Rose and Morris by Z. Hardy Rose for defendants, appellees.

BRANCH, J. There are two questions for determination by the Court: (1) Does the evidence offered by the plaintiff make out a case of actionable negligence against the defendants? (2) Does the plaintiff's evidence, considered in the light most favorable to her, show that she was contributorily negligent as a matter of law?

Appellees do not seriously argue the question of whether there is sufficient evidence offered by the plaintiff to make out a case of actionable negligence against the defendants. However, we might observe in passing that our Court in the case of *Saunders v. Warren*, 267 N.C. 735, 149 S.E. 2d 19, held: " '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."

The record discloses sufficient evidence to allow submission to the jury of the issue of actionable negligence of the defendants.

We must therefore determine the principal question presented for decision: Does the plaintiff's evidence, considered in the light most favorable to her, show that she was contributorily negligent as a matter of law?

The General Assembly of 1953 amended G.S. 20-141(e) by adding thereto the proviso "that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits described by G.S. 20-141(b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

The appellees contend, with merit, that the provisions of this section do not dispense with the duty of the operator of a motor vehicle to operate the motor vehicle with due care.

This Court interpreted this amendatory act in the case of *Burchette v. Distributing Co.,* 243 N.C. 120, 90 S.E. 2d 232, where Winborne, J. (later C.J.), speaking for the Court, said: ". . . if the driver of a motor vehicle who is operating it within the maximum speed limits prescribed by G.S. 20-141(b) fails to stop such vehicle within the radius of the lights of the vehicle or within the range of his vision, the courts may no longer hold such failure to be negligence *per se,* or contributory negligence *per se,* as the case may be, that is, negligence or contributory negligence, in and of itself, but the facts relating thereto may be considered by the jury, with other facts in such action in determining whether the operator be guilty of negligence, or contributory negligence, as the case may be. However, this provision does not apply if it is admitted, or if all the evidence discloses, that the motor vehicle was being operated in excess of the maximum speed limit under the existing circumstances as prescribed under G.S. 20-141(b)."

There was no evidence that the vehicle operated by plaintiff exceeded the maximum speed limit prescribed by G.S. 20-141(b). Therefore, the mere failure to see the snow-covered automobile on the highway in time to avoid the collision is not sufficient to support conclusively the defendants' allegations of contributory negligence. We must look to the record for other evidence to determine whether plaintiff failed to act with reasonable prudence.

"One is not negligent *per se* in driving an automobile on a highway covered with snow or ice. . . . The skidding of an automobile is not in itself, and without more, evidence of negligence." *Wise v. Lodge,* 247 N.C. 250, 100 S.E. 2d 677.

We recognize the well-established rule that "A motion for judgment of nonsuit on the ground of contributory negligence will be granted only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom." *Johnson v. Thompson, Inc.,* 250 N.C. 665, 110 S.E. 2d 306.

There are two lines of decisions in our Reports involving highway accidents, which turn on the question of contributory negligence. See *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251, and *McClamrock v. Packing Co.,* 238 N.C. 648, 78 S.E. 2d 749. One line of decisions holds that contributory negligence as a matter of law bars recovery, and the other line holds that contributory negligence is an issue for the jury. In examining these cases we find that they primarily turn on factual differences.

Parker, J. (now C.J.), speaking for the Court in the case of *Privette v. Lewis,* 255 N.C. 612, 122 S.E. 2d 381, in reference to these two lines of authority, stated: "Without attempting to analyze and distinguish the reasons underlying the decisions in those cases, they illustrate the fact that frequently the point of decision was affected by concurrent circumstances, such as fog, rain, glaring headlights, color of vehicles, etc., and that these conditions must be taken into consideration in determining the question of contributory negligence and proximate cause. 'Practically every case must "stand on it own bottom. (Citing cases)." ' "

In a *per curiam* opinion in the case of *Montford v. Gilbhaar,* 265 N.C. 389, 144 S.E. 2d 31, where plaintiff drove into a cable extending across the highway from a tow-truck to a wrecked car, which cable was difficult to see because of light and color, the Court held: "It is a jury question whether plaintiff operated his automobile at a speed greater than was reasonable and prudent under the circumstances, failed to keep his vehicle under proper control, or failed to maintain a reasonable lookout and should have seen the cable under prevailing weather conditions, *and the similarity of the*

color of the cable and the road. Nonsuit on the issue of contributory negligence should be denied when opposing inferences are permissible from plaintiff's proofs." (Emphasis added)

There was a similar factual situation in the case of *Thomas v. Motor Lines,* 230 N.C. 122, 52 S.E. 2d 377, where there was evidence tending to show that a tractor was standing on its right of the highway with headlights shining down its lane of travel, but the trailer was cross-ways on the highway, without lights burning. The driver of a car approaching from the opposite direction had his headlights tilted down to avoid blinding motorists traveling in the opposite direction. He did not see the unlighted trailer in time to avoid the collision because the night was dark, rain and sleet were falling, and the trailer was spattered with mud, covered with sleet, or blended with the surrounding darkness. The evidence was held sufficient to warrant the jury's finding that the driver of the car acted as a reasonably prudent person and, therefore, to justify denial of motion to nonsuit on the ground of contributory negligence.

We are cognizant of the recognized law that a motorist is not required to anticipate that an automobile will be stopped on the highway ahead of him at night, without lights or warning signals required by statute, but this does not relieve him of the duty of exercising reasonable care for his own safety, of keeping a proper lookout, and proceeding as a reasonably prudent person would under the circumstances to avoid a collision with the rear of a vehicle stopped or standing on the road. *Privette v. Lewis, supra.*

It is a jury question whether plaintiff operated the automobile at a speed greater than was reasonable and prudent under the circumstances, failed to keep the vehicle under proper control, or failed to maintain a reasonable lookout and should have seen the snow-covered automobile under the existing weather conditions and the snowy surroundings.

The judgment of involuntary nonsuit is

Reversed.

W. B. SHOPE v. E. E. BOYER; PARTS DISTRIBUTORS WAREHOUSE, INC., A CORPORATION; J. R. HARRIS; DAVIE AUTO PARTS CO., INC., A CORPORATION; MOTOR SUPPLY, INC., A CORPORATION; ROWAN AUTO PARTS, INC., A CORPORATION; S. B. NORTON; NORTON-RUSS AUTOMOTIVE COMPANY, A CORPORATION; T. B. BROOKS; TOM'S AUTO SUPPLY OF OXFORD, INC.; A CORPORATION; TOM'S AUTO SUPPLY OF ROXBORO, INC., A CORPORATION; MOTOR SUPPLY CO., INC., A CORPORATION; O. D. HUNT; AUTO SUPPLIERS, INC., A CORPORATION; W. K. REYNOLDS; GATE CITY AUTO PARTS COMPANY, A CORPORATION; V. R. WHITLEY; WHITLEY AUTO SUPPLY CO., A CORPORATION; O. O. HARRILL; SANFORD AUTO SUPPLY, INC., A CORPORATION; J. HOLMES DAVIS, JR.; JEWELL-STRICKLAND AUTO PARTS COMPANY, INC., A CORPORATION; AND E. C. HOWELL.

(Filed 2 November, 1966.)

1. Contracts §§ 12, 21—

The complaint alleged that customers of a distributing company desiring from time to time to purchase some of their requirements from the named distributor agreed to maintain on deposit with the distributor an ascertainable sum to guarantee payment. *Held:* The obligation of the customers was to maintain the required deposits to guarantee payment of those purchases the customers desired to make from time to time, and in the absence of allegation that the customers failed to maintain the required deposits or failed to purchase from the distributor some of their requirements or such of them as they desired, the complaint fails to allege breach of the contract.

2. Same—

Where customers obligate themselves to maintain a deposit to guarantee payment of such items as they desire to purchase from the named distributor, allegations that the customers subscribed to stock in a competing business does not allege any unlawful or tortious act or breach of contract.

3. Conspiracy § 1—

An action for civil conspiracy will not lie for a mere conspiracy alone, but only to recover the damages resulting from wrongful or unlawful acts committed pursuant to the conspiracy.

4. Conspiracy § 2— Complaint for civil conspiracy which fails to allege any wrongful act committed pursuant to conspiracy is demurrable.

Plaintiff alleged that he was employed by a distributor, that defendants were customers of the distributor and under obligation to maintain a deposit with the distributor to guarantee payment for such items as the customers desired from time to time to purchase from the distributor, and that defendants entered into an unlawful conspiracy to bankrupt the distributor, and thus injure plaintiff in his contract of employment with the distributor by depriving it of its customers, and that defendants purchased stock in a competing business. *Held:* In the absence of allegation that the defendants failed to place such orders with the distributor as they desired, that they failed to maintain the deposit required by the contract, or did any overt wrongful act pursuant to the conspiracy, the complaint fails to state a cause of action and demurrer was properly sustained.

APPEAL by plaintiff from *Riddle, S.J.*, May 23, 1966 Schedule D Session, MECKLENBURG Superior Court.

The plaintiff instituted this civil action against the individual and the corporate defendants named in the caption. Each individual defendant is alleged to be the executive officer of the corporation immediately following his name. The complaint contains 47 paragraphs. In material substance it alleges: That prior to the institution of this action the defendants, as jobbers, were engaged in the sale and distribution of automotive parts in North Carolina. On May 29, 1961, Automotive Parts Central Warehouse, Inc., (A. P. Central) was incorporated "for the purpose of serving automotive jobbers in the State of North Carolina with merchandise and stock in the automobile replacement parts business." On June 21, 1961, the plaintiff entered into an employment contract with A. P. Central in which he agreed to serve as its president and principal officer for a period of 10 years. He was to receive two per cent of all purchases billed to A. P. Central. Each of the defendants had knowledge of the terms of the plaintiff's contract.

Each corporate defendant as "customer" entered into a written contract with A. P. Central as "seller," a copy of which was attached to and made a part of the complaint in this action. The contract provided:

> "WHEREAS, Seller (A. P. Central) is engaged in the business of buying, selling and warehousing automobile parts and other products; and
> "Whereas, Customer (each defendant) *desires* from time to time to purchase *some* of its requirements of such parts and other articles as are warehoused and sold by the Seller; (emphasis added)
> "NOW, THEREFORE, in consideration of Seller's selling automobile and other parts from time to time to the undersigned, Customer hereby agrees to maintain on deposit with the Seller the sum of ($5,000.00) to guarantee payment of its accounts by the 10th of each month."

The contract further provided that the deposit should be maintained at 1½ times the monthly purchases, the seller to be charged with interest at six per cent on the deposit. Customer may advise seller it will no longer purchase merchandise from seller and desires a return of the deposit. The seller shall have six months in which to return the deposit in cash or in merchandise.

The plaintiff pitches this cause of action upon the alleged conspiracy of the defendants to violate the above designated contract.

The complaint alleges:

"32. During the spring and summer . . . of 1964 each individual defendant, for himself and in behalf of each corporate defendant . . . entered into an unlawful agreement and conspiracy to deprive A. P. Central of all its legitimate customers, to prevent A. P. Central's Suppliers from selling to A. P. Central, in order to render A. P. Central unable to perform its contract of employment with the plaintiff . . .

"38. The corporate defendant, Parts Distributors Warehouse, Inc., was formed on October 12, 1964, and, on or about said date, the defendants herein became stock subscribers in said corporation with the corrupt, tortious and unlawful intent to breach their own contracts with A. P. Central, thereby causing A. P. Central's bankruptcy, all of said scheme having been executed with the design and intent to destroy the plaintiff's contract of employment with A. P. Central.

"42. The defendants herein pursued the common goal of forcing A. P. Central into bankruptcy in order that the plaintiff's contract of employment, by virtue of the defendants having intentionally and corruptly forced A. P. Central into bankruptcy for the purpose of damage to the plaintiff, entitles the plaintiff to recover punitive damages . . ."

The plaintiff asks for $3,917.41 in actual damages, for loss of benefits to the date of filing the complaint, and $3,176.32 per month thereafter, and for $667,027.20 punitive damages.

The defendants filed a demurrer to the complaint upon these grounds:

(1) It fails to allege facts sufficient to constitute a cause of action in that the contract, which is a part of the complaint, obligated the defendant to do no more than purchase some of its requirements from A. P. Central, the amount of the purchases to be determined by customer, and to keep on deposit a fund to guarantee the payment of the accounts. The contract obligated the customer to make purchases in accordance with *its desires.* Plaintiff was not a party to the contract, and acquired no legal rights under it.

(2) Any cause of action in favor of A. P. Central arising under the contract would exist in favor of A. P. Central and pass to the trustee in bankruptcy and became a matter for the United States District Court in the bankruptcy proceeding.

(3) The complaint fails to allege that any defendant committed any overt or unlawful act, or any lawful act in an unlawful manner pursuant to the conspiracy. The terms of the defendants' contracts with A. P. Central required each defendant to purchase only according to its desires. The seller is given no right to require customer to

do anything specific except keep on deposit a sum sufficient to pay its accounts.

(4) The allegations of the complaint repeat and re-repeat conclusions without alleging any wrongful act sufficient to support any of the conclusions that plaintiff has a cause of action against any defendant.

Judge Riddle sustained the demurrer. The plaintiff declined to amend and announced its purpose to rely on the sufficiency of his complaint. He excepted to the order sustaining the demurrer and appealed.

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

Helms, Mulliss, McMillan & Johnston by Fred B. Helms for defendant appellees.

HIGGINS, J. The demurrer challenges the complaint as fatally defective in factual averments. These defects appear upon its face. Attached to and made a part of plaintiff's basic pleading is a copy of the contract between A. P. Central as seller, and each corporate defendant as customer. The plaintiff alleges the defendants conspired to violate the attached contract. The contract provides:

> "WHEREAS, Customer *desires* from time to time to purchase *some* of its requirements of such parts and other articles as are warehoused and sold by the Seller and Customer agrees to maintain on deposit with the Seller the sum of $5,000.00 to guarantee payment." (emphasis added)

The complaint does not allege any customer failed to purchase from A. P. Central some of its requirements or such of them as it desires; or failed to keep on deposit a sum sufficient to guarantee payment of its accounts. Facts are not alleged which permit the inference that any defendant breached the contract. In any event, even if the complaint alleged a cause of action for breach, it would be in favor of A. P. Central—not the plaintiff.

The complaint further alleges that defendants conspired to bankrupt A. P. Central by subscribing to stock in Parts Distributors Warehouse, Inc. Again, facts are not alleged from which it may be inferred that any defendant by subscribing to stock in a competing business violated the contract with A. P. Central, or any duty to plaintiff arising by contract or otherwise. The complaint fails to allege any unlawful or tortious act of any defendant giving rise to a cause of action in the plaintiff's favor or that the plaintiff has any right to assert any cause which A. P. Central might have against any defendant.

The plaintiff appears to rely on his charge of conspiracy. However, he fails to allege any overt, tortious, or unlawful act which any defendant committed in furtherance of the conspiracy. In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all. *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783; *Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577.

The complaint concludes that each defendant, by subscribing to stock in Parts Distributors Warehouse, Inc., thereby breached the contract between A. P. Central and the defendants. Again, facts constituting a breach are not alleged. The conclusion is therefore unwarranted. *McNeill v. Hall,* 220 N.C. 73, 16 S.E. 2d 456.

The rule of law involved is discussed by Bobbitt, J., in *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125:

> "Attention is called to certain relevant general principles. 'Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable.' 11 Am. Jur., 577, Conspiracy, sec. 45. To create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to the scheme and in furtherance of the objective. 15 C.J.S. 100, Conspiracy, sec. 5. *Muse v. Morrison,* 234 N.C. 195, 66 S.E. 2d 783; *Holt v. Holt,* 232 N.C. 497, 61 S.E. 2d 448."

We must judge the sufficiency of the complaint by the facts alleged and not by pleader's conclusions. *Bennett v. Surety Co.,* 261 N.C. 345, 134 S.E. 2d 678. The repeated use of the words combined, conspired, and agreed together to injure the plaintiff, are but conclusions of the pleader and without the allegation of the overt acts the complaint is insufficient to state a cause of action and cannot survive the demurrer. *Bennett v. Surety Co., supra; Jewell v. Price,* 259 N.C. 345, 130 S.E. 2d 668; *Burns v. Oil Co.,* 246 N.C. 266, 98 S.E. 2d 339; *Kirby v. Reynolds,* 212 N.C. 271, 193 S.E. 412.

We conclude that the complaint fails to state any cause of action which exists in favor of the plaintiff against any of the defendants. The judgment sustaining the demurrer is

Affirmed.

CARRIE YOUNG v. BOBBY L. BARRIER AND WIFE, DELORES BARRIER.

(Filed 2 November, 1966.)

1. Master and Servant § 22—

The employer is not an insurer of the safety of his employee but is liable for injury to the employee resulting from the employer's negligence in failing to exercise ordinary care under the circumstances to provide the employee a reasonably safe place to work and prevent the employee from being subjected to unreasonable risks or dangers, and the duty to exercise such care is absolute and nondelegable.

2. Master and Servant § 24—

Where the employer has actual or constructive notice of a hidden defect constituting a danger to the safety of the employee in performing his duties, and the employee is not warned of the defect and has no knowledge thereof, the employer is ordinarily liable for injuries to the employee proximately resulting therefrom.

3. Master and Servant § 22—

The general common law principles governing the liability of a master for injury to his servant applies to domestic servants.

4. Master and Servant §§ 22, 23— Whether employer was liable for injuries to employee in fall when rotten railing broke held for jury.

Defendants are husband and wife who had employed plaintiff as a domestic servant. The evidence tended to show that the *feme* defendant demonstrated the method and instructed the plaintiff to sweep under a porch railing by leaning over the railing, that the railing at the place where it was attached to the post was rotten but that it had been painted over so that the defect was not observable, and that as plaintiff was sweeping under the railing by leaning over it as instructed the railing broke loose from the post on account of the railing's rotten condition, causing plaintiff to fall to her injury. *Held*, the evidence was sufficient to be submitted to the jury on the issue of defendants' negligence and does not disclose contributory negligence as a matter of law on the part of plaintiff.

APPEAL by plaintiff from *Lupton, J.*, March 1966 Civil Session of DAVIDSON.

Civil action to recover damages for personal injuries allegedly caused by defendants' actionable negligence in failing to provide plaintiff, their domestic servant, a reasonably safe place to work.

Defendants filed a joint answer in which they admit, as alleged in the complaint, that on and prior to 10 September 1963 they were husband and wife and resided with their minor children in their home near the corporate limits of the city of Thomasville; that plaintiff was employed by them as a domestic servant to perform washing, cleaning, sweeping, mopping, and other domestic work in their home; and that at all times alleged in the complaint plaintiff worked under the direct supervision of the defendants, and especially under the direction and supervision of the *feme* defendant, who, at all times complained of in the complaint, was the wife of the male defendant and acted as his agent in directing plaintiff in the performance of all domestic work. In their answer they deny all essential elements of negligence alleged in the complaint, and pleaded contributory negligence of plaintiff as a bar to recovery.

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

W. H. Steed for plaintiff appellant.

Roberson, Haworth & Reece by Arthur M. Utley, Jr., and David L. Maynard for defendant appellees.

PARKER, C.J. Plaintiff's evidence, considered in the light most favorable to her, and giving her the benefit of all reasonable inferences to be drawn therefrom, and the judicial admissions in the answer *(Norburn v. Mackie,* 262 N.C. 16, 136 S.E. 2d 279), would permit a jury to find the following facts:

On 10 September 1963 plaintiff was employed by defendants as a domestic servant to perform ordinary domestic work in defendants' home, which included sweeping floors and looking after defendants' children. Prior to that date she had worked for defendants one to three days a week as defendants requested her services. The front porch of defendants' home is about six feet above the ground. The porch had a top railing consisting of a board connected with a post at the west end of the porch and running horizontally several feet to and connecting with another post, and running horizontally from that post several feet to and connecting with the outside wall of a room of defendants' home. The top of this railing came up to about plaintiff's hips. Beneath the top board was a similar board, which was about five inches from the floor of the porch, running horizontally and connected with the same posts and the same wall of defendants' home. Between these boards at frequent intervals were wooden slats. Hay for small ponies was kept by defendants on this porch. On the morning of 10 September 1963 Mrs. Barrier told plaintiff that Sherry, her small daughter, had just started walking

and she might pick up something from the porch and get it in her mouth, and she took a broom, leaned over the railing, and asked her to sweep underneath good and not to leave anything for the baby to get in her mouth. At the time there was no furniture on the porch, except one chair in which Sherry was sitting. After Mrs. Barrier instructed her how to clean out from under this railing by taking the broom and leaning over and outside the railing, she went in the house to get ready to carry the other children to the kindergarten.

Plaintiff at the time weighed about 240 pounds. She took a broom and started at the west end of the porch right where the railing connected with the post. She leaned over the railing to clean beneath it, as Mrs. Barrier had instructed her to do, and the railing, which was rotten, came apart from the post and she fell from the porch six feet to the ground. A piece of the railing or bannister was lying across her body, and it was rotten, completely rotten. About six months before, this railing had been painted and the paint was over the rotten places so she could not see the rotten places in the railing.

In the fall her collarbone was broken and her right leg was hurt. By reason of her injuries she could not get up from the ground and lay there about 20 or 25 minutes. About 10 minutes after she fell, Mr. Barrier came running around the house to where she was lying on the ground. He told her he was sorry she was hurt, and it was his fault, that the railing should have been fixed when he painted it about six months previously. Since the *feme* defendant lived in the same house with her husband, the jury could draw the legitimate inference that the rotten condition of this railing before it was painted was also known to her.

According to the judicial admissions in the answer and the evidence, defendants were the employers of plaintiff and she was their employee on the day she was injured, and when injured she was leaning over the railing to the front porch and attempting to sweep beneath it within the course and scope of her employment, as she was specifically shown and directed to do by Mrs. Barrier, when the railing, because of its rotten condition, broke loose where it was connected with the post at the west end of the porch, resulting in plaintiff's falling six feet to the ground.

Actionable negligence on the part of the employer is essential to his liability at common law for an injury sustained by his employee when acting in the course and scope of his employment. The employer, however, is not an insurer of his employee's safety while engaged in the performance of duties within the scope of his employment. *Fore v. Geary*, 191 N.C. 90, 131 S.E. 387; *Muldrow v. Weinstein*, 234 N.C. 587, 68 S.E. 2d 249; 3 Strong's N. C. Index, Master and Servant, § 22.

It was the legal duty of defendants, employers of plaintiff, under the allegations and proof to exercise the care of an ordinary prudent man under like circumstances to provide plaintiff a reasonably safe place to work, and to prevent her from being subjected to unreasonable risks or dangers. *Kientz v. Carlton,* 245 N.C. 236, 96 S.E. 2d 14; *Baker v. R. R.,* 232 N.C. 523, 61 S.E. 2d 621; 3 Strong's N. C. Index, Master and Servant, § 22. This duty is absolute and nondelegable. *Smith v. Granite Co.,* 202 N.C. 305, 162 S.E. 731; 56 C.J.S., Master and Servant, § 186.

When an employee has been directed by his employer to work in a place that is unsafe and dangerous because of a hidden or concealed defect and the employer has actual or constructive notice of the defect and the employee is ignorant of it, the employer as a general rule is liable for exposing the employee to a peril of which he had no knowledge when it proximately results in injury to the employee. *Cole v. R. R.,* 199 N.C. 389, 393, 154 S.E. 682, 685; 56 C.J.S., Master and Servant, § 244; 35 Am. Jur., Master and Servant, §§ 149 and 184; Prosser, Law of Torts, 3d Ed., pp. 546-48.

The general common law principles governing the liability of a master for injury to his servant have been applied in cases involving domestic servants. *Devens v. Goldberg,* 33 Cal. 2d 173, 199 P. 2d 943; *Gordon v. Clotsworthy,* 127 Colo. 377, 257 P. 2d 410, 49 A.L.R. 2d 314; elaborate annotation 49 A.L.R. 2d 317, entitled "Duty and liability of employer to domestic servant for personal injury or death"; 35 Am. Jur., Master and Servant, § 138; 56 C.J.S., Master and Servant, § 201.

In *Devens v. Goldberg, supra,* the Court, *inter alia,* held, as stated in headnotes in the Pacific Reporter:

> "In action against employer for injuries sustained by cleaning woman when porch railing gave way while she was shaking rug, whether a defective condition in railing existed, whether a reasonable inspection would have revealed the defect, and what constituted a reasonably adequate inspection under ceircumstances were questions for jury."
>
> "It is common knowledge that all wooden structures are liable to get out of repair and that exercise of care is necessary to guard against the wear and tear of use and time."

In the lower court a judgment was entered for the defendant notwithstanding a verdict for Katherine Devens, the plaintiff, and the plaintiff appealed. The prior opinion is reported in 189 P. 2d 859. The Supreme Court of California sitting *en banc* reversed the judgment of the trial court and directed the trial court to enter judgment for the plaintiff in accordance with the verdict.

Under the judicial admissions and the evidence, the jury could find that plaintiff was a domestic servant of defendants, and that the *feme* defendant in directing and showing her how to lean over and to sweep under the railing to the front porch was acting as her husband's agent; that the defendants breached their absolute duty to provide her a reasonably safe place to work in instructing and showing her how to lean over and to sweep under the railing of the front porch when they knew that the railing where it connected with the post on the west end was rotten, and when they knew that this rotten condition of this railing was covered with paint so that plaintiff could not know of it or see it, and all this constituted a breach of the duty which the defendants under the circumstances owed her, and when she leaned over the railing to sweep beneath it in the course and scope of her employment, as she was instructed to do by *feme* defendant, it broke loose from the post at the west end because it was rotten, and she fell to the ground; that this rotten condition of the railing which was concealed from her and known to defendants proximately caused her injuries; and that the breach of duty defendants owed her was such that a reasonably prudent man would have foreseen it would likely be productive of injury. The evidence clearly tends to show actionable negligence on the part of both defendants.

What is the proximate or a proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant facts and 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. The uncontradicted evidence in the record before us shows that plaintiff was attempting with a broom to lean over and to sweep beneath the railing on the front porch as she was directed to do by the *feme* defendant, who at the time was acting as an agent for her husband; that the railing, because of its rotten condition, broke loose where it was fastened to the post at the west end of the front porch; that the rotten condition of the railing was covered over with paint so that plaintiff could not see it or could not know of it; and that when the railing broke loose plaintiff fell to the ground. Considering plaintiff's evidence in the light most favorable to her, *Short v. Chapman*, 261 N.C. 674, 136 S.E. 2d 40, it cannot be said that it establishes as a matter of law that plaintiff failed to exercise ordinary care for her own safety and legal contributory negligence on her part so clearly that no other conclusion can be reasonably drawn therefrom.

The judgment of compulsory nonsuit was improvidently entered, and is

Reversed.

STATE v. WARREN WALTER McKISSICK, JR.

(Filed 2 November, 1966.)

Criminal Law § 116— Additional instruction held prejudicial as coercing jury to reach verdict notwithstanding conscientious convictions of minority.

After the jurors had deliberated for several hours the court called them back and instructed them to the effect that the jury should consider the case until it exhausted every possibility of an agreement, that disagreement of the jury would require a retrial at further expense, that the court could not and did not want to force or coerce an agreement, but that it was the duty of the jury to reach a verdict if possible, and that they should retire and consider the matter further. *Held:* In the absence of an instruction to the effect that no juror should surrender his conscientious convictions or his free will and judgment in order to agree, the additional instruction must be held prejudicial as susceptible to the construction by the minority that it should surrender its conscientious convictions in order to reach a verdict.

APPEAL by defendant from *McLean, J.*, 9 May 1966 Criminal Session of MECKLENBURG.

Criminal prosecution upon an indictment charging defendant on 10 February 1966 with robbery by the use of a deadly weapon, to wit, a pistol, of Richard Neff of $89 in lawful money of the United States, a violation of G.S. 14-87.

Plea: Not guilty. Verdict: "Guilty of armed robbery as charged in the bill of indictment."

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, and Trial Attorney Robert G. Webb for the State.

Charles V. Bell and J. Levonne Chambers for defendant appellant.

PARKER, C.J. The State and defendant offered evidence. The judge charged the jury. After the jury had deliberated in their room for several hours, the judge had them brought back into the courtroom and asked them if they had agreed upon a verdict. The jury answered, No. The court then charged them as follows, which defendant assigns as error:

> "Well, members of the jury, a Judge cannot discharge a jury lightly. You must consider this case until we have exhausted every possibility of an agreement.
>
> "I presume you realize what a disagreement means. It means that this case will have to be retried at further expense.
>
> "I do not want to force or coerce you into agreement and

could not if I wished to do so. But still it is your duty as intelligent men and women to consider the evidence, reason the matter over among yourselves and come to an agreement.

"A mistrial is always a misfortune in any case or to any County.

"Jurors, if they cannot render a verdict, are entirely useless.

"It is the duty of jurors, if possible, to render a verdict and I hope you can retire and consider the matter further, reason with each other as intelligent men and women and come to an agreement. You may retire."

Defendant contends that the above quoted statement from the charge was coercive and intimidating, and compelled an unwilling jury, or part of them, to surrender their unfettered and unbiased judgment, and reach and return a verdict.

In *Wissel v. United States,* 22 F. 2d 468, it is said: "The cases all recognize that the surrender of the independent judgment of a jury may not be had by command or coercion. . . . A judge may advise, and he may persuade, but he may not command, unduly influence, or coerce."

In *Trantham v. Furniture Co.,* 194 N.C. 615, 140 S.E. 300, Brogden, J., with his usual accuracy and clarity, speaking for the Court said: "It [the verdict of a jury] should represent the concurring judgment, reason and intelligence of the entire jury, free from outside influence from any source whatever. The trial judges have no right to coerce verdicts or in any manner, either directly or indirectly, intimidate a jury."

An instruction in substantially identical words as here was found no ground for a new trial by this Court in *S. v. Brodie,* 190 N.C. 554, 130 S.E. 205, with the exception that in the *Brodie* case the judge did not instruct the jury, as the judge did in this case, as follows: "You must consider this case until we have exhausted every possibility of an agreement."

In *S. v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552, the court instructed the jury as follows:

"That this case took a good little time to try and about a half a day in the argument and the charge of the court and some jury in this county have to pass on it, and you have been selected and sworn to decide, and it is your duty to decide it because it is an expense to the county to retry it. And it is your duty to try to come to some agreement. I am not trying to force you to agree on this case and you may go back to the jury room and continue your deliberations. . . . Remember about

the expense of this case and the fact that someone has to try it. You are intelligent men and can try it as well as any men in the county."

In finding no error in this charge, the Court said:

"While his Honor in the case at bar told the jury 'it is your duty to decide it,' he immediately followed this instruction with the words 'it is your duty to *try* to come to some agreement,' and 'I am not trying to force you to agree.' "

In *S. v. Barnes*, 243 N.C. 174, 90 S.E. 2d 321, this Court in a *Per Curiam* opinion found no error in the following charge to a jury which had been out several hours without arriving at a verdict (We have copied the quoted part of the charge from the case on appeal on file in the office of the clerk of this Court.):

"Gentlemen of the Jury, if you may reconcile any differences you may have under the evidence and render a verdict, the court would express the hope that you do so. If this jury fails to render a verdict, it would then become necessary to call upon another jury to pass upon the case. I have no reason to believe that another would have more intelligence or be better qualified than this jury to make the decision. *Even so, the court would have the jury bear in mind that each person is the keeper of his own conscience, and the court would not have a juror to do violence to his own conscience in order to render a verdict.* You may retire and deliberate further." (Emphasis ours.)

In *S. v. Green*, 246 N.C. 717, 100 S.E. 2d 52, the Court found no error in the following charge to a jury which had been out for some time without arriving at a verdict (We have copied the quoted part of the charge from the case on appeal on file in the office of the clerk of this Court.):

"Gentlemen of the Jury, *I don't want any member of the jury to surrender any conscientious opinion* that he has about this matter, but you know the reason we select a jury and let twelve jurors discuss the case is so that each member of the jury can express his opinion, and also consider the opinion of his fellows. It is very rare that all twelve would have the same opinion to begin with. We want the benefit of your combined judgment, and it may be that you have an idea that you want your fellow members to consider. Maybe some of the others have ideas that you ought to consider. In the final analysis, Gentlemen, we are seeking to determine the truth of the mat-

ter, and so far as I know you gentlemen have all the information or all of the evidence available in the case. If we should have a failure of agreement now, it would mean that the case would have to be tried over again, which would mean added expense, and in its final analysis, some twelve men are going to have to decide this case, and inasmuch as you gentlemen have all the evidence any other twelve would have, I am hoping that you can determine it, *but as I stated at the outset, I do not ask and would not permit a single one of you gentlemen to participate in a verdict that did not reflect your conscientious opinion. I don't ask or want you to do that.* I do want you to consider the views of your fellows. I might say there is not any reason to hurry in the case. This is a two weeks term, and you have until Saturday night. You don't have to hurry, but suppose you go out and try it again, and don't give up too soon." (Emphasis ours.)

In *In re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1, the jury had deliberated for approximately seven and one-half hours and had been unable to arrive at a verdict. The trial judge caused them to return to the courtroom and delivered the following instruction to them, which this Court held was without error:

"I presume you gentlemen realize was (what) a disagreement means. It means, of course, that it will be another week of the time of the Court that will have to be consumed in the trial of this action again. I don't want to force you or coerce you in any way to reach a verdict, but it is my duty to tell you that it is the duty of the jurors to try to reconcile their differences and reach a verdict *if it can be done without any surrender of one's conscientious convictions.* You have heard the evidence in the case. A mistrial, of course, will mean that another jury will have to be selected to hear the case and evidence again. And the Court recognizes the fact that there are sometimes reasons why jurors cannot agree. *The Court wants to emphasize the fact that it is the duty of jurors to do whatever they can to reason the matter over together as reasonable men and to reconcile the difference, if such is possible, without the surrender of conscientious convictions and to reach a verdict.* I will let you resume your deliberations and see if you can." (Emphasis ours).

"What amounts to improper coercion of a verdict by a trial court necessarily depends to a great extent on the facts and circumstances of the particular case and cannot be determined by any general or definite rule. . . . In urging the jury to agree on a ver-

dict, the court should emphasize that it is not endeavoring to inject its ideas into the minds of the jurors and that by such instruction the court does not intend that any juror should surrender his own free will and judgment, and these ideas should be couched in language readily understood by the ordinary lay juror." 89 C.J.S., Trial, § 481, p. 128. See elaborate annotation in 85 A.L.R. 1420, entitled "Comments and conduct of judge calculated to coerce or influence jury to reach verdict in criminal case."

The instruction in the *Barnes* case, the instruction in the *Green* case, and the instruction in the case of *In re Will of Hall* were each to the effect that no juror should surrender his conscientious conviction in order to agree on a verdict. The challenged instruction in the instant case begins in the second sentence with the words, "You must consider this case until we have exhausted every possibility of an agreement," and fails to instruct the jury that no one of them should surrender his conscientious convictions or his free will and judgment in order to agree upon a verdict. The challenged instruction might reasonably be construed by a minority of the jury as coercive, suggesting to them that they should surrender their well-founded convictions conscientiously held or their own free will and judgment in deference to the views of the majority, and concur in what really is a majority, rather than a unanimous, verdict. See *United States v. Rogers*, 289 F. 2d 433.

Defendant is entitled to a

New trial.

HERMAN LANGLEY v. INDIANA LANGLEY.

(Filed 2 November, 1966.)

1. Appeal and Error § 19—

An assignment of error which is not based on an exception duly appearing in the record is ineffectual.

2. Appeal and Error § 21—

An exception to the judgment is sufficient basis for consideration of an assignment of error that the court erred in failing to find facts sufficient to support its order denying defendant's motion to vacate the judgment.

3. Appeal and Error § 22; Attorney and Client § 3—

Defendant moved to vacate judgment for plaintiff, entered by the court upon waiver of jury trial, on the ground that she had not authorized her attorney to abandon her defense. The court denied the motion without finding the facts and there was no request for findings. *Held:* It will be

presumed that the court on proper evidence found facts sufficient to support the judgment, including a finding that defendant's attorney was authorized to abandon defendant's defense, and the denial of the motion to vacate the judgment will not be disturbed.

4. Divorce and Alimony § 13—

In a suit for divorce on the grounds of separation, defendant having been personally served with summons, the judge, in the absence of a request for a jury trial filed prior to the call of the action for trial, has authority to hear the evidence, answer the issues, and render judgment thereon. G.S. 50-10 as amended by Chapter 540, Session Laws of 1963. This rule applies equally to contested and uncontested divorce actions.

APPEAL by defendant from *Bundy, J.*, April 11, 1966, Civil Session of LENOIR.

The hearing below was on a motion by defendant to vacate a judgment of absolute divorce entered herein by his Honor, Rudolph I. Mintz, Judge presiding, at the April 1965 Session of Lenoir Superior Court.

This action for absolute divorce on the ground of two years separation was commenced by summons issued July 23, 1964, and personally served on defendant on July 24, 1964. The complaint contains the usual allegations as to residence, marriage and separation. Defendant, in an answer filed in her behalf by David S. Henderson, Esq., a member of the Craven County Bar, pleaded as an affirmative defense and as ground for allowances for reasonable subsistence and counsel fees that the separation of plaintiff and defendant on July 8, 1962, was caused solely by plaintiff's wilful abandonment of defendant.

By order dated September 22, 1964, his Honor, Joseph W. Parker, Judge holding the courts of the Eighth Judicial District, denied a motion by defendant for alimony *pendente lite.*

The judgment of absolute divorce entered by Judge Mintz is dated April 21, 1965, and in pertinent part provides:

"It appearing to the court that this is an action for absolute divorce upon the grounds of two years' separation and that personal service of summons, together with a copy of the complaint filed herein was had upon the defendant, Indiana Langley, by the Sheriff of Pamlico County, North Carolina; and

"It further appearing to the court that this action was instituted subsequent to July 1, 1963, and that neither the plaintiff nor the defendant has filed any request for a jury trial prior to the call of the action for a trial and that the same may, therefore, be heard by the presiding judge at said term of court; and

"It further appearing to the court that the defendant filed an answer in this case denying the material allegations thereof, but

that the defendant, through her attorney, personally appeared before the court and advised the court that they did not wish to pursue the defense in the case, though such defense had been interposed in good faith; and

"It affirmatively appearing to the court upon the evidence adduced at the hearing and the court finding the facts to be as follows:

"1. Were the plaintiff and the defendant married as alleged in the complaint? ANSWER: Yes.

"2. Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the commencement of this action? ANSWER: Yes.

"3. Have the plaintiff and the defendant lived separate and apart from each other for more than two years next preceding the commencement of this action? ANSWER: Yes.

"NOW, THEREFORE, on motion of Lamar Jones, Attorney for the plaintiff, it is ordered, adjudged and decreed that the plaintiff be and he is hereby granted an absolute divorce from the defendant, and the bonds of matrimony heretofore existing between the plaintiff and the defendant be and they are hereby dissolved."

Defendant's motion to vacate said judgment was filed in her behalf by her present counsel. The sole question of fact raised by defendant's said motion and plaintiff's answer thereto was whether defendant had authorized her former counsel, David S. Henderson, Esq., to advise Judge Mintz in open court that defendant "did not wish to pursue the defense" to plaintiff's action for absolute divorce.

Judge Bundy's order, after preliminary recitals, provides:

". . . and the court, after hearing all the evidence and argument of counsel, being of the opinion that said judgment of divorce should not be set aside;

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant's motion in the cause be and the same is hereby in all respects overruled and denied."

Defendant excepted and gave notice of appeal.

Lamar Jones for plaintiff appellee.

Charles L. Abernethy, Jr., for defendant appellant.

BOBBITT, J. Under the heading "Assignments of Error," defendant lists eight *contentions*. However, the exception to the judgment, noted in the appeal entries, is the only exception appearing in the record. An assignment of error is ineffectual unless based on an exception duly noted in apt time. *Vance v. Hampton,* 256 N.C. 557,

561, 124 S.E. 2d 527, 530; 1 Strong, N. C. Index, Appeal and Error § 19.

In the appeal entries, defendant was allowed thirty days in which to serve case on appeal; and plaintiff was allowed twenty days thereafter in which to serve countercase or exceptions. The record before us contains what purports to be a narrative of testimony of defendant and what purport to be affidavits. The record does not show defendant served a case on appeal on plaintiff or that a case on appeal was settled by agreement or otherwise. We accept the record in its present condition as sufficient to indicate that defendant offered evidence in support of her motion and that plaintiff offered evidence (including the affidavit of David S. Henderson, Esq., defendant's former counsel) in opposition thereto.

Prerequisite to decision on defendant's motion was a determination on conflicting evidence as to Mr. Henderson's authority in respect of his representations to Judge Mintz. Mr. Henderson's status as counsel for defendant at April 1965 Civil Session and prior thereto is not challenged. Obviously, the sole basis of Judge Bundy's order is a finding of fact that defendant expressly authorized her said former attorney to abandon defendant's contest of plaintiff's action for an absolute divorce.

Included in defendant's "Assignments of Error" is the following: "Judge Bundy erred in not finding facts in dismissing the motion in the cause." The exception to the judgment affords a sufficient basis for consideration of this assignment of error. However, such assignment of error is without merit. The record indicates, and counsel for defendant so stated upon the oral argument, that no request was made that Judge Bundy make findings of fact.

The general rule, applicable here, is well settled: "When there is no request for findings of fact and the court makes none, or none appear of record, it will be presumed that the court on proper evidence found facts sufficient to support (the) judgment." 1 Strong, N. C. Index, Appeal and Error § 22, p. 96, where numerous supporting cases are cited; also, 1 Strong, N. C. Index, Appeal and Error § 49, p. 136. This general rule was held applicable in the determination of a motion to vacate a consent judgment on the ground the attorney who consented thereto on behalf of the movant did not have authority to do so. *Gardiner v. May,* 172 N.C. 192, 89 S.E. 955. It is noted that the court, *upon request therefor,* is required to make and set forth in the judgment or order the essential findings of fact on which it is based. *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287. For exceptions to the general rule, see *Morris v. Wilkins,* 241 N.C. 507, 514, 85 S.E. 2d 892, 897; and *S. v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569.

Defendant having been personally served with summons, and no request for a jury trial having been filed prior to the call of the action for trial, the right to have the facts determined by a jury was waived; and the action was for trial without a jury. Under these circumstances, the presiding judge hears the evidence, answers the issues and renders judgment thereon. G.S. 50-10 as amended by Chapter 540, Session Laws of 1963. It is noted that G.S. 50-10 as amended by the 1963 Act applies equally to contested and uncontested divorce actions.

For the reasons stated, Judge Bundy's order denying defendant's said motion is affirmed.

Affirmed.

MRS. ELMA JONES PETREE, WIDOW OF THOMAS GILBERT PETREE, DECEASED, v. DUKE POWER COMPANY.

(Filed 2 November, 1966.)

1. Master and Servant § 93—

While the findings of fact of the Industrial Commission are conclusive when supported by any competent evidence, exception to a finding must be sustained when the finding is not supported by any competent evidence in the record.

2. Trial § 22—

An inference may not be based upon another inference.

3. Evidence § 51—

A hypothetical question to an expert may not assume as true a fact which is not in evidence.

4. Master and Servant § 54— Testimony of expert upon hypothesis not supported by facts in evidence cannot support finding of Industrial Commission.

The evidence tended to show that intestate in the course of his employment climbed a pole on which there was a transformer and wires, that a witness heard him utter a groan and looked up and saw intestate's body hanging by his safety strap, but did not see any sparks, flashes or smoke, or smell anything. There was evidence that intestate had a heart condition, and all of the evidence tended to show that at the time there was no current in the wires or transformer on the pole. *Held:* The evidence is insufficient to support a finding that an electric shock was a contributing cause of death, notwithstanding expert testimony based upon assumption not shown by the evidence that if intestate came into contact with an electric current the shock could have caused his death.

APPEAL by plaintiff from *Crissman, J.*, at December 19, 1965, Civil Session, DAVIDSON Superior Court.

Thomas Gilbert Petree was employed by Duke Power Company for some 38 years as an "A Class Service Man." His duties consisted of maintenance work and trouble shooting and required that he climb poles several times a week in connecting and disconnecting service to customers. He used pole climbers or hooks and a safety belt while working at the top of the poles. On 12 May, 1962, he went to the plant of Celand Yarn Company to disconnect the electrical power while Paul Sink, an electrical contractor, removed some switches. In connection with his work the deceased climbed a pole which had on it a transformer and several wires running to the cross-arm. One Toy Haywood who was working near by "heard some groans—just a loud groan" and he looked up and Mr. Petree was dead and hanging on the pole by his safety belt.

Upon examination of the body of the deceased the Coroner of Davidson County stated the cause of death was coronary occlusion, and with reference to the autopsy report, stated that "Examination revealed no burns on body or any evidence of electrical shock."

Further reference to the facts appears in the opinion.

Mr. Petree's widow filed claim with Duke Power Company for an award under the terms of the Workmen's Compensation Act. The hearing commissioner found that deceased was some 15 feet from the ground and close to the wires when he received an electrical shock which resulted in his immediate death, and concluded as a matter of law that he was injured by accident by electrocution arising out of and in the course of his employment. Upon appeal to the full commission his report was affirmed, and thereupon defendant appealed to the Superior Court of Davidson County, where the Court found that there was no competent evidence to support the award and reversed the Commission.

The plaintiff assigned errors and appealed.

H. I. Spainhour and Schoch, Schoch & Schoch for plaintiff appellant.

George W. Ferguson, Jr., Carl Horn, Jr., Walser, Brinkley, Walser & McGirt for defendant appellee.

PLESS, J. It is so well settled that if there is *any* evidence upon which the Commission can base its findings they must be upheld we need cite no authorities. But it is equally correct that the Commission's findings must be supported by *some* evidence.

To continue with more fundamentals: Deductions and opinions may be based only upon assumed facts — not inferences. And it is

certain that inferences cannot be founded upon inferences. Therein lies the weakness and fallibility of the plaintiff's case. Upon a hypothetical question she elicits an opinion from Dr. Max P. Rogers that the deceased came to his death from coming into contact with an electric current which then produced cardiac standstill. *But,* in order to obtain this answer, the hypothetical question assumes as true that which is not in evidence. In fact it presupposes the result the plaintiff must prove — that the deceased came into contact with static electricity. The question to Dr. Rogers was: "Doctor, if the Court should find from the evidence, by its greater weight, that Thomas Petree, in November, 1957, or prior thereto, had suffered a cardiac condition * * * and that the condition continued up to and through, including May 12, 1962, and that at that time he sustained a coronary occlusion having come into contact with electric current, do you have an opinion satisfactory to yourself and to a reasonable medical certainty what could have caused his death?" "A. I feel with reasonable medical certainty an electric shock could have caused his death." Another hypothetical question put to Dr. Rogers included the assumption that "he came into contact with static electricity" which produced the answer that "It would be my opinion that this man came into contact with an electrical current which then produced cardiac standstill resulting in death." Nowhere in the evidence is there anything to support the plaintiff's premise. On the contrary, the evidence is overwhelming (most of it being adduced on cross-examination of the plaintiff's witnesses) that all the current was disconnected which could have gone to the transformer or wires on the pole where Mr. Petree was working.

Summarizing the evidence of every witness to the event offered in behalf of the plaintiff we get the following: Toy Haywood first saw the body of deceased "hanging up there." He heard him groan and saw him on the pole, heard an "unh", but no kind of popping sound, nor did he see any sparks, flashes, or smoke, or smell anything.

Mrs. Bonnie Jordan of the High Point Enterprise arrived with her camera when the ambulance did. She said a Duke Power man arrived and said he did not think there was current, they wanted to be on the safe side but thought the power was cut on that pole, but he wanted to be sure there was no feedback, they were taking every precaution.

Lloyd Sink and a committee who inspected conditions reported that there was no possibility of any electrical connection between the two services leading in the building that would have caused a feedback from where Mr. Petree could have gotten an electrical shock.

The defendant offered positive evidence that the power was found disconnected after Mr. Petree died, and that there was no indication of any current in the transformer or any of the wires leading up to the cross-arm near Mr. Petree's body.

Paul Sink, who was working with the deceased, testified that he had cut off every one of the switches inside the building and that he saw the deceased pull off the three switches on the pole. After that he testified the deceased was just sitting there when he turned around to go back in the building. "When I got back to the switches, I loosened the lock nut and the bushing. Before I done that, though, I taken my bare hands and put on top of the switches, to see if there was any current on them, because I always did that when anybody was helping me, that they wouldn't get hurt. Then I taken the lock nut and bushing off. We dropped the switches down. No electrical current coming from the transformers out on the pole passed through those switches. If there was any coming, it would have to pass through those switches. I put my hands on them. I could have told whether there was any current coming through those switches, if it had been on there. If any current was passing from the old building back out to the position Mr. Petree occupied, it would have had to have passed through those switches. I could not feel any current coming through there. And then I took those switches down. I removed them completely."

He later testified: "I was present when the three inspectors, that is, Melvin Sink, George Jackson, and Lloyd Sink, together with Lindsey Loftin, came to make the inspection of the premises. At that time no changes had been made in any of the lines, wires, fixtures, switches or other electrical equipment, from the time that Mr. Petree was found."

D. E. Rouse, a licensed electrical engineer, and who qualified as an expert in that field, later inspected the premises. In response to a hypothetical question, he testified that in his opinion there was no electricity in any of the lines, wires or other equipment on the pole which Mr. Petree climbed and within his reach which could have produced an electrical shock to his body if he had come in contact with them.

The evidence was to the effect that the deceased had an abnormal condition of the heart, and that from 1956 on he knew he had a bad heart condition and could not carry on his normal activities.

In the face of the convincing evidence that all the power had been disconnected before Mr. Petree died and that all the switches were in the same position and condition when inspected by the committee, and with no evidence to the contrary, the cause of death could not be found to be due to any kind of electrical shock. In view

of his long history of a serious heart condition there is little reason to doubt that it caused his death.

We agree with Judge Crissman that there was no competent evidence to support the award of the Commission. His judgment is

Affirmed.

STATE v. GRELIA ARTHUR MASON.

(Filed 2 November, 1966.)

1. Criminal Law § 23—

Defendant's plea of not guilty puts in issue each element of the crime charged.

2. Bastards § 4—

In a prosecution under G.S. 49-2, the burden is upon the State upon defendant's plea of not guilty to prove not only that defendant is the father of the child and had refused or neglected to support the child, but further that his refusal or neglect was wilful.

3. Bastards § 7—

In a prosecution under G.S. 49-2, an instruction that the jury should find defendant guilty if it found from the evidence beyond a reasonable doubt that defendant was the father of the child, without submitting the question of whether defendant wilfully refused to support the child, must be held for prejudicial error, and the fact that defendant's counsel, during a spontaneous exchange between the counsel and the judge in the course of the charge, assented that the question of paternity was the sole question to be decided by the jury, does not affect this result.

4. Constitutional Law § 37—

After plea of not guilty, defendant may not, without changing his plea, waive his constitutional right of trial by jury on every issue raised.

5. Attorney and Client § 3—

An attorney may not during a spontaneous exchange between the attorney and the court during the progress of the charge and without opportunity for a conference with the client, waive or surrender the requirement that the State prove one of the essential elements of the offense charged.

APPEAL by defendant from *Burgwyn, E.J.*, February 1966 Conflict Session of EDGECOMBE.

Defendant was charged with wilfully failing to support his illegitimate child in violation of G.S. 49-2, which reads: "Any parent who wilfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject

to such penalties as are hereinafter provided. A child within the meaning of this article shall be any person less than eighteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent." The defendant entered a plea of not guilty.

The State offered evidence tending to show that defendant was the father of the illegitimate child of the prosecuting witness. Defendant denied paternity of the child and further denied that prosecutrix had made demand of him for support prior to the issuance of the original warrant.

From verdict of guilty and judgment entered, the defendant appeals, assigning errors.

Attorney General Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State.

Elreta Melton Alexander and E. L. Alston, Jr., for defendant appellant.

BRANCH, J. The defendant's principal assignments of error relate to the charge to the jury and present the question: Did the court below err in failing to charge the jury that in order to find defendant guilty, it must be satisfied beyond a reasonable doubt that defendant wilfully failed, after demand made of him, to support his illegitimate child?

Pertinent excerpts from the trial judge's charge necessary for our consideration are:

> "Now in this case, as I understand it, and if I misunderstand it I wish counsel for the defendant and for the State to correct me, there is only one question for you gentlemen to determine, and that is, is the defendant named in the warrant the father of the illegitimate child of the prosecuting witness, Winnie Johnson? He not claiming to have attempted to support it, but denies the paternity of the child as to himself. Is that correct?"
>
> Counsel for the defendant answered, "Yes, sir, your Honor."
>
> "That simplifies the matter, gentlemen, down into one question and one question alone for you to determine, and that is, is the defendant, Albert Mason, called in the warrant Grelia Mason, the father of the illegitimate child of the prosecuting witness."
>
> "(I)f you are satisfied beyond a reasonable doubt or to a moral certainty from the testimony in the case that he is the father of this child, it will become your duty to find him guilty."

"If you are satisfied from this testimony and beyond a reasonable doubt, as that has been explained to you to mean, that this young man, the defendant in this case here, is in fact the father of the little child, the daughter of Winnie Johnson, it would be your duty to find him guilty."

It is elementary that "a defendant's plea of not guilty puts in issue each essential element of the crime charged." *State v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99. This Court in considering an appeal from a conviction under G.S. 49-2 in the case of *State v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333, speaking through Devin, J. (later C.J.), said: "In order to convict the defendant under the statute the burden was on the State to show not only that he was the father of the child, and that he had refused or neglected to support and maintain it, but further that his refusal or neglect was willful, that is, intentionally done, 'without just cause, excuse or justification,' after notice and request for support."

Again considering the charge in a prosecution under this statute, the Court held in the case of *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126: "The court charged the jury that the defendant was on trial for unlawfully neglecting and refusing to support and maintain his illegitimate child. He made no attempt to define the unlawful failure to support. He nowhere told the jury that the failure to support must be wilful. . . . (T)he oversight must be held for prejudicial error. Defendant cannot be convicted unless he wilfully neglects to support his child."

Nowhere in the charge in the instant case was there any instruction as to wilful failure after demand for support made on defendant. The circumstances under which the court gave the charge in the instant case are unusual. We must conclude that the learned and experienced trial judge relied on the statement of counsel made in open court and therefore failed to charge as to the wilful failure of the defendant to support the illegitimate child after demand made on him.

Did the concurrence of defendant's counsel in the court's statement amount to such stipulation of guilt to an essential element of the crime charged as to cure the omissions in the court's charge? We must conclude that it did not.

It has been a uniform holding of this Court that "When a defendant in a criminal prosecution in the Superior Court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, *S. v. Hill,* 209 N.C. 53, 182 S.E. 716, the determinative facts cannot be referred to the decision of the court even by consent—they must be found by the jury." *State v. Muse,* 219 N.C. 226, 13 S.E. 2d 229; *State v. Cox,* 265 N.C. 344, 144

S.E. 2d 63. Moreover, it appears from the record in this case that the exchange between counsel and the court was spontaneous and did not permit conference between counsel and client for authority to be granted to make such stipulation, if it were permissible. In this connection the Court has held that an attorney has no right, in the absence of express authority, to waive or surrender by agreement or otherwise the substantial rights of his client. *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860. "The relation of attorney and client rests upon principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld." *State v. Barley,* 240 N.C. 253, 81 S.E. 2d 772.

For the errors pointed out there must be a

New trial.

JEAN GAITHER CHAMPION, ADMINISTRATRIX OF THE ESTATE OF WILLIAM STEWART CHAMPION, DECEASED, PLAINTIFF, v. JOSEPH JOHN WALLER, DEFENDANT.

(Filed 2 November, 1966.)

1. Trial § 21—

On motion to nonsuit, the evidence of plaintiff, as well as facts alleged in the complaint admitted by the answer, and allegations of new matter in defendant's further answer which are favorable to plaintiff, must be taken as true and interpreted in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences deducible therefrom.

2. Pleadings § 29—

Allegations of the complaint admitted in the answer as well as allegations of new matter in the further answer favorable to plaintiff are established without the necessity of introducing them in evidence.

3. Automobiles § 41m—

Evidence permitting the inference that defendant was driving some 45 miles per hour on the highway when he saw or should have seen, several hundred feet in front of him, a boy riding a bicycle on the right edge of the pavement in his lane of travel, and that without sounding his horn or reducing his speed he struck the bicycle in the rear, resulting in the death of the boy, *is held* sufficient to be submitted to the jury on the questions of defendant's negligence in failing to sound his horn and in maintaining an unreasonable speed under the prevailing circumstances.

4. Automobiles § 25—

Any speed may be unlawful if the driver of a motor vehicle sees, or in the exercise of due care should see, a person or vehicle in his line of travel.

5. Automobiles § 10—

While not conclusive, the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or in following too closely or in failing to keep a proper lookout.

6. Negligence § 26—

Nonsuit may not be entered on the ground of contributory negligence of a 13 year old boy.

7. Automobiles § 32—

The presence of a young boy riding a bicycle on a highway is, in itself, a danger signal to a motorist approaching the bicycle from the rear.

APPEAL by plaintiff from *Braswell, J.*, at the June 1966 Civil Session of VANCE.

This is an action for damages for the alleged wrongful death of William Stewart Champion, 13 years of age. The complaint alleges that the boy was riding his bicycle eastwardly in the eastbound traffic lane of Highway 56, approximately two miles west of Louisburg, and received injuries from which he died when the defendant's station wagon, proceeding in the same direction, overtook and struck the bicycle in an attempt to pass it. It alleges that the defendant was negligent in that he failed to keep a proper lookout, drove at a speed in excess of that which was reasonable under all the circumstances and, though he saw or should have seen the boy on the bicycle, failed to sound his horn, apply his brakes, reduce his speed or turn either to the right or the left to avoid striking the bicycle, but attempted to pass the bicycle at a point where double yellow lines painted upon the center of the highway indicated that passing was prohibited.

The answer admits that William died as the result of injuries sustained in an automobile accident on the date alleged, and that he was riding a bicycle "in an easterly direction along the eastbound traffic lane" of the highway. It denies all allegations of negligence on the part of the defendant. It further denies that the curve of the highway at the point in question is sufficient to obstruct the view of the operator of a motor vehicle thereon. For a further answer the defendant pleads contributory negligence by the deceased boy, alleging that he turned his bicycle sharply to the left when the defendant's vehicle was immediately behind him and preparing to pass, so that the bicycle struck the side of the station wagon. In the further answer the defendant alleges that the defendant ap-

proached "the point at which the plaintiff's intestate was riding his bicycle, also in an easterly direction, on said highway," and that "as the defendant approached the point at which the plaintiff's intestate was riding his bicycle on the right hand edge of the hard surfaced portion of the road," the defendant slowed his vehicle.

A witness for the plaintiff testified: He was approximately 300 feet from the point of the collision when it occurred. He did not hear a horn blow or any tires screeching, but looked up in time to see the bicycle "coming off the top of a station wagon," which was traveling in the eastbound traffic lane about 45 miles per hour, and which stopped 300 feet from where the bicycle fell to the ground. No other vehicle was in sight. The witness could see along the highway for 300 feet to the east and 800 feet to the west. The station wagon sustained damage to its right headlight and ventilator. The weather was clear and the time was shortly after 1 p.m. At the point where the collision occurred, yellow lines are painted on each side of the center of the highway.

The investigating patrolman testified that he observed no skid marks on the highway, that the posted speed limit in the area of the collision is 55 miles per hour, and that there was damage to the right front fender of the station wagon behind the wheel and slight dents in the fender and just above and to the right of the right headlight.

At the close of the plaintiff's evidence, a motion for judgment of nonsuit was allowed. The allowance of this motion and the entry of the judgment pursuant thereto is the plaintiff's only assignment of error.

Bobby W. Rogers for plaintiff appellant.
Bryant, Lipton, Bryant & Battle for defendant appellee.

LAKE, J. It is elementary that in passing upon a motion for judgment of nonsuit the evidence of the plaintiff must be taken to be true, and must be interpreted in the light most favorable to him, and all reasonable inferences in his favor must be drawn therefrom. *Bowling v. Oxford,* 267 N.C. 552, 148 S.E. 2d 624.

Facts alleged in the complaint and admitted in the answer are conclusively established by the admission, it not being necessary to introduce such allegations in evidence. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16; Stansbury, North Carolina Evidence, § 177. The same is true of allegations of new matter in a further answer, which new matter is favorable to the plaintiff. In passing upon a motion for judgment of nonsuit, all such allegations in the answer are taken to be true and are to be considered along with the evidence.

So interpreted and supplemented by the admissions in the answer, the plaintiff's evidence is sufficient to support a finding that the deceased boy, at the time of the collision, was riding his bicycle on his extreme right hand portion of the pavement in accordance with the provisions of the statutes. G.S. 20-146(b); G.S. 20-38(ff). It is also sufficient to permit, but not to compel, findings that the defendant, driving at a speed not less than 45 miles per hour, saw, or should have seen, the boy so riding the bicycle upon the pavement for a distance of several hundred feet before overtaking him, that he continued to drive in the same lane of traffic as that occupied by the bicycle without sounding his horn or reducing his speed, and struck the bicycle in the rear with sufficient force to throw it over the top of the station wagon.

Under such circumstances, a failure to sound the horn is evidence of negligence. *Webb v. Felton,* 266 N.C. 707, 147 S.E. 2d 219. There is also basis for concluding that the defendant's speed was unreasonable under the prevailing conditions. "Any speed may be unlawful if the driver of a motor vehicle sees, or in the exercise of due care could and should have seen, a person or vehicle in his line of travel." *Cassetta v. Compton,* 256 N.C. 71, 123 S.E. 2d 222. While not conclusive, the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or in following too closely, or in failing to keep a proper lookout. *Beanblossom v. Thomas,* 266 N.C. 181, 146 S.E. 2d 36; *Burnett v. Corbett,* 264 N.C. 341, 141 S.E. 2d 468; *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62. Thus there was ample evidence, taken in conjunction with admissions in the answer, from which the jury would have been justified in finding, though not compelled to find, that the defendant was negligent and such negligence was the proximate cause of the injury and death of the plaintiff's intestate.

There is in the present record no evidence whatever of contributory negligence by the deceased boy and, he being only 13 years of age, there is a rebuttable presumption that he was not capable of contributory negligence, though the plaintiff's own evidence of his exceptionally good record in school would justify the jury in finding that he was so capable of negligence. See *Caudle v. R. R.,* 202 N.C. 404, 163 S.E. 122. The judgment of nonsuit cannot be sustained on the ground of contributory negligence by the deceased.

The very presence of a young boy riding a bicycle on the highway is, in itself, a danger signal to a motorist approaching him from the rear. Ordinarily, it is a question for the jury as to whether the motorist has responded to such danger signal as a reasonable

man would have done. See *Rodgers v. Carter,* 266 N.C. 564, 146 S.E. 2d 806.

We do not express any opinion as to what were the facts of this matter. The defendant has not yet had an opportunity to testify or offer witnesses in his behalf.

Reversed.

STATE v. WARNER FOWLER, ALIAS JOHNNY RINGO GRAHAM.

(Filed 2 November, 1966.)

1. Homicide §§ 13, 23—

The defendant's contention that the killing was accidental is not an affirmative defense and places no burden of proof on defendant, since the contention amounts only to a denial that defendant committed the crime by denying the essential element of intent, and an instruction to the effect that if the State had established an intentional killing with a deadly weapon, the burden was on defendant to prove the defense of unavoidable accident to render the killing excusable homicide, must be held for prejudicial error.

2. Same—

In a prosecution for murder, defendant has the burden of proving to the satisfaction of the jury facts in justification or mitigation of the homicide, and an instruction that the burden of proving such matters to the satisfaction of the jury required a higher degree of proof than proof by the greater weight of the evidence, is error, since proof by the greater weight of the evidence may be sufficient to satisfy the jury.

APPEAL from *Bundy, J.,* January 1966 Criminal Session of WAYNE.

Defendant was tried on a bill of indictment charging him with first degree murder of W. B. Braswell. Defendant pleaded not guilty. Upon a verdict of guilty of murder in the first degree, with recommendation of mercy, judgment of life imprisonment was imposed. From this judgment defendant appeals, assigning numerous errors.

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

Herbert B. Hulse and W. Harrell Everett, Jr., for defendant.

BRANCH, J. Defendant contends and attempts to show by his evidence that the killing was accidental. He assigns as error that portion of the judge's charge as to accidental killing, in which the court stated:

"And if a defendant who has intentionally killed another with a deadly weapon would rebut the presumption arising from such showing or admission, he must establish to the satisfaction of the jury the legal provocation which would take from the crime the element of malice and thus reduce it to manslaughter, or which will excuse it altogether on the ground of self-defense, unavoidable accident, misadventure or other defense recognized by the law that would render it excusable homicide."

Here the learned trial judge apparently by inadvertence classified defendant's assertion of accidental killing with the defenses of self-defense or killing in the heat of passion, both affirmative defenses which a defendant must prove to the satisfaction of the jury. *State v. Beachum,* 220 N.C. 531, 17 S.E. 2d 674. A very lucid statement of the law relative to burden of proof in cases where defendant asserts that a killing was accidental is found in *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337, where Sharp, J., speaking for the Court, said:

"A defendant's assertion that a killing with a deadly weapon was accidental is in no sense an affirmative defense shifting the burden of proof to him to exculpate himself from a charge of murder. On the contrary, it is merely a denial that the defendant has committed the crime, and the burden remains on the State to prove an intentional killing, an essential element of the crime of murder, before any presumption arises against the defendant. (Of course, accident will be no defense to a homicide committed in the perpetration of or in the attempt to perpetrate a felony. G.S. 14-17). To hold otherwise would impose conflicting burdens of proof on the same issue and create two irreconcilable rules pertaining to the same matter. The charge here, in effect, recognizes an intentional accident — an impossibility. In accident 'the will observes a total neutrality, and does not cooperate with the deed; which therefore wants one main ingredient of a crime.' 4 Blackstone, Commentaries 26 (12th Ed., Christian's, London, 1795). Manifestly, if the State has satisfied the jury beyond a reasonable doubt that the shooting was intentional, a defendant could not thereafter establish to the satisfaction of the jury that it was accidental. In addition to posing a practical and a logical impossibility, the charge robbed defendant of the presumption of innocence and the benefit of the requirement that the State prove each and every element of the offense. *State v. Dallas,* 253 N.C. 568, 117 S.E. 2d 415; *State v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147. . . .

" 'The plea of accidental homicide, if indeed it can be properly called a plea, is certainly not an affirmative defense, and therefore does not impose the burden of proof upon the defendant, because the State cannot ask for a conviction unless it proves that the killing was done with criminal intent.' *State v. Ferguson,* 91 S.C. 235, 244, 74 S.E. 502, 505. 'It is the duty of the State to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. * * * (T)he claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt.' *State v. Cross,* 42 W. Va. 253, 24 S.E. 996, 997. Accord, *State v. Matheson,* 130 Iowa 440, 103 N.W. 137; *State v. Budge,* 126 Me. 223, 137 Atl. 244, 53 A.L.R. 241; *State v. Hazlett,* 16 N.D. 426, 113 N.W. 374; *Scott v. Lindsey,* 68 S.C. 276, 47 S.E. 389; *Hardin v. State,* 57 Tex. Crim. 401, 123 S.W. 613; 26 Am. Jur., Homicide §§ 106, 290 (1940); 40 C.J.S., Homicide, § 196 (1944)."

Hence, the defendant is not required to prove "to the satisfaction of the jury" that the killing was accidental, and where, as here, the charge so shifted the burden of proof to the defendant it bore too heavily on him. This assignment of error is sustained.

Defendant also assigns as error the court's instruction as to the intensity of proof required of him to satisfy the jury of facts in excuse, justification or mitigation of the homicide. In this connection, the trial judge charged:

"When an intentional killing has been admitted or established, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder in the second degree unless he can satisfy the jury of the truth of the facts which justify his act, or mitigate it to manslaughter. The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. However, to meet this burden the defendant is not required to prove beyond a reasonable doubt the facts he relies on in mitigation, justification or excuse. Proof beyond a reasonable doubt requires the highest intensity of proof known to our law. Our Supreme Court has this to say. 'To satisfy the jury beyond a reasonable doubt' means that the jury must be fully satisfied, or entirely convinced, or satisfied to a moral certainty of the truth of the charge. But the defendant does not meet the requirements of the law when he satisfies the jury merely by the greater weight of the evidence of the truth of the facts he relies on in

mitigation, justification or excuse. By the greater weight of the evidence is meant simply evidence that is of greater or superior weight, or evidence that is more convincing, or evidence that carries greater assurance than that which is offered in opposition thereto."

"Our Supreme Court has said that the phrase 'to the satisfaction of the jury' is considered to bear a stronger intensity of proof than that of by the greater weight of the evidence or preponderance of the evidence. So to prove a fact or facts to the satisfaction of the jury requires a higher degree of proof and signifies something more than a belief founded on the greater weight of the evidence; but it does not require as high a degree or as strong an intensity of proof as proof beyond a reasonable doubt."

The above portion of the court's charge is almost identical in content to the charge given by the trial judge in the case of *State v. Prince,* 223 N.C. 392, 26 S.E. 2d 875. The Court in holding that the charge constituted reversible error in the *Prince* case, said:

"The intensity of the proof required is that the jury must be satisfied. Even proof by the greater weight of the evidence may be sufficient to satisfy the jury. Hence, the correct rule as to the intensity of such proof is that when the intentional killing of a human being with a deadly weapon is admitted, or is established by the evidence, 'the law then casts upon the defendant the burden of proving to the satisfaction of the jury — not by the greater weight of the evidence nor beyond a reasonable doubt — but simply to the satisfaction of the jury . . . the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the grounds of self-defense, . . .' "

This decision has been approved and upheld by the Court in the recent *per curiam* decision in *State v. Matthews,* 263 N.C. 95, 138 S.E. 2d 819.

The assignments of error herein discussed are meritorious and are clearly sustained by the decisions of this Court.

We deem any discussion of the other assignments of error unnecessary, since there must be a

New trial.

IN RE SANDRA GENINE HERRING, AN INFANT.

(Filed 2 November, 1966.)

Habeas Corpus § 3—

Since an order for custody of a minor child is always subject to modification for change of condition, and the Superior Court in the district in which the child resides has jurisdiction to inquire into the matter, the presiding judge or resident judge of the county in which the minor resides has jurisdiction to hear *habeas corpus* proceedings to determine the right to custody, G.S. 17-39.1, notwithstanding prior order of the clerk of the county of the petitioner's residence in an *ex parte* proceeding awarding the custody to petitioner and order of the clerk of the county of the residence of the respondent and the child awarding custody of the child to the respondent.

APPEAL by Petitioner from *Bundy, J.*, in Chambers in WAYNE County, on 27 June, 1966.

The petitioner, Mrs. Bonnie Bell Herring, is the paternal grandmother of Sandra Genine Herring, an infant. The respondent is her maternal grandmother.

On 5 September, 1965, both parents of Sandra Genine Herring were killed as a result of an automobile accident. Sandra Genine Herring, now three years old, has remained almost continuously at the Wayne County home of Mrs. Florence Ferrell, her maternal grandmother, the respondent in this action.

Upon application before the Clerk of Superior Court of Wayne County a hearing for the appointment of a guardian of Sandra Genine Herring was held on 28 October, 1965, and the "tuition and custody of said minor" was committed to Mrs. Ferrell.

Mrs. Herring, who resides in Duplin County, filed a petition before the Clerk of Superior Court of that county for the appointment of a guardian of her little granddaughter. The Clerk awarded custody to her and the respondent, Mrs. Ferrell, gave notice of appeal.

Upon appeal Judge Fountain dismissed the proceedings without prejudice to the petitioner to undertake such other proceedings as they may be advised.

Subsequently the Clerk of Superior Court of Duplin County entered a second order naming the petitioner, Mrs. Herring, as guardian of Sandra Genine Herring, although the child was not in Duplin County.

Later the petitioner obtained a writ of *habeas corpus* in Wayne County to have the custody of Sandra Genine Herring inquired into. The matter came on for hearing on 27 June, 1966, before Judge William J. Bundy, presiding in Wayne County, and the respondent entered a Special Appearance and made a motion to dismiss based on the facts stated above and alleging that the Court had not prop-

erly acquired jurisdiction of the person of the infant. The motion was allowed and the Court entered a judgment dismissing the *habeas corpus* proceeding on the grounds that the Court did not have jurisdiction to hear and determine the matters in controversy.

The petitioner appealed.

Sasser & Duke, H. E. Phillips for petitioner appellant.
George R. Kornegay, Jr., for respondent appellee.

PLESS, J. In what are, for all practical purposes, two *ex parte* proceedings, the Clerk of the Superior Court of Wayne County awarded the custody of this little girl to Mrs. Ferrell who was a resident of that County, and shortly afterwards the Clerk of the Superior Court of Duplin County in a similar proceeding awarded the custody to his constituent, Mrs. Herring. The child has at all times in question been residing with Mrs. Ferrell in Wayne County and the jurisdiction of the matter is properly laid there.

G.S. 17-39.1 provides that "In addition * * * to other methods authorized by law for determining the custody of minor children, any superior court judge having authority to determine matters in chambers in the district may, in his discretion, issue a writ of *habeas corpus* requiring that the body of any minor child whose custody is in dispute be brought before him or any other qualified judge. Upon the return of said writ the judge may award the charge or custody of the child to such person, organization, agency or institution for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of the judge, best promote the interest and welfare of said child. The cause may be retained for the purpose of varying, modifying or annulling any order for cause at any subsequent time."

Pursuant to this statute, the paternal grandmother, Mrs. Herring, obtained a writ of *habeas corpus* which was made returnable before Judge Bundy. When the matter came on to be heard, the Respondent, Mrs. Ferrell, entered what she called a Special Appearance, in which she denied the jurisdiction of Judge Bundy. His Honor signed an order that "the Court being of the opinion that it does not have jurisdiction to hear and determine the matters in controversy * * * it is ordered, adjudged and decreed that the same be dismissed and the petitioner taxed with the costs."

The record does not disclose that any evidence was heard before Judge Bundy and no facts were found. The statute quoted above was enacted for the purpose of giving Judges of the Superior Courts authority to hear and determine the custody of infants in all cases and without regard to previous proceedings. As said in the recent

case *In Re Marlowe,* 268 N.C. 197, 150 S.E. 2d 204, "the control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify."

Since no judge has determined what will "best promote the interest and welfare of the child" the Petitioner is entitled to a hearing for that purpose. The judge presiding in the Eighth Judicial District and the Resident Judge thereof have jurisdiction.

The judgment of Judge Bundy is hereby

Reversed.

LOTTIE H. LEWIS v. BONNIE L. PARKER AND CARSON LEE HICKS.

(Filed 2 November, 1966.)

1. Appeal and Error § 24—

An assignment of error to the charge with a mere reference to the record page where the asserted error may be discovered is insufficient, it being required that the assignment of error show within itself the asserted error sought to be presented.

2. Appeal and Error § 19—

The rules of Court regarding the form and sufficiency of assignments of error are mandatory.

3. Appeal and Error § 24—

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception.

4. Appeal and Error § 19—

An assignment of error to the court's denial of appellant's motion for a new trial for errors committed during the course of the trial is a broadside assignment of error.

5. Appeal and Error § 21—

An assignment of error to the signing and entry of judgment presents only the record proper for review, and the record proper does not include the evidence and charge of the court.

APPEAL by plaintiff from *Olive, E.J.,* July 1966 Civil Session of DAVIDSON.

Civil action to recover damages for personal injuries and damage to an automobile allegedly growing out of a collision between plaintiff's automobile, which she was operating, and a vehicle being neg-

ligently operated by the *feme* defendant, and owned by the male defendant, at the intersection of Sunrise Avenue and Randolph Street in the town of Thomasville.

The defendants filed a joint answer denying the essential allegations of negligence set forth in the complaint, and alleging contributory negligence on the part of plaintiff. Their answer further alleges that the *feme* defendant is the wife of the male defendant, that she is a minor, and that Robert B. Smith, Jr., has been appointed as her guardian *ad litem.*

The plaintiff and the defendants presented evidence. Issues of negligence, contributory negligence, and damages were submitted to the jury. The jury found as to the first issue that the plaintiff was not injured by reason of negligence of the defendants as alleged in the complaint.

From a judgment upon the verdict that plaintiff recover nothing from the defendants, she appeals.

Herman L. Taylor for plaintiff appellant.

Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for defendant appellees.

PER CURIAM. Plaintiff's first assignment of error reads: "The Trial Court committed prejudicial and reversible error by charging the jury in the manner which is the subject of plaintiff's Exceptions Nos. 1, 2, 3, 4 and 5. (R pp 41-47)."

Rules 19 and 21, Rules of Practice in the Supreme Court, 254 N.C. 783, 795, 803, require that asserted error must be based on an appropriate exception, and must be properly assigned. We have repeatedly said that these rules require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Samuel v. Evans,* 264 N.C. 393, 141 S.E. 2d 627; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829. The rules of practice in this Court are mandatory and will be enforced. *Walter Corp. v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313; *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. Plaintiff's first assignment of error is ineffectual to bring up for review by this Court any part of the charge.

Plaintiff's second assignment of error is that "the Trial Court committed prejudicial and reversible error by failing to declare and

explain to the jury the law in the case and its application to the facts in the case, in violation of G.S. 1-180, which is the subject of plaintiff's Exceptions Nos. 6 and 7. (R p 52)." This assignment of error to the charge does not point out any particular statements or omissions objected to and is ineffectual as a broadside exception. 1 Strong's N. C. Index, Appeal and Error, § 24.

"The requirements of the rules and the reasons therefor have been so often reiterated that the recurring necessity for restatement baffles our understanding." *Samuel v. Evans, supra.*

Plaintiff's assignment of error "to the Court's denial of her motion for a new trial, based upon errors committed by the Court during the course of the trial" is broadside and is overruled.

Plaintiff assigns as error the court's signing and entry of the judgment. This assignment of error presents for review the face of the record proper. The record, in the sense here used, refers to the essential parts of the record, such as the pleadings, verdict, and judgment, and does not refer to the evidence and the charge of the court. *Balint v. Grayson, supra; Lowie & Co. v. Atkins, supra; Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910. No error of law appears on the face of the record proper, and the verdict supports the judgment.

No error.

STATE v. CLORAS CADE.

(Filed 2 November, 1966.)

1. Indictment and Warrant § 4—

An indictment will not be quashed on the ground that some of the testimony of the qualified witness heard by the grand jury may have been hearsay and incompetent.

2. Criminal Law § 99—

On motion for compulsory nonsuit, the State's evidence, together with so much of defendant's evidence as is favorable to the State, will be taken as true and considered in the light most favorable to the State, giving it the benefit of every reasonable inference to be drawn therefrom.

3. Criminal Law § 71—

Where the evidence upon the *voir dire* supports the court's findings that defendant's statements were made after he had been fully advised of his constitutional rights and that the statements were freely and voluntarily made without inducement by threat or promise, the court's findings are conclusive on appeal, and the admission in evidence of testimony of defendant's statements will not be disturbed.

4. Homicide § 20— Evidence in this homicide prosecution held sufficient to be submitted to the jury.

The State's evidence tended to show that defendant and decedent had an altercation in regard to the woman with which defendant was living as man and wife, that on the occasion in question defendant found them together at the door of the home of a third person, that as the woman and decedent were standing on the front porch, defendant jumped across the fence of the yard, threatened decedent, who ran, that defendant ran after him and later returned alone to the woman, that the body of decedent was found beside the house, and that death resulted from a knife wound in the chest, together with defendant's testimony that he and the decedent were fighting beside the house and that he cut decedent, *held* sufficient to be submitted to the jury in a prosecution for homicide.

5. Criminal Law § 154—

An assignment of error which does not disclose within itself the question sought to be presented is ineffectual.

6. Criminal Law § 121—

Where the indictment is sufficient and no defect appears on the face of the record proper, defendant's motion in arrest of judgment is properly overruled.

APPEAL by defendant from *Lupton, J.*, 25 April 1966 Mixed Session of DAVIDSON.

Criminal prosecution upon an indictment, drawn under the provisions of G.S. 15-144, charging defendant on 11 December 1965 with murder in the first degree of Charlie Odell Smith.

Defendant, an indigent, was represented in the trial court and in this Court by his court-appointed counsel Ned A. Beeker.

Plea: Not guilty. Verdict: Guilty of murder in the second degree.

From a judgment of imprisonment for not less than 20 nor more than 25 years, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State.

Ned A. Beeker for defendant appellant.

PER CURIAM. Defendant assigns as error the denial of his motion to quash the indictment, made before pleading thereto. His contention is that the only witness who appeared before and was examined by the grand jury was Bob Head, a deputy sheriff, and that all Bob Head knew about the case was hearsay or statements made to him by defendant, which statements were inadmissible because they were obtained in violation of his constitutional rights. This assignment of error is without merit. The statements made by defendant to Bob Head were free and voluntary and not obtained in vio-

lation of his constitutional rights, as will be hereafter set forth. Bob Head is a qualified witness, and there is no contention to the contrary. This assignment of error is overruled upon authority of *S. v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334.

The State and defendant presented evidence. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence. The State's evidence, considered in the light most favorable to it, and giving to it the benefit of every reasonable inference to be drawn therefrom, and the defendant's evidence favorable to the State *(S. v. Smith,* 237 N.C. 1, 74 S.E. 2d 291), shows the following facts: Defendant and Marie Glover, not being married to each other, had lived together for several years as man and wife. About 10 p.m. on 11 December 1965 Marie Glover and the deceased Charlie Odell Smith were visiting in the home of David Smith and his wife Annie Bell Smith. About 11 p.m. Charlie Odell Smith and Marie Glover went out the front door of the Smith home, and as they were standing on the front porch defendant jumped across the fence around the house and came running through the yard and up on the front porch. He said to Marie Glover, "Oh, yes, G-- D--- you, I told you I would catch him." He grabbed Marie Glover. Charlie Odell Smith ran around the house, and defendant pursued him. Shortly thereafter, defendant came back to the front of the house, and he and Marie Glover left. About 6 a.m. the following morning the dead body of Charlie Odell Smith was found lying on the woodpile in the back yard of the Smith home. The body of Smith was carried to the Lexington Memorial Hospital where an autopsy was performed. Dr. W. G. Smith, Sr., a practicing physician for 35 years in Davidson County and acting coroner of the County, saw Smith's dead body, and in his opinion the cause of Smith's death was an internal hemorrhage resulting from a stab wound in the right ventricle of the heart in the region of the 10th rib. In his opinion Smith could have lived only a couple of minutes — two or three — after he received the stab wound.

Later that night defendant left North Carolina and went to his brother's home in South Carolina. As a result of a phone call made by his brother to Lexington, the following night he and his brother came back to Lexington, went to the sheriff's office about 11 p.m., and defendant was placed in jail. When defendant was placed in jail he was in a drunken condition. About 7:20 a.m. the following morning Deputy Sheriff Bob Head had a conversation with the defendant in jail. The defendant objected to the admission in evidence of the statements made by him to Deputy Sheriff Head. The trial judge, in the absence of the jury, conducted a long preliminary inquiry as to the admissibility in evidence of these statements. The

court heard the testimony of Deputy Sheriff Head and the testimony of the defendant. The evidence was conflicting. After hearing this testimony, the trial judge found as facts that before the defendant made any statement to Deputy Sheriff Head that Deputy Sheriff Head stated to him that he did not have to make any statement, that any statement he made could be used for or against him in court, that he was entitled to have a lawyer and could call a lawyer on the phone if he would like to have one, that no threats were made against him and he offered him no reward or offer of reward if he made a statement, that defendant stated he did not want a lawyer and wanted to tell the truth about the matter, and that defendant's statements were freely and voluntarily made and were admissible in evidence. The judge's findings of fact are amply supported by competent evidence, and his findings of fact support his conclusion and ruling that defendant's statements were admissible in evidence, and, consequently, his ruling will not be disturbed on appeal. *S. v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *S. v. Outing,* 255 N.C. 468, 121 S.E. 2d 847, *cert. den.* 369 U.S. 807, 7 L. Ed. 2d 555; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104. *Miranda v. State of Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, decided 13 June 1966, is not retroactive. Thereafter the jury was recalled into the courtroom and Head's testimony of what defendant said to him is in substance as follows: He got off from work at approximately 10 p.m., walked to his home, and found that Marie Glover was not there. He went out looking for her. Later that night he saw Marie Glover and Charlie Odell Smith coming out of the David Smith home. He told them, "G-- D--- it, I said I was going to catch you all, and I have." He jumped over the wood fence in David Smith's front yard and Charlie Odell Smith jumped off the front porch. They started running around the house. They were fighting beside the house, and they stopped at the woodpile. Charlie Odell Smith was lying on the ground and he cut him, but he does not know how many times. He then went back to the front of the house and he and Marie Glover went to their home. Thereafter he caught a bus and went to his brother's home in South Carolina. He told his brother in South Carolina that he and Charlie Odell Smith had got into a fight and that he had hurt Charlie Odell Smith "bad." He asked his brother to call Lexington and find out about it. His brother called Lexington and told him that he might as well go back to Lexington and give up because Charlie Odell Smith was dead. About four weeks previously he told Charlie Odell Smith at his home to leave and that if he ever caught him there again he would have to kill him, or he, Smith, would have to kill him. He further said that he opened his knife when he jumped the fence and started up on the porch.

Defendant testified in his own behalf in substance as follows: About three or four weeks prior to 11 December 1965 he came home from work and Charlie Odell Smith was at his house. He told Charlie Odell Smith that he did not want to get in trouble with him but he knew that he and Marie "were messing around together," and that he would rather for him to come back no more. Smith went out of his house and told him he wanted to settle it and get it over with. He told Smith he did not want to bother him, that he and Smith started exchanging words, and Marie got in between them. On this occasion Smith pulled a knife on him. On the night of 11 December 1965 he saw Smith and Marie Glover standing on the front porch of the David Smith home, that Smith jumped off the porch, and he and Smith got into a fight and he cut Smith while they were fighting. The State's evidence, and the defendant's evidence favorable to the State, was amply sufficient to carry the case to the jury on the charge of murder in the second degree. *S. v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39. The court properly overruled the motion for judgment of compulsory nonsuit.

Defendant assigns as error the admission of hearsay evidence against him and the exclusion of relevant evidence. These two assignments of error do not show specifically what questions are intended to be presented for consideration without the necessity of going beyond the assignments of error, are ineffectual, and are overruled. *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729, and cases cited.

Defendant assigns as error the denial of his motion in arrest of judgment made after verdict and to prevent entry of judgment. The indictment is drawn in the language set forth in G.S. 15-144 and is sufficient, and no defect appears on the face of the record proper. This assignment of error is without merit and is overruled. 1 Strong's N. C. Index, Criminal Law, § 121.

Defendant's other assignments of error are formal and are overruled.

In the trial below we find

No error.

SHIRLEY B. SULLIVAN v. MARTHA JOHNSON.

(Filed 2 November, 1966.)

Mortgages and Deeds of Trust § 39; Pleadings § 12— Ordinarily, a cause of action may not be dismissed before plaintiff has filed complaint.

The land in question was foreclosed under the first deed of trust and purchased by defendant, the *cestui* in the second deed of trust, the sale resulting in a surplus above the amount of the indebtedness secured by the first deed of trust. Plaintiff, the owner of the equity of redemption, instituted action by service of summons and filed motion and affidavit for adverse examination of the defendant, seeking to have the second deed of trust declared null and void. The cause came on to be heard upon defendant's motion to vacate the order for adverse examination and petition for determination of the rights in the excess funds in the hands of the clerk, G.S. 45-21.31. Upon the hearing of defendant's petition and motion the court dismissed plaintiff's action before the adverse examination had been taken and before plaintiff had filed a complaint. *Held:* The dismissal of the action was premature.

APPEAL by plaintiff from *Bundy, J.*, March 1966 Civil Session of LENOIR.

On 26 September 1959 plaintiff and her husband, Alfred H. Sullivan, executed a deed of trust on a certain lot which they owned as tenants by the entirety in the city of Kinston, to the Mutual Savings and Loan Association of Kinston, to secure an indebtedness in the sum of $15,000.00. The deed of trust was duly recorded in Book 480, page 198, of Lenoir County Public Registry on 30th day of September 1959. Pursuant to a separation agreement entered into between them, the plaintiff conveyed to Alfred H. Sullivan all her interest in said lot. Sullivan then executed a second deed of trust securing a note in the amount of $3,500 to the defendant, Martha Johnson, which deed of trust was filed in Lenoir County Public Registry in Book 518, page 318, on November 14, 1962.

In April 1965, upon Sullivan obtaining an absolute divorce from plaintiff, a consent order was executed providing, in part, that Sullivan would convey said lot to plaintiff subject to the above two encumbrances. Subsequently, pursuant to the terms of the consent order, Sullivan executed deed to plaintiff.

Thereafter, plaintiff's attorney was appointed substitute trustee under the first deed of trust and commenced foreclosure proceedings. Defendant became the last and highest bidder at the sale. Plaintiff raised the bid and upon resale defendant again became the high bidder, and in due time paid the purchase price to the substitute trustee. From these funds the substitute trustee satisfied the note secured by the first deed of trust, and there remained in his hands the sum of $2,752.29.

On the date of the last resale, plaintiff commenced this action by the issuance of summons, and obtained order extending time to file her complaint. She also on the same date filed motion and affidavit to adversely examine the defendant, stating in her affidavit that the action sought to have a deed of trust upon certain lands owned by the plaintiff declared null and void. The motion was allowed by order of the Clerk of Superior Court dated July 26, 1965. On August 3 defendant filed a motion to vacate the order for adverse examination, and on August 4 the time for such examination was extended by order of the Clerk of Superior Court to an undetermined date upon motion of the defendant.

Before the adverse examination and before plaintiff had filed her complaint, the defendant petitioned the clerk under the provisions of G.S. 45-21.31 for a determination of the excess funds which had been paid into the clerk's hands by the substitute trustee.

At the March 1966 Session of Lenoir County Superior Court Judge Bundy entered judgment dismissing the plaintiff's cause of action.

From the above judgment the plaintiff appeals.

Turner and Harrison for plaintiff-appellant.
George B. Greene for defendant, appellee.

PER CURIAM. Plaintiff's issuance of summons, affidavit and motion to adversely examine the defendant indicate that her cause of action, if any, related to the validity of the second deed of trust. From the record it appears that there was before the judge a motion to vacate the order for adverse examination and a petition under G.S. 45-21.31 to determine rights to funds held by the Clerk resulting from the sale under the first mortgage. The record does not disclose a motion to dismiss the action. The plaintiff had not filed her complaint and the plaintiff's principal action was not before the court. Ordinarily a cause of action should not be dismissed before it is stated. When the complaint is filed, its sufficiency may then be tested. The dismissal of the action by the court below was premature and the judgment is

Reversed.

STATE v. JAMES EDWARD TABORN AND WILLIE EDWARD, ALIAS BOZO WILLIAMS.

(Filed 2 November, 1966.)

1. Criminal Law § 90—

The extra-judicial confession of one defendant is competent against him, and objection of codefendants on the ground that the statements also implicated them cannot be sustained when the court properly limits the admission of the testimony solely against the defendant making it, and therefore the fact that the witness in giving the testimony pointed toward the codefendants is not ground for objection, the witness' testimony being properly limited.

2. Criminal Law § 131—

The fact that the sentences imposed upon conviction of defendants for a crime jointly committed by them are not equal does not constitute cruel and unusual punishment, the length of sentences to be imposed being within the sound discretion of the trial court.

APPEAL by defendants from *Johnson, J.*, July 1966, Criminal Session, GRANVILLE Superior Court.

This is a criminal action in which James Edward Taborn, Willie Edward "Bozo" Williams and Charles Henry Royster were all tried under identical bills of indictment charging them with the crime of armed robbery. The cases were consolidated for trial and all three defendants pleaded not guilty.

The prosecuting witness, Lindsay Allen, testified that on the night of 27 June, 1966, he went to a ball game to locate a girl by the name of JoAnn McNeill, who had previously telephoned him concerning domestic work. One of the defendants told him that he knew JoAnn McNeill and that he would show him where she lived. The defendants and this witness crossed the street and approximately twenty feet on the other side of the street the defendant Taborn came out of the bushes with a long stick and told Allen that he wanted his watch and money, whereupon all three defendants began beating him with sticks. He testified that they stomped him and kicked him, and while they were beating on him he felt his wallet with $38 in it being removed from his hip pocket and felt his Bulova wrist watch being jerked off his arm. Allen's injuries kept him in the hospital four days.

Cecil Taylor testified that he saw two of the defendants, Taborn and Williams, beating Mr. Allen.

Nathan E. White, a police officer, testified that the defendant Royster confessed that he had assaulted Allen but denied that he had robbed him.

Taborn and Williams claimed the alibi that they were taking

part in the ball game at the time the crime was committed and offered two witnesses for corroboration.

Royster admitted that he participated in the attack on Allen with Williams and Taborn, but that he did not take anything from him nor did he see Williams or Taborn take any item from Allen.

The jury returned verdicts of guilty of armed robbery as to all three defendants. Royster received a sentence of five to seven years. Williams was sentenced to twelve to fifteen years, and Taborn's sentence was eighteen to twenty years.

Williams and Taborn appealed.

Attorney General T. Wade Bruton, Assistant Attorney General George A. Goodwyn for the State.

T. S. Royster, Jr., for defendants appellants.

PER CURIAM. Witness for the State, N. E. White, testified to a confession made to him by the defendant Royster, which was not admitted against the defendants Taborn and Williams. White used the word "subjects" as descriptive of persons who participated with him (Royster) in the crime. At one point in his testimony White pointed with his finger toward the defendants Taborn and Williams. Upon their objection, the Court overruled it "unless he is pointing to somebody." The Court directed the witness to point toward the ceiling instead. The defendants contend the Judge committed prejudicial error in failing to sustain their objection to this. We cannot agree. Bobbitt, J., speaking for the Court in *S. v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876, stated: "Where two or more persons are jointly tried, the extra-judicial confession of one defendant may be received in evidence over the objection of his codefendant(s) when, but only when, the trial judge instructs the jury that the confession so offered is admitted as evidence against the defendant who made it but is not evidence and is not to be considered by the jury in any way in determining the charges against his codefendant(s). *S. v. Bennett,* 237 N.C. 749 (753), 76 S.E. 2d 42, and cases cited. While the jury may find it difficult to put out of their minds the portions of such confessions that implicate the codefendant(s), this is the best the Court can do; for such confession is clearly competent against the defendant who made it." Stansbury discusses this same point by saying: "Confessions of one defendant are not evidence against a codefendant, but they may be admitted against the one making them with instructions to the jury not to consider them against the codefendant, and this is true although they implicate the defendant as to whom they are inadmissible." Stansbury, North Carolina Evi-

dence, 2d Edition, Sec. 188. The evidence was limited by proper instruction and we do not find any prejudicial error.

We have considered the exceptions to the charge and find them without merit.

Finally, the defendants argue that it was cruel and unusual punishment because of the distinctions in the sentences of the three defendants. The sentencing is within the sound discretion of the Judge so long as it is within the statutory limits. There is no such thing as a "science of penology". No human being has the perfect and error-proof ability to say, down to the exact year, how much time, through imprisonment, shall be taken from the life of his fellow man. But, the trial judge has information and observation not available to us. We cannot, and would not, say he was wrong.

No error.

STATE v. R. D. THOMPSON.

(Filed 2 November, 1966.)

1. Crime Against Nature § 2; Criminal Law § 131—

The punishment of a fine or imprisonment in the discretion of the court prescribed by G.S. 14-177 as amended is not a "specific punishment" within the meaning of G.S. 14-2, and the maximum lawful imprisonment is ten years.

2. Criminal Law § 133—

Where consecutive sentences are imposed upon two convictions and the first sentence exceeds the statutory maximum, the cause must be remanded for proper sentence on the first indictment with credit for the time served, defendant not having yet served as long under that sentence as he might have been legally imprisoned, and the second sentence will commence as provided therein at the expiration of the proper sentence on the first.

ON *certiorari* to review judgment of *Johnson, J.*, entered at June Criminal Session 1966 of the Superior Court of ROBESON County.

The petition, the Attorney General's answer and the record proper of proceedings in the Superior Court of Robeson County at June Criminal Session 1966 disclose the following:

The petitioner (referred to hereafter as Thompson) was indicted in each of two cases. In Case No. 19069, Thompson was charged with having committed, on April 2, 1966, the crime against nature with a named female child under twelve years of age. In Case No.

19069-A, Thompson was charged with the rape of said female child on said date. The two cases were consolidated for trial. Thompson was represented at trial by court-appointed counsel. In No. 19069 the jury returned a verdict of "Guilty of crime against nature as charged in the bill of Indictment," and in No. 19069-A the jury returned a verdict of "guilty of assault on a female with intent to commit rape as charged in the bill of indictment."

In No. 19069 the court pronounced judgment imposing a prison sentence of not less than eighteen nor more than twenty years. In No. 19069-A the court pronounced judgment imposing a prison sentence of not less than five nor more than seven years, "(t)his sentence to commence at the expiration of the sentence imposed in #19069."

Thompson, in his petition, prays that this Court vacate the judgment in No. 19069, the crime against nature case, and remand this case "FOR PROPER JUDGMENT, NOT TO EXCEED THE STATUTORY MAXIMUM OF (10) TEN YEARS." This Court allows Thompson's petition for *certiorari* and grants relief as set forth in the opinion.

Attorney General Bruton and Staff Attorney White for the State.
R. D. Thompson in propria persona.

PER CURIAM. Thompson does not attack the judgment in No. 19069-A. The sentence imposed thereby is authorized by G.S. 14-22.

Chapter 621, Session Laws of 1965, in full force and effect from and after its ratification on May 19, 1965, amended G.S. 14-177 so as to read as follows: "Crime Against Nature. If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court."

In *S. v. Blackmon*, 260 N.C. 352, 132 S.E. 2d 880, it was held that a statute (G.S. 14-55) prescribing punishment "by fine or imprisonment in the State's prison, or both, in the discretion of the court," did not prescribe "specific punishment" within the meaning of that term as used in G.S. 14-2. Where a person is convicted of any felony "for which no specific punishment is prescribed by statute," the maximum lawful term of imprisonment is ten years. G.S. 14-2. Hence, the sentence imposed by the judgment in No. 19069, to wit, imprisonment for a term of not less than eighteen nor more than twenty years, substantially exceeds the maximum lawful sentence.

"It is the general rule in this jurisdiction that where a defendant has been properly convicted but given a sentence in excess of that authorized by law, and comes to this Court pursuant to a pe-

tition for writ of *certiorari* in a *habeas corpus* proceeding, when such defendant has not served as long under the sentence as he might have been legally imprisoned, we vacate the improper judgment and remand for proper sentence. In such case, the defendant should be given credit for the time served under the vacated judgment." *S. v. Austin,* 241 N.C. 548, 550, 85 S.E. 2d 924, 926.

In Case No. 19069, the crime against nature case, the said judgment is vacated, and the cause is remanded to the Superior Court of Robeson County for judgment imposing a proper sentence, Thompson to be given credit thereon for the time served under the vacated judgment.

The sentence of not less than five nor more than seven years imposed by the judgment pronounced in Case No. 19069-A will commence, as provided therein, at the expiration of the sentence imposed by the (new) judgment (hereafter) pronounced in Case No. 19069 as directed in this opinion.

The Clerk shall forward a certified copy of this opinion to each of the following: (1) The Clerk of the Superior Court of Robeson County; (2) the North Carolina Prison Department; and (3) Thompson.

Judgment in No. 19069 vacated, and cause remanded for proper judgment in that case.

MISS ELLEN ROBINSON AND MRS. KATE R. McDIARMID v. BEN BUSIC AND I. W. ADAMS.

(Filed 2 November, 1966.)

APPEAL by defendant from *Crissman, J.,* June, 1966 Civil Session, WILKES Superior Court.

The plaintiffs instituted this civil action to recover from the defendant, Ben Busic, damages resulting from the fraud he perpetrated on the plaintiffs by inducing them to sell and convey to him by timber deed the merchantable timber on designated tracts of their lands. The plaintiffs are sisters, 73 and 81 years of age. They are inexperienced in business matters. After numerous visits, the appellant, an experienced timber dealer, advised the plaintiffs that the big trees on their lands, worth $200.00, needed to be cut and removed in order to permit the younger trees to grow. He had his attorneys prepare a deed for *all merchantable timber* on more than 100 acres of land, presented the deed, explaining to plaintiffs that merchantable

timber meant only a few big trees. Plaintiffs signed the deed. This was in January. In October, following, Busic sold the timber to I. W. Adams for $6,250.00. Appellant requested Adams not to divulge to the plaintiffs the amount he paid for the timber. Adams testified he would have paid the ladies as much in January as he paid Busic in October. The action was dismissed as to him.

Adams cut 394,334 board feet of lumber for which he received $23,015.35.

The jury answered the issues as here indicated:

"1. Did the defendant procure the timber of the plaintiffs by false and fraudulent representations, as alleged in the complaint?

Answer: Yes.

"2. If so, what amount, if any, are the plaintiffs entitled to recover of the defendant?

Answer: $5,525.00."

From a judgment on the verdict, the defendant appealed.

McElwee & Hall by John E. Hall for plaintiff appellees.
Ferree & Brewer for defendant appellant.

PER CURIAM. The appellant took many exceptions to the admissibility of evidence and to designated parts of the court's charge, none of which is sustained. The rule for the assessment of damages given by the court, while not technically correct, nevertheless was in nowise prejudicial to the defendant. There is nothing in this record to suggest the defendant would fare better, and he might fare worse at another trial.

No error.

TOMMY EDWARD HUGHES, BY HIS NEXT FRIEND, C. E. HUGHES, v. DONALD WAYNE VESTAL.

(Filed 2 November, 1966.)

APPEAL by defendant from *Lupton, J.*, March-April 1966 Civil Session of DAVIDSON.

Action and cross action growing out of a collision of automobiles. The issues submitted, and the jury's answers to the first, second and third issues, are as follows: "1. Was the plaintiff injured by

the negligence of the defendant as alleged in the complaint? ANSWER: Yes. 2. Did the plaintiff contribute to his injuries by his own negligence as alleged in the Answer? ANSWER: No. 3. What amount of damages, if any, is plaintiff entitled to recover of the defendant? ANSWER: $4,000.00. 4. Was the defendant's property damaged by the negligence of the plaintiff as alleged in the counterclaim? ANSWER: ..... 5. What amount of damages, if any, is the defendant entitled to recover of the plaintiff? ANSWER: ....." Judgment that plaintiff recover from defendant the sum of $4,000.00 and costs was entered. Defendant excepted and appealed.

Walser, Brinkley, Walser & McGirt for plaintiff appellee.

Jordan, Wright, Henson & Nichols; Hubert E. Olive, Jr; and Edward Murrelle for defendant appellant.

PER CURIAM. At Spring Term 1965, this case was before us on cross appeals by plaintiff and defendant. *Hughes v. Vestal,* 264 N.C. 500, 142 S.E. 2d 361. On the plaintiff's appeal, the plaintiff was awarded a new trial against defendant Donald Wayne Vestal. On the defendant's appeal, the judgment nonsuiting the cross action of defendant Donald Wayne Vestal was reversed. The action against defendant Paul Davis Vestal having been nonsuited at the first trial, and no appeal having been taken therefrom, the second trial was between plaintiff and defendant Donald Wayne Vestal.

Evidence offered in behalf of plaintiff and defendant, respectively, at the second trial, was substantially in accord with that offered in the first trial and summarized in the opinion of Moore, J., to which reference is made. Upon conflicting evidence, the jury answered the issues in favor of plaintiff.

The assignments of error brought forward and discussed in defendant's brief relate to the denial of defendant's motion for judgment of nonsuit and to asserted errors in the charge to the jury.

As to nonsuit, defendant contends plaintiff was guilty of contributory negligence as a matter of law. "The rule is well settled that involuntary nonsuit on the ground of the contributory negligence of the plaintiff may be allowed only when the plaintiff's evidence, considered in the light most favorable for him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom." *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787. When the evidence is considered in the light most favorable to plaintiff, we are of opinion the issues of negligence and of contributory negligence were properly submitted to the jury for determination. Conceding there may be technical error in the charge, the matters referred to

in defendant's assignments are not considered of such prejudicial nature as to warrant a new trial. Hence, the verdict and judgment will not be disturbed.

No error.

FRANCES ANN NEAL v. ARCHIE LEE STEVENS.

(Filed 2 November, 1966.)

APPEAL by plaintiff from *Gwyn, J.*, April 4, 1966 Session, FORSYTH Superior Court.

This civil action involved a claim and counterclaim growing out of a collision between the plaintiff's 1964 Ford which she was driving westwardly on Pilot View Street, and the 1960 Thunderbird which the defendant was driving northwardly on Summit Street, in the City of Winston-Salem.

The jury found defendant was negligent and plaintiff was contributorily negligent. From a judgment on the verdict, the plaintiff appealed.

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

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

PER CURIAM. The pleadings are analyzed in the opinion of this Court when the cause was here on a former appeal. *Neal v. Stevens,* 266 N.C. 96, 145 S.E. 2d 325. The evidence on the second trial was not essentially different from that discussed in the former opinion. From sufficient evidence and under a correct charge, the jury found both parties to the accident were negligent. In the judgment in accordance with the verdict, we find

No error.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. C. T. GASPERSON AND WIFE, MABEL GASPERSON.

(Filed 9 November, 1966.)

1. Eminent Domain § 5—

In determining the compensation to be paid for the taking of a portion of land or an interest therein, all factors pertinent to the fair market value of the remaining land immediately after the taking should be considered.

2. Same; Eminent Domain § 2—

The Highway Commission took an easement for a limited access highway which traversed plaintiff's land, leaving two parcels without access to each other except by a secondary road along the southern boundary, and with access to the limited access highway only at points some four or five miles distant. *Held:* The deprivation of access should be considered in determining the value of the lands remaining, G.S. 136-89.52, and an instruction to the effect that the denial of access should not be taken into consideration must be held for prejudicial error.

APPEAL by defendants from *Falls, J.*, January 24, 1966, Civil Session of BUNCOMBE.

The State Highway Commission (Commission) instituted this civil action July 1, 1963, as provided in G.S. 136-103 *et seq.*, for the appropriation for highway purposes of perpetual easements in a portion of a tract of land in Limestone Township, Buncombe County, owned by defendants.

Prior to the appropriation defendants owned a tract of land in Buncombe County, located approximately nine miles south of Asheville and two miles west of U. S. Highway 25, described as containing 85.28 acres. It was bounded on the west by the French Broad River, on the south primarily by the Glenn Bridge Road, and on the north and east by lands owned by other persons. A secondary road, known as Rockwood Road, curved through the property from the north-central area to the south-central area, terminating at Glenn Bridge Road and bisecting defendants' property. The land subject to the Rockwood Road easement consisting of 2.04 acres, was a part of defendants' 85.28-acre tract.

The appropriation was for the purpose of constructing Interstate Highway 26, a controlled-access facility. Of the land appropriated, 12.32 acres was appropriated for right of way purposes and .57 acre was appropriated for "construction easements," the latter affecting areas used for construction of gradual slopes or embankments. The portion of Rockwood Road within the appropriated area was relocated. As relocated, it is east of its original location and east of Interstate Highway 26. Interstate Highway 26 is constructed to cross over Glenn Bridge Road without providing or permitting access

thereto. The nearest places of access to Interstate Highway 26 from defendants' remaining property are four to five miles to the north and south.

As a result of said appropriation, defendants' remaining land consists of 19.61 acres lying west of Interstate Highway 26, between said highway and French Broad River, the southern portion thereof abutting Glenn Bridge Road, and of 50.74 acres lying east of Interstate Highway 26, the southern portion thereof abutting Glenn Bridge Road. Prior to said appropriation, defendants had direct access between any portion of their land and any other portion of their land. Too, defendants had access between any portion of their land and Rockwood Road. As a result of said appropriation, defendants have no means of access between the portion of their property lying west of Interstate Highway 26 and the portion thereof lying east of Interstate Highway 26 except by way of Glenn Bridge Road. Too, defendants have no means of access between the portion of their land lying west of Interstate Highway 26 and relocated Rockwood Road except by travel to and along Glenn Bridge Road.

Simultaneously with the institution of this action and the filing of complaint herein, the Commission filed a Declaration of Taking and Notice of Deposit with the Clerk of the Superior Court of Buncombe County, depositing at that time $6,250.00 as estimated just compensation. Defendants alleged damages in the amount of $47,000.00.

The court submitted and the jury answered the only issue raised by the pleadings as follows: "What amount, if any, are the defendants entitled to recover of the plaintiff, State Highway Commission, as just compensation for the appropriation of their property for highway purposes? ANSWER: $15,000.00."

Judgment, in accordance with the verdict, was entered. Defendants excepted and appealed.

Attorney General Bruton, Deputy Attorney General Lewis, Trial Attorney Smith and Associate Counsel Lamar Gudger for plaintiff appellee.

Harold K. Bennett and G. Edison Hill for defendant appellants.

BOBBITT, J. Defendants' Exception No. 21 is directed to this portion of the charge: "No compensation shall be awarded to the defendants in this action for the denial of access rights to the new highway since no rights ever existed. Thus the denial of access to the new highway shall not enter into your consideration in determining what effect the appropriation for a controlled access highway has upon

the fair market value of the remaining land immediately after the taking."

Defendants' Exception No. 22 is directed to "the failure of the court to instruct the jury to the effect that the denial of defendants to access to Interstate Highway 26 should be considered by the jury in assessing general damages in accordance with the provisions of G.S. 136-89.52."

Article 6D of G.S. Chapter 136 is entitled "Controlled-Access Facilities." A section thereof, G.S. 136-89.52, provides in pertinent part: "Along new highway locations abutting property owners shall not be entitled, as a matter of right, to access to such new locations; however, the denial of such rights of access shall be considered in determining general damages."

The applicable rule as to the measure of damages is now defined by statute as follows: "Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." G.S. 136-112(1). G.S. 136-112 was enacted as a part of Section 2, Chapter 1025, of the Session Laws of 1959. The rule as to measure of damages stated in G.S. 136-112 is in accord with that adopted and stated by this Court in numerous decisions prior to the adoption of the 1959 Act, *Robinson v. Highway Commission*, 249 N.C. 120, 105 S.E. 2d 287, decided in 1958, and cases cited therein.

It is undisputed that defendants are denied access from the remaining portions of their property to Interstate Highway 26. The question presented by assignments of error based on Exceptions Nos. 21 and 22 is whether such denial of access is to be considered in determining the fair market value of the remaining portions of defendants' land immediately after the taking. The court instructed the jury that such denial of access should not be considered. G.S. 136-89.52, in the portion thereof quoted above, expressly provides that "the denial of such rights of access *shall* be considered in determining general damages." (Our italics.)

G.S. 136-112(1) states the applicable rule as to the ultimate measure of damages. It contains no provision as to factors to be considered by the jury in determining fair market value. Under our decisions, *all* factors pertinent to the fair market value of the remainder immediately after the taking are to be considered by the jury. *Gallimore v. Highway Comm.*, 241 N.C. 350, 85 S.E. 2d 392; *Templeton v. Highway Commission*, 254 N.C. 337, 118 S.E. 2d 918. The fair market value of the remaining portions of defendants' land is materially

affected by the fact that access therefrom to Interstate Highway 26 is denied. G.S. 136-89.52 provides expressly that the denial of such rights of access is a factor to be considered. Hence, the challenged instruction was erroneous and prejudicial.

On account of said error in the charge, defendants are awarded a new trial. Discussion of defendants' other assignments of error is unnecessary. They present questions that may not recur at the next trial.

New trial.

STATE v. DELORES FIELDS.

(Filed 9 November, 1966.)

1. Assault and Battery § 15—

Where defendant contends that she did not assault the prosecuting witness in any way and that all she did was try to stop a fight between the prosecuting witness and a third person, the evidence does not require the court to instruct the jury on defendant's right to fight in self-defense or in defense of another.

2. Assault and Battery § 9—

A private citizen does not have the right to interfere in a fight between third persons unless he has a well-grounded belief that a felonious assault is about to be committed on one of them.

APPEAL by defendant from *Mallard, J.*, June 1966 Criminal Session of WAKE.

Criminal prosecution upon a warrant that charges defendant on 23 March 1966, at and in the city of Raleigh, did wilfully, maliciously, and unlawfully assault Diane Marie Evans with a deadly weapon, to wit, a razor blade. This action was first tried in the city court of Raleigh. In that court defendant was adjudged guilty and sentenced to imprisonment. From the judgment, defendant appealed to the Superior Court where she was tried *de novo*.

Plea in the Superior Court: Not guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for the State.

William W. Merriman, III, for defendant appellant.

PER CURIAM. On 23 March 1966 Diane Marie Evans saw defendant, Carolyn Taylor (who is called "Nellie"), and another girl at the Wake County jail where Diane was visiting a friend. She and Nellie got into an argument at the Wake County jail.

This is a summary of the testimony of Diane Marie Evans, except when quoted: Diane left the Wake County jail and went to her home. She was sitting on the front porch when she saw the defendant, Nellie, defendant's sister Lenora Fields, and Eriel Marie Porter coming up the street. When she saw the defendant and the three other girls coming up the street, she got off her porch and went into the house. Defendant called her out of the house and said to her, "Nellie was going to beat me up or she was going to beat Nellie." Defendant gave Nellie a razor blade and then went up on a hill on the other side of the street. Eriel was chasing her with a razor blade and had already cut her once when she picked up a brick and hit Eriel with it, and "the lick made blood." She was sitting on Eriel and defendant pushed her off Eriel and cut her with a razor blade she had between her fingers. She was not armed with anything when defendant cut her with a razor blade.

This is a summary, except when quoted, of the evidence of Dorothy Thompson, a witness for the State: She heard someone in front of Diane's house calling Diane. Diane went out in front of the house and defendant told her that "Nellie was going to fight her or beat her and if she didn't, she was going to beat Nellie." Diane was talking to Nellie, and Nellie had a razor blade waving it in Diane's face and Diane grabbed her arm. When Diane grabbed Nellie's arm, defendant and Eriel gathered around Diane, and that is when the fighting started. Every time Diane would grab Eriel, defendant would run and pull her off, and she could see Diane was bleeding on her arm. She went into the house and called the police. She is 17 years old, and Diane is 16.

This is a summary, except when quoted, of the testimony of Neil Sanders, a witness for the State: Defendant called Diane out of her house and told her, "Nellie is going to beat you and if Nellie doesn't beat you, we are going to beat you." He saw defendant with a razor blade. Eriel had a razor blade. Diane was sitting on Eriel and defendant came over, pushed Diane off Eriel, and struck her on the arm with a razor blade. Diane had not hit defendant.

Defendant presented the testimony of three witnesses. Her first witness was Carolyn Taylor, who testified in substance, except when quoted: She and Diane had an argument at the Wake County jail. After arguing with Diane, she and the three other girls left and headed for her home. They had to walk by Diane's house. When they passed Diane's house, Diane was sitting on the porch. She saw

Diane go into the house. At that time defendant did not have a razor blade. Defendant did not lay a hand on Diane the whole time they were in front of Diane's house. Defendant tried to stop Diane and Eriel from fighting. Defendant did not cut or hit anybody. She (Nellie) cut Diane on her arm with a razor blade. Defendant did not have a thing to do with the cutting. It was her fight. Defendant did not tell Diane "Nellie is going to whip you, or I am going to whip Nellie." She, Eriel, and defendant's sister were tried and convicted of assault in this case.

Lenora Fields, another witness for defendant, testified in substance: She is defendant's sister. She, defendant, Nellie, and Eriel walked down the street that goes by Diane's house. Nellie called Diane out, and Nellie and Diane had an argument. Defendant did not have a razor blade and did not cut anyone. She (Lenora Fields) was convicted of assault with a deadly weapon in this same case.

This is a summary of the testimony of Eriel Marie Porter, another witness for defendant: On 23 March 1966 she, defendant, Carolyn (Nellie) Taylor, and Lenora Fields walked by Diane's house. Defendant did not have a razor blade or any other weapon. She did not give anybody a razor blade. Defendant did not cut or hit anybody. After Nellie Taylor called Diane out of her home, defendant said she was not going to have anything to do with it and went over and stood on a little bank. She was fighting with Diane. Defendant did not push her off. She pushed Diane off herself. She has been convicted of assault with a deadly weapon in this case. She was fighting with Diane, and Diane hit her on the head with a brick and cut her on the arm with a razor blade. The whole thing started when Diane slapped Nellie.

Defendant's only assignment of error is as follows: "The court below erred in failing to apply the law to the evidence as required by North Carolina G.S. 1-180, in that it did not charge the jury with reference to the law of self-defense as advanced by the defendant."

Defendant was not a witness in the case. Defendant's evidence is to the effect that she did not cut Diane with a razor blade or assault her in any way, and that all that she did was to try to stop Diane and Eriel from fighting. There is no evidence in the record before us that defendant believed it was necessary for her to cut Diane to prevent an assault on herself or to prevent a felonious assault on Eriel, and had reasonable grounds for such belief. The facts in evidence did not call for instructions in legal principles relating to self-defense or to the right of a private citizen to defend a third person from a felonious assault. *S. v. Cooper,* 266 N.C. 644, 146 S.E. 2d 663.

This principle of law seems to be well settled in this State that

unless a defendant has a well-grounded belief that a felonious assault is about to be committed on a third person, defendant does not have the right nor the duty as a private citizen to interfere in order to prevent the supposed crime. *S. v. Robinson,* 213 N.C. 273, 195 S.E. 924.

The court instructed the jury that they could return one of three verdicts: Guilty of assault with a deadly weapon; guilty of a simple assault; or not guilty.

In the trial below we find

No error.

CLAUDE W. MABE v. RAYMOND HILL AND MAGGIE HILL.

(Filed 9 November, 1966.)

Automobiles § 40— Defendant's statements at scene held not to amount to an admission of negligence or liability.

Plaintiff had jacked up a rear wheel of defendant's car, which was stuck in the snow, and was partially under the car attempting to put chains on the wheel, when he was injured by the car rolling or falling upon him. Plaintiff contended defendant was negligent in failing to keep the brakes on as she had been instructed to do by plaintiff. *Held:* A statement by defendant that she "could have released her foot off the brake" is not sufficiently definite to constitute substantive evidence and a statement by defendant that "I feel like this is my fault, or it would never have happened," amounts to nothing more than a legal conclusion, and defendant's statements are insufficient to require submission of the issue of negligence to the jury.

APPEAL by plaintiff from *Crissman, J.,* March 1966 Civil Session of ALLEGHANY.

Civil action to recover damages for personal injuries.

Plaintiff's evidence tends to show that on 28 February 1964 the *feme* defendant was operating a "family purpose" automobile belonging to the male defendant. She was accompanied by plaintiff's wife. They encountered the plaintiff as they approached the road leading to the homes of the defendants and the plaintiff. It was snowing, and there was an accumulation of two to three inches of snow on the ground. There was a discussion between the plaintiff and the *feme* defendant as to the advisability of her attempting to take his wife home. Upon his stating that he thought she could make it, she started up the road and quickly became stuck in the snow on an upgrade. The plaintiff surmised that it would require tire chains

to move the car and advised the defendant that it would be necessary to jack up the rear of the car in order to put the chains in place. He told the defendant to put the car in "parked" position, put on the emergency brake, and "to hold the brake." The plaintiff proceeded to jack the left rear bumper of the car up so that the left rear wheel was off the ground, and crawled partly under the car near the front of the left rear wheel, attempting to fasten the chain hook around the inside of the wheel. The plaintiff was injured when the car rolled or fell upon him.

At the close of plaintiff's evidence, defendants moved for judgment as in case of nonsuit, which motion was allowed. From judgment entered accordingly, the plaintiff appealed.

R. Floyd Crouse, McElwee & Hall for plaintiff.
Johnston and Johnston for defendants.

PER CURIAM. The plaintiff's sole allegation of negligence was the failure of the *feme* defendant to "keep her brakes on as she was instructed to do by the plaintiff." He bottoms his case on two statements alleged to have been made by *feme* defendant. First, a statement to the plaintiff that she "could have released her foot off the brake." This is neither an admission nor declaration by the *feme* defendant which is sufficiently definite, certain or unequivocal to be considered as substantive evidence. Second, a statement to plaintiff's wife that "I feel like this is my fault, or it would never have happened." This is nothing more than a legal conclusion, determinable alone by the facts. *Lucas v. White,* 248 N.C. 38, 102 S.E. 2d 387.

> "In an action for recovery of damages for injury resulting from actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which he owed plaintiff under the circumstances in which they were placed; and, second, that such negligent breach of duty 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 the facts as they existed. . . . Indeed, there must be legal evidence of every material fact necessary to support a verdict, and the verdict 'must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evi-

dence, and not a mere guess, or on possibilities.' " *Wall v. Trogdon,* 249 N.C. 747, 107 S.E. 2d 757.

When tested by the applicable standards, the plaintiff's evidence is insufficient to make out a case of liability.

The judgment is

Affirmed.

STATE v. COY GORDON CHOPLIN.

(Filed 9 November, 1966.)

Trial § 36—

An instruction to the effect that the jury should scrutinize defendant's testimony because of his interest in the verdict, but that if, after such scrutiny, the jury should find that defendant had told the truth to give his testimony the same weight and credibility as that of any disinterested witness, *is held* not to constitute prejudicial error.

APPEAL by defendant from *Johnson, J.,* August A Criminal Session 1966 of WAKE.

Defendant is charged with operating a motor vehicle while under the influence of alcoholic beverages, in violation of G.S. 20-138.

The State offered as witness Patrolman R. R. East, who testified substantially as follows: He was a member of the State Highway Patrol on the 26th day of January 1966, and on that day he saw the defendant driving a 1953 Buick automobile in a northerly direction on U.S. Highway 1, approximately four miles south of Wake Forest. Choplin was driving at a very slow rate of speed and was weaving across the highway and finally ran off the highway and down an embankment. He stopped and spoke to the defendant, whereupon the defendant opened the door, fell partially out and began crawling in the direction of the patrolman. After observing the defendant, he placed him under arrest and carried him to jail. The patrolman stated that in his opinion defendant was under the influence of some intoxicating beverage.

The defendant offered evidence tending to show that he did not drive the automobile to the place where it came to stop; that he had driven to the house of a Mr. Emory and while there consumed about a pint of whiskey; that Mrs. Emory drove the car off and down the embankment. The defendant later walked to the car, started the motor, and while he was attempting to back the car out,

Trooper East drove up. The defendant also offered the testimony of Mrs. Emory to corroborate his testimony. It was stipulated by the Assistant Solicitor for the State and counsel for the defendant that the defendant was under the influence of intoxicating beverages at the time complained of in the warrant.

From a verdict of guilty as charged and verdict entered thereon, defendant appeals to the Supreme Court.

Earle R. Purser for defendant appellant.

Attorney General Bruton, Assistant Attorney General Melvin, and Staff Attorney Jacobs for the State.

PER CURIAM. The defendant abandoned all his exceptions except the one to that portion of the judge's charge which reads as follows: "That when a defendant goes upon the stand and testifies in his own behalf it becomes the duty of the jury to very closely scrutinize and examine the testimony of the defendant because he is a person interested in your verdict. He is the one who will be directly affected by the outcome of the case. So I instruct you, gentlemen of the jury, that in this case it is your duty to very closely examine and very carefully scrutinize the testimony of the defendant." Immediately thereafter the trial judge further charged the jury: "If, however, after such close scrutinizing and examination you conclude that he told the truth about those matters as to which he testified, then it would be your duty to give to his testimony the same weight and credibility that you would give to that of any disinterested witness. . . ."

This Court in considering a very similar charge in the case of *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606, held that such charge was not reversible error.

Reading the charge contextually and with the entire record, we find

No error.

STATE OF NORTH CAROLINA v. BAYARD THURMAN POOLE, JR.

(Filed 9 November, 1966.)

Automobiles § 72—

In this prosecution for operating a motor vehicle on a public highway while under the influence of intoxicating liquor, the conflicting evidence *is held* to raise a question for the jury and warrant the overruling of defendant's motion to nonsuit.

APPEAL by defendant from *Copeland, S.J.,* August 2, 1966 Criminal Session of WAKE.

Defendant, charged with operating a motor vehicle on a highway in Wake County on March 19, 1966, while under the influence of intoxicating liquor, was first convicted in the Recorder's Court of Wendell. From the judgment there imposed he appealed to the Superior Court, where the evidence of the State tended to show:

Between 5:00 and 6:00 p.m. (approximately an hour and a half before dark) on March 19, 1966, defendant, accompanied by his wife and son, drove his Ford automobile from Riverview Drive into Wayne Drive, a 30-foot wide gravel street, open to public travel. Defendant "proceeded across Wayne Drive into the road ditch in a long sweeping angle," and struck the rear end of a tractor, which Mr. Samuel A. Pittman had stopped in his own driveway with its rear wheels in the ditch on the street. After the car struck the tractor, defendant drove 100 feet beyond the Pittman house and stopped at the next house. After his wife and son got out on the right side of the car, defendant drove the automobile backward to the Pittman drive. When defendant got out he was staggering and "his equilibrium was not much." His face was red, his speech barely coherent, and he had a strong odor of alcohol on his breath. Mr. Pittman summoned a highway patrolman and "Trooper Rowe" came to the scene in a few minutes. He began his investigation by asking defendant who had been driving the automobile. Defendant, in the presence of his wife, said that he was the driver. In the opinion of Messrs. Pittman and Rowe, defendant was under the influence of some intoxicating beverage.

Defendant did not testify. He offered the testimony of his wife, who said that she — not defendant — was the driver of the automobile; that he had had two or three drinks before they left their home in Knightdale between 5:00 and 5:30 p.m.; that Pittman had caused the collision when he backed the tractor out into the road in front of her approaching automobile; that she went into the ditch in an unsuccessful effort to avoid it. She also said that to her knowledge Mr. Rowe did not ask defendant who had been driving the automobile.

The jury returned a verdict of guilty as charged in the warrant. From the judgment imposed, defendant appeals.

T. W. Bruton, Attorney General, William W. Melvin, Assistant Attorney General, and Donald M. Jacobs, Staff Attorney for the State.

Earle R. Purser for defendant.

PER CURIAM. Defendant's assignments of error present only the question of nonsuit. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736; *State v. Dishman,* 249 N.C. 759, 107 S.E. 2d 750. The preceding statement of the evidence manifests its sufficiency to overrule the motion for nonsuit. The record discloses that throughout the trial the judge correctly applied the pertinent rules of law. Obviously, the jury accepted the State's evidence and rejected defendant's. In the trial, we find

No error.

STATE v. EDWARD BERNARD DAY, EUGENE DAVIS, JOSEPH WILLIAM FREELOW, AND LEWIS STANLEY.

(Filed 9 November, 1966.)

APPEAL by defendants from *McConnell, J.,* August 30, 1965, Criminal (Mixed) Session of UNION.

The four defendants were indicted in a bill charging that they, on October 9, 1964, "unlawfully, wilfully, and feloniously, having in their possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a pistol, whereby the life of Lessie Newsome was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away money of the value of over $300.00 from the presence, person, place of business, and residence of Lessie Newsome," etc., a violation of G.S. 14-87.

Defendants were represented by counsel.

Evidence offered by the State tended to show the facts narrated below.

Three Newsome sisters, Miss Mattie, aged 76, Miss Lillie, aged 61, and Miss Lessie, aged 59, and their unmarried brother, Wid Newsome, aged 63, resided in their farm dwelling some nine miles from Monroe; the home of their nearest neighbor was a quarter of

a mile or so away. They had $3,000.00 in one hundred dollar bills in a trunk; $1,000.00 in fifty dollar bills in a pocketbook, which was in a cupboard or cabinet; and "$500.00 of change" in other cabinets "in different kinds of containers, snuff boxes and tobacco cans and so forth."

On the morning of October 9, 1964, Wid left home about 8:30 "to see about some seed wheat." The four defendants "drove up in the yard" about 10:00 a.m. At that time, the three sisters were the only persons in the Newsome house. Defendant Davis got out of the car and, after obtaining permission, got a bucket, put water in the car, and got back in the car. Shortly thereafter, he came back to the house, and at that time told Miss Lillie, who came to the door, that "he heard Mr. Newsome had some sweet potatoes to sell." She replied, succinctly: "He's not." Thereupon, the four defendants, each having a pistol in his hand, forced their way into the Newsome home. Defendant Davis struck Miss Lillie with the blackjack and knocked her down. The three sisters began to scream and holler. They were threatened, tied, gagged and blindfolded. Defendant Davis said, "When we get all the money we can find, we're going to set this house with gas and burn you all up in here."

For thirty minutes or more, in the hearing of the three sisters, the Newsome house was ransacked and plundered. The defendants left when Wid Newsome and another brother, Hamp Newsome, approached. Freelow left on foot. Day, Davis and Stanley covered their departure in the car by drawing their pistols and threatening Wid and Hamp. The Newsome money, referred to above, was gone. The house was in a state of complete upheaval and disorder; the contents of shelves, cabinets, chests, the trunk, also bedclothes, were scattered over the floor, and the mattresses were cut, etc.

Each defendant testified he was not in Union County on October 9, 1964, and was not involved in any way in the incidents referred to in the State's evidence.

As to each defendant, the jury returned a verdict of "GUILTY." As to each defendant, a judgment imposing a prison sentence was pronounced. Defendants excepted and appealed.

Attorney General Bruton, Deputy Attorney General McGalliard and Staff Attorney White for the State.

Plumides & Plumides and Jerry W. Whitley for defendant appellants.

PER CURIAM. Each of the assignments of error brought forward in defendants' brief has been carefully considered. Defendants' contention in respect of each assignment is fully considered

and answered in the Attorney General's brief. Suffice to say, none of the assignments discloses prejudicial error or presents a question of sufficient merit to require or warrant discussion. The jury, on uncontradicted evidence, found the alleged (serious and despicable) crime was committed; and, on conflicting evidence, found said crime was committed by these defendants.

No error.

R. B. STOKES CONCRETE COMPANY v. WARREN B. WARDEN, AND WIFE, CHARLOTTE L. WARDEN.

(Filed 9 November, 1966.)

APPEAL by plaintiff from *Brock, S.J.*, May 1966 Nonjury Session of WAKE.

Small claim adjudicated under G.S. 1-539.3 *et seq.*

Plaintiff R. B. Stokes, the sole proprietor of R. B. Stokes Concrete Company, instituted this action to recover a balance of $671.71 allegedly due him for constructing "certain concrete walkways and other work" on defendants' premises. Defendants denied that they were indebted to plaintiff in any amount and alleged a counterclaim against him in the amount of $1,000.00. They averred that a swimming pool and the walks surrounding it, which plaintiff had constructed for them, contained defective materials and workmanship.

Plaintiff's evidence tended to show: On May 16, 1963, plaintiff contracted to construct a swimming pool for defendants at a cost of $4,600.00. He guaranteed the work for one year and agreed to give defendants a first-class job, and he performed his agreement. After the pool was finished, the parties entered into another contract for additional work on walkways and for "work under the house and the front yard." The cost of this additional work was $1,713.05. Plaintiff has made every reasonable effort to satisfy defendants, but Mr. Warden is a perfectionist who cannot be satisfied. The total unpaid balance due plaintiff on both contracts is $671.71 with interest from October 1, 1963.

The evidence for defendants tended to show: Contract specifications for the walks which plaintiff agreed to construct called for a drop of one inch in eight feet. The sidewalks were not so constructed but were put in "reasonably flat." As a result, water was trapped and "birdbaths" were created. After the first winter, cracks appeared in the corners of the swimming pool; some tiles cracked

and paint chipped. Other defects were also enumerated. Defendants estimate that "75 to 80% of the jointed line area all the way around the pool" was defective in one way or another. Plaintiff promised to remedy the defects but failed to do so. Mr. Warden illustrated his testimony with colored slides showing the pool and the walks. One of his witnesses estimated that it would cost $1,037.40 to repair the defects.

Judge Brock answered the issues raised and entered judgment that defendants were entitled to recover $325.00 from plaintiff and that plaintiff was entitled to recover nothing of defendants. Plaintiff appeals.

Allen W. Brown for plaintiff.

Poyner, Geraghty, Hartsfield & Townsend by Marvin D. Musselwhite, Jr., for defendants.

PER CURIAM. This case involved only a factual dispute, which the judge has resolved. The assignments of error disclose no error of law.

The judgment is

Affirmed.

JOSEPH LICHTENFELS, JOHANNA L. ABRAHAMS, CAROLYN L. GREEN, AND HELEN L. GUMPERT v. NORTH CAROLINA NATIONAL BANK, A CORPORATION.

(Filed 23 November, 1966.)

1. Trusts § 7—

A trustee, in the management, investment and reinvestment of the trust property, will not be held liable to the beneficiaries for the difference between the value of the *corpus* of the trust at the time of distribution and the value it would have had, in the light of hindsight, if the trustee had sold certain stock of the estate and reinvested, but the trustee may be held liable only for losses resulting from its failure to act in good faith or its failure to use ordinary care and reasonable diligence in the management of the estate.

2. Same—

Where the trustor fixes rules for the exercise of discretionary power in the trustee to invest and reinvest the trust property, the trustee must follow the trustor's directive unless such directive becomes impossible of performance, or is illegal, or there is such a change of circumstances as to justify or require a deviation therefrom.

3. Same; Executors and Administrators § 9—

The trustee of a testamentary trust, as well as an executor, is a person named by the testator to carry into effect the intention of the testator as ascertained from the instrument and to dispose of the estate according to its terms, and the trustee must give effect to such intent unless it is contrary to some rule of law or at variance with public policy.

4. Same— Evidence held insufficient to show mismanagement of trustee in failing to diversify trust holdings.

The *corpus* of the trust created by the will in question included a block of stock in a closely held family corporation, which, through various mergers and stock splits, comprised a large percentage of the trust estate. The will in question expressly authorized the trustee to retain the stock as a proper investment and left it solely to the discretion of the trustee to allow the investment to remain intact, but with power to invest and reinvest. The evidence further tended to show that those in the management of the family corporation were careful, cautious and highly respected businessmen, that the corporation operated close at hand and the management was well known to the trust officers, that the trust officers periodically reviewed the portfolio, did sell a small amount of the stock for reinvestment, and that their retention of most of the stock was in accordance with the wishes of the life beneficiary of the trust. *Held:* The evidence fails to establish a right in the distributees of the *corpus* to surcharge the trustee with a breach of trust in holding a large part of the *corpus* in the stock of the corporation and in failing to sell more of the stock for reinvestment.

APPEAL by plaintiffs from judgment dismissing the action entered by *Campbell, J.*, on January 13, 1966, in the Superior Court of BUNCOMBE County.

The plaintiffs instituted this civil action on February 1, 1963, alleging they, as remaindermen, are entitled to surcharge the defendant, Trustee of the Carrie C. Long Trust, with the sum of $2,467,854.55 resulting from the trustee's mismanagement. The alleged mismanagement consisted in retaining 18,000 shares of Cone Mills stock which should have been sold for diversification.

The Will of Carrie C. Long, executed April 25, 1923, was attached to and made a part of the complaint. After disposing of the household effects and certain other bequests, the testatrix devised and bequeathed all other property to the executors in trust "to divide into two equal parts." One part with its income was given to her daughter, Edna L. Lichtenfels, for life, with the remainder to her children. The oldest child at the time was 11 years of age. The other one-half of the trust with interest was given to another daughter, Dorothy L. Berney, for life, with remainder to her children. The trusts were administered as one until May 14, 1938, when they were separated. The Berney trust is not involved in this action.

Among the assets of the Lichtenfels trust were 258 ½ shares of common and 126 ½ shares of preferred stock in three Cone corp-

orations. In 1946, by consolidation and mergers, both the common and preferred stocks were retired and 9,101 shares of common stock in Proximity Manufacturing Company were substituted. On January 1, 1948, the Proximity Manufacturing Company stocks were retired and in lieu thereof 27,303 shares of common stock in Cone Mills Corporation were issued.

The Carrie C. Long will contained this directive:

> "THIRD: I hereby grant to my said Executors and Trustees, or the survivor of them, full power and authority to sell, mortgage, exchange or otherwise dispose of any property, whether real or personal, which may come into their possession, or to which they may be entitled as a part of my estate, and vest them or the survivor of them with full power and authority to convert all or any part of my estate into cash, upon such terms and at such times as they may deem it proper to do for all the purposes herein mentioned, and with like power and authority to invest and reinvest any and all funds held by them as Trustees, in such securities as they may deem wise and expedient. My trustees are hereby expressly authorized to retain as a proper investment of trust funds, any stock or other securities owned by me, or which may be purchased by them after my death, and I leave it solely to them to allow such investments to remain intact to be increased, reduced, or entirely converted into our other investments or securities."

During the course of the trial, lasting six weeks, the parties examined expert and other witnesses and introduced numerous documents. The plaintiffs' witnesses testified in substance that a prudent investor would have applied the doctrine of diversification to guard against loss and to produce certain gain on an advancing market and should have sold the major portion of the Cone Mills stock. One of the experts, Dr. Latane, testified:

> "Based upon these records and the evidence that I have considered, and the records in this case, I have an opinion satisfactory to myself as to whether or not the action of the Trust Review Committee on that date (1947) in connection with this Trust was the conduct of a prudent investor. My opinion is that it was not conduct suitable for a prudent investor because the Trust was clearly overbalanced and held far too much Proximity Manufacturing Company capital stock."
> * * *
>
> "I have an opinion satisfactory to myself as to what action a prudent investor and Trustee would have taken on that date.

I believe a prudent investor on that date would have already been actively planning and carrying out a policy of reducing the holdings of Cone Mills Stock from 27,303 shares to approximately — to 1,303 shares of stock."

Another witness, Mr. McCarley, after designating Cone Mills stock as cyclical, testified:

"I have an opinion satisfactory to myself as to the percentage of a trust or investment portfolio that a prudent investor would devote to or have invested in cyclical stocks. I would like to state that there are many opinions in this, my personal opinion is that in the neighborhood of not over 20 per cent of the total investment should be in cyclical securities." * * *

"I have an opinion satisfactory to myself as to what percentage of a total portfolio a prudent investor would have devoted to or invested in any one individual cyclical stock. My opinion is not over five per cent in any one issue."

Other witnesses gave similar opinion evidence.

The defendant also offered many witnesses, including investment experts. Mr. Holderness testified:

"I have an opinion satisfactory to myself as to whether or not the stock of the two companies (Proximity and Cone Mills) was suitable for retention by a prudent investor or prudent Trustee from 1947 until date. I think it definitely was suitable, and that its retention would be prudent. * * * If I held stock which was suitable for retention, I would not sell it solely for purposes of diversification."

Mr. Miller, investment analyst and partner in Drexel and Company, Philadelphia, testified:

"There are approximately 500 textile manufacturers in this country. I would describe approximately 20 of them as being major producers . . . Cone Mills being fifth or sixth in sales in the United States. We have made a study or investigation of the financial structure and condition, including the results of operations, assets, liabilities and net worth, of Cone Mills Corporation, formerly named Proximity Manufacturing, during the period from the beginning of 1946 through the year 1962. In making such a study or investigation, the sources of information used were the ones I have already mentioned that are applicable to financial study. They would be the annual reports in Moody's and Standard & Poor's, the financial statements prepared by A. M. Pullen & Company, the Reorganization

Plan of the Cone Companies, and, of course, all of the other industry data which I have mentioned.

"Based upon my investigation, I have an opinion satisfactory to myself as to whether the common stock of Cone Mills Corporation, formerly Proximity Manufacturing Company, from the standpoint of quality was suitable for retention by a prudent investor at all times during the period from January 1, 1946, through December 31, 1962. The opinion is that the common stock of Cone Mills was suitable for retention from the standpoint of quality by a prudent investor during this period."

Other witnesses gave similar testimony.

Mr. McPheeters testified: "I was a director of the bank most of the time and a member of the Trust Committee. . . . In those meetings, the Carrie Cone Long Trust was considered very carefully, repeatedly. . . . I believe the minutes reflect that consideration was given to the Carrie Cone Long Trust in those meetings an average of two to four times a year. The members of the Trust Department considered the Carrie Cone Long Trust very frequently. * * *

"In the light of the income that was being derived from this stock, comparable to anything that we could possibly hope to reinvest in, plus the likelihood, in our opinion, at least, of general appreciation in value of the assets, determination was made to retain the stock, of course taking into account always the provisions of the will, and advice of the estate's attorney and the wishes of the life tenant."

The evidence disclosed, and the court found, that Cone Mills stock was closely held by the Cone family. It did not have an established market value until it was listed on the New York Stock Exchange in November, 1951.

"12. The various Cone family holdings heretofore referred to were closely held family stocks and were not traded on any listed or over-the-counter market until the year 1947, and the defendant and its predecessor, Security, in the absence of readily available 'market' values, used the par value of said holdings in its trust review sheets; (that the so-called Cone family holdings were treated separately by the trustee until the year 1947) when a 'market' value was more readily ascertainable; that at all times from May 4, 1936, when the defendant and its predecessor, Security, began to administer the trust estate, the so-called Cone family securities amounted to more than 35%

of the entire holdings of corporate stocks, and in May, 1948, amounted to as much as 90% of all the corporate stock holdings." (This resulted from reorganization. No Cone Mills stock was purchased.)

"13. That the so-called Cone family stock holdings, pursuant to various mergers and stock splits and name changes, in 1946 became 9,101 shares of Proximity common stock and in 1948 became 27,303 shares of Cone Mills Corporation common stock; that on November 4, 1951, Cone Mills Corporation stock was admitted to trade on the New York Stock Exchange."

On July 20, 1949, the defendant's Trust Department wrote the life tenant:

"A recent review of the securities in your Trust indicates that 91.6 per cent of the investments are in common stocks, the value of the Cone Mills Corporation stock accounting for practically all of this percentage. The practice of confining the investments of any Trust to one security has never been considered a wise procedure and the Trust Committee of our Board of Directors has discussed several times the question of disposing of at least a part of the Cone Mills stock in order to diversify the investments held in this Trust. They, of course, have been cognizant of the family connection, the standing of the Company in the industry as well as its financial statement and liberal dividend policy. We have assumed in the past that due to the reasons mentioned above, and possibly others, and the fact that we have heard nothing from you in this connection, that there was no desire on your part that any part of the holdings of Cone Mills stock be disposed of for reinvestment. If our assumption is correct and it is your desire that we continue to retain all of the stock, please so indicate upon the bottom of the copy of this letter which is attached."

The life tenant replied: (July 23, 1949)

"You are correct in assuming that there is no desire on my part that any part of the holdings of Cone Mills stock be disposed of for reinvestment. I am perfectly satisfied with the investment, and pleased with the income it produces, and I would feel distressed if you disposed of any of the stock for the purpose of reinvestment. Very truly yours, Edna Long Lichtenfels."

On September 26, 1952, the Trustee wrote life tenant:

"The committee is mindful of your connection with the Company as a member of the family and is also well aware of the bril-

liant success that the corporation has made. However, it is felt that for your benefit and for the benefit of those who will receive the estate in the future the prudent approach is to reduce the holdings of the Cone stock by sale and to reinvest in tax exempt bonds. To do this will probably increase rather than decrease your spendable income, since if you are in the 75% income tax bracket a 2% tax exempt return at that range is the equivalent of an 8% taxable return.

"We plan, therefore, to sell at the market 2,303 shares of the 27,303 that are held in the account. It is our further plan to keep the matter before us with the idea of making further reductions in the stock holding from time to time.

"We hope that you will agree that this is the best thing to do."

The life tenant replied:

"I concur with you that it is wise to reduce the holdings of Cone stock and diversify the risk, especially since I have heard so much talk about a depression next year and am rather concerned about 'having all my eggs in one basket.' I appreciate the action you have already taken, with reference to the 2,303 shares you have sold and reinvested in first class municipal bonds."

On September 16, 1958, the Trust Officer wrote:

"We completed the sale of 2,303 shares Cone Mills Corporation stock in 1953 and also sold 2,000 shares in 1954. These shares were sold in the $24 and $26 price range. Since the account is still very heavily invested in one common stock and since there is no indication of an early up-turn in earnings for the textile industry generally, and further due to the fact that Cone Mills Corporation stock has moved up substantially in price from recent lows, our Trust Investment Committee now recommends the following:

"Sell: 3,000 shares Cone Mills Corporation—$43,540.00.

"Purchase: $30,000 Tax-free municipal bonds rated 'A' or better by Moody's, to yield about 3½%."

The Court further found that during the administration of the Trust the life tenant, Mrs. Lichtenfels, mother of the plaintiffs, received income from the trust in the amount of $946,684.07. Upon all the evidence, the Court found:

"11. That the defendant and its predecessor, Security, kept and maintained trust review sheets showing the assets of the trust from time to time together with the dates of the various

reviews as set forth and contained in Stipulation 24-A, which Stipulation is made a part of this finding."

"13a. Stock of Cone Mills Corporation and its predecessor companies, at all times during the administration of this trust by the defendant and its predecessor, Security, was suitable, from the standpoint of its quality, for retention within the corpus of the trust."

"19. That at the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved for judgment of nonsuit, and the Court being of the opinion that there was sufficient evidence of the lack of due diligence on the part of the trustees under the prudent man rule in failing to diversify and in selling other stock in lieu of the Cone stock to raise an issue for the Court acting as a jury, said motions were overruled, but, in view of the subsequent conclusion as a matter of law that the prudent man rule is not applicable to this case under the terms of the will in question, the Court is not called upon and does not make further findings of fact bearing upon said issue."

From the findings of fact, the court concluded:

"1. The defendant and its predecessor, Security, performed duties as trustee of the trust in good faith and without any fraud, direct or indirect.

"2. The Will of Carrie Cone Long vested in the defendant and its predecessor, Security, as trustee, not only the express authorization to retain investments in stock or other securities but said instrument left it 'solely' to the trustee (the defendant and its predecessor, Security) to allow such investments to remain intact, to be increased, reduced, or entirely converted into other investments or securities.

"3. That, in view of the terms and provisions of said Will, the Court is not called upon and does not pass upon the duty of the defendant and its predecessor, Security, to diversify investments as between so-called equities and fixed income investments and as between the individual type of holdings in each group as being required as a part of the duty of a trustee at all times acting in conformity with the actions of a prudent investor.

"4. The trustee had the express power under the terms of the Will to determine whether or not to diversify the investments in the trust, and this power relieved it of any duty to diversify the investments of the trust in the absence of bad faith, fraud

or abuse of discretion, and there was no bad faith, fraud or abuse of discretion on the part of the trustee.

"5. The trustee did not breach any duties imposed upon it by the terms of the Last Will and Testament of Carrie Cone Long, as hereinabove interpreted by the Court, and this action is therefore dismissed, and the costs to be taxed by the Clerk are charged to the plaintiffs without any charge for defendant's attorneys' fees."

The plaintiffs entered numerous exceptions both to the findings of fact and to all conclusions of law. These exceptions constitute the basis of plaintiffs' assignments of error.

Williams, Williams and Morris by Robert R. Williams, Jr., for plaintiff appellants.

Adams, Kleemeier, Hagan & Hannah by Charles T. Hagan, Jr., and Uzzell and DuMont by Harry DuMont for defendant appellee.

HIGGINS, J. During the pleading stage of this controversy the court heard and passed on numerous motions to strike from, and by amendment add to, the pleadings. On defendant's motion the court ordered the case transferred to Mecklenburg County for trial. The order was reversed by this Court. The opinion, reported in 260 N.C. 146, contains factual background not now repeated.

After the removal order was vacated and the case returned to Buncombe County, the parties, by stipulation, waived a jury trial and consented for Judge Campbell to hear the evidence, find the facts, enter his conclusions of law, and render judgment. See *Woodward v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639. Based upon the findings, Judge Campbell concluded the plaintiff had failed to make out a case and entered judgment dismissing the action. The plaintiffs excepted and appealed.

The case on appeal, including the exhibits, comprises more than 1,800 pages. Each of the briefs exceeds 100 pages. Notwithstanding the length of the record, the parties, by stipulation, limited the inquiry to these questions: (1) Did the plaintiffs establish their right to surcharge the trustee with a breach of trust resulting in loss? And (2), if so, what was the amount of the loss?

The powers and duties of the trustee in this case have their foundation in the trust instrument — the Will of Mrs. Carrie C. Long. The will specifically provides: "My trustees are hereby expressly authorized to retain as a proper investment of trust funds, any stock or other securities owned by me, or which may be pur-

chased by them after my death, and I leave it solely to them to allow such investments to remain intact . . ."

The Lichtenfels Trust, among other assets, received 258½ shares of common and 126½ shares of preferred stock in three Cone corporations. In 1946, by consolidations and mergers, the common and preferred stocks were withdrawn and in lieu thereof 9,101 shares of common stock in Proximity Manufacturing Company were substituted. In 1948 the Proximity stock also was withdrawn and 27,303 shares of Cone Mills Company stock were substituted. At the time of settlement the trustee delivered to plaintiffs 18,000 shares of Cone stock. The other 9,303 shares had been sold in small blocks for purposes of reinvestment.

When the first sale was proposed, Mrs. Lichtenfels was consulted and replied: "I would feel distressed if you disposed of any of the stock for purposes of reinvestment." This advice was given by the life tenant who was the mother of the remaindermen. Later, she approved the trustee's sales made for purposes of some diversification. Is the trustee now responsible for failure to sell more? Here are some of the rules by which the trustee's conduct on this question should be judged:

> "Trustees are justly and uniformly considered favorably, and it is of great importance . . . that they should not be held to make good losses in the depreciation of stocks or the failure of the capital itself, which they hold in trust, provided they conduct themselves honestly, and discreetly and carefully, according to the existing circumstances, in the discharge of their trusts. If this were held otherwise, no prudent man would run the hazard of losses, which may happen without any neglect or breach of good faith." *Sheets v. Tobacco Co.*, 195 N.C. 149, 141 S.E. 355.
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> "Good faith and the use of ordinary care and reasonable diligence are all that can be required of executors and administrators . . . They are not insurers." *Thigpen v. Trust Co.*, 203 N.C. 291, 165 S.E. 720.

The foregoing cases were decided on the general rule. In them sole discretion or other directives were not given by the trustor.

> "When it appears that a trustee has exercised, or proposes to exercise . . . discretion in good faith, and with an honest purpose to effectuate the trust, the courts will not undertake to supervise or control his actions. They will not undertake to set aside or override his judgment in matters clearly committed to his discretion, and to substitute therefor the judgment of others,

or their own judgment, upon the sole allegation that the action of the trustee is not wise or just." *Carter v. Young,* 193 N.C. 678, 137 S.E. 875.

"It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator. The controlling objective is to preserve the trust and effectuate the primary purpose of the testator." *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713.

"A breach of trust necessarily supposes that there is a rule for the government of the trustee. The creator of the trust may prescribe what rules he pleases." *Hester v. Hester,* 16 N.C. 328.

"A trustor is privileged to impose terms and conditions upon the administration of his estate, as well as to select the agencies for the distribution of his bounty." *Young v. Hood,* 209 N.C. 801, 184 S.E. 823.

The law selects and applies certain standards for the conduct of trustees. The trustor, however, may fix the rules for the exercise of the powers given, "except so far as the performance of the duties or the exercise of the powers is or becomes impossible, or the provision is illegal, or there has been such a change of circumstances as to justify or require deviation from the terms of the trust." Scott on Trusts, 2d Ed., § 164.

The testator's intention must be ascertained from the will and given effect "unless it is contrary to some rule of law or at variance with public policy." *Entwistle v. Covington,* 250 N.C. 315, 108 S.E. 2d 603.

An executor (likewise a trustee) is one named by the testator and appointed to carry the will into effect after the death of the maker and to dispose of the estate according to its terms. *In Re Will of Wilson,* 260 N.C. 482, 133 S.E. 2d 189; *Trust Co. v. Bryant,* 258 N.C. 482, 128 S.E. 2d 758; *Callaham v. Newsom,* 251 N.C. 146, 110 S.E. 2d 802.

More is involved in this case than the wisdom of diversification in the management of a trust estate. The corpus of the trust contained what had become a large block of Cone Mills stock. The Cone family originated and developed the textile business into the fifth or sixth largest in this country. The ownership and management were in the hands of members of the family. According to the evidence, those in control were careful, cautious, highly respected and successful businessmen. The trustor, a member of the family, made her brothers executors and trustees. She provided, however, that the Atlantic Bank and Trust Company, defendant's predecessor, should succeed the brothers if they failed to qualify. The terms

of her will expressly authorized the trustee to retain The Cone stock as a proper investment of trust funds. ". . . and I leave it solely to them to allow such investment to remain intact."

By succession, the present defendant became trustee. Its trust officers lived in Greensboro. They were well acquainted with the business operations of Cone Mills. The trust officers and trust committee of the defendant knew that to sell stock in a company operated close at hand and whose management they knew to be careful and successful, and to reinvest in other stocks would not only involve transfer and brokerage fees, but would place in the trust portfolio stocks in companies operated away from Greensboro by people not known, or not well known.

But recognizing, as the trust officers of the defendant bank did, that under ordinary circumstances there is some safety in diversification, nevertheless these questions confronted the trustee: When would it be good business to sell Cone stock? When, and at what prices, would it be good business to buy replacements? Not only the considerations discussed in the preceding paragraphs, but the directives in the will served not to lock, but to put a brake on, and to slow down, the spin of the diversification reel. Mrs. Long had taken the risk of accumulating and retaining what had developed into a large block of Cone Mills stock. By the terms of her will she authorized her trustee to continue the risk solely in its discretion. The excellent income, amounting to almost one million dollars, to the life tenant was an added inducement to hold Cone stock.

The depreciation in the value of textile stocks, according to one witness, resulted from two-price cotton and synthetics. By looking backward, one may find in financial records times at which Cone stock could have been sold and times and prices at which other stock could have been bought with great benefit to the trust. But wisdom resulting solely from a backward look is not a fair test. Many businesses considered by the experts as sound, have wound up in bankruptcy. The future of a business, as an investment, may look bright, but success is never a certainty. The experts are able to give well informed forecasts but future success is only a hope and a prediction — never a certainty. Looking backward to 1946, two hundred fifty-eight and one-half shares of common stock and 126½ shares of preferred stock had, by consolidation, become 9,103 shares of Proximity Manufacturing Company stock; and in 1948 had become 27,303 shares of Cone Mills. The trustee held and delivered to the plaintiffs 18,000 shares. The remainder had been sold in small blocks for reinvestment. When a sale was first proposed, Mrs. Lichtenfels, the life tenant, advised ". . . I would feel distressed if you dis-

posed of any of the stock for purpose of reinvestment." This advice came from the life tenant who was the mother of the remaindermen. Later on, however, she approved the trustee's sales made for purposes of diversification.

The parties in their exhaustive briefs have discussed various rules relating to diversification. The discussions involved the Massachusetts, New York, and Pennsylvania rules, the prudent man, the all eggs in one basket, the bad faith and gross negligence rules, and cite cases, textbooks and law review articles sufficient to keep a slow reader busy from now until Christmas. 47 A.L.R. 2d, 187; 54 Am. Jur., § 327; Scott on Trusts, 2d Ed.; Bogert on Trusts, § 683; 41 Columbia Law Review 1282; Vol. 61 Michigan Law Review 1545. After all, this is a North Carolina case. The trust was created by the Will of a North Carolina citizen to be administered under the laws of this State. Here the directives in a Will are honored and given effect unless some over-riding and compelling reason requires deviation. *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Cocke v. Duke University,* 260 N.C. 1, 131 S.E. 2d 909. The rule of law which fits this case is stated in 47 A.L.R. 2d 187, at 266: "But where a decedent leaves an estate which is not diversified in a prudent manner, as where the principal asset of the estate is stock in a family corporation, and he authorizes the retention of investments, the trustee is not obliged to sell part of the assets merely to obtain diversification." Citing authorities, including the leading diversification State — Massachusetts.

As a side reflection on the trustee's decision to sell only 9,303 shares of common stock at prices as low as $12.37 per share, we may note the stipulation in this case that on the day of distribution, November 8, 1963, the fair market value of Cone Mills stock was $14.77 per share; and on the day trial began, April 26, 1965, the stock had a fair market value of $26.87 per share. From the foregoing it may be well argued the trustee sold as much as was wise.

The evidence shows, and the court found, the defendant gave due attention to the composition of the Long trust. The record sustains Judge Campbell's findings and conclusions that the plaintiffs have failed to make out their case. The judgment dismissing the action is

Affirmed.

STATE v. WALLACE ELEE FOSTER.

(Filed 23 November, 1966.)

1. Burglary and Unlawful Breakings § 4; Larceny § 5—

The presumption from the possession of property which has been recently stolen does not obtain until the evidence establishes that the property had been stolen, that the property in possession of defendant was the identical property which had been stolen, and that the property was found in the possession of the defendant recently after the larceny.

2. Burglary and Unlawful Breakings § 4—

Evidence that six new tires of a particular make and tread had been stolen by breaking and entering the prosecuting witness' place of business, and that shortly after the breaking six tires of similar make and tread were found in defendant's constructive possession, without evidence identifying them as the identical tires taken from the prosecuting witness' place of business, is insufficient to raise a presumption of defendant's guilt of breaking and entering, since the doctrine of recent possession does not apply in the absence of evidence identifying the property found in defendant's possession as the identical property stolen.

3. Same—

Evidence of defendant's possession of property which had recently been taken from the prosecuting witness' place of business without any breaking or entering raises no presumption of defendant's guilt of breaking and entering even though other property had been stolen by breaking and entering from the prosecuting witness' place of business on same night. G.S. 14-54.

4. Larceny § 7— Evidence of defendant's recent possession of stolen property held sufficient to overrule nonsuit in larceny prosecution.

Evidence that an electric battery charger was stolen from the prosecuting witness' place of business, that shortly thereafter an electric battery charger was found at the place of business owned and operated by defendant and his brother, that the battery charger had the appearance of having been freshly painted, that defendant's brother knew nothing about how the battery charger got into the building, together with evidence identifying by a cigarette burn the battery charger found in defendant's constructive possession as the identical battery charger which had been stolen, *held* sufficient to be submitted to the jury on the question of defendant's guilt of larceny of the battery charger.

5. Larceny § 5—

It is not required in order for the doctrine of recent possession of stolen property to apply that the property be found in the hands or on the person of defendant, it being sufficient if the property is under defendant's exclusive personal control.

6. Criminal Law § 154—

An assignment of error must show within itself specifically what questions are intended to be presented for consideration without the necessity of going beyond the assignment of error itself. Rule of Practice in the Supreme Court No. 19(3).

7. Criminal Law § 118—

Where an indictment contains several counts and the evidence applies to one or more but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates.

8. Larceny § 9—

Where, in a prosecution for larceny of specified items of merchandise, the State's evidence is sufficient to be submitted to the jury on the question of defendant's guilt of the larceny of one of such items but not as to the others, a general verdict of guilty will be presumed to relate only to that item supported by the evidence, and the verdict will not be disturbed on appeal.

9. Larceny § 3—

Where the evidence is sufficient to support conviction of larceny of one item having a value less than $200 but insufficient to support a conviction of larceny of other items charged in the bill of indictment, the sentence cannot exceed that for a misdemeanor, G.S. 14-72, and the sentence for a felony must be vacated and the cause remanded for proper sentence.

APPEAL by defendant from *Gambill, J.*, 28 March 1966 Session of STANLY.

Criminal prosecution on an indictment containing three counts: The first count charges defendant on 1 January 1966 with feloniously breaking and entering a building occupied by one Floyd Hinson, wherein merchandise, chattels, and other valuable securities were being kept, with intent to commit a felony therein, a violation of G.S. 14-54; the second count charges defendant on the same day with the larceny of one electric battery charger, two 775x14 white wall tires, two 825x14 white wall tires, two 775x15 black wall tires, and six cartons of cigarettes, of the value of more than $200, of the goods and chattels of the said Floyd Hinson by feloniously breaking and entering a certain building occupied by Floyd Hinson wherein goods and valuables of Floyd Hinson were kept, a violation of G.S. 14-72; and the third count charges defendant on the same day with feloniously receiving stolen goods knowing them to have been previously stolen, taken, and carried away.

Plea: Not guilty. The court allowed a motion for judgment of nonsuit on the third count of receiving alleged in the indictment. Verdict: Guilty as charged in the indictment.

From a judgment of imprisonment on the first count in the indictment, and from a judgment of imprisonment on the second count in the indictment, the judgment on the second count to commence at the expiration of the sentence of imprisonment on the first count, defendant, by his court-appointed counsel, appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Richard L. Brown, Jr., for defendant appellant.

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

The evidence of the State tends to show these facts: Floyd Hinson operated a Phillips "66" service station in the Frog Pond community, Stanly County, adjacent to Highway #27, about eight and one-half miles from the town of Albemarle. About 7:30 p.m. on 31 December 1965 he left his service station with all the windows down and fastened and all the doors closed and locked. Hinson returned to his service station a few minutes before 2 a.m. on 1 January 1966 and found that it had been broken into. He called the sheriff of the County. While waiting for the sheriff to arrive, he discovered that six Phillips "66" tires were missing that had been in his storeroom when he closed the night before and left. These six tires consisted of two 775x14 Deluxe action tread, white wall tires; two 775x15 safety action tread, black wall tires; and two 825x14 premium action tread, white wall tires. There were also missing six cartons of cigarettes. He went over to his grease pit and found that his used battery charger, which was in the grease pit the night before, was missing. This battery charger was white with a red trim. On 5 January 1966 he saw his used battery charger at the county jail. It had been freshly repainted. He identified the battery charger as his property by what looks like a cigarette burn that was on the charger when he got it. The charger originally had a three-prong plug, and one prong was broken off when he purchased it. It is now standard for a battery charger of this type to have three electrode plugs on it. He saw two automobile tires at the county jail and four automobile tires on a car in the police station. These six tires were of the same size and tread design that were stolen from his service station. The four tires on the automobile were all white walls, and the other two were black walls. The value of his used battery charger and of the six tires he saw at the county jail would be more than $200. Floyd Hinson testified on cross-examination: "I would not swear that those six tires are the same tires that I had at my service station, but I'll swear that they are the same size, tread design, and in the same order as those that got away from my service station."

On 31 December 1965 and during the early part of January 1966 Jackie Foster and his brother, the defendant, operated a garage and body shop business located at 910 East 18th Street in the city

of Charlotte. On 5 January 1966 Dwight Farmer, a deputy sheriff of Stanly County, went to the garage and body shop business located at 910 East 18th Street in the city of Charlotte, which was operated by Jackie Foster and his brother, the defendant. On entering this garage and body shop building he observed the battery charger, which Floyd Hinson identified as his, and two new Phillips "66" black wall tires in the back of the garage. The two tires were in the trunk of a 1955 or 1956 Ford automobile. The outside of the battery charger had the appearance of being freshly painted. He took these articles in custody and carried them to the town of Albemarle. Defendant was not in the building when he was there. He saw there Jackie Foster, a brother of the defendant.

Hoyle Lowder, a member of the Albemarle police department, saw defendant on West Main Street in the town of Albemarle on the night of 1 January 1966. He saw him again on 4 January 1966 on West Main Street in the town of Albemarle between 8:30 and 9:00 p.m. driving a white 1959 Oldsmobile. Nobody was in the car with him. The Oldsmobile defendant was driving on the night of 4 January 1966 had on it four new Phillips "66" white wall tires. Lowder took the automobile to the police department. The tires on this Oldsmobile were taken off and exhibited in court as State's Exhibit No. 2.

William D. Foster, a brother of defendant and a witness for the State, testified in substance: He is a mechanic employed by his brother, the defendant. He first saw this electric battery charger on Saturday morning in his brother's garage. There were paint cans on the floor when his brother and defendant moved into the building. The night before, he left the garage and closed it, and the next morning he saw this battery charger in the back of the garage. When he saw it in the back of the garage, defendant and several persons were there. He saw two tires in the back of the car that same morning. He last saw the battery charger when the officers picked it up and carried it away. He knows nothing about how the battery charger and the tires got into the building. He and his brother, the defendant, had keys to the garage.

Defendant did not testify in his own behalf, but offered the testimony of three witnesses.

Jackie Foster, brother of defendant and a witness for defendant, testified in substance: He first saw the battery charger introduced in evidence by the State on 2 January 1966 when a man by the name of John Langford came by the garage operated by defendant and himself selling secondhand merchandise. That day he bought from John Langford four 14-inch white wall tires, two 15-inch black wall tires, a battery charger, and a .22 rifle, and paid him $100 for

them. He kept the battery charger in the back part of the garage. He sold four white wall tires and the rifle to John Threat. John Threat put these four tires on his 1959 Oldsmobile. He kept the other two black wall tires in the garage in another car that they had got on a transaction for work being done on another car. On cross-examination Jackie Foster testified in substance: John Threat, his girl friend Yvonne Cahoon, and defendant were in the garage when he bought the battery charger and the tires from John Langford. The articles that he purchased from John Langford were worth about $300. He did not know the items were stolen. The battery charger looked like it had been freshly painted. He came to the town of Albemarle on the night of 4 or 5 January 1966 with Threat and defendant in Threat's 1959 Oldsmobile. That night he and Threat were arrested at the Pepper Pot Grill in Albemarle.

John Threat testified in substance for defendant: He worked part time with defendant and his brother. He went to their garage about 8:30 a.m. on 2 January 1966 and saw Jackie Foster purchase the battery charger, six automobile tires, and a rifle from a man he had never seen before. Later on that morning he bought the four white wall tires from Jackie Foster for $10 each and put them on his 1959 Oldsmobile, and he also bought from Jackie Foster for $20 the .22 rifle. On the night of 4 or 5 January 1966, he, Jackie Foster, and defendant came to the town of Albemarle in his 1959 Oldsmobile. At that time the .22 rifle was in his car. He had intended to take it out at his home but forgot it. He was arrested at the Pepper Pot Grill in Albemarle.

Yvonne Cahoon, a witness for defendant, testified in substance: On the morning of 2 January 1966 she went to the Foster garage with John Threat. She saw a man whom she did not know pushing a battery charger in the door. She saw a money transaction between Jackie Foster and this man. She also saw a man whom she did not know take some automobile tires into the garage.

After the defendant rested his case, the State offered as a witness H. A. Simmons, a deputy sheriff of Stanly County, who testified in substance: Somewhere around the premises of Hinson's service station that was broken into on the night of 31 December 1965 he made a plaster cast of a heel print. He sent this plaster cast of the heel print and the shoes of defendant to the F.B.I. laboratory in Washington, D. C. The F.B.I. laboratory sent back to him the plaster paris cast and defendant's shoes and a report of the result of its examination reading as follows: "Result of examination. Heelprints on the glass and cast were found to have been produced by heels of the same design as the heels on the submitted shoes. However, no specific wear characteristics or measurements in common

were found which would enable a determination whether the questioned prints were made by these particular shoes. The submitted evidence will be returned to you separately."

The State contends that its evidence considered in the light most favorable to it is sufficient to carry the case to the jury by virtue of the principle of law known as recent possession of stolen property by the accused. The rule itself indicates the conditions under which it operates, and to bring it into play there must be proof of three things: (1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. *S. v. Parker,* 268 N.C. 258, 150 S.E. 2d 428; *S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458; *S. v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533; 3 Strong's N. C. Index, Larceny, § 5; 52 C.J.S. Larceny, § 105; 32 Am. Jur., Larceny, §§ 122, 138.

"The identity of the fruits of the crime must be established before the presumption of recent possession can apply. The presumption is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery." *S. v. Jones, supra.*

The State has ample evidence that Floyd Hinson's service station was broken into and entered during the nighttime, and that there were stolen therefrom six automobile tires as specified in the indictment; that on the night of 4 January 1966, four days after the theft defendant was driving a 1959 white Oldsmobile on Main Street in the town of Albemarle which had on it four new Phillips "66" white wall tires; and that the next day a deputy sheriff of Stanly County went to the garage and body shop business located in the city of Charlotte, which was operated by defendant and his brother, Jackie Foster, and found there two new Phillips "66" black wall tires, which he carried to the town of Albemarle. Floyd Hinson looked at these six automobile tires and testified: "I would not swear that those six tires are the same tires that I had at my service station, but I'll swear that they are the same size, tread design, and in the same order as those that got away from my service station." It is a fact of common and general knowledge that Phillips Petroleum Company manufactures and sells thousands of Phillips "66" automobile tires throughout the United States similar to those that were stolen from Floyd Hinson's service station. Even if we concede that these six Phillips "66" automobile tires were stolen, there is no evidence that they were stolen from Floyd Hinson's service station and were Floyd Hinson's property. Consequently, the

rule of recent possession of stolen property cannot apply to these six automobile tires. The evidence is that the electric battery charger was taken from the grease pit of Floyd Hinson's service station, and that no breaking and entering was involved in taking this electric battery charger. The trial court erred in not allowing defendant's motion for judgment of compulsory nonsuit as to the first count in the indictment charging a breaking and entry, a violation of G.S. 14-54. The judgment of imprisonment on the first count in the indictment is vacated.

The State has ample evidence that on the night of Friday, 31 December 1965, or the early morning of Saturday, 1 January 1966, Floyd Hinson's electric battery charger was stolen from the grease pit of his service station. When this electric battery charger was stolen, it was painted white with a red trim. On Saturday morning, 1 January 1966, William D. Foster, a brother of defendant, saw an electric battery charger in the back of the garage and body shop owned and operated by defendant and his brother, Jackie Foster. At that time the defendant and several other persons were in the building. Paint cans were on the floor when defendant and his brother moved into the shop. He last saw the battery charger when the officers picked it up and carried it away. He knows nothing about how the battery charger got into the building. He and his brother, the defendant, have keys to this garage and body shop. On 5 January 1966 a deputy sheriff of Stanly County went to the body shop business located in the city of Charlotte which was operated by Jackie Foster and his brother, the defendant, and observed in the back of the garage an electric battery charger, the outside of which had the appearance of being freshly painted. When he was there, defendant was not in the building, but he saw there Jackie Foster. He took this electric battery charger and carried it to the town of Albemarle. Hinson identified this battery charger as his property by what looks like a cigarette burn that was on the battery charger when he got it, and by the fact that one of its three prongs was broken off when he purchased it. When he saw it on 5 January 1966 at the county jail in Albemarle, it had been freshly repainted.

In *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920, 156 A.L.R. 625, the Court said:

> "The applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession. 'It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence' *(S. v. Smith,* 24 N.C. 406), and so re-

cently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. *S. v. Baker,* 213 N.C. 524, 196 S.E. 829; *S. v. Ford,* 175 N.C. 797, 95 S.E. 154; *S. v. Graves,* 72 N.C. 482. If the circumstances are such as to exclude the intervening agency of others between the theft and the recent possession of stolen goods, then such recent possession may afford presumptive evidence that the person in possession is the thief. *S. v. Patterson,* 78 N.C. 470; *S. v. Lippard,* 183 N.C. 786, 111 S.E. 722; *S. v. McFalls,* 221 N.C. 22, 18 S.E. 2d 700. The presumption, however, is one of fact only and is to be considered by the jury merely as an evidential fact along with other evidence in determining the defendant's guilt, *S. v. Baker, supra.*"

It is not always necessary that the stolen property should have been actually in the hands or on the person of the accused, it being sufficient if the property was under his exclusive personal control. 52 C.J.S., Larceny, § 107; 32 Am. Jur., Larceny, § 140; 1 Wharton's Criminal Evidence, 12th Ed. by Anderson, Presumptions and Inferences, § 135. This Court said in *S. v. Harrington,* 176 N.C. 716, 96 S.E. 892: "The principle is usually applied to possession which involves custody about the person, but it is not necessarily so limited. 'It may be of things elsewhere deposited, but under the control of a party. It may be in a store-room or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence.' *S. v. Johnson,* 60 N.C. 237."

The court correctly denied defendant's motion for judgment of compulsory nonsuit of the second count in the indictment, but the trial judge should have submitted the count of larceny to the jury only as to the electric battery charger, for the reason that there is no evidence in the record before us tending to show that the defendant stole the six automobile tires and six cartons of cigarettes, the property of Floyd Hinson, as specified in the second count in the indictment.

Defendant's assignments of error to the admission of evidence are overruled for two reasons: (1) These assignments of error do not show specifically what questions are intended to be presented for consideration without the necessity of going beyond the assignment of error itself. Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 783, 797; *S. v. Spears,* 268 N.C. 303, 150 S.E. 2d 499; *In re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59; and (2)

they are without merit. Defendant has no exception to the court's charge.

There was a general verdict of guilty as charged in the indictment. The law is well settled in this jurisdiction that where an indictment contains several counts and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates. *S. v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281; *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Cody,* 224 N.C. 470, 31 S.E. 2d 445; *S. v. Snipes,* 185 N.C. 743, 117 S.E. 500. The first syllabus in our Reports in *S. v. Holder,* 133 N. C. 709, 45 S.E. 862, is: "Where there is more than one count in a bill of indictment, and there is a general verdict, the verdict is on each count; and if there is a defect in one or more of the counts, the verdict will be imputed to the sound count." The evidence of the State tends strongly to show that the defendant is guilty of the larceny of the electric battery charger stolen from the grease pit of Floyd Hinson, the property of Floyd Hinson, but there is no evidence that he was guilty of the larceny of the six automobile tires and the six cartons of cigarettes specified in the second count in the indictment, and there is no evidence that defendant is guilty of breaking and entry as charged in the first count in the indictment. It is manifest that the jury convicted the defendant of the larceny of the electric battery charger here. By analogy to the rules above stated in this paragraph, the verdict will be imputed to the second count in the indictment, and it will be presumed that the verdict of guilty on the second count relates only to the electric battery charger.

On the second count in the indictment charging larceny, the judge sentenced defendant to be imprisoned for not less than five nor more than ten years. It is perfectly plain from the evidence in the record that this electric battery charger was of less value than $200, and, consequently, the larceny of it from the grease pit was merely a misdemeanor. G.S. 14-72.

The judgment of imprisonment in the larceny case is ordered vacated, and this case is remanded to the Superior Court for a judgment on the verdict of guilty of the larceny of the electric battery charger, which is a misdemeanor.

The result is this: Reversed as to the first count in the indictment. No error in the trial of the second count in the indictment, except as to the judgment, and the judgment imposed upon the verdict of guilty upon that count is vacated, and the case is remanded for a proper judgment on that count in the indictment for the larceny of the electric battery charger, a misdemeanor.

VOYD L. HUBBARD, TRADING AND DOING BUSINESS AS HUBBARD'S SUPERETTE, v. QUALITY OIL COMPANY OF STATESVILLE, INCORPORATED; QUALITY OIL TRANSPORT COMPANY, A PARTNERSHIP; AND WILLIAM J. HAMILTON.

(Filed 23 November, 1966.)

1. Negligence §§ 4, 5—

The doctrine of *res ipsa loquitur* does not apply to an explosion occurring about the attic of the building on plaintiff's premises while the individual defendant was delivering gasoline to underground storage tanks in front of the premises, since the underground tanks and building are under plaintiff's and not defendant's control. Further, under the evidence in this case, more than one inference could be drawn as to the cause of the explosion.

2. Negligence § 21—

When the doctrine of *res ipsa loquitur* does not apply, plaintiff has the burden of showing the failure of defendant to exercise the degree of care which would have been exercised by an ordinarily prudent man under the circumstances and that such failure was a proximate cause of the injury complained of.

3. Negligence § 24a—

Negligence is not presumed from the mere fact of injury, and in order to overrule nonsuit plaintiff must introduce evidence of every material fact necessary to support with reasonable certainty the probability of negligence on the part of defendant and that such negligence was a proximate cause of the injury, and evidence which raises a mere guess or possibility is insufficient to overrule nonsuit.

4. Evidence § 51—

The explosion in suit occurred while defendant employee was delivering gasoline to underground storage tanks on plaintiff's premises. There was no evidence that before the explosion in the attic of plaintiff's building gasoline had been spilled on the ground in the area of the filler pipes in front of the building. *Held:* Testimony of an expert based upon the hypothesis that the gasoline vapors came from the evaporation of spilled gasoline on the ground is incompetent as being based upon a fact not supported by evidence.

5. Appeal and Error § 51—

Incompetent evidence admitted at the trial must be considered for whatever it is worth in passing upon the lower court's refusal of defendants' motions for nonsuit.

6. Negligence § 24a— Evidence on question of defendant's negligence as the proximate cause of explosion held insufficient for jury.

Plaintiff's evidence tended to show that the individual defendant delivered gasoline to the underground storage tanks on plaintiff's premises before daylight on a still, cold, foggy morning, that the individual defendant left the vehicle unattended while the gasoline was flowing into the underground tanks, and that an explosion occurred in the area of the attic of plaintiff's building, causing the damage in suit. The evidence dis-

closed that there were vent pipes from the underground tanks running into the building and through the attic where an oil heater and electric motors were located, and also that there were louvers opening from the outside into the attic. There was no evidence that gasoline was spilled around the filler pipes in front of the building prior to the explosion. *Held:* Whether the gasoline fumes causing the explosion arose from gasoline spilled around the inlet of the storage tanks or whether they came from the vents from the storage tanks is left in mere conjecture, and nonsuit should have been entered. Further, the evidence failed to show any causal connection between the explosion and the fact that the individual defendant left the vehicle unattended while the gasoline was flowing into the underground storage tanks.

7. Negligence § 7—

An act of negligence relied on must be shown to have had a causal relationship to the injury in order to avail plaintiff.

APPEAL by defendants from *Clarkson, J.,* Special 13 June 1966 Session of ALEXANDER.

Civil action for damages for the destruction of plaintiff's property resulting from an explosion alleged to have been caused by defendants' actionable negligence.

The evidence offered at the trial tends to show: Quality Oil Company of Statesville, Inc., is a North Carolina corporation in the business of selling gasoline products to retail dealers. Quality Oil Transport Company is a partnership, acting as agent for the corporate defendant in the business of making deliveries of gasoline. The individual defendant, Hamilton, was at the time in question an employee of the partnership defendant, delivering gasoline to plaintiff's premises. Plaintiff is sole owner of Hubbard's Superette, operating as a general grocery store and gas station.

At approximately 6:00 o'clock A.M. on 3 January 1965, defendant's tanker gasoline truck, driven by defendant Hamilton, arrived at plaintiff's place of business to make a delivery of gasoline. It was parked between the gasoline pumps and the building, parallel with the street and the front of the building. The tank portion of the vehicle was divided into five separate containers, each with varying capacities of 900 to 2000 gallons of gasoline. One Wike, an employee of plaintiff, came out of the store, climbed up on top of the tanker, opened the lid to each of the five separate containers, and inspected the containers to determine the amount of gasoline in the containers. After making his inspection, he left the tanker and returned to the store. In the meantime, defendant Hamilton had been connecting the hoses and performing the other tasks necessary to unload gasoline into the underground tanks located under plaintiff's store. In order to do this, he attached two hoses to the truck and connected the ends to "L" shaped pipes which were fitted to "filler"

pipes, these being pipes running from the underground tanks to the surface. Hamilton then went inside the store. He had been inside approximately fifteen minutes when an explosion occurred that knocked one wall, the windows and doors outward. Hamilton ran outside, shut off the valves at the truck so as to cut off the flow of gas, and released the hoses from the truck. He then moved the truck to a safe distance. He returned, capped the filler pipes, and removed the hoses. By this time the fire which had begun inside the store almost immediately after the explosion, had spread considerably.

The filler pipes, which were located some six to eight inches in front of the wall, ran to three tanks which were buried beneath the store building. Three vent pipes ran from the tanks to the ground level and then up the back wall of the building, stopping at a point where the back wall met the roof; these pipes released the air and fumes from the tank as the volume of gasoline displaced the air in the tank. A vent constructed in the dormer facing towards the front of the building provided ventilation in the attic. The walls of the building were 9 feet high, and the attic, where the roof peaked, was another 5 or 6 feet in height. Another attic vent was built in the north wall. The filler pipes were next to the east wall, the closest pipe being 12 feet from the corner where the east wall met the north wall. Within the attic was a hot-air oil-burning furnace, in which the oil was ignited by electric sparks. There was a room immediately behind and adjacent to the store which housed refrigeration equipment. This equipment was run by five electric motors situated within the room. The vent pipes were immediately adjacent to this room and were located in the corner where the north wall of the room joined the west wall of the store. A new room was being constructed on the back of the store.

At the time the gasoline was being delivered, the temperature was about 30 degrees. It was foggy, damp, and the air was still.

The jury answered issues of negligence, contributory negligence and damages in favor of plaintiff. Judgment was entered on the verdict. Defendants appeal.

McElwee & Hall for plaintiff.

Deal, Hutchins and Minor, and Richard Tyndall for defendants.

BRANCH, J. The decisive question on this appeal is whether the court erred in overruling defendants' motion for nonsuit.

The doctrine of *res ipsa loquitur* is not invoked by plaintiff, nor is it available. The attic furnace, the underground tanks, filler pipes, and the entire store building were under the control of the plaintiff. The doctrine does not apply when the instrumentalities causing

the injury are not under the exclusive control or management of the defendant. Nor does the doctrine apply "where more than one inference can be drawn from the evidence as to the cause of the injury, (or) . . . where the existence of negligent default is not the more reasonable probability. . . ." *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251. Therefore, the plaintiff must present evidence of actionable negligence on the part of the defendant in order to carry his case to the jury. To establish actionable negligence plaintiff "must show: (1) That there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed to the plaintiffs under the circumstances in which they were placed; and (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the results 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 that existed. . . . Negligence is not presumed from the mere fact of injury. . . . There must be legal evidence of every material fact necessary to support a verdict, and the verdict 'must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibility' . . . If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed." *Lane v. Dorney,* 250 N.C. 15, 108 S.E. 2d 55; *Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33; *Reason v. Machine Co.,* 259 N.C. 264, 130 S.E. 2d 397.

Plaintiff, in support of his allegations, attempts to show by direct and circumstantial evidence that defendants were negligent in that their agent, Hamilton, (a) attempted to deliver gasoline during the dark and prior to daylight hours, (b) attempted to deliver gasoline into underground tanks when the weather was dense, foggy, and heavy, and the air was still, (c) left the vehicle unattended while delivering a hazardous and dangerous substance, (d) allowed or permitted gasoline to overflow or leak from the filler pipes or hoses onto the driveway in large quantities, creating an extremely dangerous and hazardous condition.

Plaintiff offered direct evidence which tended to sustain his allegation that defendants left the truck and tanker unattended after starting delivery of gasoline; that the weather was dense, foggy and heavy, and the air still, and that the delivery was made prior to daylight hours. Plaintiff seeks to show by circumstantial evidence that defendants' agent negligently allowed gasoline to spill or leak in front of the store building, and that the leakage or spillage was the proximate cause of the explosion. His theory is that as

the spilled gasoline evaporated during a period of ten or fifteen minutes, vapors from it traveled through a vent into the attic, where they were drawn into the fresh-air inlet of the furnace and to the open flame, thereby causing the explosion.

The only evidence of spilled gasoline near the filler pipes and in front of the store was the testimony of plaintiff's witness Shew, who testified, over defendants' objections, substantially as follows: That he was some three-quarters of a mile from the plaintiff's store when he saw a flash in the sky above the store. He immediately proceeded to the store, and arrived there about one minute later. "I saw some guy — I don't know who he was — at the tanker. He was at the back unhooking a hose. One was already unhooked from the tanker. The other hose was already loose. It was laying beside the tank, . . . He got in his tanker and left. . . . he came back up there . . . in a short time and took the hoses out of the tank . . . we pulled one down next to the gas tank and we carried the other one across the road to the mail box." Question by plaintiff's attorney: "Now when you went to help him pull the pipe away — or pull the hose away, what was he doing at that time at the filler pipe? A. He pulled the hose out and was putting a cap on it." Question by plaintiff's attorney: ". . . at the time you were there at the filler pipes, did you make an examination around the filler pipe and leading from the filler pipe down the highway? A. No, I didn't exactly make an examination. I just noticed there was some gas had run down through there. . . . There was no fire out in front of the store anywhere along that whole area at that time."

Plaintiff also offered the testimony of Charles Harmon, who was, over defendants' objection, qualified as an expert in the field of thermo dynamics, gas dynamics, and gas combustion. Over defendants' objection, plaintiff's counsel asked him a hypothetical question as to what might or could have caused the explosion and fire. This question contained, *inter alia,* the following two hypotheses: "10. That during the period that the tanker was unloading its gasoline into the storage tank the strong odor of gasoline was smelled. 11. That prior to the time that the tanker began the unloading of gasoline there was no gasoline on the ground in the area of the filler pipes or in front of the building." In answer, Mr. Harmon said: "It is my opinion that the explosion and resulting fire could or might have resulted from gasoline vapors in the correct proportion to cause an explosive mixture. That such a mixture came in contact with the open flame of the hot air furnace, and that this vapor entered the attic space where the furnace was through the louvered ventilator, *and that the vapor came from the evaporation*

of spilled gasoline in front of the store." (Italics ours) Defendants' motion to strike this answer was overruled.

"Expert opinion derives its probative force from the facts upon which it is predicated, and these must be legally sufficient to sustain the opinion of the expert. . . . The facts on which an opinion is based must measure up to legal requirements. Expert testimony on a state of facts not supported by the evidence is inadmissible.

"Expert testimony on speculation or conjecture is not evidence, especially when it conflicts with physical facts. . . . *The expert's opinion cannot be elicited to supply the substantive facts necessary to support the conclusion.*" (Italics ours) Rogers on Expert Testimony, Third Edition, § 54, pp. 109, 111.

"The objection to the admission of opinion evidence of expert witnesses on the ground that in the particular instance it invades the province of the jury has been expressed by this Court in several decisions. . . . 'Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must not usurp the province of the court and jury by drawing conclusions of law or fact upon which the decision of the case depends.'

"However, it would seem that the proper test is whether additional light can be thrown on the question under investigation by a person of superior learning, knowledge or skill in the particular subject, one whose opinion as to the inferences to be drawn from the facts observed or assumed is deemed of assistance to the jury under the circumstances. . . . Undoubtedly it would be competent for an expert witness to give his opinion as to what causes would produce the result observed, but this would not permit him to inject into the consideration of the jurors the weight of his assertion that such result was in fact produced by a particular cause." *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818.

It was competent for the expert witness to express an opinion that gasoline vapors coming in contact with the open flame in the attic furnace could have produced the explosion, but it was beyond his province as a witness to state to the jury as a fact that the explosion was caused by vapors that came from the evaporation of spilled gasoline in front of the store. Expert opinion testimony is no stronger than the facts upon which it is based, and evidence based on guess, conjecture or speculation should be disregarded. The objection to the hypothetical question should have been sustained and the answers stricken, because of the insufficiency of evidence showing that gasoline spilled BEFORE the explosion. On the contrary, the evidence suggests that it was spilled AFTER the explosion when Hamilton disconnected the hose. Although incompetent, this evidence must be considered for whatever it is worth in passing upon

the motion for nonsuit. Assuming that the gas was spilled in front of the store, the crucial question remains as to WHEN it was spilled.

Plaintiff's expert witness further testified: "Evaporation is affected by the temperature so that if the gasoline is cold, it will evaporate more slowly than if it is hot. If the outside temperature is cold, rather than warm, it will evaporate more slowly cold than warm. . . . I would say that some of the important factors in determining the question as to whether the presence of gasoline vapors in an area would be the size of the area covered; the time it had been there in existence; the temperature of the ground and the air, and of the gasoline itself; and finally, whether or not there was any wind, motion or anything to carry it away; . . . If an area is covered with gasoline and the air is completely still, the evaporation is going to be slower than if there is a wind blowing across it; gasoline vapors are three to four times heavier than air. . . . Assuming that the jury finds from the evidence that the regular gas tank, or one of the regular gas tanks, or tanks holding regular gas, underneath the store was a 4,000 gallon tank and was empty, then for each gallon of gasoline put into that tank there would necessarily be a gallon of air or gasoline or vapors expelled from the tank. . . . Taking my theory about the fumes going into the combustion chamber and there being ignited by the flame, then the explosion would propagate out to wherever these fumes were present. This propagation would be on the order of thousandths of a second, perhaps. When you have ignition anywhere in a volume of fumes, it is going to propagate to the end of those fumes immediately, using the term immediately in the ordinary sense. . . . The ignition of a flammable mixture of gasoline vapors will propagate to the point where the flammable mixture is no longer a flammable mixture. And if the flammable mixture extended from the point of ignition to the source of the gasoline fumes, then it would propagate right down to the source of the gasoline."

All of plaintiff's evidence shows that there was no fire in front of the store for an appreciable length of time after the explosion. Yet, plaintiff contends that the source of the fumes or vapors which caused the explosion came from in front of the store building.

It is more plausible to infer from plaintiff's evidence that as gasoline was received in the underground tanks vapors were expelled from the tanks through the vent pipes into the attic, where they were ignited by the furnace, or into the refrigeration equipment room where they were ignited by the electric motors.

The only evidence which plaintiff offered to sustain his allegations of defendants' negligence was that tending to show that Hamilton left the tanker unattended after starting the flow of gasoline.

Plaintiff failed to show, however, that defendant Hamilton's absence or his failure to have the truck attended *caused* gasoline to spill or leak in front of the store. Without some evidence that Hamilton had caused or permitted gasoline to spill *before* the explosion, plaintiff cannot establish such negligence as a proximate cause of the explosion, and his allegation fails.

"There must be some causal relationship between the breach of duty and the injury." *Reason v. Sewing Machine Co.*, 259 N.C. 264, 130 S.E. 2d 397.

The plaintiff relies heavily on the case of *Moore v. Beard-Laney, Inc.*, 263 N.C. 601, 139 S.E. 2d 879, in which the agent of the defendant was delivering gasoline to the plaintiff's service station, and the agent had been warned that one of the tanks might overflow, that it was necessary to watch the air vent on the tank in order to see when the tank was full. Notwithstanding, after the agent started pumping gasoline for delivery, he went into the store and while he was in the store the tank overflowed; the gasoline was ignited by a spark from an electric switch, causing damage. The Court held these facts sufficient to be submitted to the jury on the issue of negligence. The *Moore* case, however, is distinguishable from the instant case, in that there the plaintiff not only offered direct evidence that the tank had overflowed before the explosion, but that defendant had been warned of the danger. There was also direct evidence that the gasoline which had overflowed was ignited by a spark from an electric switch. Comparable evidence is lacking here. Plaintiff has failed to offer any evidence that the explosion was caused by the actionable negligence of defendants.

The motion for nonsuit should have been allowed. The judgment below is

Reversed.

WILLIAM LARRY McDONALD, BY HIS NEXT FRIEND, BERNICE TEDDER McDONALD, PLAINTIFF, v. MOORE SHEET METAL AND HEATING COMPANY, INC., AND NORMAN KELLOGG, DEFENDANTS.

(Filed 23 November, 1966.)

1. Negligence § 22—

The fact that defendant paid plaintiff's hospital bill, incurred as a result of the injury in suit, is not an implied admission of liability, and is incompetent in evidence.

2. 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.

3. Trial § 21—

Discrepancies and contradictions in plaintiff's evidence do not warrant nonsuit, since they are for the jury to resolve.

4. Same—

Upon motion to nonsuit, plaintiff's evidence must be interpreted in the light most favorable to him, giving him all reasonable inferences to be drawn therefrom.

5. Automobiles § 7—

While the motor vehicle statutes are not applicable when the vehicles in question are being operated upon private property, the common law rules of liability for injury proximately caused by negligence do apply, and therefore conduct which, in the absence of statute, would constitute negligence if occurring on a public highway will also be deemed negligence if occurring while vehicles are moving upon private property through a tunnel leading to a highway in the same manner as upon a heavily congested public highway.

6. Negligence § 21—

No presumption of negligence arises from the mere fact of injury.

7. Negligence §§ 1, 7—

Negligence is the doing of some act or the failure to do some act contrary to the conduct of a reasonably prudent man under the circumstances, and is actionable if injury to another is reasonably foreseeable, but the law does not require omniscience, and proof of negligence must rest on more than mere conjecture.

8. Automobiles § 41r— Evidence held insufficient to show actionable negligence in causing plank to fall from defendant's truck and strike passenger in following vehicle.

Plaintiff's evidence was sufficient to support findings that defendant driver laid across the body of the truck driven by him a number of loose two-by-eight planks, held in place only by their own weight, and that as he drove the truck through a tunnel on private property, one of these planks in some unexplained manner flew through the air and struck plaintiff, who was riding on the body of the following truck. The evidence further disclosed that a number of vehicles were traversing the tunnel, bumper to bumper, at some five miles per hour. There was no evidence that any part of defendant's truck or any plank thereon struck any portion of the tunnel, and no evidence of any sudden jerks or jolts at the time in the operation of defendant's truck. *Held:* Under the circumstances existing at the time of the accident it could not have been reasonably foreseen that the plank would fall from the truck and strike plaintiff, assuming that it did so, and nonsuit was properly entered.

APPEAL by plaintiff from *Latham, S.J.*, at the May 1966 Civil Session of RANDOLPH.

This is an action for damages for personal injuries alleged to have been received when the plaintiff was struck on the head by a piece of timber which flew off of a truck owned by the corporate defendant and driven by the individual defendant, Kellogg. The plaintiff appeals from a judgment of nonsuit.

The complaint alleges, and the answer admits, that Kellogg was driving a truck owned by the Heating Company with its knowledge and consent. The answer denies that he was acting in the course of his employment by the corporation.

The complaint alleges that Kellogg was negligent in the following respects: He constructed upon the corporation's truck a "grandstand," and operated the truck knowing that this "grandstand" was composed of timbers "loosely brought together" and likely to slide off the truck and injure the persons or properties of others; he operated the truck at a speed greater than was reasonable and prudent under existing conditions; he failed to keep a proper lookout; he drove the truck "upon the highway" carelessly and in wilful disregard of the rights and safety of others; and failed to keep the truck under proper control. The complaint further alleges that as Kellogg drove the truck beneath an underpass, leading from the grounds of the Charlotte Speedway, the "grandstand" struck the underpass, throwing one of the timbers from the truck driven by Kellogg into the pickup truck in which the plaintiff was riding as a passenger, so that it hit the plaintiff upon the head, inflicting serious injuries. The defendants filed a joint answer denying all allegations of negligence.

Their motion for nonsuit having been granted at the close of the plaintiff's evidence, the defendants offered no evidence, though the defendant Kellogg testified when called as a witness for the plaintiff. As to the following matters, there is no conflict in the evidence offered by the plaintiff:

The events in question took place on the property of the Charlotte Speedway, in a tunnel or passageway running beneath its race track and affording ingress and egress for vehicular traffic moving between the public highway and the "infield" of the racetrack.

On the afternoon in question, the plaintiff and his companions, in a pickup truck, and Kellogg and his companions, in the Heating Company's one-ton stake body, Chevrolet truck (hereinafter called Kellogg's truck), went to and parked in the "infield" and viewed automobile races upon the track of the Speedway. After the races, both vehicles were passing through the tunnel toward the highway. There were two lanes of traffic passing through the tunnel in the same direction, Kellogg's truck being in the right lane and the pickup truck being in the left lane. The plaintiff was sitting in

the bed of the pickup, with his back to its cab and on the side nearest Kellogg's truck.

Throughout the length of the tunnel its roof and the track above it were supported by concrete pillars placed from six to eight feet apart, each pillar being two feet square. This row of pillars separated the two lanes of vehicles. A guard rail, three feet high, ran throughout the length of the tunnel on each side of the lane used by Kellogg. The rail on his right was three feet from the right side of the tunnel. That on his left was three feet from the line of pillars supporting the roof. There were similar guard rails along the lane used by the pickup in which the plaintiff was riding.

The plaintiff was struck upon the head by a plank while the pickup truck was within the tunnel, approaching its exit on the highway side of the track. The plaintiff, himself, remembers nothing about being struck and does not know what hit him. No witness actually saw the blow.

In each lane of travel the vehicles were moving "bumper to bumper" at a speed of only some five miles per hour, with innumerable stops and starts. Upon observing the injury to the plaintiff, his companions caused the driver of the pickup to stop and, running to Kellogg's truck, notified him that there had been an injury to the plaintiff. Thereupon, Kellogg stopped just outside the tunnel, walked back and picked up from his own lane of travel a piece of timber (variously described) which had been upon Kellogg's truck when it left the "infield" and started through the tunnel.

Each vehicle, while in the "infield," had upon it a type of platform placed thereon by the occupants of the vehicle and upon which they sat or stood while viewing the races. These were still upon the vehicles as they entered the tunnel to leave the Speedway property. All or part of the platform which had so been placed upon Kellogg's truck came off of it in the passage through the tunnel. There was no one riding in the bed of Kellogg's truck.

By reason of his injury, the plaintiff was carried to a hospital, where he received medical attention, the evidence as to the nature of his injuries not being material to this appeal.

In the following testimony offered by the plaintiff, certain discrepancies and conflicts will be observed:

One companion of the plaintiff testified that loose two-by-eight or one-by-eight planks lay across Kellogg's truck, resting upon the tops of the sides of the truck bed. Another testified that the plank which struck the plaintiff was a two-by-eight which was eight to ten feet long and came off of Kellogg's truck. This witness testified that after the plaintiff was injured, an occupant of Kellogg's truck "got the plank from the tunnel entrance." A third companion

of the plaintiff testified that the planks so lying across the top of the bed of Kellogg's truck were loose and that the plank, which he observed on the ground after the plaintiff was injured, was "something like a one-and-a-half-by-five." and was six or eight feet in length.

The plaintiff and one of his companions testified that the structure built upon the pickup truck, in which the plaintiff was riding, was nailed together and braced, leaving the sides open from the top of such structure down to the sides of the pickup truck bed.

Kellogg, called as a witness by the plaintiff, described the platform, which lay upon and came off of Kellogg's truck, as a piece of crating about three feet wide, seven feet, four inches long, and an inch and a half thick. (He subsequently estimated its length at eight feet, three inches.) Its weight was about 20 pounds. It lay across the bed of the truck, resting upon the sides of the truck body and extending eight or nine inches beyond the truck body on each side. A "piece" was nailed to each end of the crate so as to extend downward over and outside of the truck body. This platform was not fastened in any way to the truck body but was held in place only by its own weight. After the injury to the plaintiff, Kellogg picked up a "piece" of this crating from the ground within his lane of traffic. The platform, while resting upon Kellogg's truck, did not strike any piling. "It couldn't have." There was no other loose plank on the rear of Kellogg's truck. In driving through the tunnel Kellogg's truck did not jerk or jump as it started and stopped with the line of traffic.

Kellogg further testified that a tarpaulin was stretched over the structure built upon the pickup truck in which the plaintiff was riding, which tarpaulin came down all the way along each side of the pickup truck, covering all of the area between the top of the structure and the side of the truck bed.

Ottway Burton and John Randolph Ingram for plaintiff appellant.

Miller and Beck for defendant appellees.

LAKE, J. Upon direct examination of the defendant Kellogg, who was called as a witness for the plaintiff, concerning a conversation with the father of the plaintiff at the hospital, the plaintiff propounded this question: "Did you discuss the hospital bill?" Objection thereto was sustained. If the witness had been permitted to answer, he would have testified, "I paid the hospital bill." There is no merit in this assignment of error. The fact that the defendant paid the plaintiff's hospital bill is not an implied admission of lia-

bility, and evidence of such payment is not competent, nothing else appearing. *Hughes v. Enterprises,* 245 N.C. 131, 95 S.E. 2d 577, 63 A.L.R. 2d 685; *Brown v. Wood,* 201 N.C. 309, 160 S.E. 281.

Other assignments of error relating to the exclusion of evidence offered by the plaintiff are not discussed in the brief and are, therefore, deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court.

The remaining assignment of error relates to the granting of a motion for judgment of nonsuit. Such a motion cannot be sustained on the ground that there are discrepancies and contradictions in the evidence offered by the plaintiff, such as conflict between the testimony of the defendant called as a witness for the plaintiff and the testimony of other witnesses for the plaintiff. Such discrepancies and contradictions in the plaintiff's evidence are for determination by the jury. *Saunders v. Warren,* 264 N.C. 200, 141 S.E. 2d 308; *Benton v. Montague,* 253 N.C. 695, 117 S.E. 2d 771; *Bell v. Simmons,* 247 N.C. 488, 101 S.E. 2d 383; Strong, N. C. Index, Trial, § 21. The plaintiff's evidence must be interpreted in the light most favorable to him and all reasonable inferences in his favor must be drawn therefrom. *Coleman v. Colonial Stores, Inc.,* 259 N.C. 241, 130 S.E. 2d 338; *Redden v. Bynum,* 256 N.C. 351, 123 S.E. 2d 734.

So interpreted, the plaintiff's evidence is sufficient to support findings that the defendant Kellogg laid across his truck a number of loose two-by-eight planks, the ends of which rested upon the tops of the side boards of the truck, each plank being held in place only by its own weight, and, as he drove the truck through the tunnel, one of these planks came off of the truck in some manner not explained, flew through the air, and struck the plaintiff upon the head.

The plaintiff alleged in his complaint that Kellogg was negligent in that he operated the truck "knowing that the loosely brought together timbers forming this homemade grandstand would be likely to slide off and injure persons," and that the "negligently constructed, rickety grandstand hit the concrete underpass, throwing timbers into the pickup truck." There is no evidence that any part of the truck or of any plank thereon struck any portion of the tunnel. The only evidence is to the contrary.

There is no evidence to support any other allegation of negligence in the complaint. The plaintiff's case must, therefore, stand or fall upon the sufficiency of the above facts to support the allegations concerning the "grandstand" and the sufficiency of those allegations to constitute negligence.

Although, at the time of the events in question, the two vehicles were being operated upon private property of the Speedway, and

not upon a public highway, it was incumbent upon Kellogg to use that degree of care in the operation of the truck which a reasonable man would use under like circumstances. Though the statutes applicable to the operation of motor vehicles upon public highways would not apply to such operation elsewhere, the common law rules of liability for injury proximately caused by negligence do apply. *Bennett v. Young,* 266 N.C. 164, 145 S.E. 2d 853. Kellogg knew, or should have known, that vehicular traffic was moving through the tunnel in the same manner as upon a heavily congested public highway. Therefore, conduct by him which, in the absence of statute, would have constituted negligence if it had occurred upon a congested public highway must be deemed negligence if it occurred while driving through this tunnel.

Proof of an injury, without more, does not raise a presumption of negligence. *Spell v. Contractors,* 261 N.C. 589, 135 S.E. 2d 544. Negligence is the doing of an act which a reasonable man would not do under the same circumstances, or the failure to do an act which a reasonable man would not omit under similar circumstances. An act or omission does not constitute actionable negligence unless a reasonable man could have foreseen that injury to another would be likely to occur from such act or omission. *Pinyan v. Settle,* 263 N.C. 578, 139 S.E. 2d 863; *Electric Co. v. Dennis,* 255 N.C. 64, 120 S.E. 2d 533; *Priest v. Thompson,* 254 N.C. 673, 119 S.E. 2d 613. "The law does not require omniscience and proof of negligence must rest on a more solid foundation than mere conjecture." *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838.

Assuming that it might reasonably be foreseen that a loose plank of the size here described, lying flat across the top of a truck, might blow off or be shaken off and do injury to another if the truck were operated at a high speed or over such terrain or in such a manner as to cause violent vibration, it does not follow that it could be reasonably foreseen that such a plank would fall off so long as the truck was operated without sudden jerks and jolts, and at a speed not in excess of five miles per hour. Actionable negligence by Kellogg at the time the plaintiff was injured cannot be predicated upon an assumption that when Kellogg reached the open highway, he intended to operate at a greater speed.

There being no evidence that the truck or the plank struck any part of the tunnel or that the truck was proceeding otherwise than at an exceedingly low speed and without jolting or jerking, the cause of the plank's falling from the truck and striking the plaintiff, assuming that it did so, is left in the realm of conjecture and

speculation. The granting of the motion for judgment of nonsuit was, therefore, proper.

Affirmed.

NATIONWIDE MUTUAL INSURANCE COMPANY v. CANADA DRY BOTTLING COMPANY.

(Filed 23 November, 1966.)

1. Pleadings § 24—

Where order overruling demurrer to an amended complaint recites that the amended complaint, which was filed in apt time, was with leave of the court, and the recital in the order is not challenged, defendant may not thereafter contend that his motion to strike the amended complaint should have been allowed because no motion for leave to amend had been made as required by G.S. 1-131.

2. Appeal and Error § 3—

Where a motion to strike a further answer and defense amounts to a demurrer thereto, the order allowing the motion is immediately appealable.

3. Pleadings § 34—

A motion to strike allegations constituting an entire defense amounts to a demurrer to such defense and requires that the allegations be taken as true.

4. Insurance § 53—

Where the owner's insurer pays the owner damages, less a stipulated deduction, inflicted by the negligence of another and the insurer is subrogated *pro tanto* to the rights of the owner against the tort-feasor, a compromise agreement in an action by the owner against the tort-feasor, even though embodied in a consent judgment, does not preclude the insurer from suing the tort-feasor on its subrogated claim when at the time of entering the consent judgment the tort-feasor has knowledge of the payment of the claim by the insurer and its right to subrogation.

5. Judgments § 30—

Since a consent judgment is but a contract between the parties entered upon the records with the sanction of the court, the matters concluded by such consent judgment must be determined by the construction of the judgment as a contract.

APPEAL by defendant from orders entered by *Martin, Special Judge*, January 24, 1966 Civil Session, and at April 25, 1966 Civil Session, of BUNCOMBE.

Plaintiff (Nationwide) instituted this action and filed its com-

plaint on May 4, 1965. Defendant (Canada Dry) demurred. Its demurrer was sustained by Judge Martin in an order filed August 10, 1965. On August 31, 1965, Nationwide filed an amended complaint.

The amended complaint in substance alleges: On July 10, 1962, on a street in Waynesville, North Carolina, a truck owned by Canada Dry and operated by Groome, its agent, collided with a parked automobile owned by Doris A. Wilson (Wilson). The collision and the damage to the Wilson car were caused solely by the negligence of Groome while operating Canada Dry's truck as its agent. Under an insurance policy it had issued, Nationwide was obligated to Wilson for the damages to her car, less the sum of $50.00, resulting from said collision. Nationwide, in discharge of its said obligation, paid to Wilson the sum of $439.14, and became subrogated to her rights against Canada Dry. Nationwide prayed that it recover from Canada Dry the sum of $439.14, attorney fees and costs.

On September 30, 1965, Canada Dry filed (1) a motion to strike the amended complaint and dismiss the action "because a Demurrer to the plaintiff's cause of action has heretofore been sustained," and (2) a demurrer to the amended complaint.

Judge Martin, by order filed January 28, 1966, denied Canada Dry's motion to dismiss and overruled its demurrer to amended complaint. This order recites: "and the Court finding that the Plaintiff filed an amended Complaint on the 31st day of August, 1965, and with leave of Court . . ." It was ordered that Wilson be made a party to this action. (Note: The record does not show she has been made a party by service of process or otherwise.) Defendant filed exceptions to this order.

On February 25, 1966, Canada Dry answered the amended complaint. As a first further answer and defense, it pleaded the three-year statute of limitations. Its second further answer and defense, consisting of paragraphs 1-14, inclusive, will be summarized in the opinion.

Judge Martin, by order filed July 18, 1966, (1) denied Nationwide's motion to strike Canada Dry's first further answer and defense and (2) allowed its motion to strike paragraphs 1-14, inclusive, of the second further answer and defense.

On appeal, Canada Dry's assignments of error are based on its exceptions to Judge Martin's order of January 28, 1966, *and* on its exceptions to Judge Martin's order of July 18, 1966.

Williams, Williams & Morris and J. N. Golding for plaintiff appellee.

Roy W. Davis, Jr., and Van Winkle, Walton, Buck & Wall for defendant appellant.

BOBBITT, J. Canada Dry asserts the court erred (1) in overruling, by the order of January 28, 1966, its motion to strike the amended complaint and dismiss the action, and (2) in striking, by the order of July 18, 1966, its alleged second further answer and defense.

Canada Dry contends Nationwide made no motion for leave to amend within thirty days after Judge Martin's order of August 10, 1965, as provided in G.S. 1-131. The amended complaint was filed August 31, 1965. The exceptions to Judge Martin's order of January 28, 1966, do not challenge the recital to the effect leave to amend had been granted. All of the successive hearings were before Judge Martin. Under these circumstances, defendant's exception to that portion of Judge Martin's order of January 28, 1966, in which he denied defendant's motion to strike the amended complaint and dismiss the action, is considered unsubstantial and without merit. Hence, said order will not be disturbed.

Nationwide's motion to strike Canada Dry's second further answer and defense is in substance a demurrer thereto and will be so considered. *Mercer v. Hilliard,* 249 N.C. 725, 107 S.E. 2d 554; *Galloway v. Lawrence,* 263 N.C. 433, 139 S.E. 2d 761. Hence, the factual allegations in Canada Dry's second further answer and defense must be taken as true. *Jewell v. Price,* 259 N.C. 345, 130 S.E. 2d 668.

Canada Dry, in its second further answer and defense, alleges in substance: Nationwide paid Wilson $439.14, this being $50.00 less than their agreed evaluation ($489.14) of the damage to the Wilson car. Thereafter, on February 27, 1963, Wilson instituted an action against Canada Dry in the Superior Court of Haywood County, North Carolina, for all damages to her car, and prayed that she recover $1,300.00. Canada Dry answered, denying negligence and pleading "various defenses." Canada Dry moved that the court join Nationwide as a party to said action because of the settlement it had made with Wilson under said collision insurance policy. Upon objection by Wilson, the court in its discretion denied Canada Dry's motion. Nationwide "acquiesced in the denial of said motion." Canada Dry entered into a settlement agreement with Wilson for all damages to her car, "the same representing a compromise settlement with respect to the interests of Doris A. Wilson, the plaintiff, and this defendant." The terms of said settlement were embodied in a consent judgment. Wilson was awarded judgment against Canada Dry for $400.00 and Canada Dry was taxed with the costs. The judgment contains this provision: "That the defendant, or its agents or successors or assigns, be and it is hereby released of and from any and all claims, demands and causes of action which the plaintiff, or any person acting by, through or for her, now has or may later have

arising upon or in any way connected with the matters and things alleged in the plaintiff's complaint." Canada Dry pleads said judgment in the Haywood County suit as "a full and final bar to the cause of action now alleged by the plaintiff against this defendant."

Defendant did not allege Nationwide had knowledge or notice of the pendency of the Haywood County action unless the allegation that Nationwide "acquiesced in the denial of said motion" is accepted as a sufficient allegation that Nationwide had such knowledge or notice. Canada Dry alleges Nationwide was not made a party to that action. Moreover, the only reasonable inference to be drawn from Canada Dry's allegations is that Nationwide did not participate in the compromise of said action set forth in said judgment. The written consent to the judgment in the Haywood County action is signed by Wilson and her attorney and by Canada Dry and its attorneys. Whether Canada Dry has paid the consent judgment in the Haywood County action is not disclosed by its pleading.

Since Canada Dry alleges it moved that Nationwide be joined as a party in the Haywood County action "because of the plaintiff's settlement with (Wilson) under said insurance policy", it appears clearly that Canada Dry had knowledge of Nationwide's subrogation rights when it negotiated the settlement with Wilson.

Wilson's right to *maintain* an action in Haywood Superior Court, without the joinder of Nationwide, for the recovery of the full amount of the damages to her car is well established. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231, and subsequent decisions based thereon. It is noted that Wilson sued Canada Dry to recover damages in the amount of $1,300.00. The evaluation of Wilson's damages at $489.14 was for the purpose of settlement as between Nationwide and Wilson.

The question is whether the consent judgment, setting forth a compromise settlement made by Canada Dry with Wilson, with knowledge of Nationwide's subrogation rights but without Nationwide's consent, is a bar to Nationwide's right to maintain this action. Decisions in this jurisdiction and elsewhere impel a negative answer.

In *Phillips v. Alston,* 257 N.C. 255, 125 S.E. 2d 580, Phillips and his collision insurance carrier, as coplaintiffs, alleged the insured car of Phillips was damaged in the amount of $490.00 by the negligence of Alston; and that the insurer, by reason of its policy provision, had paid to Phillips the sum of $390.00. The plaintiffs prayed for judgment in the total amount of $490.00. Alston denied negligence and pleaded as a bar the release theretofore executed by Phillips and his wife. A jury trial was waived and decision was based on the court's findings of fact, *viz.:* Phillips's insured car was

damaged by the negligence of Alston in the amount of $490.00. The insurer paid Phillips $390.00 pursuant to its obligation under its policy. Alston's insurance liability carrier paid $3,100.00 for the release. The $3,100.00 was paid as compensation to Mrs. Phillips on account of her personal injuries and hospital expenses. The release, which was executed by both Mr. Phillips and Mrs. Phillips, purported to release Alston "from all claims and demands, actions and causes of action, damages, cost, loss of service, expenses and compensation on account of, or in any way growing out of bodily injuries and property damages" resulting from the collision. When the $3,100.00 settlement payment was made and the release obtained, Alston's liability insurance carrier, which had negotiated the settlement with Mr. and Mrs. Phillips, had notice of the subrogation rights of Phillips's insurer. A judgment (1) that Phillips recover nothing, and (2) that Phillips's insurer recover $390.00 and costs, was affirmed by this Court.

Rodman, J., for this Court, said: "While a *tort-feasor* is entitled to have the total damage ascertained in one action, he cannot, when he has knowledge of insurer's rights by virtue of its payment to the owner, defeat those rights by making payment to and taking a full release from the owner. The payment so made and release taken will be construed as a mere adjustment of the uncompensated portion of the loss. Insurer may then assert its right against the *tort-feasor.* (Citations)"

In the later case of *Insurance Co. v. Spivey,* 259 N.C. 732, 131 S.E. 2d 338, the factual situation is distinguishable on the ground the defendants' settlement with the insurer related solely and expressly to the insured's uncompensated loss of $100.00. Even so, this excerpt from the opinion of Rodman, J., is significant:

"It is said in 46 C.J.S. 179, cited with approval in *Burgess v. Trevathan, supra:* 'After the loss has been paid by the insurer, or the insurance is in the process of adjustment, a third person, having knowledge of the fact, cannot make settlement with insured for the loss, his liability being to insurer to the extent of the insurance paid; and if a third person makes such settlement it is no defense to a suit by insurer against him.'

"The right of a tort-feasor to defeat the claims of an insurer who has been subrogated to the rights of its insured was again considered in *Phillips v. Alston,* 257 N.C. 255, 125 S.E. 2d 580. We there reaffirmed the conclusion reached in *Powell v. Water Co.,* (171 N.C. 290, 88 S.E. 426), that the tort-feasor who has knowledge of insurer's rights cannot, by settling with claimant for the rights remaining in him, defeat the insurer's rights. 29A Am. Jur. 810-811."

Phillips v. Alston, supra, and *Insurance Co. v. Spivey, supra,* are in accord with authority in other jurisdictions.

In Vance on Insurance (Hornbook Series 3d Ed.), § 134, p. 794, it is stated: "After the insured has received payment under a policy, the tort-feasor, having knowledge of this fact, cannot defeat the insurer's right to subrogation by any settlement with the insured. If with knowledge of the previous payment by the insurer the tort-feasor does procure a release from the insured, such release will constitute no defense as against the insurer, nor will the insurer be allowed to recover the payment made to the insured. But a tort-feasor who in good faith and without any knowledge of any payment by the insurer to the insured does settle with the insured, may set up this fact as a bar to the insurer's action for subrogation." Accord: 46 C.J.S., Insurance § 1211a(2), p. 179; 29A Am. Jur., Insurance § 1733; 6 Appleman, Insurance Law and Practice § 4092, p. 584; Annotation, 92 A.L.R. 2d 102, *124.*

It should be noted that we are not presently concerned with a factual situation where the insured prosecutes an action to recover full damages to final judgment. In this connection, see *Insurance Co. v. R. R.,* 165 N.C. 136, 80 S.E. 1069, and *Ocean Acc. & Guar. Corp. v. Hooker Electro-Chemical Co.,* 240 N.Y. 37, 147 N.E. 351 (1925).

The fact that the terms of settlement are incorporated in a consent judgment in a pending action is immaterial. Such a judgment is a contract and must be so interpreted. *Insurance Co. v. Spivey, supra,* and cases cited.

The conclusion reached is that the alleged compromise settlement made by Canada Dry with Wilson and embodied in the consent judgment in the Haywood County action is not a bar to Nationwide's action. Hence, the order striking paragraphs 1-14, inclusive, of Canada Dry's second further answer and defense was proper.

Affirmed.

STATE v. ORVISTER BARBER.

(Filed 23 November, 1966.)

1. Criminal Law § 71—

The evidence on the *voir dire* in regard to the voluntariness of a confession is solely for the court for the purpose of determining the competency of the confession in evidence; upon the admission of the confession in evidence, it is for the jury to determine whether the statements referred to in the testimony were in fact made by the defendant, and the weight, if any, to be given such statements. To this end evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury, but the testimony on the *voir dire* may not be brought out before the jury.

2. Same; Criminal Law § 108—

Defendant did not testify upon the *voir dire* but testified at the trial to the effect that the incriminating statements attributed to him and admitted in evidence were induced by threats and promises. *Held:* An instruction not based on any testimony before the jury that the officer said that he used no threats and made no promises to induce the statements is error in inadvertently advising the jury as to the testimony upon the *voir dire*, and such error, in connection with the subsequent charge that the court had determined that the confession was freely and voluntarily given, must be held for prejudicial error as an expression of opinion by the court.

PLESS, J., dissenting.

APPEAL by defendant from *Shaw, J.*, May 2, 1966 Session of FORSYTH.

At November 28, 1960 Term, defendant was indicted in a bill charging that he, on November 5, 1960, "unlawfully, wilfully and feloniously having in possession and with the use and threatened use of a certain firearm, to wit, a certain pistol, whereby the life of Bill Cofer was endangered and threatened, did commit an assault upon and put in bodily fear the said Bill Cofer and by the means aforesaid and by threats of violence and by violence did unlawfully, wilfully and feloniously take, steal and carry away personal property, to wit, $72.69 in money from the place of business known as Henry's Grocery and Market, where, at said time, the said Bill Cofer was in attendance, said money being the property of Henry Cofer, the owner of Henry's Grocery and Market," etc., a violation of G.S. 14-87. At said term, defendant pleaded guilty as charged and judgment imposing a prison sentence of not less than twenty nor more than thirty years was pronounced.

At April 4, 1966 Criminal Session, Judge Armstrong, in a post-conviction proceeding, vacated the judgment entered at said No-

vember 28, 1960 Term and ordered a new trial on the ground defendant had not been represented by counsel. At May 2, 1966 Session, before Shaw, J., defendant, then represented by Edmund I. Adams, his court-appointed counsel, pleaded not guilty to said indictment and was tried thereon. The jury returned a verdict of "Guilty as charged," and Judge Shaw pronounced judgment imposing a prison sentence of fourteen years. Defendant excepted and appealed. Mr. Adams was permitted to withdraw as counsel; and, by order of May 20, 1966, W. Douglas Parrish, Esq., was appointed counsel to prosecute defendant's appeal. Too, an order was entered that Forsyth County pay necessary costs for mimeographing, etc., incurred in perfecting defendant's appeal.

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

W. Douglas Parrish for defendant appellant.

BOBBITT, J. This appeal relates solely to whether error prejudicial to defendant was committed during his trial at May 2, 1966 Session of Forsyth Superior Court. Disposition requires application of the following legal principles established by our decisions, *viz.:*

1. "When the State offers a confession in a criminal trial and the defendant objects on the ground it was not voluntary, the question thus raised is determined by the judge in a preliminary inquiry *in the absence of the jury.* . . . The trial judge hears the evidence, observes the demeanor of the witnesses and resolves the question." (Our italics.) *S. v. Outing,* 255 N.C. 468, 472, 121 S.E. 2d 847, 849, *cert. den.,* 369 U.S. 807, 7 L. Ed. 2d 555, 82 S. Ct. 652. Accord: *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *S. v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

2. "In the establishment of a factual background by which to determine whether a confession meets the test of admissibility, the trial court must make the findings of fact. . . . Of course, the conclusions of law to be drawn from the facts found are not binding on the reviewing courts." *S. v. Barnes, supra,* opinion by Higgins, J. This legal principle underlies the decision in *S. v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569.

3. These findings of fact are made only for one purpose, namely, to show the basis for the judge's decision as to the admissibility of the proffered testimony. They are not for consideration by the jury. They should not be made or referred to in the jury's presence. *S. v. Walker,* 266 N.C. 269, 145 S.E. 2d 833.

4. "If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the tes-

timony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *S. v. Walker, supra.*

Our decisions seem to be in accord with what is referred to in Appendix A of the separate opinion of Mr. Justice Black in *Jackson v. Denno,* 378 U.S. 368, 411, 12 L. Ed. 2d 908, 936, 84A S. Ct. 1774, 1799, 1 A.L.R. 3d 1205, 1234, as the "Wigmore or 'Orthodox' rule," briefly stated therein as follows: "Judge hears all the evidence and then rules on voluntariness for purpose of admissibility of confession; jury considers voluntariness as affecting weight or credibility of confession."

We consider this procedure "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Jackson v. Denno,* 378 U.S. 368, 391, 12 L. Ed. 2d 908, 924, 84A S. Ct. 1774, 1788, 1 A.L.R. 3d 1205, 1221; *Boles v. Stevenson,* 379 U.S. 43, 13 L. Ed. 2d 109, 85 S. Ct. 174.

In *S. v. Walker, supra,* a decision which overruled *S. v. Davis,* 63 N.C. 578, and *S. v. Fain,* 216 N.C. 157, 4 S.E. 2d 319, to the extent in conflict therewith, it was held that a statement to the jury, or in its presence and hearing, of the court's findings to the effect the confession attributed to the defendant was voluntarily made "constituted a positive expression of opinion and invaded the province of the jury in violation of G.S. 1-180," and that "(u)pon admission of the proffered testimony, credibility of the witness and the weight, if any, to be given his testimony, were exclusively for determination by the jury free from any expression of opinion by the court with reference thereto."

By proper exception and assignment of error, defendant asserts the presiding judge committed prejudicial error by charging the jury as follows: "By the way, Mr. Burton said that he used no threats and made no promises. He said that he did not intimidate the defendant in any manner to get him to make the confession; that he told him whatever he said could be used in court for or against him as the case might be."

In 1960, Mr. W. C. Burton held the rank of detective sergeant in the Police Department of Winston-Salem. At May 2, 1966 Ses-

sion, when this case was tried, Mr. Burton was a captain, head of the Detective Division of said department.

Mr. Burton testified for the State. Upon objection by defendant's counsel to a question relating to statements made by defendant to Mr. Burton, the court excused the jury and conducted a *voir dire* hearing to determine and pass upon the admissibility of the testimony. In the absence of the jury, Mr. Burton testified, although in greater detail, as set forth in the challenged excerpt from the charge. At the conclusion of Mr. Burton's testimony, the court, in the absence of the jury, found "that the statement or confession made by the defendant to Captain W. C. Burton of the Winston-Salem Police Department on or about the 5th day of November, 1960, was given freely and voluntarily without any force or compulsion whatever and is competent in evidence." Thereupon, the jury was recalled; defendant's objection was overruled; and Mr. Burton testified, in the presence of the jury, as to incriminating statements made to him by defendant. This procedure was in strict accord with our decisions.

Defendant did not testify at the *voir dire* hearing. He did testify at the trial. The substance of the portion of his testimony at trial relevant to the question under consideration was that such statements as he made to (unnamed) officers were induced by threats and promises.

Mr. Burton did not testify at trial, in the presence of the jury, that he "used no threats and made no promises"; or that he "did not intimidate the defendant in any manner to get him to make the confession"; or that he "told (defendant) whatever he said could be used in court for or against him as the case might be."

In the challenged excerpt from the charge, the judge inadvertently advised the jury as to what Mr. Burton had testified in the *voir dire* hearing in the absence of the jury. This was error. Its prejudicial effect is manifest when considered in connection with the following statement in the charge: "And then there was an investigation by the Court to determine whether or not the confession or statement made by the defendant to Captain Burton was given freely and voluntarily, and the Court admitted the statement in evidence and you heard what Mr. Burton testified about." When so considered, it appears that the judge, after advising the jurors of the substance of testimony Mr. Burton had given in their absence, further advised them that, based on an investigation he had conducted in their absence, he had determined that the statements attributed to defendant were made freely and voluntarily and therefore had admitted into evidence the testimony as to such statements. Under the legal principles set forth above, this was prej-

udicial error for which defendant must be and is awarded a new trial.

New trial.

PLESS, J., dissenting: We have here a conflict of decisions of this Court. Which shall prevail?

While this Court has held for many years that the voluntariness of an alleged confession is for determination by the Judge in the absence of the jury, it was not until a few months ago that it went so far as to say (in *S. v. Herbert B. Walker,* 266 N.C. 269, 145 S.E. 2d 833) that a statement to the jury that an alleged confession was voluntary constituted an expression of opinion that was reversible error. Pursuant to that decision the majority has ordered a third trial in this case.

But—the Court is overlooking, and ignoring, in my opinion, a much more important, well established and practical line of decisions. Every court everywhere says that to justify a new trial the error should be such that without it, a different result might have been expected. The error must be "substantial", prejudicial and harmful.

We said in *S. v. King,* 225 N.C. 236, 34 S.E. 2d 3, "To warrant a new trial it should be made to appear that the ruling complained of was material and prejudicial to the defendant's rights, and that a different result would have likely ensued."

Can it be reasonably argued that if the Judge had not made the statement attributed to him that the defendant would *probably* have been acquitted? The victims had identified him, he was seen in the vicinity and he *voluntarily* confessed his guilt. If the Judge just had not referred to his finding of voluntariness his conviction would stand. We send it back for a third trial at much expense and add to already over-crowded dockets. All this in obeisance to the doctrine of *stare decisis* as respects the *Walker* case—but disregarding the doctrine in the much more important, self-imposed (but here forgotten) rule requiring *substantial,* harmful and prejudicial error probably causing a different result.

Does the majority predict a verdict of acquittal when the next judge doesn't let the jury know that he has found the defendant's confession voluntary? That was not the history of the *Walker* case. This very week we are again hearing his appeal. He has now had the new trial awarded him last January. Without the allegedly substantial error being repeated in it he has again been convicted.

Since a defendant can now appeal without reason, cause, or expense to himself, I predict the defendant's conviction will be before us again within a few months. And nothing will have been gained.

MRS. MARY VINIA FORBIS v. GEORGE GERALD WALSH AND WIFE, MARY LOUISE WALSH.

(Filed 23 November, 1966.)

1. Appeal and Error § 51—

Judgment of nonsuit in the lower court must be reversed on appeal if the evidence considered in the light most favorable to plaintiff is sufficient to permit the jury to find all facts necessary to constitute a cause of action in plaintiff's favor.

2. Deeds § 17—

Contemporaneously with plaintiff's execution of deed to defendants, defendants executed a contract to furnish plaintiff maintenance and support in accordance with her then standard and custom of living, and to reconvey upon request upon their failure to perform in any respect the acts specified in the contract. Plaintiff's evidence tended to show that she left the premises some ten months thereafter as a result of fear induced by threats and abuse of the *feme* defendant, that plaintiff had demanded a reconveyance, and that the request was refused. *Held:* The evidence raised an issue for the determination of the jury and judgment of nonsuit was error.

3. Appeal and Error § 51—

On appeal from judgment of nonsuit, the Supreme Court will discuss the evidence only to the extent necessary to determine its sufficiency to go to the jury and may refrain from discussing or deciding any other question.

APPEAL by plaintiff from *Latham, S.J.*, February 7, 1966, Schedule C Session, MECKLENBURG Superior Court.

The plaintiff instituted this civil action to compel defendants specifically to perform their written contract to reconvey to her two certain specifically described tracts of land located in Mecklenburg County. The plaintiff alleged that on February 15, 1965, she was induced by the defendants to convey to them by warranty deed the described lands. As consideration for the conveyance the defendants executed the following agreement:

"STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG AGREEMENT

THIS IS TO CERTIFY that on this date Mrs. Mary Vinia Forbis, Route #4, Matthews, North Carolina, has conveyed certain real estate to George Gerald Walsh and wife, Mary Louise Walsh. It is further agreed between the parties that in consideration for the transfer of the property which has been transferred from Mrs. Forbis to Mr. and Mrs. Walsh that Mr. and Mrs. Walsh hereby agree that they shall furnish Mrs. Forbis with all required needs for her maintenance and support, including a suitable residence where she may live. This Agreement to fur-

nish the maintenance and support for Mrs. Forbis includes any and all things which might be needed for her well-being and, of course, includes the right of Mrs. Forbis to be supported and maintained in accordance with her present standard and custom of living.

"If for any reason George Gerald Walsh and wife, Mary Louise Walsh, fail in any respect to perform the acts and deeds specified herein, then upon request said property shall be reconveyed to Mrs. Mary Vinia Forbis.

"This the 15th day of February, 1965.

s/ George Walsh (SEAL)

s/ Mary Louise Walsh (SEAL)"

The plaintiff alleged the defendants executed the contract and breached it by refusing to carry out its terms in that they failed to maintain or support her or to provide for her a suitable residence as they had agreed. She alleged demand for a reconveyance of the land and the defendants' refusal.

By answer, the defendants denied they had breached the agreement or that the plaintiff is entitled to a reconveyance. They admit the plaintiff has made demand for reconveyance which they have refused.

The evidence disclosed that the plaintiff is 72 years of age. She is the widow of Oscar Forbis who died October 6, 1964. The defendant, Mary Louise Walsh, is the only child of the plaintiff. After the death of Oscar Forbis in October, 1964, the plaintiff lived in the defendants' home in Charlotte until December 1, 1964, when all the parties moved to the plaintiff's home on the described lands. According to the testimony of the plaintiff, and in its light most favorable to her, the defendants began arguments and pleas that the plaintiff convey the lands to them. At first she declined. Finally she agreed, and executed the deed in consideration of the agreement which was attached to the complaint.

The plaintiff, as summarized in part and quoted in part, testified:

"After the deed was signed on February 15th my daughter and son-in-law continued to live with me on the land until October, 1965, when I left. During that period of time from February 15th until October 23, 1965, when I left, I was left alone quite a lot of times, perhaps five or six days a week. I can't even tell you how much; it was quite a lot of times. When they went off I was left alone for a week at a time, four or five days. They went to Memphis a couple of times and they stayed there about a week. They went to Atlanta and stayed there about a week. They went to New York on July 6, 1965, and they stayed

there about a week. During those times I was at the home by myself. I had no transportation and they did not request anyone to check on me, to my knowledge, although I had my neighbor to check on me from time to time to see if I was all right."

After the parties returned from a trip to the beach, the plaintiff testified: "I knew there was trouble and that there was something wrong. I recall that my son-in-law turned on the television and my daughter went in the bedroom, and after a little bit began complaining. She said, 'I am tired of this thing. Mother is just with us everywhere we go. We don't get any time to ourselves at all. She's always in the car. She's everywhere we go,' and she said, 'I have got a headache,' and Jerry got up and went over and turned off the television. They went in their room and I went to my bedroom."

On July 25, the plaintiff requested her daughter to drive her to the homecoming reunion at her church. "She said that I didn't let her know soon enough. I said that if it was inconvenient for her to take me to church, that it was all right, that she didn't have to. I guess my daughter was very, very mad, although I didn't know she was so terribly mad. She finally did agree to take me.

"We got in the car and left the home to go to church, which is in the Mint Hill section. We went past the road which leads to church. I would say we passed it about three or four miles and we went into Union County near Hemby's Bridge. She said that she didn't have time to take me to church and cursed me on the way; I don't remember the bad words she used because I was scared nearly stiff. She cursed me and told me, 'I've got a good notion to kill you. I think I will take you out and bash your head in, that's what I think I will do.' "

After the church service the plaintiff went to the home of her brother and sister-in-law. On the following Monday afternoon they took her back home. "When I returned home . . . my daughter scarcely said anything to me. Finally she said, 'Why don't you get out and go live with people your own age? You ought to be with people like yourself.' " . . . "On one occasion I started to the mail box to get the paper. When I left the house my daughter said, 'Don't come back. If you do I will kill you.' . . . I started to the mail box. My daughter ran after me and I was frightened and I screamed. She slapped her hand over my mouth. . . . My neighbor, Roy Hooks, saw this."

Roy Hooks testified: "I heard some type of commotion on that occasion. I was 150 or 200 feet from their house at the time. Mrs. Forbis seemed to be attempting to scream, a kind of muffled scream, as though she might be in distress. Her daughter, the defendant, Mrs.

Walsh, was speaking rather loud and seemed to be trying to get her back in the house."

The plaintiff offered evidence she is now living in Concord and the defendants are contributing nothing to her support.

At the conclusion of the plaintiff's evidence, the court entered judgment of involuntary nonsuit. The plaintiff excepted and appealed.

Wardlow, Knox, Caudle & Wade by J. J. Wade, Jr., H. Edward Knox for plaintiff appellant.

Millsaps, Robertson & Brumley by Richard H. Robertson, A. Neal Brumley for defendant appellees.

HIGGINS, J. The only assignment of error challenges the court's judgment of involuntary nonsuit entered at the close of the plaintiff's evidence. If the evidence, in its light most favorable to her, is sufficient to permit the jury to find all pertinent facts involved in the cause of action she has alleged, the judgment of nonsuit is erroneous and should be set aside to the end that a jury may pass on the evidence and answer the issues raised by the pleadings. *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7; *Saunders v. Warren*, 264 N.C. 200, 141 S.E. 2d 308.

The plaintiff brought this action for breach of the written contract quoted in the statement of facts. The contract was in writing, under seal, duly acknowledged and registered. It recites the plaintiff, by warranty deed, conveyed two tracts of land to the defendants — her daughter and son-in-law. The consideration for the conveyance was the promise of the defendants to furnish maintenance and support "[which] includes any and all things which might be needed for her well-being." The parties agreed upon the plaintiff's relief in case of a breach of this contract, "If for any reason [the defendants] fail in any respect to perform the acts and deeds herein, then upon request said property shall be reconveyed to Mrs. Mary Vinia Forbis."

The plaintiff offered evidence sufficient to raise the issue of fact whether the defendants had breached the contract. The issue was for jury determination. The court could not answer it as a matter of law. In such cases the Court discusses evidence only to the extent necessary to disclose the basis for decision. We refrain from discussing or deciding any question except that the evidence is sufficient to go to the jury. Pertinent decisions on other matters are discussed in the briefs, including *Mills v. Dunk*, 263 N.C. 742, 140 S.E. 2d 358; *Higgins v. Higgins*, 223 N.C. 453, 27 S.E. 2d 128;

Stamper v. Stamper, 121 N.C. 251, 28 S.E. 20; *Wall v. Williams,* 93 N.C. 327.

For the reasons assigned, the judgment of nonsuit is

Reversed.

MRS. ESTHER W. BYERS, ADMINISTRATRIX OF ESTATE OF WEAVER BYERS, DECEASED, v. STANDARD CONCRETE PRODUCTS COMPANY.

(Filed 23 November, 1966.)

1. Highways § 1—

The State Highway Commission is an administrative agency of the State having the delegated police power to establish, maintain and improve the State and county highways, and having such additional powers as are incidental to the powers expressly delegated.

2. Highways § 2; Automobiles §§ 6, 21.1—

The State Highway Commission is specifically delegated the power to limit loads on bridges, and when it has posted on a bridge a warning sign limiting the load such provision is not only to prevent damage to the bridge but is also designed to promote the safety of persons using the bridge, and therefore it is a safety regulation so that its violation constitutes negligence *per se* and is actionable if it proximately causes injury.

3. Highways § 2; Automobiles § 41y—

Evidence tending to show that defendant employee drove defendant's vehicle upon a highway bridge under reconstruction, that the vehicle had a weight greatly in excess of the weight limitation posted on the bridge, that the bridge collapsed, resulting in fatal injury to a highway foreman who was upon the bridge in the discharge of his duties, *is held* sufficient to be submitted to the jury on the issue of negligence, since a violation of G.S. 136-72 constitutes negligence *per se,* and the employee could have foreseen that injury or consequences of a generally injurious nature might have been expected by entering upon the bridge with the heavily loaded truck.

4. Negligence § 26—

Nonsuit on the ground of contributory negligence is proper only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference can be drawn therefrom, and nonsuit on the issue should be denied when opposing inferences are permissible from plaintiff's proof.

5. Automobiles § 42k—

Plaintiff's evidence tended to show that her intestate was employed by the Highway Commission as a skilled bridge man, that defendant's driver arrived at the bridge with a truck greatly in excess of the posted weight limit for the bridge and that the driver stopped and descended from the

truck and talked to plaintiff's intestate, that thereafter the driver drove upon the bridge as intestate was some 18 feet onto the bridge, and that the bridge collapsed, resulting in fatal injury to intestate. *Held:* Intestate will not be held guilty of contributory negligence as a matter of law, the purport of the prior conversation between intestate and the driver being in the realm of speculation.

APPEAL by plaintiff from *Crissman, J.*, May-June 1966 Civil Session of WILKES.

Civil action to recover damages for alleged wrongful death.

Plaintiff's evidence tended to show the following: On 26 May 1965 plaintiff's intestate was employed by the North Carolina Highway Commission as a skilled bridge man. He, with a crew, was engaged in reconstructing bridge No. 241 in Wilkes County. Defendant had a contract with the North Carolina State Highway Commission to provide concrete needed in the reconstruction of the bridge, and had been delivering concrete to the site in its trucks. On this date, defendant's agent arrived at the site with a truck fully loaded with concrete. The evidence tends to show that the gross weight of the loaded truck was 40,000 pounds. The evidence further tended to show that at each end of the bridge was a sign stating "Weight Limit — single vehicle 10 tons; truck and trailer 18 tons." The bridge had remained open to traffic during the construction work.

One Lundy Hart, a member of the construction crew, testified that he observed defendant's loaded truck pull up on the west side of the bridge and stop; that he saw the driver descend from defendant's truck and talk to plaintiff's intestate. The record does not reveal the contents of the conversation. The last time he saw plaintiff's intestate he was about 18 feet onto the bridge. "The bridge shook about twice, and I reached down and got ahold of the form and everything was quiet and the truck was sitting in the creek." As a result of the bridge collapsing the plaintiff's intestate was injured and died from the injuries the next day.

At the close of plaintiff's evidence defendant's motion for nonsuit was allowed. Plaintiff appealed.

Hayes & Hayes for plaintiff appellant.
Moore & Rousseau for defendant appellee.

BRANCH, J. Plaintiff's principal assignment of error is based upon her exception to the allowing of defendant's motion for involuntary nonsuit. The State Highway Commission is an administrative agency of the State, to which the State has delegated the police power to establish, maintain and improve the state and county

highways. The Commission possesses such additional powers as are incidental to the purposes for which it was created. *Contractors, Inc., v. Hertz Corp.,* 256 N.C. 277, 123 S.E. 2d 802. Certain powers are specificially delegated to the State Highway Commission by G.S. 136-72, which reads as follows:

> "Load limits for bridges; liability for violations:—The State Highway Commission shall have authority to determine the maximum load limit for any and all bridges on the State highway system or on any county road systems, to be taken over under §§ 136-51 to 136-53, and post warning signs thereon, and it shall be *unlawful* for any person, firm, or corporation to transport any vehicle over and across any such bridge with a load exceeding the maximum load limit established by the Commission and posted upon said bridge, *and any person, firm, or corporation violating the provisions of this section shall, in addition to being guilty of a misdemeanor,* be liable for any or all damages resulting to such bridge because of such violation, to be recovered in a civil action, in the nature of a penalty, to be brought by the Commission in the superior court in the county in which such bridge is located or in the county in which the person, firm, or corporation is domiciled; if such person, firm, or corporation causing the damage shall be a nonresident or a foreign corporation, such action may be brought in the Superior Court of Wake County."

In the case of *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273, the Court considered a violation of G.S. 119-43 relative to the storage, labelling and handling of gasoline, and speaking through Bobbitt, J., said:

> "Violation of a statute, or ordinance of a city or town, relating to the storage, handling and distribution of gasoline is negligence *per se.* . . . This is the rule generally as to statutes enacted for the safety and protection of the public; *a fortiori,* when such violation in itself is a criminal offense. . . . In such case, the sole question is whether such negligence (or wrong) was the proximate cause of the injury for which recovery is sought. True, proximate cause, even when the violation of such statute is the negligence involved, includes foreseeability as one of its elements. . . . But when such negligence is alleged to have been the proximate cause of plaintiff's injury, this is sufficient, as against demurrer, unless it appears affirmatively from the complaint that there was no causal connection between the alleged negligence and the injury."

This Court has considered a great many statutes which impose a specific duty for the protection of others, and has held in many instances that violation thereof constitutes negligence *per se*. The violation of an ordinance against employing children under twelve years of age was held negligence *per se*. *Leathers v. Tobacco Co.*, 144 N.C. 330, 57 S.E. 11. The violation of an ordinance that forbade a railroad to block crossings for more than ten minutes was held negligence *per se*. *Dickey v. R. R.*, 196 N.C. 726, 147 S.E. 15. The failure to obtain a permit to operate oversize or overweight vehicles in violation of G.S. 20-119 was negligence *per se*. *Lyday v. R. R.*, 253 N.C. 687, 117 S.E. 2d 778. Also, the violation of many of the safety statutes relative to the operation of motor vehicles has been held to constitute negligence *per se*. Thus, the general rule in North Carolina is that the violation of a statute or ordinance that imposes upon a person a specific duty for the protection of others constitutes negligence *per se*. The basis of the rule seems to be that the statute prescribes the standard of care, and the standard fixed by the Legislature is absolute. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331. Upon proof of breach of the statute, negligence is proven.

This Court has not specifically held that G.S. 136-72 is a statute imposing a specific duty for the protection of others. However, the Supreme Court of Virginia, in the case of *Tiller v. Commonwealth*, 193 Va. 418, in considering a statute regulating and controlling the size and weight of vehicles using the Virginia highways, used this language:

> "Construction and maintenance of highways in this state involves the expenditure of vast sums of money and it is obvious that the purpose of the legislature in enacting the statute herein involved was to prevent injury to roads and bridges *and to promote the safety of persons traveling over the highways by prohibiting the use on the public highways of vehicles of excessive weight.*" (Italics ours)

There is sufficient evidence to show that defendant's agent violated the provisions of G.S. 136-72. Upon being confronted with the warning sign on the bridge and being on notice that the bridge was being repaired, the defendant's agent could have foreseen that some injury or that consequences of a generally injurious nature might have been expected by entering upon the bridge with the heavily laden truck.

The defendant contends that the plaintiff's intestate was contributorily negligent. Since the burden of proof on the issue of contributory negligence is upon the defendant, nonsuit on this ground should be allowed only when plaintiff's evidence, taken in the light

most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom. *Waters v. Harris,* 250 N.C. 701, 110 S.E. 2d 283.

Plaintiff's evidence shows nothing more than that the deceased proceeded out on the bridge towards the other side after having been engaged in conversation with defendant's driver. The conclusions defendant would have us draw from the evidence adduced at the trial amount to nothing more than inferences. "Nonsuit on the issue of contributory negligence should be denied when the relevant facts are in dispute *or opposing inferences are permissible from plaintiff's proof.*" (Italics ours) *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743.

It is clear from plaintiff's evidence that her intestate was lawfully on the bridge. "It is the duty of drivers of vehicles to use due care to avoid injuries to pedestrians and other travelers lawfully using the way, or to persons rightfully working therein, and they are liable for injuries proximately resulting from their negligence in this regard." 25 Am. Jur., Highways, § 225, p. 519.

For reasons stated, the judgment allowing defendant's motion for nonsuit is

Reversed.

STATE v. MARMAN LEE KELLER.

(Filed 23 November, 1966.)

1. Forgery § 1—

The false making of checks with fraudulent intent, which checks are capable of effecting a fraud, constitutes forgery.

2. Criminal Law § 9—

A person is not liable for a criminal act committed by another when he does not participate in the commission of the act, directly or indirectly, but he is a party to the offense without regard to any previous confederation or design if he is present and actually aids or abets the perpetrator in the commission of the offense.

3. Forgery § 2—

Evidence tending to show that defendant participated in conversations in which plans were formulated to steal a check-writing machine and blank printed checks of a corporation, that thereafter defendant stated the check-writing machine and checks had been taken, and that defendant drove two others in a car from place to place where they alighted, filled in, endorsed and cashed the checks, which were falsely signed with

the purported signature of the president of the corporation, *held* sufficient to support defendant's conviction as an aider and abettor in the forgery of the checks.

APPEAL by defendant Keller from *McLaughlin, J.*, April 1966 Session of CABARRUS.

Criminal prosecution upon ten indictments, which were consolidated for trial, each one of which charges in the first count Gary Wayne Edwards, James Dalton Jordan, and Marman Lee Keller with forgery of a check, a violation of G.S. 14-119, and in the second count charges the same defendants with uttering a forged check, a violation of G.S. 14-120. The check set forth in the first indictment, No. 10-192, reads as follows:

"B & W HOMES, INC. 66-484
Box 147 531
Landis, N. C.
6-4 1965 543
Pay to the order of James L. Thompson $75.94
75 DOLS 94 CTS Dollars
MERCHANTS & FARMERS BANK
Landis, N. C.
B & W HOMES, INC.
/s/ Claude Woodie"

Each check in the other nine indictments is substantially similar, with these exceptions: The amount payable in each of the other nine checks is different, except that in indictment No. 10-198 and indictment No. 10-199 the amount is identical, to wit, $70.86; five of the other nine checks are payable to James L. Thompson and endorsed James L. Thompson; the check in indictment No. 10-194 is payable to Larry M. Johnson, and the endorsement bears the name of James L. Thompson; the check set forth in indictment No. 10-197 is payable to Larry M. Johnson and endorsed Larry Monroe Johnson; the check in indictment No. 10-198 is payable to Larry M. Johnson, but the record does not show by whom it was endorsed; the check in indictment No. 10-199 is payable to Larry M. Johnson and endorsed Larry M. Johnson; some of the checks are stamped paid 5 June 1965, and some are stamped paid 7 June 1965; in each of the other nine indictments the indictment sets forth that the check is signed Claude Woodi instead of Claude Woodie as in the first indictment.

Plea: The record shows that James Dalton Jordan and Marman Lee Keller pleaded not guilty. The record does not show the plea of Gary Wayne Edwards, but appellant Keller's brief states that de-

fendant Edwards pleaded guilty and testified for the State. Verdict: The record states "the jury says for its verdict that the defendant [Marman Lee Keller] is guilty of the charge of forgery embraced in each of the respective bills of indictment, Nos. 10-192 through 10-201, and not guilty of the charge of uttering embraced in each of the respective bills of indictment, Nos. 10-192 through 10-201." The record does not show the verdict as to Jordan.

From a judgment of imprisonment in case No. 10-192, and from a judgment of imprisonment in case No. 10-193, this sentence to run consecutively to the prison sentence pronounced in case No. 10-192 which, by defendant's consent, was suspended for a period of five years upon specified conditions, and from judgments continued in the other eight cases, defendant Keller appeals.

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

Llewellyn, McKenzie & Johnson by C. M. Llewellyn; and Clarence E. Horton, Jr., for defendant appellant.

PARKER, C.J. The defendant offered no evidence. Defendant Keller assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

The evidence for the State considered in its most favorable light and giving to the State every reasonable intendment thereon and every reasonable inference to be drawn therefrom *(S. v. Roux,* 266 N.C. 555, 146 S.E. 2d 654), shows the following: "Claude Woodie is president of B & W Homes, Inc., a manufacturer of mobile homes. He uses in his business checks imprinted with the name of B & W Homes, Inc. About a year ago the office of his business was broken into, and half of a large check book was stolen. At the same time, a check-writing machine was stolen. The check-writing machine imprinted words and letters upon a check. "B & W Homes, Inc." is on the machine. (He was testifying at the April 1966 Session of Cabarrus County Superior Court, and each of the ten bills of indictment charges the offense was committed on 4 June 1965.) He did not sign any one of the checks set forth in the ten indictments, and he did not authorize any person to sign his name on any one of these ten checks. He spells his name "Woodie" and not "Woodi." Defendant Keller never worked for B & W Homes, Inc.

Gary Wayne Edwards, a witness for the State, testified: "I talked to Marman Lee Keller relative to the checks about a week before they were cashed. I didn't talk directly to Mr. Keller. He talked in my presence about a week before they were cashed. It was talked that a check detector *(sic)* would be stolen. Mr. Keller

was talking about checks, and a check protector *(sic)* being stolen, and Mr. Jordan, he was supposed to fix the checks up. Carl Benge and myself were to cash the checks."

Defendant Keller, Carl Benge, and Gary Wayne Edwards went down to the place of business of B & W Homes, Inc., to steal therefrom checks and a check protector, but the B & W Homes, Inc., was open and they could not be stolen that night. The following weekend defendant Keller, Benge, and Edwards met in a poolroom in North Kannapolis about seven o'clock. Edwards testified: "He talked to Carl Benge, but I don't know what was said, and then he left again and came back about eleven o'clock. He said we would go back in the car, that the checks and check protector had been taken. 'He' is Mr. Keller."

As the Attorney General accurately states in his brief, "the above evidence sets the stage of the plot for Keller and others to forge the checks in question and to get them cashed."

The State offered other evidence to this effect: Edwards saw defendants Keller and Jordan on 4 June 1965. Jordan gave Edwards and Benge some checks and two motor vehicle operator licenses. Edwards does not know definitely who made the checks up, and did not see a check-writing machine at any time. While Edwards and Benge were being given the checks and operator licenses, Keller was in a nearby restaurant. After Edwards and Benge got the checks and licenses from Jordan, Keller drove his (Edwards') car from place to place in Kannapolis and waited while Edwards and Benge filled in, endorsed, and cashed the checks, and that the proceeds from the checks were pooled and divided equally between Edwards, Benge, Keller, and Jordan. On cross-examination Edwards testified in substance that Keller stayed in the restaurant while he and Benge talked to Jordan at his car, and that Jordan gave him some partially filled out checks and two driver licenses. He did not see Jordan make up any of the checks or the driver licenses, though the ink was still wet on the licenses.

Deputy Sheriff Tucker, a witness for the State, testified that after warning defendant Keller of his constitutional rights, Keller told him in substance as follows: He was driving Edwards' car that day in the Kannapolis area. He was taking Edwards and Benge from place to place, but did not know what they were doing. He learned that they were cashing checks. They split up the money from these checks, but he did not think the money was split equally; he only got $150.

The State's evidence was amply sufficient to permit a jury to find (1) a false making of every check set forth in the ten indictments, (2) a fraudulent intent on the part of every person who

knowingly participated in the false making of every one of the said ten checks, and (3) every one of the said ten checks was apparently capable of effecting a fraud. These are the three essential elements necessary to constitute the crime of forgery. *S. v. Phillips,* 256 N.C. 445, 124 S.E. 2d 146; *S. v. Dixon,* 185 N.C. 727, 117 S.E. 170.

This is said in 22 C.J.S., Criminal Law, § 79, 1961:

> "It is a general rule under the common law that one is not liable for the criminal acts of another in which he did not participate directly or indirectly. A person is a party to an offense, however, if he either actually commits the offense or does some act which forms a part thereof, or if he assists in the actual commission of the offense or of any act which forms part thereof, or directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. To constitute one a party to an offense it has been held to be essential that he be concerned in its commission in some affirmative manner, as by actual commission of the crime or by aiding and abetting in its commission and it has been regarded as a general proposition that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent."

This has been quoted with approval in *S. v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54; *S. v. Spears,* 268 N.C. 303, 150 S.E. 2d 499.

In 21 Am. Jur. 2d., Criminal Law, § 120, it is stated:

> "A principal in a crime must be actually or constructively present, aiding and abetting the commission of the offense. It is not necessary that he do some act at the time in order to constitute him a principal, but he must encourage its commission by acts or gestures, either before or at the time of the commission of the offense, with full knowledge of the intent of the persons who commit the offense. He must do some act at the time of the commission of the crime that is in furtherance of the offense."

It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Taft,* 256 N.C. 441, 124 S.E. 2d 169; *S. v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241.

Considering the State's evidence in the light most favorable to it, it is plain that the total combination of facts shown by the evidence shows substantial evidence of defendant Keller's guilt of all essential elements of the felonies charged in both counts of the ten

indictments and is amply sufficient to carry the cases charged in the ten indictments to the jury against him, and to support the verdict of guilty of forgery charged in the first count of each indictment returned against defendant Keller. The trial judge properly overruled defendant's motion for judgment of compulsory nonsuit.

We have considered defendant's other assignments of error. Prejudicial error is not shown. No new principles of law are involved. Defendant's other assignments of error do not merit discussion, and all are overruled.

In the trial below we find

No error.

CLARK'S GREENVILLE, INC., A CORPORATION, v. S. EUGENE WEST, MAYOR OF THE CITY OF GREENVILLE, NORTH CAROLINA, AND J. E. CLEMENTS, RALPH BRIMLEY, JOHN HOWARD AND PERCY COX, MEMBERS OF THE CITY COUNCIL FOR THE CITY OF GREENVILLE, NORTH CAROLINA, AND H. F. LAWSON, CHIEF OF POLICE OF THE CITY OF GREENVILLE, NORTH CAROLINA.

(Filed 23 November, 1966.)

1. Constitutional Law § 10—

The courts have the power and duty to determine whether a legislative body has exceeded its delegated or constitutional authority, but if the legislative act in question is within the constitutional powers of the legislative body, the courts cannot inquire into the motives, wisdom, or expediency which prompted its enactment, and must declare the law as written.

2. Same; Municipal Corporations §§ 27, 34—

Plaintiff sought to restrain the enforcement of defendant municipality's ordinance regulating the sale of merchandise on Sunday. Plaintiff conceded that the municipality had the power to enact the ordinance, G.S. 160-52, G.S. 160-200(6), (7), (10), but contended that the municipal council enacted the ordinance pursuant to a conspiracy with other merchants to destroy plaintiff's competitive advantage over those merchants who did not wish to remain open on Sunday. *Held:* Demurrer was properly sustained, since the courts will not inquire into the motives which prompt a municipality's legislative body to enact an ordinance which is valid on its face.

APPEAL by plaintiff from *Bundy, J.*, at Chambers in Greenville on June 27, 1966. From PITT.

Plaintiff, a corporation operating a general retail store in the city of Greenville, instituted this action against the mayor, other

members of the City Council, and the chief of police of the City of Greenville to test the validity of the ordinance entitled "An Ordinance amending Chapter 23, Section 13-56 of the Code of the City of Greenville, to provide for the due observance of Sunday" (Sunday ordinance). The action was begun by the issuance of summons on March 21, 1966. At the same time, plaintiff secured an order extending the time for filing complaint until the 11th day of April, 1966. On March 24, 1966, plaintiff applied to the Honorable Joseph W. Parker, Judge holding the courts of the Third Judicial District, for a temporary injunction restraining defendants from enforcing the Sunday ordinance pending the final disposition of this cause. Judge Parker, after "having examined the record herein and having examined the affidavit of James Quinn," manager of plaintiff's Greenville store, enjoined defendants from enforcing the Sunday ordinance and from interfering in any manner with the operation of plaintiff's business on Sunday pending the further orders of the court. Defendants were directed to show cause on April 13, 1966, at the courthouse in Pamlico County why the injunction should not be continued until the final disposition of this case. Thereafter, plaintiff's time for filing complaint was extended and the April 13th hearing was continued by consent to be heard before Judge Parker at a time and place within the Third Judicial District to be fixed by mutual consent or upon ten days' notice given by one party to the other.

The complaint was filed on April 25, 1966. In brief summary, it contains the following allegations:

After having made a study of the retail market in and near Greenville, on August 14, 1965, plaintiff opened a retail department store outside the city limits of Greenville. At that time, the city had no plans to annex the area within which plaintiff's store was located, and there were no State laws or Pitt County ordinances prohibiting the operation of a general retail store on Sunday. Plaintiff expected that a large percentage of its total sales would be made on Sunday. On August 15, 1965, plaintiff began keeping its store open from 1:00 p.m. until 6:00 p.m. on Sunday. At its next regular meeting on September 2, 1965, the City Council began proceedings to annex and to incorporate within the city limits, *inter alia*, the area in which plaintiff's store is located. This annexation was completed on November 18, 1965. At that time, business activities in Greenville on Sunday were in fact unrestricted although, since 1949, certain sales and activities had been regulated and shops and stores were prohibited from making "any sale on Sunday except in cases of necessity." On March 10, 1966, the City Council, in order to destroy plaintiff's competitive advantage over those merchants who do not

wish to remain open on Sunday, agreed with them and with the Greenville Chamber of Commerce and Merchants' Association to enact an ordinance which would prohibit plaintiff's business activities on Sunday. In furtherance of that conspiracy and in order to accomplish its purpose, the City Council enacted the controverted Sunday ordinance, which is "patterned after the Sunday closing ordinance of Winston-Salem." The ordinance in controversy is attached to the complaint as Exhibit A. It prohibits merchandising in Greenville on Sunday and requires all places wherein merchandise is kept for sale to remain closed from Saturday midnight until Sunday midnight. It then exempts certain types of stores, stands, and businesses from the closing requirement, but, notwithstanding these exemptions, sales of specified items are absolutely forbidden. Some of the businesses exempted from closing requirements sell on Sunday some of the same articles which plaintiff sells, but the ordinance requires all general retail and wholesale merchandising stores to remain closed on Sunday.

The ordinance's preamble recites that, in response to "a clear and present need," the City Council was acting under G.S. 160-52 and G.S. 160-200(6), (7), and (10) to restrict business activity on Sunday in Greenville in order to provide the citizens with a day of rest and to promote the public health, safety, morals, and general welfare.

Within the time allowed, defendants demurred to the complaint upon the ground that it did not state a cause of action for that it appeared from the face of the complaint that the Sunday ordinance "is a valid exercise of the police power and not violative of any section of the Constitution of the State of North Carolina or the Constitution of the United States." Pursuant to notice, the demurrer came on to be heard before Bundy, J., Resident Judge of the Third Judicial District, at Chambers in Greenville. At the same time, also pursuant to notice, defendants moved to dissolve the temporary restraining order which Judge Parker had issued. On June 27, 1966, Judge Bundy entered two orders: one dissolved the injunction; the other sustained the demurrer and dismissed the action. From these judgments plaintiff appealed.

Thomas J. White and John R. Hooten for plaintiff.

David E. Reid, Jr.; James, Speight, Watson & Brewer; Gaylord & Singleton for defendants.

SHARP, J. The Greenville Sunday ordinance in question is, in all material aspects, a verbatim copy of the Winston-Salem Sunday ordinance which withstood attack upon its constitutionality in

Charles Stores v. Tucker, 263 N.C. 710, 140 S.E. 2d 370. (In that opinion, the provisions of the Winston-Salem ordinance are quoted and summarized at pages 711-713, 140 S.E. 2d 371-372.) Plaintiff concedes that a municipality has the power to enact Sunday observance laws and that the Greenville ordinance is substantially similar to the Winston-Salem ordinance, which this Court has held to be valid. It contends, however that the motives which prompted Greenville's City Council to enact its Sunday ordinance invalidate it; that the Council's purpose was a private one, to prevent plaintiff from keeping its store open on Sunday and thus benefit those merchants who wished to remain closed on that day; and that the ordinance's preamble was a calculated misrepresentation.

The question presented, therefore, is whether the court may inquire into the motives which prompted a municipal legislative body to enact an ordinance valid on its face. The answer is No.

> "(T)he courts are not at liberty to question the motives of a coordinate branch of the government. Indeed, unless the law itself declares the intent with which it was passed, it is the duty of the courts to enforce it as they find it enacted, assuming that of several conceivable motives the lawful one only operated to cause its enactment." *State v. Womble,* 112 N.C. 862, 867, 17 S.E. 491, 492.

Accord, Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267; *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187. The rule is well stated in 16 Am. Jur. 2d, Constitutional Law § 169 (1964):

> "One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the court cannot inquire into the motives of the legislature. Thus, the motives which impel the legislature or any component part or member of it to enact a law cannot be made a subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the law, even though fraud, bribery, and corruption are alleged; the courts cannot declare a statute void in consequence of alleged improper motives which influenced certain members of the legislature that passed the law. Questions as to legislative motivations are for the electorate to consider, not the courts." *Id.* at 384-5.

Accord, 16 C.J.S., Constitutional Law § 154, p. 809 (1956); 62 C.J.S., Municipal Corporations §§ 200, 201 (1949); Annot., Validity of municipal ordinances affected by motives of members of council which adopted it, 32 A.L.R. 1517 (1924); 53 A.L.R. 942 (1928). A valid ordinance, albeit inspired by bad motives, may prove bene-

ficial, while a bad and invalid one is sometimes passed with the best of intentions. "Hence it is well settled that evidence *aliunde* is inadmissible to assail the motive which induced the enactment of an ordinance for the purpose of determining its validity." 37 Am. Jur., Municipal Corporation § 182, p. 820 (1941).

When the validity of a municipal ordinance is assailed, the only question for the courts is whether the legislative body had the power to enact the ordinance. *State v. Revis,* 193 N.C. 192, 136 S.E. 346. It is often said that matters of local concern are and should be left largely to the judgment and discretion of a town government and that the courts will not interfere with their acts "unless they are manifestly unreasonable and oppressive." *State v. Stowe,* 190 N.C. 79, 81, 128 S.E. 481, 482; *Rosenthal v. Goldsboro,* 149 N.C. 128, 62 S.E. 905; *Brodnax v. Groom,* 64 N.C. 244. This is merely another way of saying that no legislative body can exceed its delegated or constitutional authority. As long as it does not exceed its powers, the courts are not concerned with the motives, wisdom, or expediency which prompt its actions. These are not questions for the court but for the legislative branch of the government. *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660; *Ferguson v. Riddle,* 233 N.C. 54, 62 S.E. 2d 525; *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854. "If that body is wrong, it will be influenced by their *(sic)* constituents to repeal or modify the ordinance." *State v. Rice,* 158 N.C. 635, 639, 74 S.E. 582, 583. As Pearson, C.J., said in *Brodnax v. Groom, supra* at 250:

> "For the exercise of powers conferred by the Constitution, the people must rely on the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties.
>
> "This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government or upon the county authorities."

In enacting its Sunday ordinance, the City Council of Greenville acted within its authority; its act, therefore, is free from judicial interference. *State v. Revis, supra.* Any other rule would permit any displeased or disgruntled citizen to question the validity of any legislative enactment merely by alleging bad faith and conspiracy on the part of the body which passed it. Orderly government could not survive such license.

Plaintiff's contention that Judge Bundy, the resident judge of the district, had no jurisdiction to dissolve the injunction is without

merit. Having sustained the demurrer and dismissed the action, it followed that the injunction should have been dissolved.

Affirmed.

STATE v. MARSHALL MILLER, RAY PENNELL, THOMAS HUMPHRIES, ERNEST MORRIS, MELVIN MORRIS.

(Filed 23 November, 1966.)

1. **Criminal Law § 139—**

The verdict of the jury upon conflicting evidence is conclusive on appeal in the absence of any prejudicial error committed during the trial.

2. **Criminal Law § 120—**

Where there is confusion in the verdict of the jury as to whether it related to one another of the lesser offenses embraced in the indictment and submitted by the court, it is proper for the court to clarify for the jury the possible verdicts and ascertain the verdict upon which all the jurors agreed, and thereupon to accept the verdict as thus ascertained.

3. **Rape § 18— Evidence of defendants' guilt of assault with intent to commit rape held sufficient to support convictions.**

In this prosecution for rape the sole controversy was whether the acts of intercourse on each occasion and with each defendant were with the consent of the prosecutrix or by force and against her will. The evidence tended to show that one defendant, in the presence of another went to the home of the prosecutrix in the middle of the night, falsely represented that his wife had been taken to a hospital and that he needed the prosecuting witness as a baby sitter, and thereby procured the consent of the mother of the prosecuting witness for the prosecuting witness to accompany him, that he thereupon took the prosecuting witness to the automobile where the three other defendants were sitting, and that they did not return her to her home until six o'clock the next morning after each had had intercourse with her. Prosecutrix testified that each act of intercourse was by force and against her will. *Held:* The evidence was sufficient to overrule defendants' motions for nonsuit in a prosecution for rape and to support conviction of each defendant of assault on a female with intent to commit rape.

APPEAL by defendants from *Braswell, J.*, April, 1966 Criminal Session, GRANVILLE Superior Court.

Each of the above named defendants was separately indicted for the rape of Ribbie Parham. Each indictment charges the offense was committed on January 23, 1966, in Granville County. Upon arraignment, each defendant entered a plea of not guilty. By the consent of all, the charges were consolidated and tried together.

In substance, the State's evidence disclosed the following: About one o'clock Sunday morning, January 23, 1965, the defendants, Ernest Morris and Ray Pennell, went to the Parham home in Granville County. Ernest Morris stated to Channie Parham, mother of Ribbie Parham, that the defendant's wife was "bad off sick," and he had to take her to the hospital. He wanted a baby sitter to stay with his children while he and his wife were away. The mother consented for Ribbie, age 17, to do the baby sitting. When the two men and Ribbie went to the defendant's automobile, Marshall Miller, Thomas Humphries, and Melvin Morris were in or near the vehicle. Ribbie testified that each of the five defendants had intercourse with her in the back seat of the automobile and that the acts were committed by force and against her will; that she begged and tried to resist, to no avail. After riding around for some time in the automobile, the defendants took her to the home of one Glascock in Stem; that Ernest Morris remained with her in the automobile while the other defendants went in the house. Shortly thereafter Ernest made her go in the house where he and each of the other defendants, again by force and against her will, had intercourse with her. All went back to the Morris automobile and rode to Oxford where Ray Pennell and Marshall Miller left. The other three defendants went to Ribbie's home and put her out about six o'clock in the morning. She went into the house in tears.

On cross-examination, Ribbie admitted she had had intercourse with Ernest Morris on one prior occasion. The State offered other testimony, including the result of Dr. Finch's physical examination.

Each of the defendants testified for the defense. Their evidence was in substantial accord with the story told by Ribbie Parham and her mother, with one exception: each defendant testified that Ribbie consented to the acts of intercourse on each occasion and with each defendant. The evidence further disclosed that the defendants had been together and had been drinking until about midnight when they decided to get one of the Parham girls to go out with them. They fabricated the sick wife story.

At the close of the State's evidence, and again at the close of all the evidence, each defendant moved for a directed verdict of not guilty and excepted to the court's refusal to allow the motion. As to each defendant, the jury returned this verdict: "Guilty of assault with intent to commit rape." Each appealed from a prison sentence of 15 years.

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

Watkins and Edmundson by William T. Watkins for defendant appellants.

HIGGINS, J. The critical issue in this case is whether the acts of intercourse (which the witness and all defendants admitted) were by force and against the will of Ribbie Parham as she testified, or with her consent as each of the defendants testified. The jury heard the witnesses and observed their demeanor, and returned verdicts "guilty of assault with intent to commit rape." The verdicts are conclusive unless the court, during the trial, committed prejudicial error.

The court instructed the jury to consider five possible verdicts: (1) rape; (2) rape with a recommendation that punishment should be imprisonment for life; (3) assault with intent to commit rape; (4) assault on a female; (5) not guilty. The jury returned a separate verdict as to each defendant. When asked the verdict as to Marshall Miller, the foreman replied: "He is guilty of assault on a female, No. 3." After clarifying statements by the court, and after the court had ascertained that all jurors had agreed, as to each defendant, the jurors stated they found each defendant "guilty of an assault with intent to commit rape." The verdict as to the defendant Miller was challenged by Assignment of Error No. 9. While at first there was some confusion, the court was careful to have the verdict ascertained, returned, and recorded as the jury had found it. That is, "guilty of assault with intent to commit rape."

The evidence required the court to instruct the jury under what findings of fact guilty verdicts could be rendered and of what offense. Likewise, the court charged that failure to find guilt beyond a reasonable doubt required a verdict of not guilty. The defendants contend the evidence was insufficient to permit a guilty verdict on any count and that the court committed error in failing to direct a general verdict of not guilty. The court gave clear and explicit instructions as to the rules of law applicable to the facts as the jury might find them to be from the evidence. The charge was correct. *State v. Carter,* 265 N.C. 626, 144 S.E. 2d 826.

The defendants' version of this episode is certainly unappealing. Ernest Morris, in the presence of Ray Pennell, fraudulently obtained the mother's consent for Ribbie Parham, age 17, to baby sit for him while he took his wife to the hospital. Instead, the two took Ribbie to the automobile where the other defendants were sitting. The five, all drinking, kept this immature girl out until six o'clock in the morning, then left her at home in tears to face her mother. This record does not disclose any reason to believe another jury would have more sympathy for such conduct. There is a chance it might have less.

No error.

MILNER HOTELS, INCORPORATED, v. CITY OF RALEIGH, GATEWAY PLAZA, INC., SEBY B. JONES AND ROBERT D. GORHAM.

(Filed 23 November, 1966.)

Municipal Corporations § 15— Municipality adopting natural stream as part of its drainage system is under duty to keep it free of obstructions.

The complaint alleged that defendant municipality drained surface waters from a substantial part of the city into a natural stream and adopted the stream as a part of its storm drainage system, and that the city entered into a contract and agreement with the State Highway Commission to maintain, inspect and repair culverts within its limits and, in compliance therewith, undertook from time to time to clean obstructions from the stream, and that the waters of the stream overflowed plaintiff's property during a storm as a result of the city's failure to clean obstructions from a culvert or to enlarge a culvert. *Held:* The allegations were sufficient to state a cause of action against the municipality, since a municipality which assumes control and maintenance of a drain is under duty to use reasonable care to keep such drain in reasonable repair and free from obstructions.

APPEAL by plaintiff from *Morris, E.J.*, at 1 May, 1966 Non-Jury Term of Wake County Superior Court.

This is a civil action arising out of flood damage to plaintiff's property in the City of Raleigh, on 29 July, 1965. All defendants demurred to plaintiff's complaint. The demurrer of the defendant City of Raleigh was sustained and this is an appeal by the plaintiff from that order.

The plaintiff alleges in substance that Pigeon House Branch is a natural stream or watercourse entirely within the City of Raleigh and flows through plaintiff's property. In July, 1965, and for some time prior thereto, the City of Raleigh utilized said stream to drain the storm and surface drainage by connecting its gutters and street drains with the stream. Some time before 29 July, 1965, the City of Raleigh entered into a contract and agreement with the State Highway Commission to maintain, inspect and repair the streets and culverts within the corporate limits of Raleigh. Under it the City undertook from time to time to perform the promised maintenance under its contract and from time to time through its agents, servants and employees attempted to clear debris and other deposits from Pigeon House Branch, but only after rainstorms had ended and the waters therefrom had subsided.

On various occasions before 29 July, 1965, during rainstorms the waters of Pigeon House Branch overflowed its banks and flooded the property of plaintiff on which it operated a motel. The plaintiff notified the City and on several occasions its employees performed work on the stream, partially removing obstructions.

On 29 July, 1965, a heavy rainstorm occurred and waters from the stream backed up and completely flooded the property of the plaintiff, entering the motel itself, forcing guests therein to evacuate and damaging its property.

Notice of its claim for property damage was filed with the City within the time required by the City charter.

The complaint alleges that the City negligently: Allowed a State highway culvert to become obstructed; took no action to keep it free of obstructions; failed to enlarge the culvert; allowed large amounts of debris to accumulate in the channel of the stream; failed to inspect it and take action until after a rain storm.

The City demurred on the grounds that plaintiff's complaint failed to state a cause of action in that there were not sufficient allegations in the complaint to show that it had any legal duty to perform any of the acts which the complaint alleges that the City failed to perform.

The demurrer was sustained and the plaintiff appealed.

Young, Moore & Henderson by J. Allen Adams for plaintiff appellant.

Paul F. Smith, Donald L. Smith for City of Raleigh, appellee.

PLESS, J. In *Johnson v. Winston-Salem*, 239 N.C. 697, at p. 707, 81 S.E. 2d 153, which is cited by the Present Chief Justice Parker, in *Hormel & Company v. Winston-Salem*, 263 N.C. 666, at p. 675, 140 S.E. 2d 362, it is said: "The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof." That this is the generally accepted rule is shown by the following excerpt: "The rule as to municipal liability for defects and obstructions in sewers and drains * * * remains the same whether a natural watercourse is adopted for drainage purposes or an artificial channel is built; and, where a municipality has assumed jurisdiction over a stream flowing into the city, it may become liable for injury caused by its negligence in the control of the water. Where a city adopts a natural watercourse for sewerage or drainage purposes, it has the duty to keep it in proper condition and free from obstructions, and it is liable for damage resulting from neglect therein." 63 C.J.S. 262.

The plaintiff specifically alleges that the City "utilized said natural stream or watercourse to drain the storm and surface drain-

age of a substantial part of the center of the City * * * and had adopted said stream or watercourse as a part of its storm drainage system or sewer".

Further quoting from the *Johnson* case, *supra:* "There is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third persons for their own convenience and the better enjoyment of their property unless such facilities be accepted or controlled in some legal manner by the municipality."

38 American Jurisprudence, 636 and 637, also states this to be the general rule: "In the application of the principles governing municipal liability for injuries resulting from defects or obstructions in sewers, it is immaterial whether the actual construction of the sewer was done by the municipality or by a private individual, if it is under control of the municipality at the time.

"When, therefore, a municipal corporation assumes the control and management of a sewer or drain which has been constructed in a public street under its supervision, it is bound to use reasonable diligence and care to keep such sewer or drain in good repair, and is liable in damages to any property owner injured by its negligence in this respect.

"The duty of maintaining sewers and drains in good repair includes the obligation to keep them free of obstruction, and a municipality is liable for negligence in its exercise to any person injured by such negligence, whether the damages result from its failure to use reasonable diligence to keep its sewers and drains from becoming clogged, — as where the municipal corporation fails in its duty to exercise a reasonable degree of watchfulness to ascertain the condition of sewers and drains from time to time so as to prevent them from becoming obstructed."

The complaint brings this case within the above rule when it alleges that the City "entered into a contract and agreement with the State Highway Commission to maintain, inspect and repair the streets and culverts within the corporate limits of the City" * * * and "undertook from time to time to perform the promised maintenance under its contract."

The demurrer should have been overruled.

Reversed.

BOBBITT, J., concurs in result.

BERTIS MAE RICHARDSON v. ERNEST McCAIN RICHARDSON.

(Filed 23 November, 1966.)

1. Divorce and Alimony § 16—

A wife is entitled to alimony without divorce under G.S. 50-16 if the husband separates himself from her and fails to provide her and the children of the marriage with necessary subsistence, and the wife is also entitled to relief thereunder if the husband is guilty of misconduct that would constitute cause for divorce, either absolute or from bed and board, including abandonment as defined by G.S. 50-7, and therefore if the husband abandons the wife within the purview of G.S. 50-7 she is entitled to alimony without divorce, notwithstanding that he may continue to provide support for her and the children of the marriage.

2. Divorce and Alimony § 8—

There is an abandonment of the wife within the purview of G.S. 50-7 if the husband without consent of the wife and without justification ceases cohabitation without the intention of renewing it, and while his failure to provide her adequate support thereafter may be evidence of abandonment, the mere fact that he does provide adequate support for her does not negate abandonment, abandonment under G.S. 50-7 not being synonymous with the offense of abandonment as defined in G.S. 14-322.

3. Divorce and Alimony § 16—

Where the wife offers evidence that the husband ceased cohabitation with her without justification and against her desires, the evidence is sufficient to make out an abandonment supporting an award of alimony without divorce, and nonsuit is improperly entered upon the ground that the wife failed to introduce evidence that the husband ceased to provide adequate support for her and the children of the marriage.

APPEAL by plaintiff from *Latham, Special Judge,* May 2, 1966 Civil Session of RANDOLPH.

Plaintiff instituted this action May 3, 1965, under G.S. 50-16, for alimony without divorce. She alleged she and defendant were married January 3, 1948, and that their only living child, Ernest Steve Richardson, was eight years old. She prayed for subsistence for herself and the child, for custody of the child (subject to reasonable visitation by defendant), for possession of the homeplace, and for allowance of fees to her counsel.

In brief summary, plaintiff alleged that defendant, without any provocation by plaintiff, on or about March 27, 1965, abandoned the plaintiff and their child, and also that defendant, by his conduct, offered such indignities to her person as to render her condition intolerable and life burdensome. The alleged indignities consisted largely of defendant's persistent attentions to and association with one Thelma East. Plaintiff alleged defendant had failed to provide adequately for the support of herself and of her child. The

reason, so plaintiff alleged, was that defendant was squandering his money on Thelma East.

Defendant denied all of plaintiff's essential allegations.

The only evidence was that offered by plaintiff. At the conclusion thereof, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit and dismissed the action.

Ottway Burton for plaintiff appellant.
Walker, Anderson, Bell & Ogburn for defendant appellee.

BOBBITT, J. Plaintiff's primary contention is that the court erred in granting defendant's motion for nonsuit.

With reference to the alleged abandonment: Plaintiff offered evidence tending to show that defendant, without any provocation by plaintiff, left the home on March 27, 1965, and thereafter lived elsewhere. Pertinent to what occurred on March 27, 1965, plaintiff testified: "When he left, he said he was going to leave and that he was going to stay away and I would say, 'Bud, you are making a mistake.' I said, 'Can't you think about what you are doing?' I said, 'Can't you try to do right?' and I said 'For Steve's sake, everybody's sake,' and he just couldn't agree with that. He said he was going to leave anyway."

One of the grounds for relief under G.S. 50-16 exists "(i)f any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life." Defendant contends plaintiff's evidence discloses defendant had provided plaintiff and their son with subsistence and therefore nonsuit was proper.

G.S. 50-16 also provides the wife is entitled to the relief prescribed therein if the husband "be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board."

"G.S. 50-7 provides, as a ground for divorce from bed and board: '1. If either party abandons *his* or *her* family.' (Italics added.) It is available to the husband as well as to the wife. Abandonment under G.S. 50-7(1) is not synonymous with the criminal offense defined in G.S. 14-322. 'In a prosecution under G.S. 14-322, the State must establish (1) a wilful abandonment, and (2) a wilful failure to provide adequate support.' *S. v. Lucas,* 242 N.C. 84, 86 S.E. 2d 770. True, the husband's wilful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment as used in G.S. 50-7(1). 'A wife is entitled to her husband's society and the protection of his

name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete.' 17 Am. Jur., Divorce and Separation Sec. 98." *Pruett v. Pruett,* 247 N.C. 13, 23, 100 S.E. 2d 296, 303. Accord: 24 Am. Jur. 2d, Divorce and Separation § 104; Nelson, Divorce and Annulment, Second Edition, Vol. I, § 4.05; Lee, North Carolina Family Law, Vol. 1, § 80, p. 305.

In *Thurston v. Thurston,* 256 N.C. 663, 124 S.E. 2d 852, the defendant (husband) assigned as error the allowance of alimony and counsel fees *pendente lite.* The order was based on a finding of fact "that the defendant, without just cause or reason, and without adequate provocation on the part of the plaintiff, . . . wilfully and deliberately abandoned his family within the meaning of G.S. 50-7(1)." The *pendente lite* order was affirmed. Higgins, J., after quoting with approval from *Pruett v. Pruett, supra,* stated: "A defendant may not abandon his wife and defeat an action under G.S. 50-7(1) by making voluntary payments which he may abandon at will." In this connection, see *Sguros v. Sguros,* 252 N.C. 408, 114 S.E. 2d 79.

In *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24, the wife's application for alimony *pendente lite* was denied on the ground the defendant was providing adequately for his wife and children. The court made no specific finding as to whether the husband had wilfully abandoned his wife and children. This Court affirmed the *pendente lite* order, basing its decision upon the presumption that the court below, "for the purposes of the motion, resolved the crucial issues of fact against plaintiff." It is noted that an allowance of a fee to plaintiff's counsel was made in said *pendente lite* order.

"The statute (G.S. 50-16) provides two remedies, one for alimony without divorce, and another for subsistence and counsel fees pending trial and final disposition of the issues involved." *Deal v. Deal, supra; Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443; *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226. Only the first of these remedies is involved on this appeal. Alimony *pendente lite* is not involved. The trial below was on the merits.

Having reached the conclusion that the evidence, when considered in the light most favorable to plaintiff, was sufficient to support a finding that defendant without just cause abandoned plaintiff as alleged, and that the judgment of involuntary nonsuit must be reversed, we do not consider plaintiff's numerous assignments of

error based on exceptions to rulings by the court with reference to the admissibility of evidence.

Reversed.

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS v. DR. E. C. GRADY.

(Filed 23 November, 1966.)

1. Physicians and Surgeons and Allied Professions § 6—

The Board of Dental Examiners is not a court and is not required to observe the technicalities of a court, and the Board in revoking or suspending the license of a dentist is required by statute to determine and announce its action after a hearing at which the accused is given opportunity to present such evidence as he may desire. G.S. 90-41.

2. Physicians and Surgeons and Allied Professions § 7—

On appeal to the Superior Court from order of the Board of Dental Examiners suspending the license of a dentist, the Superior Court should hear the accused in like manner as a consent reference, G.S. 90-41, and the court should weigh the evidence and make its own independent determinations of the matters in dispute.

3. Same—

Where an order of the Board of Dental Examiners is based upon its findings that respondent employed an unlicensed person to repair dental plates without written work orders and that respondent received payment therefor, and the specific time and place of such acts are easily deducible from the records, it is error for the Superior Court to dismiss the proceedings on the ground that the order of the State Board was not based on sufficiently definite findings of fact.

APPEAL by plaintiff from *Copeland, S.J.*, at March 1966 Term of WAKE County Superior Court.

This proceeding was instituted against Dr. E. C. Grady, a licensed dentist, for the purpose of determining whether or not his license to practice dentistry should be revoked or suspended for violation of the Dental Practices Act, G.S. 90-22, *et seq.*

The charges upon which this hearing before the North Carolina State Board of Dental Examiners was based alleged, in essence, that Dr. Grady (1) had a professional connection with one Paul S. Lee designed to circumvent the provisions of the Act; (2) permitted Paul S. Lee to use his name for the illegal practice of dentistry; (3) employed an unlicensed person to perform work which could lawfully be done only by one licensed to practice dentistry in

this State; (4) engaged in unprofessional conduct by enabling one Paul S. Lee to practice dentistry illegally and entering into an agreement with the said Paul S. Lee for a division of fees.

The Board of Dental Examiners convened in Raleigh on 8 May, 1965, to hear testimony in support of the charges. Claude S. Sitton testified that he was hired by the Board of Dental Examiners to investigate Dr. E. C. Grady. He stated that he was an attorney in Morganton, N. C., and that on two occasions he visited the offices of Dr. Grady in La Grange, N. C., in connection with his investigatory work. He observed that Paul S. Lee and Dr. E. C. Grady shared offices; that Lee repaired dentures there without written work orders; that payment for work done by Lee was receipted in the name of Dr. Grady; that he observed Lee removing an impression tray from a woman's mouth; that Dr. Grady admitted that he told Lee to take an impression of Lillian Arthur's mouth; that he did not make or keep written work orders; that he told Lee to make all denture repairs; that when he was busy he had Lee make impressions of the mouth; that as a consequence of certain of these matters, Paul S. Lee was tried and convicted for illegal practice of dentistry.

Joe Bannon testified that he assisted Claude S. Sitton in the investigation and went to the offices of Lee and Grady. He stated that Lee placed a mold with impression material in his (Bannon's) mouth for the purpose of taking an impression and that Lee had no written work order for this work.

Dr. Grady was given notice of the hearing and did appear with counsel at the hearing where he cross-examined the above witnesses. However, Dr. Grady did not offer any testimony.

On 22 May, 1965, the Board ruled that Dr. Grady had engaged in unprofessional conduct and ordered him to surrender his license for a period of six months.

From this ruling Dr. Grady appealed to the Superior Court of Wake County, filing exceptions to the opinion and order of the Board of Dental Examiners, to which the Board filed a Response to the exceptions.

On 30 April, 1966, Judge Copeland vacated the Board's order and dismissed the proceeding against Dr. Grady on the grounds that "the findings of fact upon which the opinion and order of the North Carolina State Board of Dental Examiners is based are insufficient because of vagueness, indefiniteness and lack of specific reference to time and place of alleged violations by the respondent to support the action taken as set out in said order and opinion * * * and that the transcript of the hearing before the North Carolina State Board of Dental Examiners does not contain any evidence to sup-

port findings that respondent E. C. Grady had violated the provisions of Article 2, Chapter 90 of the General Statutes of the State of North Carolina".

Plaintiff appealed.

Patton, Ervin & Starnes for plaintiff appellant.
Herbert B. Hulse, Sasser & Duke for defendant appellee.

PLESS, J. G.S. 90-41 provides, in part, "After hearing all the evidence, including such evidence as the accused may present, the Board shall determine its action and announce the same." There can be no question that the Board has done so. But the respondent complains that specific findings of fact, with minute details as to particulars, time and place were not entered in written form. The statute does not so require. The Board is not a court and is not expected to know and observe the technicalities that trained attorneys and judges would demonstrate. The Board has really done much more than the statute requires and has not only "announced its action" (in writing, which is not provided in the statute) but has given its reasons therefor, all of which are substantiated by uncontroverted and undenied evidence.

To hold that the Board's findings of fact are insufficient, "because of vagueness, indefiniteness and lack of specific reference to time and place of alleged violations by the respondent" overlooks those parts which find that the respondent employed an unlicensed dentist to repair dental plates without written work orders and that his employee did so and that respondent received payment therefor. While the order did not specifically state that this took place in the respondent's offices in La Grange on 17 December, 1964, and 2 April, 1965, this was easily deducible from the record and the respondent could not have been prejudiced by its omission.

While the evidence was sufficient to support the Board's findings of fact it appears that in the Superior Court the matter was not "heard * * * as in the case of consent references" as required by G.S. 90-41. To the end that it may be, it is remanded to the Superior Court of Wake County.

In a consent reference the judge is expected to rule upon the report somewhat in the capacity of a jury. He is not expected to approve the work of the referee merely because the evidence will support it. He should weigh it and make his own independent determination of the truth of the matters in dispute.

"The importance of faithful observance of these principles by the judge cannot be exaggerated for a twofold reason. His review is designed to clear away errors of the referee. Besides, facts found

by the judge on his review of the referee's report are accepted as final on appeal to this Court if they are supported by testimony." *Macon v. Murray,* 231 N.C. 61, 55 S.E. 2d 807.

Error and Remanded.

ERVIN L. EVANS v. STAR GMC SALES AND SERVICE, INC., AND YELLOW MOTORS CREDIT CORPORATION.

(Filed 23 November, 1966.)

1. Chattel Mortgages and Conditional Sales § 17—

Where the assignee of a chattel mortgage and note securing same grants an extension of time for payment upon notification by the mortgagor that the chattel had had a breakdown in breach of the seller's warranty, but upon later default the mortgagor surrenders the vehicle to the assignee, who proceeds to foreclose and sell the vehicle under the terms of the instrument and in conformity with law, *held,* the foreclosure sale cannot constitute a legal wrong, and the mortgagor may not hold the assignee liable in damages regardless of motive, assignee not being a party to the warranty.

2. Same; Conspiracy § 1—

A complaint alleging that the seller and the assignee of the purchase money note secured by a chattel mortgage conspired to deprive the mortgagor of his interest in the chattel by foreclosure and sale after breach of the seller's warranty against major breakdown fails to state a cause of action for civil conspiracy when there is no allegation that the foreclosure and sale was not had after default and in strict conformity with law, since, in such instance, there is no allegation of wrongful act essential to a cause of action for civil conspiracy.

3. Conspiracy § 1—

An agreement to do a lawful act cannot constitute grounds for civil conspiracy regardless of the motives of the parties, since an action for civil conspiracy will lie only when there is damage resulting from an unlawful act done pursuant to an unlawful conspiracy.

4. Same—

Where the allegations are insufficient to state a cause of action for civil conspiracy as to one of the two alleged conspirators, the action for civil conspiracy must fail as to the other alleged conspirator, since a confederation of two or more persons is necessary to constitute a conspiracy.

APPEAL by plaintiff from *Johnson, J.,* at July 1966 Civil Term of WAKE County Superior Court.

This is a civil action to recover from defendant Star GMC Sales and Service (hereinafter referred to as Star) and defendant Yellow

Motors Credit Corporation (hereinafter referred to as Yellow Motors) for civil conspiracy in the wrongful conversion of a truck-tractor.

The plaintiff alleges that on 2 July, 1964, he purchased from Star a truck-tractor for $9,750.00, warranted against any major breakdown for a period of 6 months, and executed a conditional sales contract agreeing to pay $300.00 per month for a period of 35 months. Star assigned this contract to Yellow Motors.

Within the six-months warranty, on 15 November, 1964, the truck-tractor had a major breakdown while in the State of Florida. Plaintiff contacted Star concerning the breakdown and was informed that Star would tow the truck to Raleigh and make repairs. A month later Star informed plaintiff that he would have to tow the truck to Raleigh if he wanted the repairs made. Plaintiff delivered the truck to Star in Raleigh, but alleges that no repairs were made during the months of December, 1964, and January, 1965. Meanwhile he had also informed Yellow Motors of the breakdown and it had granted an extension of time to make payments. Yellow Motors later agreed to extend the time that plaintiff had to pay on the conditional sales contract upon the plaintiff paying the November, December, 1964, and January, 1965, interest payments which plaintiff did.

Since Star made no repairs plaintiff suggested and Star agreed that he would make them, Star agreeing to take a note for the parts at wholesale prices, but when the rebuilding was completed Star refused to turn the vehicle over to him unless he would get his mother to co-sign with him a note in the sum of $2,904.84. He attempted to deliver this note to Star but no official was available, so he left the note with a mechanic and drove the truck to Florida. Upon arriving there on 2 March, 1965, Yellow Motors demanded payment of the full balance and upon his failure to pay required the return of the truck to Greenville, N. C., where it was delivered to Yellow Motors.

The plaintiff being some six monthly payments in arrears, Yellow Motors advertised and sold the truck-tractor under the terms of the conditional sales contract.

Evans then instituted this action in which he alleges that the defendants conspired to deprive him of his interest in the truck by unlawful methods by repossessing and foreclosing under the conditional sales contract. He sought $19,000 in actual damages and punitive damages of $25,000. Each defendant demurred and upon adverse decision the plaintiff appealed.

Davis & Brown, Bailey, Dixon & Wooten for plaintiff appellant.

Maupin, Taylor & Ellis and Frank W. Bullock, Jr., for defendant appellee, GMC Sales & Service, Inc.

Young, Moore & Henderson for defendant appellee, Yellow Motors Credit Corp.

PLESS, J. Upon the demurrer of the defendants it is by operation of law admitted that Yellow Motors was the holder in due course of a conditional sales contract from plaintiff to Star, and that the plaintiff was some $1,800 in arrears, having made no monthly payment on the principal for several months. The plaintiff makes no claim that Yellow Motors warranted the truck-tractor and under the provisions of the assigned contract Yellow Motors was authorized to declare the entire balance due upon default in payment by plaintiff. This it did, proceeding with foreclosure which is not attacked for irregularity or failure to comply with the terms of the conditional sales contract. Neither is it claimed that the law of North Carolina pertaining to foreclosure of chattel mortgages was not observed. The consequence is that having done nothing unlawful Yellow Motors could not be liable to the plaintiff. "The exercise of a legal right in a lawful manner cannot support a claim for either punitive or compensatory damages." *Rea v. Credit Corp.*, 257 N.C. 639, 127 S.E. 2d 225.

The complaint refers to several alleged extensions of time granted him by Yellow Motors, but for the final extension no period of time is set forth and no consideration for that extension is alleged. The plaintiff's action in voluntarily driving the truck-tractor from Florida to Greenville, N. C., for the purpose of surrendering it to Yellow Motors at the latter point would indicate that he claimed no further rights under the alleged extension.

A conspiracy is an agreement between two or more persons to commit an unlawful act or to do a lawful act in an unlawful manner. *Burton v. Dixon*, 259 N.C. 473, 131 S.E. 2d 27; *Muse v. Morrison*, 234 N.C. 195, 66 S.E. 2d 783. An agreement to do a lawful act cannot constitute a conspiracy regardless of the motives of the parties and even if it could be shown that Yellow Motors agreed with Star that it would repossess the truck-tractor and forclose its lien, this did not constitute an unlawful agreement and, hence, not a conspiracy. The bare allegation of conspiracy is refuted by any reasonable interpretation of the complaint, and the case was properly dismissed as to Yellow Motors.

It follows that the allegation of conspiracy against Star must also fail, since two or more confederates are necessary to constitute

a conspiracy and, with Yellow Motors eliminated, Star had no one with whom to conspire.

We are of opinion that for the foregoing reason the action of the Court sustaining the demurrers was proper.

The plaintiff's cause of action is based entirely and exclusively upon an alleged civil conspiracy. We have therefore gone into that claim.

However, this decision is not to be construed as approving the plaintiff's position that had he established a conspiracy it would have given him a cause of action. There is no such thing as a civil action for conspiracy, as is fully stated in the recent case of *Shope v. Boyer,* 268 N.C. 401, ... S.E. 2d ..... That case cites an excerpt from *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125; "The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof — the damage — not the conspiracy or the combination."

This decision deals only with the matters presented by the pleadings in this cause. It will not preclude the plaintiff from pursuing any other cause of action he may have as to Star.

Affirmed.

LUCILLE G. FLOYD, ADMINISTRATRIX OF THE ESTATE OF JIMMY FLOYD, v. HAROLD M. NASH AND WIFE, MARY EVELYN NASH AND DUKE POWER COMPANY.

(Filed 23 November, 1966.)

1. Electricity § 5—

It is not negligence *per se* for a power company to maintain an uninsulated wire 19 feet above the ground along its right of way across a farm, and it may not be held liable for the death of a workman electrocuted while engaged in filling a feed tank constructed under such wire when the evidence discloses that the feed tank was constructed after the power line was in use, and there is no evidence that the power company knew that the feed tank had been constructed on its right of way.

2. Negligence § 33—

The mere fact that the owner of land permits the construction of a feed storage tank under the power line on the right of way of a power company cannot constitute basis for liability of the landowner to an employee of the owner of the storage tank who was electrocuted while attempting to fill the tank when a part of the unloading apparatus came in contact with the wire, the owner of the land not having given any instructions as to where the driver's truck should be stopped or how the unloading apparatus should be operated.

3. Electricity § 8— Evidence held to disclose contributory negligence on part of workman in coming in contact with wire he knew to be charged.

Decedent was engaged in delivering feed into a storage tank having its top some three feet below a power line. In unloading the feed from the truck it was not necessary to raise the blower pipe more than four or five inches above the top of the tank. The evidence further disclosed that defendant driver had delivered feed into the storage tank some two or three times a week for six months prior to the fatal occurrence, and that on the occasion when he was electrocuted he raised the blower pipe so that it came in contact with the power line, and that he knew of the presence of the power line and that it was carrying electric current, although he did not know the exact voltage. *Held:* The evidence disclosed contributory negligence as a matter of law on the part of decedent.

APPEAL by plaintiff from *Brock, S.J.*, at the August 1966 Special Session of UNION.

This is an action for wrongful death. The complaint alleges that Jimmy Floyd was instantly killed on 11 January 1963, when a blower pipe attached to a feed truck, the contents of which he was about to discharge through the pipe into a storage tank upon the farm of the defendants Nash, came in contact with an uninsulated power line of the defendant Power Company. It alleges that the defendants Nash were negligent in constructing the feed tank directly beneath the power line and the Power Company was negligent in permitting it to remain there upon its right of way.

The defendants filed answers denying their own negligence and pleading contributory negligence by the deceased. In addition, the Power Company pleads the negligence of his employer, McMillan Feed Mills, Inc., as an intervening, insulating cause, and also as a bar to the right of the employer or its insurance carrier to recover on account of benefits paid pursuant to the Workmen's Compensation Act.

At the conclusion of the plaintiff's evidence, a judgment of nonsuit was entered in favor of each defendant. The plaintiff appeals from the judgments so entered in favor of the Power Company and Mr. Nash. There is no appeal from the judgment so entered in favor of Mrs. Nash.

The evidence, taken in the light most favorable to the plaintiff, may be summarized as follows:

The deceased died immediately as the result of an electric shock received when the blower pipe, attached to the truck, came in contact with the power line while the deceased was in the process of raising it in order to place it in position above the feed tank so as to discharge into the tank the contents of the truck.

The feed tank was constructed about a year prior to this occur-

rence. It is in the shape of a cylinder or a truncated cone. Upon its top was a lid, hinged upon the side away from the power line. To put feed into the tank, it was necessary to climb a ladder to the top of the tank and open this lid. In so doing, one faced the power line. The blower pipe upon the truck was then manoeuvered into position above this opening so that the feed could be deposited into the tank. The nearest point of the perimeter of the tank was four feet, four inches from a vertical line extending from the ground to the power line. The power line was approximately 19 feet above the ground, three feet higher than the top of the tank. It was uninsulated and its normal load was 7200 volts. The deceased knew of the presence of the power line and that it was carrying electric current, though he did not know the exact voltage. He had delivered feed into this tank two or three times a week for six or eight months prior to this occurrence. He and Mr. Nash discussed the presence of the power line when he first began making these deliveries.

The blower pipe lay in a cradle on the top of the truck. It was raised with a hydraulic control to the height desired and then swung around by hand into the position for unloading. The truck and the tank were about the same height. In order to unload the truck, it was not necessary to raise the blower pipe more than four or five inches above the top of the tank.

At about noon on the day of his death, the deceased drove the feed truck to the Nash farm and stopped it beside the tank and beneath the power line. The weather was clear. There was no surviving eye witness to what then occurred. Upon hearing an explosive noise, Mr. Nash, who was 100 yards away and whose view was cut off by an intervening building, went to the scene and observed that the truck was backed up beneath the power line. It had never before been stopped in that position for unloading. The blower pipe, which was some 18 feet in length, was raised to a 90 degree angle and was in contact with the power line. The power line was about the size of a man's little finger. There were no signs erected warning of high voltage on the line.

Mr. Nash is an electrician as well as a farmer. He had a contract with the McMillan Feed Mills for the raising of chickens. The feed tank was near to and used in connection with the chicken house. The chickens, the feed in the tank and in the truck, and the truck and blower pipe were all property of McMillan Feed Mills. The tank was constructed on the Nash farm by its predecessor in that business, and was not owned by Mr. Nash. It was erected upon the right of way which had been granted to the Power Company by a former owner of the farm.

The chicken house was built by Mr. Nash approximately two

years prior to this occurrence. The Power Company knew of its construction, but there is no evidence that the Power Company was notified of the construction of the feed tank, which was built after the construction of the chicken house. The meter for all electricity used on the Nash farm was at the dwelling house, from which the tank was not visible. The Power Company caused the meter to be read once a month. To reach it, the employee of the Power Company used a road other than the one which led to the chicken house and feed tank.

When the company which constructed the feed tank, and which originally had a contractual arrangement with Mr. Nash, went out of business, the McMillan Feed Mills entered into its contract with him concerning the raising and feeding of its chickens. Prior to so contracting, it inspected the chicken house and feed tank. Periodically, it sent its driver, the deceased, to check the amount of feed in the tank and fill it so as to meet the requirements of the chickens. Mr. Nash did not give the deceased any instructions as to where or how to place the truck or the blower pipe for unloading. Regardless of where the truck stopped to unload, it was necessary to swing the blower pipe beneath the power line in order to reach the tank.

Other evidence was introduced with reference to the life expectancy and earning power of the deceased, and to show that he had never worked as an electrician or had any education with reference to electricity.

Griffin and Perry for plaintiff appellant.

Harold D. Coley, Jr., William I. Ward, Jr., Carl Horn, Jr. and Richardson & Dawkins for defendant Power Company.

Coble Funderburke for defendants Nash.

PER CURIAM. There is no evidence in the record to show, or to support an inference, that the Power Company knew of the existence of the feed tank or had any notice that it would be constructed. It was built after the power line was constructed and in use. This distinguishes the present case from *Essick v. Lexington*, 233 N.C. 600, 65 S.E. 2d 220, and brings it within the rule of *Philyaw v. Kinston*, 246 N.C. 534, 98 S.E. 2d 791, insofar as negligence by the Power Company is concerned.

It is not negligence *per se* for a power company to run an uninsulated wire 19 feet above the ground along its right of way across farm land and to use it for the transmission of power at high voltage. See *Davis v. Light Co.*, 238 N.C. 106, 76 S.E. 2d 378, a stronger case for the plaintiff than the present one.

The evidence shows that the defendant Nash did not construct, determine the location of, own, control or use the feed tank. At the most, he permitted its construction by another upon his land and its use by the employer of the deceased for the storage of its feed. The evidence is that when the deceased first began making deliveries to this tank, six months prior to his death, he and Nash discussed the presence of the power line, the nature of that discussion not being shown in the evidence. Nash did not give any instruction to the deceased as to where the truck should be stopped or how the blower pipe should be operated. Under these circumstances, the mere fact that Nash had superior knowledge of electricity will not support a finding of negligence by him, in the absence of anything to indicate to him that the deceased did not have an awareness of the danger inherent in an electric power line, such as is generally possessed by adults of normal intelligence.

Even if negligence by either of these defendants could reasonably be inferred upon the evidence in this record, the evidence leads inescapably to the conclusion that the deceased, and certainly his employer, who inspected the premises before sending the deceased thereon, was guilty of contributory negligence. Knowing of the presence of the power line, and having filled this tank on many previous occasions, the deceased, for some unknown reason, permitted the metal blower pipe to rise far higher than necessary and to come in contact with the power line. This tragic lapse of attention to a known danger in the immediate vicinity must be deemed negligence by the deceased. See *Lewis v. Barnhill,* 267 N.C. 457, 148 S.E. 2d 536.

The deceased was not a child, and there is nothing to indicate that he did not have normal experience and intelligence. Under these circumstances, the fact that he was not specifically educated or trained in the use and dangers of electricity does not absolve him from the duty to use the care which a man of ordinary prudence would use in manoeuvering a metal pipe in the vicinity of an electric power line. In spite of the deceased's lack of training in the handling of electricity, we think that the evidence leads inescapably to the conclusion that he failed to use the care of a reasonable man, knowing what he knew concerning the presence of the power line, and that his failure to do so was a contributing cause of his death. The contrary view expressed in *Essick v. Lexington, supra,* is not consistent with the later opinion in *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849, and is hereby disapproved.

Affirmed.

JOAN K. WEBB, ADMINISTRATRIX OF ISAAC N. STURDIVANT, v. SEABOARD AIR LINE RAILROAD COMPANY, CHARLEY GRIMES, GEORGE R. THOMAS AND NELLIW C. THOMAS.

(Filed 23 November, 1966.)

1. Process § 8—

The service of summons after the date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity.

2. Same—

Where there is nothing upon a paper writing to indicate that it is an alias or pluries summons or that it related to any original process, such paper writing, even though sufficient to constitute an original summons, cannot constitute an alias or pluries summons.

3. Limitation of Actions § 12—

Where original summons issued prior to the bar of a statute of limitations is not served until after its return date, and an instrument issued after the bar of the statute does not indicate that it was an alias or pluries summons or was related to the original process, there is a discontinuance of the original action and plea in bar to the second action must be allowed.

APPEAL by plaintiff from *McConnell, J.*, at August 1966 Special Civil Session of UNION.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate.

Isaac N. Sturdivant died on February 1, 1964. Plaintiff qualified as administratrix of his estate in Union County on 1 February 1966, and on the same date caused summonses to be issued by the Clerk of Superior Court of Union County to Wake County for defendant Seaboard Air Line Railroad Company and to the Sheriff of Union County for defendant George R. Thomas. On the same date an order was entered extending time to 18 February 1966 for filing complaint as to each defendant. The summons and order relative to defendant Railroad were delivered to counsel for plaintiff, who delivered same to the Sheriff of Wake County shortly before 24 February 1966. The Sheriff of Wake County served same on defendant Railroad on 25 February 1966, and made return accordingly to the Clerk of Superior Court of Union County. Counsel for plaintiff received the summons issued to the Sheriff of Union County for defendant Thomas and the order extending time to file complaint on 18 February 1966. He delivered same to the Sheriff of Union County on 3 March 1966 and same were served on defendant Thomas on 3 March 1966.

Complaint entitled as above was filed by plaintiff in the office of the Clerk of Superior Court of Union County on 18 February

1966. On the same date, at the instance of plaintiff, paper writings entitled "Summons" were issued to the Sheriff of Wake County for defendant Seaboard Air Line Railroad Company, and to the Sheriff of Union County for defendant George R. Thomas. Both of these paper writings together with copies of the complaint above referred to were delivered to counsel for plaintiff on 18 February 1966.

The paper writing entitled "Summons" issued to the Sheriff of Union County for defendant Thomas, together with copy of said complaint, were delivered by plaintiff's counsel to the Sheriff of Union County shortly before 3 March 1966. The Sheriff received same on 3 March 1966, served them on the same date, and made return to the Clerk of Superior Court of Union County.

Shortly before 24 February 1966 plaintiff's counsel delivered the paper writing entitled "Summons" and copy of said complaint to the Sheriff of Wake County, who received same on 24 February 1966, served them on defendant Railroad on 25 February 1966 and made return to the Clerk of Superior Court of Union County.

Both defendants answered, pleading, *inter alia,* that the action was not commenced within two years after it accrued.

Upon the action coming on for trial, each defendant moved that it be dismissed. The motions were allowed and plaintiff appeals.

Griffin and Perry for plaintiff.

Smith & Griffin for defendant George R. Thomas.

Richardson & Dawkins and Cansler & Lockhart for defendant Seaboard Air Line Railroad Company.

PER CURIAM. G.S. 1-89 provides, in pertinent part: "Summons must be served by the sheriff to whom it is addressed for service within twenty (20) days after the date of its issue."

G.S. 1-95 contains the following: ". . . When the defendant in a civil action or a special proceeding is not served with summons within the time allowed for its service, it shall not be necessary to have new process issued. At any time within ninety days after issue of the summons, or after the date of the last prior endorsement, the clerk, upon request of the plaintiff shall endorse upon the original summons an extension of time within which to serve it. . . . As an alternate method of extending the life of a summons in those cases where the defendant in a civil action or special proceeding is not served with summons within twenty days, plaintiff may sue out an alias or pluries summons returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety days after the date of issue of the next preceding summons in the chain of summonses."

The record does not reveal that there was any endorsement by the Clerk of Superior Court on the original summons or any issuance of alias or pluries summons pursuant to G.S. 1-95. The original summons was not served within twenty days of its issue. This summons had lost its vitality and was *functus officio* when the Sheriff served it. There is no authority in the statute for the service of this summons after the date fixed for its return. *Green v. Chrismon,* 223 N.C. 724, 28 S.E. 2d 215.

The plaintiff contends that the paper writing entitled "Summons" issued by him as to both defendants on 18 February 1966 constituted an alias summons or extension of the summons issued on 1 February 1966. We cannot agree with this contention. An alias or pluries summons improperly issued as such may still be sufficient as an original summons. But when it is desired that the action shall date from the date of issuance of the original summons, or when it is necessary for it to do so, in order to toll the statute of limitations, the successive writs must show their relation to the original process. *Ryan v. Batdorf,* 225 N.C. 228, 34 S.E. 2d 81. There is nothing in the paper writing issued on 18 February 1966 to indicate that it was an alias or pluries summons or which related it to the original process.

There was a discontinuance of the action commenced on 1 February 1966 and the plea in bar to the second action was properly allowed.

The judgment dismissing the action is

Affirmed.

JAMES EVERETT CHRISCOE v. STELLA RELIA STALEY CHRISCOE (DENNIS).

(Filed 23 November, 1966.)

1. Habeas Corpus § 3—

Order awarding the custody of children respectively to their paternal aunt and their maternal uncle and their respective spouses upon the court's findings, supported by evidence, that the divorced parents of the children and the second wife of the father were not suitable persons to have the custody and care of the children, and that the best interest of the children required the awarding of their custody in accordance with the order, will not be disturbed.

2. Same; Appeal and Error § 12—

Order awarding custody of minor children should not be held in abeyance pending review.

3. Judgments § 6—

A decree of the court is *in fieri* during the term and the trial judge has authority during the term to modify or add to its decree.

4. Costs § 3—

In proceedings for the award of the custody of minor children, the court has the discretionary power to apportion the costs among the parties. G.S. 6-20.

APPEAL by plaintiff from *Morris, E.J.*, at June 1966 Special Session of RANDOLPH Superior Court.

The plaintiff and defendant, his divorced wife, are the parents of three children — two boys, eight and seven, and a four-year-old girl. The father seeks their custody, which was denied by Judge Morris, and has appealed.

It appears from the pleadings and evidence that plaintiff and defendant had an unhappy marriage, that the plaintiff went to Texas for some eight months, and sent only $25 for his three children during that time.

Upon his return he obtained a divorce and is now married to Faye Keeling Chriscoe. While Thelma, then three years old, was living with them, she was left with her step-uncle, 17 years old. Because he said she cursed he beat her so badly that "it looked like the blood was ready to come out".

The plaintiff's neighbors signed affidavits that they frequently heard them "fussing and cursing". The court found that the plaintiff's present wife is a person of high temper and that it would not be in the best interest of the children to submit them to her custody — which would result if awarded to the plaintiff.

The court found (reluctantly) that their mother is not a fit and suitable person to have custody of the children. She has not appealed.

The court then found that plaintiff's sister, Mrs. Henry Beam, has had the custody of James Colon Chriscoe, the oldest boy, most of his life, that she loves him and treats him as her own child, that he wants to live with her and that his continued residence with her is in his best interest "which the court holds to be the Polar Star" and so awards his custody and that of his younger brother to her.

Judge Morris makes similar findings that the other child, Thelma, loves and is wanted by the mother's brother and his wife, Willie and Reba Hussey, and awarded them her custody.

The plaintiff is given visiting privileges and the right to have the children with him at least thirty days a year.

Ottway Burton for plaintiff appellant.
Walker, Anderson, Bell & Ogburn for defendant appellee.

PER CURIAM. In his order Judge Morris said that he "feels an uneasiness in submitting these children to her (the present Mrs. Chriscoe's) discipline, custody, care and tuition, and feels that it will not be in their best interest so to do; the court finding, furthermore, that the husband, the plaintiff in this cause, has, for certain periods of time, manifested a distinct unwillingness to perform his parental duties, thereby constituting him not a fit and proper person to have the care, custody and tuition of said minor children".

This case presents a pitiful picture. Three attractive children were left by their father, an able-bodied man, for eight months during which he sent a dime a day for their support, $25. Since his remarriage he has left them in such condition that his 17-year-old brother-in-law beat the little 3-year-old girl so that "there were many places on her legs that looked as though the blood was ready to come out — about eight long marks on her legs, from her panties on down"; that Faye Chriscoe stated * * * "that the baby sitter, my brother, whipped her for saying 'damn' "; then Faye Chriscoe later said that "James Chriscoe had also whipped the child because Thelma had told him a lie, and also for Thelma using the word 'damn' ".

The plaintiff's sister, Vera Beam, made an affidavit that in her opinion the plaintiff and his present wife "are not proper persons to raise these children; that they beat the children unmercifully; fuss at them in loud and boisterous tones, and do not appear to genuinely love either of these children".

The above excerpts are sufficient to justify the court in his finding that "the environment at the place of residence of the plaintiff is not in the best interest of these children" and his further finding that the best interest of the children will be served by making the order of custody set forth in the statement of facts.

His disposition of the matter is in accord with *In Re Bowman*, 264 N.C. 590, 142 S.E. 2d 349, where it is said: "In determining who shall have the custody of the child of a broken home — one of the gravest responsibilities cast upon a Superior Court judge — 'the welfare of the child * * * is the polar star * * *'."

After the court had considered the evidence and heard the argument of counsel he dictated the order complained of, and shortly afterwards the court was adjourned for the day, the order not having been typed and, of course, not signed. That night the plaintiff went to the home where John Edward Chriscoe was and took him to his (plaintiff's) home, saying that he could keep the boy "until

November when the matter was heard in Raleigh". This matter was called to the attention of the judge the following morning and a discussion of possible contempt proceedings was held.

The judge then dictated an order that pending the appeal to the Supreme Court the custody of the children was to be immediately vested with Mr. and Mrs. Beam and Mr. and Mrs. Hussey, to which the plaintiff excepted. In *Joyner v. Joyner,* 256 N.C. 588, 124 S.E. 2d 724, Higgins, J., speaking for the Court, said: "In a custody case the court acquires jurisdiction of the child as well as of the parent. The child thus becomes a ward of the court. The court's duty to its ward should not be held in abeyance pending review." Inasmuch as the dictated order of the judge had not been signed and the matter remained *in fieri* during the term of the court, he was authorized to add to the order the following morning when he decreed that the children should remain with the persons to whom they had been awarded pending the appeal. "The general power of the court over its own judgments, orders, and decrees in both civil and criminal cases, during the existence of the term at which they are first made is undeniable. * * * Until the expiration of the term the orders and judgments of the court are *in fieri,* and the judge has power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice." *S. v. Godwin,* 210 N.C. 447, 187 S.E. 560. While the action of the plaintiff in taking the child caused discussion of possible proceedings in contempt, no formal finding to that effect was made and no penalty imposed, and the matter is now moot.

The plaintiff also excepts to the order of the court in which he was taxed with one-third of the costs of the proceeding, the remainder being taxed against Mr. and Mrs. Beam and Mr. and Mrs. Hussey. The latter took no exception to the order but the plaintiff says in his brief that the action of the court "is puzzling * * * it should have been all or nothing." G.S. 6-20 provides that: "In other action costs may be allowed in the discretion of the court unless otherwise provided by law." This statute has been construed as meaning that the taxing of the costs in cases of this type is in the discretion of the trial judge, which discretion is not reviewable. The plaintiff should not complain because he is taxed with only one-third of the costs when it could have been the entire amount, and his exception is not well taken.

Affirmed.

STATE v. MRS. SANDRA MARSHBURN
AND
STATE v. JOSEPH G. MARSHBURN.

(Filed 23 November, 1966.)

1. Criminal Law § 33—

Evidence of defendant's membership in the K.K.K. is properly excluded.

2. Assault and Battery § 14—

The evidence in this case *held* sufficient to be submitted to the jury on the issue of the male defendant's guilt of assault on a female, he being a man over 18 years of age, and on the issue of the *feme* defendant's guilt of assault with a deadly weapon.

3. Husband and Wife § 6—

In this prosecution of husband and wife for assault on an 18 year old girl by attacking her and cutting off her hair, the evidence *is held* to disclose that the *feme* defendant was a moving spirit in the attack and to refute any claim that the wife acted under coercion of the husband.

APPEAL by defendant Mrs. Sandra Marshburn in No. 497 from *Mallard, J.*, April, 1966 Regular Criminal Session, and by defendant Joseph G. Marshburn in No. 499 from *Bickett, J.*, March, 1966 Regular Criminal Session, WAKE Superior Court.

These criminal prosecutions originated by warrants issued by the Garner Recorder's Court. In No. 497 the warrant charged that Mrs. Sandra Marshburn did unlawfully and wilfully assault one Linda Medlin with a deadly weapon, to-wit: a certain pair of scissors. In No. 499 the warrant charged that Joseph G. Marshburn, a male person over the age of 18 years, did unlawfully and wilfully assault one Linda Medlin, a female person. Each defendant was convicted in the Garner Recorder's Court. From a sentence of imprisonment each appealed to the Superior Court. The separate trials in the Superior Court resulted in convictions and prison sentences from which each defendant appealed.

Though the cases were based on separate warrants and were separately tried, nevertheless the prosecutions grew out of a single transaction. The defendants are husband and wife. The evidence at the trial in the Superior Court disclosed that on November 23, 1965, the defendants, in the nighttime, went to the home of Linda Medlin. The male defendant went to the house where Linda Medlin lived, called to her, and when she came to the door he requested the return of a watch and two rings which he had given her. After making his request he returned to his motorcycle out in the driveway. As the prosecuting witness attempted to deliver the watch and rings to Joseph Marshburn at the driveway, the female defendant, Sandra Marshburn, arose from behind the motorcycle and attempted

to assault her. Joseph Marshburn forcibly removed Linda's curlers and the female defendant, using a pair of scissors, clipped all the witness's hair, leaving it gapped and not over one-quarter of an inch long. During the difficulty the witness called to her younger brother in the house to bring the shotgun. The male defendant warned against this, drew his pistol, fired two shots in the air, as a result of which the prosecuting witness instructed her brother to stay in the house. The defendants demanded that the prosecuting witness remove all her clothes. She took refuge in a school bus, attempted to lock the door, but the defendants pursued her inside. The female defendant struck the witness with her fist and made this threat: "If I tried that stunt again [closing the door of the bus] she was going to stick the scissors in me and cut my guts out."

The jury in No. 497 convicted Mrs. Sandra Marshburn of an assault with a deadly weapon; and in No. 499 convicted Joseph Marshburn of assault on a female, he being a male person over 18 years. From judgments of imprisonment, both defendants appealed. The appeals were heard together in this Court.

T. W. Bruton, Attorney General, Ralph Moody, Deputy Attorney General, Andrew A. Vanore, Jr., Staff Attorney for the State.

Vaughan S. Winborne for defendant Mrs. Sandra Marshburn, appellant.

Douglas F. DeBank for defendant Joseph G. Marshburn, appellant.

PER CURIAM. The assignments of error in the two cases involve (1) the exclusion of evidence of Joseph G. Marshburn's membership in the K.K.K.; and (2) the sufficiency of the evidence to go to the jury and to sustain the convictions. We have carefully examined all assignments of error. The examination fails to disclose error in either trial.

It is difficult to understand why the charges were separately brought, and separately tried, and that two records were presented here. During the entire transaction both defendants were present, actively supporting each other in the assaults on an 18-year-old girl. The evidence disclosed that she and the male defendant had become engaged while the defendants were living in a state of separation. The evidence further disclosed that the prosecuting witness did not know the defendant Joseph Marshburn was a married man until a short time before the assaults were committed. The evidence refutes any claim the wife acted under the coercion of the husband.

On the contrary, it is rather obvious that she was the moving spirit in the attacks.

In No. 497 — *State v. Mrs. Sandra Marshburn* — No error.

In No. 499 — *State v. Joseph G. Marshburn* — No error.

STATE OF NORTH CAROLINA v. PURCELL BULLOCK.

(Filed 23 November, 1966.)

Criminal Law § 71—

Where the evidence supports the court's finding that the defendant's confession was freely and voluntarily made after defendant had been advised of his constitutional rights to remain silent and to have counsel, the admission of the confession in evidence cannot be disturbed notwithstanding defendant's testimony at the trial to the contrary. The trial having occurred prior to the announcement of the decision in *Miranda v. Arizona*, 384 U.S. 436, that decision has no application.

APPEAL by defendant from *Bickett, J.*, at the March 1966 Criminal Session of WAKE.

The defendant and three others were charged in an indictment, proper in form, with the crime of safe cracking as defined in G.S. 14-89.1. The jury found him guilty. He was thereupon sentenced to confinement in the State's Prison for a term of 10 years, to begin at the expiration of a sentence previously imposed in another case. His only assignments of error are to the admission in evidence of a written confession by him and of testimony of two police officers concerning it. The trial judge found the confession to have been made freely and voluntarily. It contained a detailed description of how the safe was removed from the premises of the owner, of the manner in which it was broken open, and of the tools used.

Prior to the admission of any of this evidence, the trial judge heard, in the absence of the jury, testimony of the two officers and of the defendant concerning the circumstances under which the confession was made. The testimony of the officers was to the following effect:

While Bullock was under arrest upon another charge, the police officers received a telephone call from a priestess, whose church affiliation is not disclosed by the record, stating that the defendant had, in the course of a confession to her, disclosed his participation in this safe cracking. The officers thereupon questioned the defendant about this offense. Before he made any statement about it,

they advised him that he did not have to make a statement, that if he did so it could be used against him in court and that he had a right to call an attorney. They advised him to call an attorney. He stated that he did not need one. He did not tell them that he had no funds with which to employ counsel. He had access to the telephone and made some telephone calls. The officers promised him nothing to induce him to make a statement and made no threats to him with reference to the offense now in question or any other charges. No force of any kind was used or threatened by the officers. When the defendant confessed to the offense and told the officers how it was committed, his statement was promptly reduced to writing and he signed it. He read the statement by himself and it was read aloud by the officers before he signed it. He completed the eleventh grade in school.

The defendant's testimony concerning this confession was to the following effect:

He told the officers he had nothing to do with this safe cracking. The officers told him that they would drop some other warrants against him and get the court to place him on probation if he would confess to this offense and testify against the other participants therein. He had told the officers that he wanted to go home and they informed him that they would set the bond at $500 and he could go home as soon as he "got out." They did not mention a lawyer. He knew that he had a right to a lawyer and that he did not have to say anything if he did not wish to. The officers had so informed him in connection with the other matter for which he was then under arrest. He concluded that he did not need a lawyer because the officers told him he would be placed on probation. He did not read the written confession before he signed it but the officers read it to him. He told the officers some of the things written in the statement but not all of them.

In his testimony on *voir dire* the defendant said, "The statement that the detectives have is true."

The written statement signed by the defendant and introduced in the evidence, in addition to the detailed description of the offense charged, contains the following:

> "I Purcell Bullock do make the following statement without promise or without threat or violence of any type and of my own free will and after being advised of my right to a lawyer, and that this can be used against me I do make the following statement. * * *
>
> "This is a true statement of the break in and safe robbery at Capitol Tire Co. and I sign this of my own free will without promise from any one."

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

William W. Merriam, III, for defendant appellant.

PER CURIAM. The evidence is ample to support the finding of fact by the trial court that the confession was made voluntarily, without fear or hope of reward. This finding is, therefore, conclusive on appeal. *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. The trial having occurred prior to the announcement of the decision of the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694, that decision has no application to this appeal. *Johnson v. New Jersey,* 384 U.S. 719, 86 S. Ct. 1772, 16 L. ed. 2d 882. The admission in evidence of this confession and of the testimony of the officers concerning it was in accord with the law of this State as explained in *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

No error.

C. I. T. CORPORATION v. DR. LARRY A. TYREE, DR. JAMES J. RASCHER, AND CLEO H. RAMEY, EXECUTRIX OF THE ESTATE OF FRED A. RAMEY, DECEASED.

(Filed 23 November, 1966.)

1. Cancellation and Rescission of Instruments § 8—

Mere averment that a party's signature to the instrument in suit was procured by fraud is insufficient, but it is required that the facts constituting the fraud as well as fraudulent intent affirmatively appear from the pleading.

2. Evidence § 27—

Where a party signs an instrument clearly setting forth his liabilities thereunder he may not claim that he was induced to sign it by representation that he would not be bound, since such prior parol representations are in direct conflict with the terms of the written instrument.

APPEAL by defendant Tyree from *Hall, J.,* at April 1966 Term of WAKE Superior Court.

The plaintiff alleges that on 10 December, 1963, Roane-Barker, Inc., leased to the defendants Tyree and Rascher, physicians, certain medical equipment. The lease agreement provided that the defendants would pay to the lessor or its assignee total payments aggregating $4,417.41, of which $104.43 was paid in advance and the

balance was payable in 36 equal monthly installments. Cotemporaneously with the execution of the lease agreement, Fred R. Ramey, in consideration of the lessor's entering into the agreement with the defendants Tyree and Rascher made and delivered to Roane-Barker, Inc., his written guaranty of payment.

Immediately thereafter, for value, Roane-Barker, Inc., sold and assigned to the plaintiff the lease agreement with all its rights, title and interest in and to the medical equipment.

Plaintiff alleges that only one monthly payment of $119.81 was paid in accordance with the terms of said agreement and that the account is now past due for all months since January 10, 1964.

The plaintiff further alleges a second lease agreement between Roane-Barker, Inc., and the defendants Tyree and Rascher entered on 3 March, 1964. The lease agreement was identical to the above lease agreement except that the total payments aggregated $296.94 of which $8.25 was paid in advance and the balance was payable in 35 equal monthly payments. Ramey gave a written guaranty of payment for this lease and Roane-Barker, Inc., assigned it to plaintiff as before. Plaintiff alleges that no payment was made in accordance with the terms of the lease and the account is now past due for all months since 3 March, 1964.

It alleges that demand for payment was made but defendants, including Ramey, refused to make payment. On 12 January, 1965, plaintiff took possession of all the equipment leased under the two leases. The property was sold at auction and the plaintiff now alleges that after applying the proceeds a balance of $2,534.01 is due and unpaid.

The defendant Rascher was not served with summons and Mrs. Ramey as Executrix filed no answer. The defendant Tyree filed an answer in which he set up the defense that he signed the lease upon the statement by Roane-Barker's representative that it would hold Fred Ramey solely liable, and that his signature was required because it could lease the equipment only if signed for by physicians, and that he would not be liable. He claimed this represented fraud in the inducement which estopped plaintiff as assignee to assert any claim against him.

At the trial the plaintiff's demurrer *ore tenus* was upheld and the jury then found defendants indebted to plaintiff as alleged and judgment was signed thereon. The defendant appealed.

Yarborough, Blanchard, Tucker & Yarborough for plaintiff appellee.

Adams, Lancaster, Seay, Rouse & Sherrill for defendant appellant.

PER CURIAM. The plaintiff alleged it was the holder in due course of a lease agreement signed by three persons, one of whom was the defendant. That the lease was in default and that a total of $2,534.01 was due on it.

The defendant made formal denial of the above. His denials were in some instances not very careful of the truth, in that he denied that the property was leased, that the agreement provided for monthly payments or that it was irrevocable. In direct conflict with these denials the defendant in his Further Answer says that his signature on said lease was procured upon a statement by lessor that another signer (Fred Ramey) would be held solely liable and that his signature was required because the equipment could be released only if signed for by a physician. These were his claims by which he sought to plead fraud in the inducement.

The bare claim of fraud is not sufficient — the facts constituting it must be pleaded with particularity. *Colt v. Kimball,* 190 N.C. 169, 129 S.E. 406, arrays the various holdings and says, citing many cases, "The facts relied upon to constitute fraud, as well as the fraudulent intent, must be clearly alleged. * * * Fraud must be charged positively, and not by implication. * * * Fraud must be charged so that all its necessary elements appear affirmatively. * * * It is not sufficient to allege as a conclusion merely that the signature to the contract was procured by fraud and misrepresentation of plaintiff's agent. The facts must appear so that the court, itself, can see that these facts, if found to be true, do constitute fraud."

Here hardly any of the essential elements are pleaded — and especially is there missing any allegation that the inducement was falsely made to the knowledge of the lessor's agent.

Further, the defendant's claim that his signed agreement to be bound by the terms of the lease meant nothing is at complete variance with the law. In *Rankin v. Helms,* 244 N.C. 532, 94 S.E. 2d 651, the present Chief Justice quotes from *Ins. Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606, "It is well nigh axiomatic that no verbal contract between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions."

The plaintiff's demurrer *ore tenus* was properly sustained and in the trial there was

No error.

IN THE MATTER OF THE WILL OF W. H. ADAMS, DECEASED.

(Filed 23 November, 1966.)

1. Appeal and Error § 19—

Assignments of error must be based on appropriate exceptions and must specifically show within the assignment of error itself the questions sought to be presented, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient.

2. Same—

Rules of Practice of the Supreme Court governing appeals are mandatory and will be enforced.

3. Wills § 22—

In this caveat proceeding, the charge of the court *is held* to have correctly placed the burden on caveator to show by the greater weight of the evidence that decedent did not have sufficient mental capacity to make a will.

4. Appeal and Error § 21—

An assignment of error to the signing and entry of judgment presents for review only the face of the record proper, which does not include the evidence and the charge of the court.

APPEAL by propounders from *Bailey, J.*, February 1966 Civil Session of HARNETT.

Issue of *devisavit vel non*, raised by a caveat to a paperwriting propounded as the last will and testament of W. H. Adams, deceased, based upon alleged mental incapacity and undue influence.

Propounders and caveators offered evidence. The following issues were submitted to the jury and answered as indicated:

"1. Was the paperwriting propounded dated the 12th day of June, 1962, executed by W. H. Adams 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 said paperwriting did the said W. H. Adams have sufficient mental capacity to make a valid last will and testament?

"Answer: No.

"3. Was the execution of the paperwriting propounded in this cause procured by undue influence as alleged?

"Answer: No.

"4. Is the said paperwriting referred to in Issue No. 1 propounded in this cause, and every part thereof, the last will and testament of W. H. Adams, deceased?

"Answer: No."

From a judgment ordering and decreeing that the paperwriting dated 12 June 1962, propounded in this case as the last will and testament of W. H. Adams, deceased, is not the last will and testament of W. H. Adams, deceased, and that said paperwriting is void and of no effect, propounders appeal.

McLeod and McLeod and D. K. Stewart by Max E. McLeod for propounders, appellants.

Robert C. Bryan; Bryan and Bryan; Morgan, Williams and Jones; James A. Howard; and Raymond C. Dunn for caveators, appellees.

PER CURIAM. Propounders' first assignment of error reads:

"1. The court allowing evidence of mental capacity and charge relating thereto.

"EXCEPTIONS No. 2 (R p 40); No. 3 (R p 41); No. 4 (R p 44); No. 5 (R p 47); No. 19 (R p 79); No. 23 (R p 94); No. 25 (R p 104); No. 26 and No. 27 (R p 106)."

Propounders' second assignment of error reads:

"2. The court's admission of evidence relating to purported previous paperwritings of testator and the charge thereon.

"EXCEPTIONS No. 1 (R p 32); No. 6 and No. 7 (R p 51); No. 8 (R p 54); No. 9 and No. 10 (R p 55); No. 11, No. 12, No. 13 (R p 57); No. 17 (R p 72); No. 18 (R p 75); No. 21 (R p 85); No. 23 (R p 94); No. 24 (R p 95); No. 29 (R p 112); No. 30 (R p 114)."

These two assignments of error are typical of propounders' third and fourth assignments of error, in that none of these four assignments of error show specifically what question is intended to be presented for consideration by this Court without the necessity of going beyond the assignment of error itself.

Rules 19 and 20, Rules of Practice in the Supreme Court, 254 N.C. 783, 795, 803, require that asserted error must be based on an appropriate exception, and must be properly assigned. We have repeatedly said that these rules require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Samuel v. Evans,* 264 N.C. 393, 141 S.E. 2d 627; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271;

Steelman v. Benfield, 228 N.C. 651, 46 S.E. 2d 829. The rules of practice in this Court are mandatory and will be enforced. *Walter Corp. v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313; *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. Propounders' first four assignments of error are ineffectual to bring up for review by this Court any part of the trial judge's rulings as to the admission of evidence, and the charge thereon.

"The requirements of the rules and the reasons therefor have been so often reiterated that the recurring necessity for restatement baffles our understanding." *Samuel v. Evans, supra.*

Propounders' fifth assignment of error is to the denial of their request for peremptory instructions as to the issues. This assignment of error is without merit, and is overruled.

Propounders' sixth assignment of error reads:

> "6. The court's failure to include Burden of Proof placed on caveators on issue of mental capacity.
>
> "EXCEPTIONS No. 22 (R p 90); No. 27 (R p 106); No. 28 (R p 108)."

This assignment of error is overruled, for the reason that a reading of the charge in its entirety shows that the trial judge in his charge clearly placed upon the caveators the burden of proof of showing by the greater weight of the evidence that W. H. Adams did not have sufficient mental capacity to make a will on 12 June 1962.

Propounders' last assignments of error, Nos. 7 and 8, are formal, and are overruled.

Propounders assign as error the court's signing and entry of the judgment. This assignment of error presents for review the face of the record proper. The record, in the sense here used, refers to the essential parts of the record, such as the pleadings, verdict, and judgment, and does not refer to the evidence and the charge of the court. *Balint v. Grayson, supra; Lowie & Co. v. Atkins, supra; Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910. No error of law appears on the face of the record proper, and the verdict supports the judgment.

No error.

CHARLES MILLER v. WALTER L. JONES AND WIFE, ANNIE C. JONES.

(Filed 23 November, 1966.)

1. Pleadings § 18—

Demurrer will not lie for misjoinder of parties alone, even in those instances when such defect appears on the face of the complaint itself, since such misjoinder is not fatal and may be cured by the withdrawal of a plaintiff or the dismissal of a defendant, as the case may be.

2. Husband and Wife § 6—

In an action for assault committed by husband and wife, it will not be assumed upon demurrer that the wife cannot be held civilly liable unless it positively appears from the facts alleged in the complaint that she was acting under coercion from the husband.

3. Appeal and Error § 3—

Order overruling demurrer for misjoinder of parties alone is not immediately appealable but may be reviewed only by *certiorari*. Rule of Practice in the Supreme Court No. 4(a).

APPEAL by defendants from *Latham, S.J.*, July-August Civil Session of RANDOLPH.

Appeal from an order overruling a demurrer.

Plaintiff, in his complaint, alleges these facts: He is a seventh-grade schoolteacher in the Randleman Public Schools. Defendants, husband and wife, maliciously conspired and agreed with each other to assault plaintiff. In furtherance of their joint plan and agreement, on the morning of April 26, 1966, they went to plaintiff's classroom, where he was "standing before his class." Defendant husband requested him to come into the hall for a conference. Complying with that request, plaintiff stepped into the hall, where defendant husband immediately struck him in the face and elsewhere with his fists, knocked him to the floor, and kicked him about the head and body with his shoe. Defendant wife, aiding and abetting her husband in the assault, had stationed herself at a turn in the hall in order to warn him in the event the school principal or some other person should approach. The assault upon plaintiff was made in full view of several of his students. It caused plaintiff bodily injury, severe physical pain, and much mental anguish. He further alleges that he is entitled to recover both actual and punitive damages from defendants jointly and severally.

Defendants demurred to the complaint for that: (a) there is a defect of parties; (b) no cause of action has been stated against defendants; (c) no cause of action has been stated against defendant wife; and (d) "there is a defect of parties and a misjoinder of parties." The court overruled the demurrer and allowed defendants 30 days in which to answer. Defendants gave notice of appeal.

Coltrane and Gavin for plaintiff.
Seawell & Seawell & Van Camp for defendant.

PER CURIAM. A defect of parties occurs when there has been a failure to join either a plaintiff or a defendant whose presence in the suit is necessary to give the court jurisdiction and authority to decide the controversy. When such a defect appears from the complaint itself, it is a ground for demurrer, G.S. 1-127(4), and a fatal defect unless the necessary party is brought in under G.S. 1-73. A superfluity of parties is not a defect of parties; it is a harmless surplusage which is no ground for demurrer. ("A 'defect of parties' applies to necessary parties, and not to unnecessary ones." *Shuford v. Yarborough,* 197 N.C. 150, 151, 147 S.E. 824.) A misjoinder of parties, standing alone, is likewise not a ground for demurrer. Such a misjoinder may be cured by the withdrawal of a plaintiff or the dismissal of a defendant, as the case may be. 1 McIntosh, North Carolina Practice and Procedure § 641 (2d Ed. 1956); Brandis, Permissive Joinder of Parties, 25 N.C.L. Rev. 1, 6 (1946). See also *Tucker v. Eatough,* 186 N.C. 505, 120 S.E. 57.

Obviously, there is no defect of parties in this action. Plaintiff has made parties defendant the only two people involved who could be defendants. Were we to assume that the *femme* defendant is not subject to suit upon the facts alleged in the complaint because — as defendants contend — she is not civilly responsible for uniting with her husband in committing a tort, her joinder would be merely surplusage and no grounds for demurrer. We consider it appropriate to say, however, that we make no such assumption with reference to the *femme* defendant's nonliability. 41 C.J.S., Husband and Wife § 219, p. 711 (1944); 27 Am. Jur., Husband and Wife § 480 (1940); Annot., Liability of wife for husband's torts, 12 A.L.R. 1459, 1480. See also *Burnett v. Nicholson,* 86 N.C. 99, and the comments of Clark, C.J., in his concurring opinion in *Young v. Newsome,* 180 N.C. 315, 316, 104 S.E. 660, 661.

Defendants' appeal has no worth either in substantive or adjective law; it is totally without merit. The Supreme Court will not entertain an appeal from an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. Rulings based upon other grounds will be reviewed only upon a writ of *certiorari.* Rules of Practice in the Supreme Court of North Carolina 4(a).

Appeal dismissed.

LEE F. BEATTY AND WIFE, KATHERINE J. BEATTY, v. GASTON REALTY COMPANY AND REAL ESTATE, INC., BOTH NORTH CAROLINA CORPORATIONS.

(Filed 23 November, 1966.)

Judgments § 13—

Where summons is served upon a person as managing agent of a domestic corporation and such person denies the validity of the service on the ground that he is not such agent, but nevertheless later files answer on behalf of the corporation while still denying the agency, the court may strike from the answer those allegations denying agency and thereupon must deny plaintiff's motion to strike the answer and for judgment by default and inquiry, since in such event the answer of defendant corporation is filed.

ON *certiorari* to review order entered by *Houk, J.*, at the June 20, 1966 Civil Session, GASTON Superior Court.

Horace M. DuBose, III, for plaintiff appellants.
William N. Puett for defendant appellee.

PER CURIAM. Plaintiffs instituted this civil action on June 20, 1965, to recover from the defendants the sum of $7,500.00 damages resulting from defective workmanship in the construction of a dwelling house the defendants built for the plaintiffs who paid the full contract price of $22,000.00. The plaintiffs specifically described the defects in workmanship and the damage of $7,500.00 resulting therefrom.

The summons and complaint were served on Earl R. Ransom, managing agent of Gaston Realty Company, a corporation. Earl R. Ransom entered, or attempted to enter, a special appearance and moved to dismiss the action as to Gaston Realty Company on the ground that he is not its managing agent. After hearing, Judge Falls found that Earl R. Ransom is and was at the time of service of process the managing agent, and that the service on him was a valid service on Gaston Realty Company. The court ordered the Gaston Realty Company to answer. Earl R. Ransom, still protesting his lack of authority, filed an answer denying any defects in workmanship in the construction of the house or that any sum is due the plaintiffs.

The plaintiffs moved to strike the answer and for judgment by default and inquiry. Judge Houk struck from the answer that part which alleged that Earl R. Ransom was not the managing agent of Gaston Realty Company but denied the judgment by default and inquiry for failure to file answer. Of course, after finding Earl R. Ransom is the managing agent of Gaston Realty Company, and

has filed their answer, the court could not flip the coin and from the other side say that the plaintiffs are entitled to judgment by default and inquiry because no answer had been filed.

No error in the order entered by Judge Houk is made to appear, and the order is

Affirmed.

STATE v. GORDON LEE SULLIVAN.

(Filed 23 November, 1966.)

Constitutional Law § 30; Criminal Law § 131—

Defendant's contention that he did not receive a fair and impartial trial, based solely on informal remarks made by the judge at the time of pronouncing sentence, is feckless when the sentence of the court is for a term greatly less than the permissible maximum and refutes any claim that defendant was not treated fairly.

APPEAL by defendant from *Burgwyn, E.J.*, at April 1966 Criminal Term of DURHAM Superior Court.

The appellant was charged in two bills of indictment, Nos. 9494 and 9495, with breaking, entering, larceny and receiving. Through his counsel and in his own proper person, he entered a plea of guilty to breaking and entering and larceny in both cases. As to the third count in the two bills of indictment the State took a nol pros.

In case No. 9494 the State offered the testimony of a Durham police officer that on 16 March, 1966, at approximately 2:49 A.M., he observed the appellant and another male near a laundry. When they noticed the officer's presence they began to run. They were apprehended and the investigating officer found a safe lying face down between the laundry and their 1958 De Soto automobile. In the automobile two blue crowbars, a pistol and cartridges were found. On the front door of the laundry that had been pried open there was a large amount of blue paint. The appellant was identified as a resident of the State of Maryland.

In case No. 9495 the State offered evidence that on 16 March, 1966, Braxton's 66 Service Station was broken into by someone prying the front door open. A cigarette machine was forced open and approximately $12.00 was taken therefrom. The coin box of the cigarette machine was found in the middle of the floor. It was dusted and processed for fingerprints and a latent print identified as that of the appellant was found.

The appellant offered no evidence in either case.

The Court consolidated all counts for judgment and imposed a single prison sentence of not less than five nor more than seven years.

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

Richard M. Hutson, II, for defendant appellant.

PER CURIAM. The defendant's sole exception is that he did not receive a fair and impartial trial before a fair tribunal. In support of his claim he quotes the presiding judge at the time of sentencing him: "North Carolina has been made a picking place for criminals from Maryland. They are riding down here regularly from Maryland, robbing people who are trying to make an honest living. I find this true in about every court I hold."

This Court does not intend to restrict informal remarks made by a judge at the time of pronouncing judgment, but there is nothing in Judge Burgwyn's statements to justify the defendant's exception, even though he be a resident of Maryland.

The undisputed facts in the cases, plus the defendant's plea of guilty in both, justified a substantial sentence. The fact that the court imposed only a 5-year sentence when a total of 40 years imprisonment was permissible, refutes his claim that he was not treated fairly.

No error.

GODWIN BUILDING SUPPLY CO., INC., v. MARY N. HIGHT.

(Filed 23 November, 1966.)

1. Appeal and Error § 22—

Where there are no exceptions to any finding by the trial court, an assignment of error that the evidence was insufficient to support the findings is ineffectual and does not present this question for review.

2. Husband and Wife § 3—

Where there is no evidence that the husband purported to act as agent of the wife in the purchase of certain building materials or that she ratified the purchase or received any benefit therefrom, the purchase price of such material may not be credited by the seller upon his contract to purchase land from the wife.

APPEAL by plaintiff from *Bailey, J.*, at the 16 June 1966 Civil Session of HARNETT.

This is a suit for the specific performance of a contract to convey land. By consent, it was tried by the judge without a jury. No exception was entered to the court's findings of fact. From these the court concluded that the plaintiff was entitled to specific performance, and thus to the conveyance to it of the land in question, upon the payment to the defendant of a specified amount.

The findings of fact may be summarized as follows:

The defendant and her husband owned the land in question as tenants by the entirety. They entered into a lease agreement with the plaintiff, which granted to the plaintiff the option to purchase the land for $12,000 and provided that there should be credited upon such purchase price payments made by the plaintiff upon a then existing note made by the defendant and her husband to a third party and secured by a deed of trust upon the land. Thereafter, the husband alone came to the plaintiff's place of business and contracted for the purchase of certain building materials, which the plaintiff sold and delivered to him upon his written agreement that the agreed price of these goods would be applied upon the price to be paid by the plaintiff for the land as specified in the option. The defendant was not a party to the purchase of such materials or to the agreement for credit upon the option price of the land. The husband of the defendant then died so that she became the sole owner of the land, subject to the above mentioned deed of trust and to the plaintiff's option.

Upon these facts the court concluded, as matters of law, that the plaintiff is entitled to specific performance by the defendant upon the payment to her of $12,000, less the amounts which had been paid by the plaintiff upon the said note secured by the deed of trust, and less the balance remaining due upon such note. Thus the court concluded that the plaintiff was not entitled to a credit upon the option price of the land on account of the materials sold by the plaintiff to the now deceased husband of the defendant.

Howard G. Godwin for plaintiff appellant.
W. A. Taylor for defendant appellee.

PER CURIAM. Since there is no exception in the record to any finding of fact by the trial court, that portion of the plaintiff's assignment of error relating to the sufficiency of the evidence to support the findings does not bring this question before us. *Cooperative Exchange v. Scott,* 260 N.C. 81, 132 S.E. 2d 161. However, we note that all of the findings of fact made by the trial court have ample

support in the evidence and, therefore, would be conclusive upon appeal to this Court even if exceptions thereto had been duly entered. *Milk Producers Co-op v. Dairy,* 255 N.C. 1, 22, 120 S.E. 2d 548.

The defendant's husband was not her agent by virtue of the marital relationship. *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract. *O'Donnell v. Carr,* 189 N.C. 77, 126 S.E. 112. Here, there is no evidence of such authority, real or apparent, in the defendant's husband to contract on her behalf to credit the purchase price of the building materials upon the purchase price of the land. There is no evidence that the husband purported so to contract on behalf of the defendant or that, if he did, she ratified the arrangement or received any benefit therefrom.

Affirmed.

JAMES WAYMAN SCOTT, SR. v. EARL WALTON TROGDON, JR.

(Filed 23 November, 1966.)

Trial § 48—

The action of the trial court in setting aside the verdict in its discretion will not be disturbed on appeal when the record fails to disclose any abuse of discretion.

APPEAL by plaintiff from *Riddle, Special Judge,* April 1966 Civil Session of RANDOLPH.

Plaintiff instituted this action March 8, 1965. He alleged he sustained property damage of $350.00 and damages of $10,000.00 on account of personal injuries as the result of a rear-end collision on August 10, 1963, caused by defendant's negligence. Answering, defendant admitted his car struck the rear of plaintiff's car and that his negligence was the sole proximate cause of the collision. He admitted there was some (but not extensive) damage to plaintiff's 1950 Dodge but denied plaintiff received any personal injuries.

Plaintiff and defendant offered evidence relating to the amount of damages plaintiff had sustained as a result of the collision.

The court submitted, and the jury answered, the following issues: "1. What amount, if any, is the plaintiff, James Wayman Scott, Sr., entitled to recover of the defendant, Earl Walton Trog-

don, Jr., for: a) Property damage? ANSWER: *$325.00.* b) Personal injuries? ANSWER: *$10,000.00.*"

The court, allowing defendant's motion, "ORDERED, *in the discretion of the Court,* that the verdict of the jury in this trial be set aside and that a new trial be held in this action." (Our italics.)

Plaintiff excepted and appealed.

Ottway Burton for plaintiff appellant.
Coltrane & Gavin for defendant appellee.

PER CURIAM. "(W)hen a trial court sets aside a verdict in its discretion, as here, its action in so doing is not subject to review by appeal to the Supreme Court, in the absence of a manifest abuse of discretion. *Walston v. Greene,* 246 N.C. 617, 99 S.E. 2d 805; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Goodman v. Goodman,* 201 N.C. 808, 161 S.E. 686; *Bird v. Bradburn,* 131 N.C. 488, 42 S.E. 936; *Brink v. Black,* 74 N.C. 329." *Goldston v. Wright,* 257 N.C. 279, 125 S.E. 2d 462.

Here, as in *Goldston,* the record discloses no abuse of discretion on the part of the trial court. The appeal is without substance and will be dismissed.

Appeal dismissed.

RAYMOND D. HOPKINS v. FLONNIE M. HOPKINS.

(Filed 23 November, 1966.)

Judgments § 6—

During the term when the judgment is *in fieri* the court has the power to vacate the judgment, and the court's order doing so will not be disturbed on appeal, certainly when the court finds that the judgment was entered as a result of fraud upon the court.

APPEAL by plaintiff from *Latham, S.J.,* June Session 1966 of CABARRUS.

Civil action for absolute divorce on the ground of one year separation.

This action was originally heard by Judge James F. Latham on 6 June, 1966, the first day of a two-weeks session. Upon finding from the evidence that summons had been personally served, no answer or other pleading had been filed by defendant, and that the parties had lived separate and apart for more than one year, judg-

ment was entered granting an absolute divorce to plaintiff. Two days after the signing of the judgment, the defendant under oath stated that she and her husband had lived together as man and wife within one year immediately preceding the commencement of the action. A bench warrant charging perjury was issued for the plaintiff by Judge Latham on 8 June 1966. On 13 June, Judge Latham issued notice to plaintiff to appear and show cause on 15 June 1966, at 9:00 o'clock A.M., why the divorce judgment should not be vacated on account of fraud. This notice was served on plaintiff on the date issued. Hearing was duly held, and on 15 June 1966 Judge Latham entered an order finding as a fact that plaintiff and defendant were living together as man and wife on 6 June, 1966; that on 6 June 1966 the plaintiff had falsely stated under oath that he and his wife had been separated since 15 February 1964. The court in said order concluded that the judgment of absolute divorce granted to the plaintiff was improvidently entered and was entered as a result of fraud upon the court. The judgment of divorce was vacated and declared null and void and of no effect. Upon entry of the order, plaintiff's attorney moved that the order be amended to provide that same might not be used in any subsequent civil or criminal proceedings in which the plaintiff might be involved. Motion denied. Plaintiff appeals from the order vacating the judgment of absolute divorce.

B. W. Blackwelder for plaintiff appellant.
No counsel contra.

PER CURIAM. The judgment of absolute divorce entered 6 June 1966 was vacated by Judge Latham during term.

During a term of court a judgment is said to be within the breast of the court, and it may be changed at any time. McIntosh, N. C. Practice and Procedure, Judgments, § 1712, p. 162.

It has been the settled rule for some time that any order or decree made was, during the term, *in fieri,* and that the court during the term could *vacate* or modify the same. *Gwinn v. Parker,* 119 N.C. 19, 25 S.E. 705.

Affirmed.

D & W, INC., T/A MERRY GO-GO ROUND, ON BEHALF OF ITSELF, AND DIAB, INC., T/A PECAN GROVE SUPPER CLUB, AND SUCH OTHER CITIZENS AND PLAINTIFFS OF MECKLENBURG COUNTY, NORTH CAROLINA, AFFECTED BY THE TURLINGTON ACT AND THE ALCOHOLIC BEVERAGE CONTROL ACT OF NORTH CAROLINA, V. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, THE COUNTY OF MECKLENBURG, CLAWSON WILLIAMS, CHAIRMAN OF THE ALCOHOLIC BEVERAGE CONTROL BOARD OF THE STATE OF NORTH CAROLINA, JONES Y. PHARR, CHAIRMAN OF THE MECKLENBURG COUNTY ALCOHOLIC BEVERAGE CONTROL BOARD, HENRY SEVERS, JOHN HORD, ERNEST SELVY, GEORGE STEPHENS, W. FLEMING TALMAN, SR., LAWRENCE C. ROSE, G. W. BIRMINGHAM, JR., ROBERT I. CROMLEY, SR., RAY B. BRADY, CHARLES E. KNOX AND FRED C. COCHRANE.

(Filed 30 November, 1966.)

1. Statutes § 5—

The meaning of a statute must be determined from a construction of the language of the act itself considered *in pari materia* with any other statutes dealing with the same subject matter, together with its preamble, title, legislative history, etc., but the intent and meaning of the Legislature cannot be shown by the testimony of a member of the Legislature which passed the act.

2. Injunctions § 5—

Ordinarily, injunction will not lie to restrain the enforcement of a criminal law, either on the grounds that it is void or that the officials' interpretation of it is erroneous, and its validity or construction may be challenged only by way of defense to a criminal prosecution based thereon; the sole exception to this rule is when injunction is necessary to protect property or fundamental human rights guaranteed by the constitution.

3. Same—

Restaurateurs may not enjoin the enforcement of the State liquor regulations merely on the ground that the threatened enforcement is based on an erroneous interpretation and would preclude their customers from bringing taxpaid liquor on the premises for consumption with their meals and thus would result in financial loss to them by curtailing their business, since the threatened enforcement does not preclude plaintiffs from engaging in their constitutional right to earn a livelihood in the restaurant business or threaten any other constitutional right, and the mere fact that they may suffer some pecuniary loss from such enforcement is merely consequential.

4. Appeal and Error § 2—

Even though an action for injunctive relief is subject to dismissal on the ground that the relief is inapposite, the Supreme Court, on appeal from the granting of the injunction, may determine the merits of the controversy in the exercise of its discretionary jurisdiction when a question of great public interest is involved.

5. Intoxicating Liquor § 1—

The Turlington Act remains the law throughout this State except to the extent that it has been modified or repealed by the ABC Act, and the

ABC Act repeals only those provisions of the Turlington Act which are irreconcilable with the provisions of the ABC Act, construing the two Acts *in pari materia.*

6. Statutes § 11—

Repeal of a statute by implication is not favored, and in order for a later statute to repeal a former by implication the later statute must be irreconcilable with the former and the implication of repeal must be necessary.

7. Intoxicating Liquor § 1— ABC Act does not permit possession by individual in private club or restaurant.

Regardless of whether an area has elected to come under the ABC Act or not, a person may legally possess in this State alcoholic beverages as defined by G.S. 18-60 only in his private dwelling for the personal consumption of himself, his family and bona fide guests, G.S. 18-11, or while transporting not in excess of one gallon purchased out of the State or from an ABC store in this State to his private dwelling, G.S. 18-49, G.S. 18-58, and it is unlawful for a person, even in an area which has elected to come under the ABC Act, to transport to a restaurant, a private club, or other public place, alcoholic beverage as defined by the statute for consumption on the premises, notwithstanding the beverage may be concealed from public view.

8. Constitutional Law § 10—

Public policy is the exclusive prerogative of the General Assembly, and the courts may judicially interfere with acts of the legislative body only when they are beyond the bounds prescribed by the constitution.

APPEAL by defendants from *Riddle, J.,* April 1966 Special Criminal Session of MECKLENBURG.

Action by plaintiff, a corporation engaged in the restaurant business, in behalf of itself and seventeen other restaurants operating in Mecklenburg County, to enjoin the City of Charlotte, Mecklenburg County, the Alcoholic Beverage Control Board of the State of North Carolina, and the Alcoholic Beverage Control Board of Mecklenburg County from enforcing the Turlington Act as amended by the Alcoholic Beverage Control Act of 1937 (ABC Act).

Except as quoted, the allegations of plaintiffs' complaint and amended complaint are summarized as follows:

Mecklenburg County has elected to come under the ABC Act. The Attorney General, on March 31, 1966, advised the judge of the Recorder's Court of Charlotte that neither the Turlington Act nor the ABC Act permits one to possess strong alcoholic beverages at any place within "a wet territory" other than in one's dwelling as provided in G.S. 18-11 "and while being transported to one's dwelling as provided by law." Defendants have announced their intention to begin the immediate enforcement of the ABC Act in accordance with this interpretation, which is an erroneous one and con-

trary to the interpretation which defendants have given the law for a period of nineteen years or more.

> "That since the passage of the Alcoholic Beverage Control Act of 1937 it has become common practice in the City of Charlotte, County of Mecklenburg, and the State of North Carolina to condone, permit, sanction, encourage, and allow persons to take intoxicating liquor into public places, such as owned by the plaintiffs to wit: restaurants, night clubs, country clubs, Veterans' clubs, Elks Clubs, and others, and consume same provided that same was not openly displayed on the table and provided same was in a 'brown (or other color) bag', brief case, pocket, or other means of obscuring same.
>
> "That for a period of 19 years or more, the laws have been enforced in this County by the defendants pursuant to the Alcoholic Beverage Control Act. That these plaintiffs commend the defendants for their successful enforcement of said act; even though the defendants have required that the plaintiffs' customers conceal their tax-paid alcoholic beverages in 'Brown bags' underneath their tables at restaurants, night clubs, bottle clubs, country clubs, etc., much to the inconvenience of these plaintiffs as citizens and their customers. . . . (T)he plaintiffs being law abiding citizens have complied or attempted to comply with the defendants' request, require their customers to keep the bottles in 'brown bags' or otherwise concealed and under the table of the said customer. On this point the defendant must admit that the plaintiffs have been overly cooperative. . . . (S)uch successful enforcement of the laws by the defendants and such wonderful cooperation by the plaintiffs allowed our community to prosper. . . ."

The enforcement contemplated by defendants would be an interference with plaintiffs' individual liberty and would deprive them of their rights under Sections 1 and 17 of Article I of the North Carolina Constitution to earn a livelihood for that it would either force plaintiffs out of business or cause them to lose "considerable business." Plaintiffs and others similarly situated have no adequate remedy at law for that actions at law would subject them to (1) inconveniences, fines and penalties; (2) criminal actions; (3) the loss of their beer and wine licenses; and (4) the necessity to "police" their patrons. Plaintiffs pray both a temporary and a permanent injunction prohibiting defendants from enforcing the law according to their announced intentions.

On April 7, 1966, Judge Riddle signed an order directing defendants to show cause on April 18, 1966, why the temporary injunction

requested by plaintiffs should not be granted. At the appointed time, the matter came on for hearing. Two restaurateurs, testifying for plaintiffs, said that since defendants had announced the new policy, their businesses had declined $2,000.00 a week; that 90% of their patrons "used setups and consumed alcoholic beverages other than beer and wine while at the restaurants." A third said that his business had declined 15% to 20% with a resulting loss of $300.00 to $400.00 a week. Each proprietor said that his restaurant had a beer license; that he allowed customers to bring tax-paid whiskey in bags onto his premises for consumption before or during their meal; and that it would be impossible to prevent the practice unless patrons were "harassed, frisked, or searched" and unless the restaurant had "a force of ten to every ten tables."

In addition to the foregoing testimony, the verified complaint was introduced as an affidavit. The court also permitted, over defendants' objection, the affidavit of Frank Snepp, Esquire, a Charlotte attorney and a member of the North Carolina General Assembly during its 1959 regular session. Mr. Snepp averred that the purpose of Section 2 of Chapter 745 of the 1959 Session Laws, which chapter amended General Statutes § 18-78.1(5), was "to allow the holders of beer and wine permits to permit patrons to enter on their premises with tax-paid whiskey and to possess and consume it there."

At the conclusion of plaintiffs' evidence, defendants moved that the action be dismissed for a lack of equity. The judge denied the motion and entered an order in which he found, *inter alia,* (a) that the plaintiffs and others similarly situated have and will suffer severe and irreparable economic loss, injury and hardship by the enforcement of the law as enunciated by the State Alcoholic Beverage Control Board and the Attorney General's opinion of March 31, 1966; (b) the plaintiffs have no adequate remedy at law and "equitable relief is the only real relief which is available to them." The judge concluded as a matter of law that, in the so-called conforming, or wet, jurisdictions:

> "(A) judicial interpretation of the Turlington Act as modified by the Alcoholic Beverage Control Act of 1937, as amended from time to time, (a) does not prohibit the possession of tax-paid alcoholic beverages not in the purchaser's homes or being transported by the purchaser as permitted by law, and not being displayed at athletic contests or places similar to athletic contests; and, (b) that there is no violation of the criminal laws of the State of North Carolina when members of bona fide private clubs maintain on their private premises, in individual private lockers, small quantities of alcoholic beverages,

for their sole use, from time to time, for such persons on said private premises, so long as (1) such member lawfully acquired the alcoholic beverage in question; (2) such member had the sole control over the private locker and its contents; and (3) the said alcoholic beverages were kept for the sole use of the member and not for the sale, exchange, distribution or division among the members of the club or other persons."

Pursuant to the foregoing findings and conclusions, Judge Riddle, "in his equitable jurisdictions," restrained defendants, pending further orders of the court, from

"arresting, charging, or in any manner interfering with plaintiffs or any person in Charlotte, Mecklenburg County, or in any other wet or conforming area that has elected to come under the provisions of the Alcoholic Beverage Control Act of 1937 (G.S. 18-36 *et seq.*), for the consumption, display or possession for his own personal use of tax-paid alcoholic beverages, except insofar as such consumption, display or possession for his own personal use is expressly prohibited by the provisions of the said Alcoholic Beverage Control Act of 1937, including the prohibitions contained in G.S. 18-47 and G.S. 18-51. . . ."

From the judgment entered, defendants appeal.

Plumides & Plumides; Jerry W. Whitley for plaintiff appellees.

T. W. Bruton, Attorney General, James F. Bullock, Assistant Attorney General for defendant appellants.

John H. Small, Amicus Curiæ.

SHARP, J. Defendants' first assignment of error challenges the admissibility of the affidavit of Mr. Frank Snepp, a member of the Legislature of 1959, to show the legislative purpose in enacting Chapter 745, Session Laws of 1959, which amended G.S. 18-78.1. This evidence was incompetent. More than a hundred years ago this Court held that "no evidence as to the motives of the Legislature can be heard to give operation to, or to take it from their acts. . . ." *Drake v. Drake,* 15 N.C. 110, 117. The meaning of a statute and the intention of the legislature which passed it cannot be shown by the testimony of a member of the legislature; it "must be drawn from the construction of the act itself." *Goins v. Indian Training School,* 169 N.C. 736, 739, 86 S.E. 629, 631. In construing a statute, Merrimon, J., laid down the rule in *State v. Partlow,* 91 N.C. 550, 552:

"Its meaning in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascer-

tained by appropriate means and *indicia,* such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia,* the preamble, the title, and other like means. But the meaning must be ascertained from the statute itself, and the means and signs to which, as appears, upon its face, it has reference. It cannot be proved by a member of the legislature or other person, whether interested in its enactment or not. A statute is an act of the legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise, each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent."

Defendants' second assignment of error is that the court erred in denying their motion to dismiss the action. This motion was based on the ground that equity will not interfere to prevent the enforcement of the criminal law. The general rule is well settled: Equity will not restrain the enforcement of a criminal statute or regulatory ordinance providing a penalty for its violation; it may be challenged and tested only by way of defense to a criminal prosecution based thereon. See *Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406. If the act is unconstitutional or, if valid, it is being enforced in an unlawful way because of a misinterpretation, these defenses will defeat any prosecution based on it. *Thompson v. Lumberton,* 182 N.C. 260, 108 S.E. 722; *Paul v. Washington,* 134 N.C. 363, 47 S.E. 793; 2 Strong, N. C. Index, Injunctions § 5 (1959); 28 Am. Jur., Injunctions § 189 (1959). The legal remedies of "trial by jury, *habeas corpus,* motion, and plea are abundant safeguards in such instances, especially in the light of the serious consequences likely to follow the arbitrary tying of the hands of those intrusted with the enforcement of penal statutes." *Monroe Greyhound Ass'n v. Quigley,* 223 N.Y. Supp. 830, 831. To the general rule, however, there is an exception: If the statute or ordinance itself is void, its enforcement will be restrained where there is no adequate remedy

at law and such action is necessary to protect property and fundamental human rights which are guaranteed by the constitution. *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764; *Speedway, Inc. v. Clayton,* 247 N.C. 528, 101 S.E. 2d 406; *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851; *Davis v. Charlotte, supra; McCormick v. Proctor,* 217 N.C. 23, 6 S.E. 2d 870; 28 Am. Jur., Injunctions § 188 (1959); 43 C.J.S., Injunctions § 158 (1945). The constitutionality of a statute, however, may never be tested by injunction unless a plaintiff alleges and shows that its enforcement will cause him individually to suffer a personal, direct, and irreparable injury to some constitutional right. A party who is not personally injured by it may not assail a statute's validity. *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482; *Newman v. Comrs. of Vance,* 208 N.C. 675, 182 S.E. 453.

Plaintiffs here do not question the validity of the Turlington Act or the ABC Act of 1937; they only question defendants' interpretation of these Acts. The general rule that equity will not interfere by injunction with police officers in the enforcement of the criminal laws applies, however, whether a plaintiff contends the act is void or the officials' interpretation of it is erroneous. 28 Am. Jur., Injunction § 183 (1959); 43 C.J.S., Injunctions § 156, p. 771 (1945).

> "The fact that peace officers may be mistaken in their conclusions of fact, or in their interpretation of the law, or of any statutory provision, does not authorize a court of equity in restraining them in their future efforts to conscientiously enforce the law. They may make mistakes, and those arrested may be acquitted, but such matters do not justify a blanket injunction against honest law enforcement." *Wood Bros. Thresher Co. v. Eicher,* 231 Iowa 550, 1 N.W. 2d 655, 660. *Accord, Monroe Greyhound Ass'n v. Quigley, supra; Rutzen v. City of Belle Fourche,* 71 S.D. 10, 20 N.W. 2d 517; *P. E. Harris & Co. v. O'Malley,* 2 F. 2d 810 (9th Cir. 1924).

There is nothing in the case at bar to take it out of the fundamental rule that equity will not interfere to prevent the enforcement of the criminal law. Plaintiffs do not contend that they have a constitutional right to provide a place for their patrons to consume alcoholic beverages as defined by G.S. 18-60. They assert that the law does not prohibit them from doing so and that their patrons or customers have a legal right "to bring a small quantity of tax-paid whiskey" to a restaurant for their own use, and that plaintiffs will lose business if their customers are arrested for possessing and consuming intoxicating beverages in restaurants. Obviously, plaintiffs'

constitutional right to earn a livelihood by engaging in the restaurant business is not infringed by either the Turlington Act or the ABC Act.

If it were to be assumed that the 1966 opinion of the Attorney General which triggered this action constituted an erroneous interpretation of these two enactments and that defendants were acting upon a misapprehension of the meaning of those laws when they announced their intention to enforce them in accordance with that opinion, still plaintiffs have shown no direct, personal injury. If fewer people "eat out" because they cannot take their liquor away from home and plaintiffs' income is reduced in consequence, the loss is merely consequential. Furthermore, the fact that they may suffer some pecuniary loss from such enforcement is not the test. *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650.

The action of the court below in issuing the injunction in question is without sanction in precedent or principles of equity. Ordinarily, in a case thus constituted we would decline to pass upon the question presented and order the action dismissed. *Dare County v. Mater,* 235 N.C. 179, 69 S.E. 2d 244; *Clinton v. Ross,* 226 N.C. 682, 40 S.E. 2d 593; *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273; *Motor Service v. R. R.,* 210 N.C. 36, 185 S.E. 479. Such procedure, however, would not end this controversy, which has become a matter of great public interest. As Barnhill, J. (later C.J.), said in *Suddreth v. Charlotte, supra* at 634, 27 S.E. 2d at 654, dismissal would "tend to prolong an unfortunately provocative situation. . . . Hence, we have exercised our discretionary right to express an opinion on the merits of the exceptive assignments of error. . . ." See also *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469; 1 Strong, N. C. Index, Appeal and Error § 2 (1957).

We come, then, to the determinative question in this controversy: Where and under what circumstances in an area which has elected to come under the ABC Act (wet, or conforming, area) may one legally possess alcoholic beverages as defined in G.S. 18-60, *i. e.,* all beverages containing more than 14 per centum of alcohol? (Beer, wine, and ales containing a lower alcoholic content are eliminated by this definition.) This is a question which has not heretofore been squarely presented to this Court. To find the answer we must construe the Turlington Act (N. C. Pub. Laws 1923, ch. 1, codified as G.S. 18-1 through G.S. 18-30) as amended by the ABC Act (G.S. 18-36 through G.S. 18-62). Defendants contend that one may legally possess alcoholic beverages in any area in North Carolina (whether it be wet or dry) at the following places only: (1) in his own dwelling as provided by G.S. 18-11; (2) while transporting not more than

one gallon from a point outside the State to a point inside the State as provided in G.S. 18-58, or from an ABC store in the State to his dwelling as provided by G.S. 18-49. Plaintiffs, although conceding that the statutes in question "are somewhat ambiguous and are subject to construction," contend that in a wet, or conforming, area such as Mecklenburg County, "possession of alcoholic beverages purchased from the ABC system is legal without restriction as to place" so long as the possession is not for the purpose of sale. More specifically, they contend that a person can legally bring "a small quantity of tax-paid liquor" with him to a restaurant, and that restaurants and clubs selling beer and wine under an "on premise" license (G.S. 18-72) may legally permit the consumption of alcoholic beverages on their premises. They insist that G.S. 18-78.1(5), as rewritten by the General Assembly in 1959, no longer forbids the consumption of alcoholic beverages on such licensed premises.

The Turlington Act is still the primary law in every area which has not elected to come under the ABC Act. G.S. 18-61; *State v. Anderson* and *State v. Brown,* 265 N.C. 548, 144 S.E. 2d 581; *State v. Welch,* 232 N.C. 77, 59 S.E. 2d 199; *State v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449; *State v. Davis,* 214 N.C. 787, 1 S.E. 2d 104. Where liquor stores have been established under the ABC Act, the Turlington Act is the law except to the extent it has been modified or repealed by the ABC Act (N. C. Pub. Laws 1937, ch. 49). *State v. May,* 248 N.C. 60, 102 S.E. 2d 418; *State v. Hill,* 236 N.C. 704, 73 S.E. 2d 894; *State v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *State v. Carpenter,* 215 N.C. 635, 3 S.E. 2d 34; *State v. Davis, supra.* The ABC Act contains no clause specifically repealing the Turlington Act or any other provisions of the law relating to alcoholic beverages. It therefore repealed only those laws which are "utterly irreconcilable" with it. "Repeals of statutes by implication are not favored, and, to work a repeal, the implication must be necessary." *State v. Epps,* 213 N.C. 709, 716, 197 S.E. 580, 584. "The two acts constitute the body of our law relating to the purchase, possession, and sale of intoxicating liquor and must be construed *in pari materia.*" *State v. Avery,* 236 N.C. 276, 279, 72 S.E. 2d 670, 672. *Accord, State v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623. The two acts have been thus construed since the passage of the ABC Act and the rule "is not now to be broken in upon."

In 1935, by two acts (N. C. Pub. Laws 1935, ch. 418 and ch. 493), the General Assembly authorized the sale of alcoholic beverages in 18 counties under the control of a County Liquor Commission or an Alcoholic Beverage Control Board. A notable difference existed between these two acts and the ABC Act, which specifically

repealed them: The former explicitly exempted each of the 18 counties to which they applied from the application of the Turlington Act when the voters approved the establishment of liquor stores; the ABC Act does not exempt any county from Turlington's application.

Under the Turlington Act it is unlawful for any person anywhere in the State to "manufacture, sell, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor" as defined in the Act (G.S. 18-2) *except:* (1) It is not unlawful to possess liquor in one's private dwelling while it is occupied and used as his dwelling only and provided "such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein." G.S. 18-11. (2) It is not unlawful to possess liquor for nonbeverage purposes and wine for sacramental purposes as provided in G.S. 18-2, 18-20, and 18-21. In other words, the Turlington Act was strict prohibition; it was even more stringent than the Federal Volstead Act. *State v. Sigmon,* 190 N.C. 684, 130 S.E. 854; *State v. Hickey,* 198 N.C. 45, 150 S.E. 615. For all practical purposes, under Turlington, the only place one could legally possess any intoxicating liquor was at home. *State v. Shinn,* 238 N.C. 535, 78 S.E. 2d 388. Even so, the Turlington Act made it unlawful for a person to purchase or transport intoxicating liquor anywhere in the State. *State v. Winston,* 194 N.C. 243, 139 S.E. 240. Upon the enactment of the ABC Act, it became lawful to transport, for one's own personal use, not in excess of one gallon *if* the beverage was legally acquired, and *if* it was still in its original container, seal and cap undisturbed. Specifically, G.S. 18-49 authorized such transportation from a county in North Carolina coming under the provisions of the ABC Act to or through another county in North Carolina not coming under the provisions of this Act. G.S. 18-58, without making any distinction between dry and wet counties, authorized one to purchase "outside of this State and bring into the same for his own personal use" not more than one gallon. Thus, not more than one gallon can legally be brought from outside the State into either area. G.S. 18-49 does not specifically authorize the transportation of any quantity of alcoholic beverage from an ABC store to any place in the wet county where purchased. Obviously, however, the right to buy the liquor includes the right to take it home. It was equally obvious that the legislature intended G.S. 18-49 to have statewide application. To have licensed residents of a wet county to transport an unlimited quantity of liquor within the county would have defeated its stated purpose "to establish a system of control of the sale of certain alcoholic beverages in North Carolina." N. C.

Pub. Laws 1937, ch. 49, § 1. Such was the view of this Court in 1938, one year after the ratification of the ABC Act, when it said:

> "The expressed purpose looking to uniformity and the several provisions of the act make it apparent that certain provisions of the 1937 act are to be given State-wide effect. This is particularly true as to the transportation provisions with which the Turlington Act, ch. 1, Public Laws 1923, conflicts only in respect to liquor being transported to Alcoholic Beverage Control Stores, and whiskey purchased from a County Store and being transported in a sealed container in an amount not to exceed one gallon for personal use, and as to the transportation of a like quantity brought into the State in sealed packages and upon which the taxes have been paid. Hence, it is still unlawful in this State for any person to possess or transport intoxicating liquors for any purpose other than those specified in the act or in a quantity in excess of one gallon, unless such liquor is in actual course of delivery to a County Store. Therefore, ch. 1, Public Laws 1923, in so far as it deals with the transportation within the State of intoxicating liquors is not inconsistent with the 1937 act except in the indicated particulars and it is still in force." *State v. Davis, supra* at 791, 1 S.E. 2d at 106-7.

Neither G.S. 18-49 nor G.S. 18-58 specifically designates the place to which liquor legally purchased may be transported. Such a designation was unnecessary. Since the only place where liquor may be legally possessed is in one's private dwelling, that is the only place to which it may be legally transported. See *State v. Welborn,* 249 N.C. 268, 271, 106 S.E. 2d 204, 205.

The legislature having made it lawful for one to purchase and transport not more than one gallon of alcoholic beverages from an ABC store to one's home for the purposes mentioned in G.S. 18-49, this Court held that so long as one did not possess more than one gallon in his home he was protected from the presumption of illegality, or the rule of evidence, created by G.S. 18-11 and G.S. 18-32(2). To that extent only, G.S. 18-11 and G.S. 18-32(2) were modified by G.S. 18-49. *State v. Suddreth, supra; State v. Barnhardt, supra; State v. Hill, supra.* Although one may possess in his home an unlimited amount of alcoholic beverages for the use of himself and his bona fide guests, if he possesses more than one gallon, the burden devolves upon him to establish not only that the possession thereof comes within the exceptive provisions of G.S. 18-11, but also "that it was legally acquired and transported to his private dwelling and

there kept, not for sale, but for family uses only." *State v. Barnhardt, supra* at 228, 52 S.E. 2d at 907.

Other than excluding the possession of one gallon of alcoholic beverages in one's home from the presumption created by G.S. 18-11 and G.S. 18-32(2) and the license given by G.S. 18-49 and G.S. 18-58 to transport not more than one gallon for the purpose therein stated, the ABC Act does not *ipsissimis verbis* grant any greater privilege to possess alcoholic beverages than did the Turlington Act.

The Turlington Act (G.S. 18-15) forbids any corporation, club, association, or person, to keep or maintain, alone or by association with others, "a clubroom or other place where intoxicating liquor is received, kept, or stored for barter, sale, exchange, distribution, or division among the members of any such club or association . . . or among any other persons by any means whatever. . . ." It also forbids any corporation, club, association, or person from acting as agent in procuring or keeping intoxicating liquor for any such purpose. No provision in the ABC Act modifies this section.

The Turlington Act (G.S. 18-18) provides: "It is unlawful for any person to serve with meals, or otherwise, any liquor or intoxicating bitters, where any charge is made for such meals or service." No provision of the ABC Act modifies this section, which recognizes the right given one by G.S. 18-11 to serve liquor in one's home to one's bona fide guests and outlaws serving it with meals at any place where a charge is made for the meal or service. Restaurants charge for meals and their service! The prohibition of G.S. 18-18 extends to *any person:* It thus includes the restaurateur and his employees; the host who entertains his guests at a restaurant or club; and the patron who brings his bottle and serves himself — none of whom may legally transport the liquor to the restaurant in the first place!

Plaintiffs assert that nowhere in the ABC Act, except in G.S. 18-47 and G.S. 18-51, is the possession, display, and consumption of alcoholic beverages prohibited. They argue, therefore, that in wet counties it is permitted at all other places. G.S. 18-47 prohibits drinking on the premises of liquor stores and other property used by a county ABC Board. G.S. 18-51 makes it unlawful for any person to drink alcoholic beverages or to offer a drink to another upon the premises occupied by an ABC store or a county ABC Board. It also makes it unlawful for any person "to be or become intoxicated or to make any public display of any intoxicating beverages at any athletic contest or public place in North Carolina." In G.S. 18-47 and G.S. 18-51, the legislature was giving attention to specific places where it obviously thought special hazards existed. These two statutes define additional criminal offenses and were de-

signed, *inter alia,* to prevent drinking before driving. It is a reasonable assumption that one who drinks at home is less likely to be guilty of drunken driving than one who drinks away from home. To hold that by specifically forbidding the drinking of intoxicants on premises controlled by ABC Boards and by proscribing intoxication and the public display of intoxicating beverages at athletic contests the General Assembly impliedly repealed the application of G.S. 18-2, G.S. 18-15, and G.S. 18-18 to wet counties and authorized unrestricted possession at all other public places is to attribute to it a furtiveness in dealing with the liquor question which that legislative body does not merit. As defendants point out in their brief, such a construction would mean that in a wet county liquor might be displayed and consumed, not only in restaurants, but also in stores, public buildings (including courthouses), parks, swimming pools — in every place except on ABC premises, public roads and streets, or at athletic contests. Such a drastic change in the law is not so readily implied.

It is noted that the Turlington Act proscribed both whiskey and beer. G.S. 18-1; *State v. Anderson* and *State v. Brown, supra.* The Beverage Control Act of 1939 (G.S. 18-63 through G.S. 18-93), which relates to unfortified wines, beer, ale, porter, and other brewed or fermented beverages defined by G.S. 18-64, specifically provides (G.S. 18-66): "The purchase, transportation and possession of beverages enumerated in § 18-64 by individuals for their own use are permitted without restriction or regulation." This is plain talk indeed. It cannot, therefore, be doubted that beer and the other beverages defined in G.S. 18-64 are exempted from the Turlington Act. With reference to the stronger beverages defined by G.S. 18-60, the legislature included in the ABC Act no provision similar to G.S. 18-66. When it decides to exempt these alcoholic beverages from the Turlington Act, it will say so in language equally clear. In the meantime, "it is not ours to make the law. That is legislative. It is ours to interpret the law as the legislature enacts it." *State v. Suddreth, supra* at 616, 27 S.E. 2d at 626.

Plaintiffs' contention that the 1959 amendment to G.S. 18-78.1(5) (N. C. Pub. Laws 1959, ch. 745, § 2) authorized the consumption of tax-paid whiskey on the premises of those places holding beer and wine permits from the ABC Board is likewise without merit. Prior to June 4, 1959, G.S. 18-78.1(5) provided that no holder of a license authorizing the retail sale of fortified wines and beverages as defined in G.S. 18-64 for consumption on or off the premises where sold shall "sell, offer for sale, possess, or permit the consumption on the licensed premises of any kind of alcoholic liquors the sale of which

is not authorized under his license." Since the 1959 amendment, this statute provides that no such licensee shall "sell, offer for sale, possess, or *knowingly* permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized *by law*." (Italics denote the changes.)

In *Campbell v. Board of Alcoholic Control,* 263 N.C. 224, 139 S.E. 2d 197, the petitioner appealed from an order of the State Board of Alcoholic Control which suspended his retail license to sell beer because of sales to minors under the age of 18. In discussing the 1959 amendment to G.S. 18-78.1(5), Higgins, J., said:

> "(I)t appears by the punctuation that the word 'knowingly' does not modify sell, offer for sale, or possess, but does modify 'permit the consumption on the premises.' . . . The proprietor is responsible if he knowingly permits another to drink on his premises *even if he carried his own beverage.*" *Id.* at 226, 139 S.E. 2d at 199. (Emphasis added.)

Cf. Boyd v. Allen, 246 N.C. 150, 97 S.E. 2d 864. A restaurateur with a beer and wine license might derive some comfort from the addition of the word *knowingly* in subsection 5 — provided his "brown bag" clientele was sufficiently careful and discreet. No comfort, however, is provided by substituting the words *by law* for *under his license,* for his patrons may not legally transport alcoholic beverages to his premises or possess them there — and neither he nor they, of course, is authorized to sell them. Again we say that had the legislature intended to permit the consumption of strong alcoholic beverages in restaurants, stores, filling stations, and on the premises of every business which has a beer or wine license, it would have "spelled out" this drastic change in the law. Any such interpretation would disrupt the plan of control set out in G.S. 18-78.1(5), and abolish the safeguards by which the legislature has attempted to protect the traveling public from drunken drivers.

> "Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject." Black on Interpretation of Laws § 53 (1st Ed. 1896).

In brief summary, the law with reference to the possession of whiskey or similar intoxicating beverages is this: Whether the area

be wet or dry, conforming or nonconforming, a person may legally possess alcoholic beverages as defined by G.S. 18-60 only in his private dwelling as provided by G.S. 18-11 and while transporting not in excess of one gallon purchased out of the State or from an ABC store within the State to his dwelling as provided by G.S. 18-49 and G.S. 18-58. This has been the law since the passage of the ABC Act of 1937.

It is the prerogative and function of the legislative department of the government to make the law. Only the General Assembly, therefore, can establish the public policy of this State with reference to alcoholic beverages. The courts are not the judges of the wisdom or impolicy of a law; their province is to interpret and apply the law which the legislature has written. *Trust Co. v. Green,* 236 N.C. 654, 73 S.E. 2d 879; *State v. Scoggin,* 236 N.C. 19, 72 S.E. 2d 54; *Ferguson v. Riddle,* 233 N.C. 54, 62 S.E. 2d 525; *State v. Means,* 175 N.C. 820, 95 S.E. 912. The judiciary will interfere with acts of the legislative body only when they are beyond the bounds prescribed by the constitution. *State v. Revis,* 193 N.C. 192, 136 S.E. 346.

The judgment of the court below is

Reversed.

NEVA McEACHERN, ADMINISTRATRIX OF THE ESTATE OF OSCAR McEACHERN, DECEASED, v. DR. W. H. MILLER, JASPER JONES AND WAYNE MEMORIAL HOSPITAL, INCORPORATED OF WAYNE COUNTY, NORTH CAROLINA.

(Filed 30 November, 1966.)

1. Pleadings § 18—

If the complaint fails to state a cause of action against one of defendants, the joinder of such defendant cannot constitute a misjoinder; if the complaint does state a cause of action against such defendant, a voluntary nonsuit as to such defendant prior to the hearing of the demurrer eliminates such defendant and obviates misjoinder.

2. Negligence § 7; Torts § 2—

There may be two or more proximate causes of injury, and if two persons commit separate acts which join and concur in producing the result complained of, the author of each act is liable for the damage inflicted, and the injured party may bring action against either one or both.

3. Same; Death § 3; Hospitals § 3; Physicians and Surgeons § 11—

Plaintiff alleged that her intestate, seriously wounded, was taken to a hospital and became the patient of a staff physician; that the physician, though he knew or should have known of intestate's serious condition,

failed to administer any treatment; that the hospital, knowing of the physician's failure, failed to provide treatment; and that proper treatment would have saved intestate's life. *Held:* The complaint liberally construed alleges a single cause of action for wrongful death based upon the concurring negligence of the physician and the hospital, and demurrer for misjoinder of parties and causes of action must be overruled.

APPEAL by plaintiff from *Bundy, J.*, May 2, 1966 Session, WAYNE Superior Court.

The plaintiff, Neva McEachern, Administratrix of the Estate of Oscar McEachern, instituted this wrongful death action against Jasper Jones, Dr. W. H. Miller, and Wayne County Memorial Hospital, Inc. As against the defendant Jones, the plaintiff alleged her intestate, on August 3, 1963, was injured by defendant Jones' intentional and unprovoked discharge of a firearm into the abdominal region of the body of plaintiff's intestate. The plaintiff further alleged that shortly after the gunshot wound, her intestate was taken to the Wayne County Memorial Hospital where he became the patient of the hospital and of its staff physician, the defendant, Dr. W. H. Miller.

In paragraphs VI and VII, the plaintiff alleged:

"VI. That after plaintiff's intestate was hospitalized, as mentioned in preceding paragraphs, and after defendant Miller had formed the relationship of physician and patient with him, defendant Miller, with notice of the seriousness of the injuries of plaintiff's intestate, neglected to administer to the injuries of plaintiff's intestate or to ascertain by even the most superficial examination of the body of plaintiff's intestate the treatment to be accorded to plaintiff's intestate; that defendant Miller neglected to examine or to see plaintiff's intestate for many hours after his admittance into the defendant's hospital although he knew or should have known of the seriousness of the condition of plaintiff's intestate; that defendant corporation, through its agent and employee, knew of the seriousness of plaintiff's intestate's physical condition and of defendant Miller's neglect but took no steps or measures to see that he was properly administered to other than to admit him to the hospital; that defendant corporation did not provide the most minimal emergency treatment for plaintiff's intestate, although defendant corporation, as well as defendant Miller, knew plaintiff's intestate had suffered injury by a gunshot wound in the abdomen.

"VII. That the direct and proximate cause of the death of plaintiff's intestate was the concurring negligence of defendant's corporation and defendant Miller as follows:

(a) The negligence and carelessness of defendant Miller in not seeing and examining plaintiff's intestate during which time treatment could have been prescribed or devised which would have saved the life of plaintiff's intestate.

(b) The negligence and carelessness of defendant corporation, through its agents and employees, in not providing medical attention for plaintiff's intestate with full knowledge and notice of his physical condition and injuries and with full knowledge and notice of his neglect by defendant Miller.

(c) The concurring negligence of defendants Miller and defendant corporation, by which negligence plaintiff's intestate did not receive medical attention which would have preserved his life."

On September 20, 1965, the defendants Wayne Memorial Hospital, Inc., and Dr. W. H. Miller filed separate demurrers upon the ground of misjoinder of parties and causes. On October 13, 1965, the defendant Jones filed a similar demurrer. On May 2, 1965, the plaintiff, through her attorneys of record, took a voluntary nonsuit as to the defendant Jasper Jones.

After the nonsuit as to Jones, Judge Bundy sustained the demurrers upon the ground of misjoinder of parties and causes and dismissed the action. The plaintiff excepted and appealed.

Mitchell & Murphy, Earl Whitted, Jr., for plaintiff appellant.

Smith, Leach, Anderson & Dorsett for defendant W. H. Miller, M.D., appellee.

Dupree, Weaver, Horton, Cockman & Alvis by Jerry S. Alvis for defendant Wayne County Memorial Hospital, Inc., appellee.

HIGGINS, J. The plaintiff instituted this wrongful death action against Jasper Jones, Dr. W. H. Miller, and Wayne Memorial Hospital, Inc. The complaint alleged: that about noon on August 3, 1963, Jones unlawfully and without provocation discharged "a firearm into the abdominal region of intestate's body . . ." Immediately thereafter, the intestate was taken to, and became a patient of, Wayne Memorial Hospital and of Dr. W. H. Miller, a staff physician of the Hospital. Both assumed the duties and responsibilities of providing medical treatment for the injuries. Dr. Miller failed to administer any treatment and the hospital, knowing of Dr. Miller's failure, also failed to provide treatment; that proper treatment would have saved intestate's life. The detailed allegations are set forth in paragraphs VI and VII quoted in the statement of facts.

The defendants filed separate demurrers upon the ground of misjoinder of parties and causes. The plaintiff, having alleged the wrongful death of her intestate resulted from the failure of Dr. Miller and the Hospital to provide proper medical treatment, which, if given, would have saved intestate's life, it is doubtful whether the plaintiff stated a cause of action for wrongful death against Jones. The rule of liberal construction does not permit the Court to write into a complaint facts which it does not allege. *Johnson v. Johnson,* 259 N.C. 430, 130 S.E. 2d 876. Unless a cause of action is alleged against Jones, having him in the case would not be a misjoinder. If there is no case stated, there is no misjoinder. *Batts v. Faggart,* 260 N.C. 641, 133 S.E. 2d 504. However, before the hearing on the demurrer, the plaintiff took a voluntary nonsuit as to Jones. "The nonsuit removed the defendant's objection raised by the first demurrer." *Boles v. Graham,* 249 N.C. 131, 105 S.E. 2d 296.

The nonsuit as to Jones eliminated the main thrust of the first demurrer. However, in this Court Dr. Miller and the Hospital filed demurrers *ore tenus* upon the ground that there is still a misjoinder of parties and causes.

We think the complaint, when liberally construed, alleges a single cause of action based on the joint and concurrent negligence of both Dr. Miller and the Hospital in that both failed to provide medical treatment to an injured man who had a right to expect proper medical attention from both. The rule is stated by Barnhill, J., later C.J., in *Bost v. Metcalfe,* 219 N.C. 607, 14 S.E. 2d 648: "The well established and familiar rule that a plaintiff may consistently and properly join as defendants in one complaint several joint tort-feasors applies where different persons, by related and concurring acts, have united in producing a single or common result upon which the action is based. 9 A.L.R. 942; Anno. 35 A.L.R. 410."

"There may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tort-feasors." *Batts v. Faggart, supra; Riddle v. Artis,* 243 N.C. 668, 670, 91 S.E. 2d 894.

This action is for wrongful death, for which there may be only one recovery. Plaintiff alleged her intestate's death resulted from the joint and concurrent negligence of the hospital where he was duly admitted as a patient and of the hospital staff doctor who accepted responsibility for examination and treatment. The plaintiff further alleged that proper treatment which was due him would have saved his life; the lack of it caused his death. "If the facts

alleged are sufficient to warrant recoveries against each defendant for wrong done only by that defendant, there is a misjoinder of parties and causes. *Williams v. Gooch,* 206 N.C. 330, 173 S.E. 342; *Lucas v. Bank,* 206 N.C. 909, 174 S.E. 301. In that event the demurrer should be sustained. If, however, the facts alleged show a joint invasion of plaintiff's rights warranting a judgment against defendants jointly, there is no misjoinder." *Nye v. Oil Co.,* 257 N.C. 477, 126 S.E. 2d 48.

In the case before us one cause of action (for wrongful death) is alleged and one recovery is permissible. Hence this case as to the Doctor and the Hospital falls in the "no misjoinder" category. This conclusion requires us to overrule the demurrers *ore tenus* filed here and to reverse the judgment sustaining the demurrers entered in the Superior Court of Wayne County.

Reversed.

CARSON C. CRANFORD v. MARK STEVEN STEED, BY HIS GUARDIAN AD LITEM RUTH MORRIS STEED, AND RUTH MORRIS STEED.

(Filed 30 November, 1966.)

Judgments § 25— Court must determine validity of consent judgment before dismissing defendants' counterclaims because precluded by the judgment.

It is error for the court to dismiss defendants' answers and counterclaims, filed within the time allowed, on the ground that a consent judgment settling the controversy had been entered prior to the filing of the answers and counterclaims, when at the time there was on file and undetermined, defendants' motions to vacate the purported consent judgment on the ground that it was procured by defendants' insurer without their knowledge or consent, since a determination of defendants' motions to vacate the purported consent judgment is a prerequisite to the determination of plaintiff's motions to dismiss the answers and counterclaims, obviating any objection that no notice had been given of a hearing on defendants' motions to vacate the judgment.

APPEAL by defendants from *Latham, Special Judge,* May 2, 1966 Civil Session of RANDOLPH.

Plaintiff instituted this action to recover damages for personal injuries and property damage he sustained September 3, 1965, as the result of a collision on N. C. Highway No. 49 between the (his) farm tractor he was operating and an automobile owned by defendant Ruth Morris Steed (Mrs. Steed) and operated by her son, defendant Mark Steven Steed (Mark).

This action was commenced as to Mark by the issuance of summons on December 17, 1965, and as to Mrs. Steed by the issuance of summons on January 7, 1966. On December 17, 1965, an order was entered extending the time for filing complaint (as to Mark) until January 6, 1966. The complaint, in which Mark and Mrs. Steed were named defendants, was filed January 6, 1966. It was served on Mark and on Mrs. Steed on January 11, 1966.

On January 26, 1966, John H. Skeen, Clerk of the Superior Court, signed the following judgment:

"This cause coming on to be heard and being heard before the Honorable John H. Skeen, Clerk of the Superior Court of Randolph County, and it appearing to the Court from the statement of counsel that all matters of controversy set out in the pleadings have been agreed upon by the parties, and that the defendants have agreed to pay to the plaintiff and the plaintiff has agreed to accept the sum of $1033.90 and the costs of this action in full accord and satisfaction thereof.

"Now, therefore, it is ordered, adjudged, and decreed that the plaintiff have and recover of the defendants the sum of $1033.90 and the costs of this action to be taxed by the Clerk."

On February 10, 1966, defendants applied for and obtained an order extending their time for filing answer or other pleading through March 2, 1966. The order for such extension was signed by Roberta G. Lewis, Assistant Clerk of Superior Court.

Defendants' application for such extension, signed by Ottway Burton, Esq., their personal counsel, asserted, *inter alia*, that "Nationwide Mutual Automobile Insurance Company who *(sic)* was carrying the un-insured motorist contract for the defendants has without any authorization or ratification . . . attempted to purportedly settle this case and the defendants' attorney has not had sufficient time to fully investigate matter."

The affidavit of Mrs. Steed filed March 1, 1966, and the joint affidavit of Mark and of Mrs. Steed as guardian *ad litem* for Mark, filed March 2, 1966, asserted that any purported settlement was without their authorization or ratification and completely contrary to their wishes; that they had no information that said purported consent judgment of January 26, 1966, had been entered, until the date of their affidavits, to wit, February 26, 1966; and that they had authorized their attorney to proceed to have said consent judgment stricken from the record. The case on appeal states: "March 1, 1966: Both defendants filed a motion in the form of an affidavit dated February 26, 1966, to have purported judgment stricken from the record. A copy of the affidavit given to the plaintiff's attorney."

On March 1, 1966, John H. Skeen, Clerk of Superior Court,

upon an affidavit of Mrs. Steed that Mark was an infant, without general or testamentary guardian, appointed Mrs. Steed as guardian *ad litem* to represent Mark in this action.

On March 1, 1966, separate answers and counterclaims were filed (1) by Mrs. Steed, individually, and (2) by Mrs. Steed, as guardian *ad litem* for Mark, the counterclaims being for property damage and for personal injuries, respectively.

On March 13, 1966, plaintiff moved that the answer and counterclaim of each defendant be dismissed "for that Summons has not been issued in said cause."

Judge Latham, in separate orders dated May 5, 1966, dismissed each answer and counterclaim and taxed defendants with the costs. Each order recites that plaintiff's motion to dismiss was allowed for that "(a) judgment had been entered in said cause on the 26th day of January, 1966 . . . and said answer and counterclaim were filed in said cause on March 1, 1966."

In a supplemental order dated May 12, 1966, Judge Latham set forth that plaintiff's said motions to dismiss were calendared for hearing on Monday, May 2, 1966; that defendants, through their counsel, moved that said purported judgment of January 26, 1966, be vacated; that plaintiff's counsel objected on the ground no notice had been given of a hearing on defendants' motion to vacate; and that "the court sustained the objection and refused to hear the motion to vacate, to which ruling the defendants, through counsel, and in apt time, excepted."

Defendants, having excepted to said orders of May 5, 1966, and to the rulings referred to in the order of May 12, 1966, appealed.

Walker, Anderson, Bell & Ogburn for plaintiff appellee.
Ottway Burton for defendant appellants.

BOBBITT, J. The complaint having been served on defendants on January 11, 1966, the time for filing answer had not expired on January 26, 1966, the date the purported consent judgment was entered. Defendants' motion for an extension of time to file answer or other pleading was filed February 10, 1966, within thirty days after service of complaint. On February 10, 1966, the assistant clerk extended the time for defendants to plead through March 2, 1966. Hence, but for said purported consent judgment of January 26, 1966, defendants' pleadings were filed in apt time. G.S. 1-125.

On January 26, 1966, when the purported consent judgment was entered, a guardian *ad litem* had not been appointed to represent Mark. Mrs. Steed was appointed guardian *ad litem* on March 1, 1966. Assuming Mark was an infant without general or testamentary guardian on January 26, 1966, this fact alone would seem suffi-

cient to require that the purported consent judgment of January 26, 1966, be vacated as to him. 2 Strong, N. C. Index, Infants § 3. However, the principal contention of both defendants is that the purported consent judgment should be declared void and set aside because it was entered without their authority, consent or knowledge.

Decision requires application of the following well established legal principles, *viz.:*

"A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court. (Citations) It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties. (Citations) It acquires the status of a judgment, with all its incidents, through the approval of the judge and its recordation in the records of the court." *McRary v. McRary,* 228 N.C. 714, 719, 47 S.E. 2d 27, 31. Accord: *Owens v. Voncannon,* 251 N.C. 351, 354, 111 S.E. 2d 700, 703; 3 Strong, N. C. Index, Judgments § 8.

"The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. (Citations)" *Ledford v. Ledford,* 229 N.C. 373, 49 S.E. 2d 794. Accord: *Stanley v. Cox,* 253 N.C. 620, 632, 117 S.E. 2d 826, 834; 3 Strong, N. C. Index, Judgments § 8.

"(W)hen a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in the cause." *King v. King,* 225 N.C. 639, 35 S.E. 2d 893, and cases cited. Accord: *Brown v. Owens,* 251 N.C. 348, 350, 111 S.E. 2d 705, 707; *Overton v. Overton,* 259 N.C. 31, 37, 129 S.E. 2d 593, 598; 3 Strong, N. C. Index, Judgments § 25.

On May 2, 1966, when the case was calendared for hearing on plaintiff's motions to dismiss the answers and counterclaims, there was on file and undetermined defendants' motion to vacate said purported consent judgment of January 26, 1966. The basis of plaintiff's said motions was his contention that the purported consent judgment was a final judgment and therefore no further proceedings in the cause were permissible. Hence, a determination of defendants' motion to vacate the purported consent judgment was a prerequisite to decision of plaintiff's motions to dismiss defendants' answers and counterclaims. It was error to proceed to a consideration and determination of plaintiff's said motions without first affording defendants an opportunity to be heard on their pending motion to vacate said purported consent judgment.

The orders dismissing defendants' answers and counterclaims

are vacated and the cause is remanded with direction that a hearing be had and determination made on defendants' motion to vacate said purported consent judgment of January 26, 1966. Further proceedings herein will depend on the decision made pursuant to such hearing.

Error and remanded.

KIRBY HALL, INDIVIDUALLY AND AS AGENT FOR CALVIN FAIRCHILD, v. CITY OF MORGANTON, CYRUS BROOKS AND BEN S. WHISNANT.

(Filed 30 November, 1966.)

1. Injunctions § 8—

The courts have the power to restrain a threatened wrongful act by a municipal corporation.

2. Injunctions § 13; Municipal Corporations § 4— City may not force home owner to subscribe to city's electric service by threat to discontinue water service.

Where it appears from the allegations of the verified complaint and a supporting affidavit that the then owner of the lot in question, situate outside the corporate limits, paid the city a fee for the privilege of tapping onto the city's water main, that at all times the owner had been current in payments of his account to the city, and that the city had threatened to cut-off the water supply to the dwelling unless the owner switched from a private power company to the city as the source of his electric current, the court properly continues to the hearing the temporary restraining order issued in the cause, since the case involves not merely the right to require a city to serve a water customer outside its limits but the right of a city to force a home owner to switch from a private power company to the city's electric system by threat to cease water service to the owner's house.

ON *certiorari* to review the order of *Froneberger, J.*, entered June 22, 1966. The case was pending in BURKE Superior Court.

The plaintiff, Kirby Hall, individually, and as Agent for Calvin Fairchild, instituted this civil action against the City of Morganton, Cyrus Brooks, City Manager, and Ben S. Whisnant, Mayor. The plaintiff alleged he is the agent of Calvin Fairchild who is a resident of Burke County but is now a member of the Armed Forces of the United States stationed in Formosa. The complaint alleged that Fairchild owns a dwelling located on Case Street, outside the corporate limits of Morganton. Subsequent to the construction of the dwelling in 1964, the City, which owns the water supply system, has furnished water to the dwelling for which all bills have been paid at maturity.

Since the date of construction the dwelling house has been sup-

plied electric service by Duke Power Company. The City of Morganton owns and operates an electric power distribution system. The City, through its manager, has notified plaintiff that on June 15, 1966, the water supply will be cut off from the dwelling unless the plaintiff switches from Duke Power Company to the City system as its source of electric current.

The plaintiff further alleged that if the water supply is cut off, the dwelling will be rendered unfit for human habitation and the owner will lose his valuable rental contract. The plaintiff, on behalf of the owner, alleged the City is acting arbitrarily, capriciously, and in breach of its commitment to supply water to the dwelling; that plaintiff does not have an adequate remedy at law. He asks for a temporary and permanent restraint against the City's threatened act to cut off the water supply.

Upon the filing of the complaint, Judge Farthing issued a temporary order returnable before Judge Froneberger on June 20, 1966. The defendants filed a demurrer on these grounds: (1) The plaintiff does not have legal capacity to bring this action; (2) the complaint shows the dwelling is outside the City of Morganton; (3) the City has no obligation to furnish water to the dwelling.

The plaintiff filed the affidavit of Wheeler Dale who apparently was the owner of the lot. At least he constructed the dwelling and contracted with Duke Power Company for electric service. In connection therewith he granted an easement, now of record, over the lot on which the building was constructed, as well as over other property. After the completion he secured from the City of Morganton a water tap connection with the City's nearby water main. For this privilege he paid the City of Morganton the sum of $300.00. At the time the water line was installed and the tap connected, Duke Power Company was already furnishing power to the dwelling. Judge Froneberger continued the restraining order to the final hearing. The defendants excepted and appealed.

Patton, Ervin & Starnes by Frank C. Patton for plaintiff appellee.

John H. McMurray for defendant appellants.

HIGGINS, J. This Court has allowed the plaintiff to amend the complaint by attaching as an exhibit thereto a power of attorney executed by Calvin Fairchild ratifying the bringing of this action by Kirby Hall and authorizing him to prosecute it as attorney in fact. Under the rules, therefore, this is the only question to be reviewed here: Did the plaintiff make a sufficient showing to justify the court's order continuing the temporary restraint, preserving the status quo until the final hearing? Injunctive relief is granted

only when irreparable injury is real and immediate. *Membership Corp. v. Light Co.*, 256 N.C. 56, 122 S.E. 2d 761; *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E. 2d 278.

The court issued the restraining order and continued it to the hearing upon the basis of the verified complaint and the supporting affidavit of Wheeler Dale. The defendants have filed a demurrer but have not filed an answer. According to the complaint, the defendants have threatened to cut off the water supply to the Fairchild residence unless the owner switches its source of electric current from Duke Power Company to the power facilities operated by Morganton. According to Dale's affidavit, Duke owns a power easement over the owner's land to the dwelling. While Duke was supplying power, the City contracted with the owner for the tap on the City's water main. For this privilege Dale paid the City $300.00. At all times the owner has been current in the payment of his accounts. If the City fails to supply water the dwelling will be uninhabitable.

More is involved in this case than the right to require the City to serve a customer outside the City limits. *Fulghum v. Selma*, 238 N.C. 100, 76 S.E. 2d 368. On the present showing the question is whether the City may force the home owner to switch from Duke Power to City power by a threat to sever the owner's connection with the City water system for which he paid $300.00. The court has power to restrain a municipal corporation's threatened wrongful acts. *Wishart v. Lumberton*, 254 N.C. 94, 118 S.E. 2d 35.

The complaint and affidavit filed by the plaintiff furnish sufficient factual basis for Judge Froneberger's order continuing the restraint to the hearing. The order is

Affirmed.

WESTARC LEASING CORPORATION v. CAPITAL SIGN SERVICE, INC., AND CLAWSON A. HICKS.

(Filed 30 November, 1966.)

1. Actions § 2—

A foreign corporation does not transact business in this State solely by maintaining an action here, G.S. 55-131, and therefore the court correctly refuses to dismiss the action on a note by a foreign corporation on the ground that it was an undomesticated corporation transacting business in this State.

2. Pleadings § 30—

Motion for judgment on the pleadings in an action on a note by the payee should be denied when the maker and guarantor of payment allege that the note was given for equipment leased from the payee, that the equipment was defective, and that the payee had breached its representation to put the equipment in good working order, since the pleadings raise controverted issues of fact.

APPEAL by defendants from *McKinnon, J.*, at August 1966 Non-Jury Term of WAKE County Superior Court.

The plaintiff is a corporation with its principal office in Yakima, Washington. It alleges that on 11 April, 1964, the plaintiff leased to the defendant, Capital Sign Service, Inc., a Model EL-37 Mobile maintenance truck on a 1964 Chevrolet chassis, said lease to run for a period of sixty months. The monthly payments were to be $280.28. It further alleges that the defendant, Capital Sign Service, Inc., became delinquent and refused to make any payments during June 1965, and that it, acting under the terms of the lease, declared all the rents due. The plaintiff alleges that the total amount now due and unpaid is $14,510.52, and that the defendant Clawson A. Hicks individually agreed to guarantee the payment of all money due under the said lease.

The defendants filed answer admitting execution of the lease, admitting non-payment and offering as a defense that the plaintiff is a non-resident corporation not domesticated to do business in North Carolina and that the action should be dismissed by virtue of G.S. 55-154. Also that the equipment delivered pursuant to the lease was not according to the specifications, and particularly that it was furnished a Ford chassis, instead of a Chevrolet as called for by the contract. The defendants notified the plaintiff of these defects by telephone and the plaintiff waived further notice of the defects; failed to enforce the warranties applicable to the equipment or to put it in good working condition; that the defendant relied upon the representations that the equipment would be put in good working condition and made further payments to the plaintiff in reliance thereof, and in addition has spent at least $1,000 in repairs in attempting to get said equipment to operate. In their counterclaim they sought to recover this amount as well as the rentals paid.

The Court held that an issue under G.S. 55-154 was not raised and granted judgment on the pleadings for $14,510.52 against both defendants, and they appealed.

Bailey, Dixon & Wooten for plaintiff appellee.
Vaughan S. Winborne for defendants appellants.

PLESS, J. While G.S. 55-154 provides that no undomesticated foreign corporation transacting business in this State shall be permitted to maintain any action or proceeding in any court of this State, etc., the lower court ruled correctly that the plaintiff was protected by G.S. 55-131 which provides that a foreign corporation shall not be considered to be transacting business in this State in maintaining or defending any action or suit, etc.

However, the court erred in granting judgment on the pleadings. In the defendants' further answer which, under the plaintiff's demurrer thereto is deemed admitted, they alleged that the property leased was defective, that the plaintiff had been notified and that upon the representations that the equipment would be put in good working condition they made payments to the plaintiff in reliance thereon and have further expended $1,000 in attempting to get said equipment to operate.

These allegations raise questions that can be determined only by trial on the merits and the action of the court in awarding judgment on the pleadings is hereby

Reversed.

STATE v. ALEX DOUGLAS DAWSON.

(Filed 30 November, 1966.)

1. Criminal Law § 139—

Defendant's appeal from sentences entered upon his pleas of guilty, understandingly entered, presents for review only whether error appears on the face of the record proper.

2. Criminal Law § 131—

Where defendant enters pleas of guilty to two separate offenses he may not contend that the consecutive sentences entered by the court were excessive when the sentences are within the limits of the applicable statutes, since the court has authority to provide that such sentences run consecutively.

APPEAL by defendant from *Clark, Special Judge,* March 28, 1966 Criminal Session of CUMBERLAND.

Defendant was indicted in two bills, one (#21,727) charging first degree burglary and the other (#21,728) charging rape. The indictments charged these crimes were committed February 5, 1966, about 3:00 a.m. The named occupant of the dwelling and victim of the alleged rape was a woman 82 years of age.

Defendant was represented by court-appointed counsel.

Defendant tendered, and the State accepted, pleas of guilty of lesser included degrees of the crimes charged, *viz.*: (1) in #21,727, a plea of guilty of breaking and entering a dwelling house with intent to commit a felony; and (2) in #21,728, a plea of guilty of assault with intent to commit rape. Defendant, after careful inquiry by the court, stated he understood fully the nature of the crimes referred to in his pleas, the maximum punishment therefor and that he entered the pleas freely and voluntarily.

Upon said pleas, the court pronounced judgments as follows: (1) In #21,728, judgment imposing a prison sentence of fifteen years; and (2) in #21,727, judgment imposing a prison sentence of ten years, the sentence in #21,727 to begin upon expiration of the sentence in #21,728.

Defendant excepted and appealed; and the court, on account of defendant's indigency, appointed counsel who had represented defendant at trial to represent him in connection with his appeal and ordered that Cumberland County pay the costs incident to obtaining a transcript of the proceedings in the superior court and of providing the record and brief on appeal.

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

Herbert H. Thorp for defendant appellant.

PER CURIAM. Defendant having entered said pleas of guilty, his appeal presents for review only whether error appears on the face of the record proper. *S. v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800. The record on appeal contains one assignment of error, namely, that "(t)he sentences imposed by the court were excessive." The assignment is without merit. The sentence in #21,728 is authorized by G.S. 14-22; and the sentence in #21,727 is authorized by G.S. 14-54. The court's authority to provide that such sentences shall run consecutively is well established. 1 Strong, N. C. Index, Criminal Law § 133. No error appearing, the judgments of the court below are affirmed.

It is noteworthy that the evidence presented to the presiding judge prior to pronouncement of said judgments was sufficient to support convictions of defendant for the capital felonies charged in the indictments. The impression prevails that defendant was well and ably represented by his court-appointed counsel.

Affirmed.

HOWARD THURMAN RATLIFF, ADMINISTRATOR OF THE ESTATE OF HOWARD THURMAN RATLIFF, JR., v. DUKE POWER COMPANY.

(Filed 14 December, 1966.)

1. Automobiles § 8—

The fact that a truck towing a trailer carrying a 40 foot utility pole, in making a left turn into an intersecting road, necessarily blocks both lanes of the two-lane highway on which it was traveling, does not constitute negligence or wrong doing *per se*.

2. Automobiles § 24—

The requirement of G.S. 20-117 that a red flag not less than 12 inches both in length and width should be displayed at the end of a load extending more than four feet beyond the rear of a vehicle traveling during daylight hours is not met by a flag of the statutory dimensions when the top of such flag is draped over the load so that less than 12 inches of the flag hangs perpendicular, and failure to meet the requirement of the statute is negligence *per se*.

3. Automobiles § 6—

The violation of a safety statute is negligence *per se* unless the statute provides to the contrary, and such violation is actionable if it is the proximate cause of injury to the plaintiff.

4. Automobiles § 21.1—

Vehicles transporting poles in the daytime are exempt from the requirements of G.S. 20-116(e), and therefore during the daytime it is not negligence *per se* to transport without a special permit a 40 foot pole on a trailer.

5. Automobiles § 8—

The fact that a driver looks and gives the statutory signal before making a left turn does not necessarily absolve him of negligence in making such turn, but he is also required to use the care a reasonably prudent man would use under like circumstances, and whether the circumstance of making a left turn with a truck pulling a trailer carrying a 40 foot utility pole demands, in the discharge of the duty to use due care, the stationing of some person at the intersection to stop following traffic, is a question for the jury.

6. Automobiles § 41h—

Evidence that the driver of defendant's truck was pulling a trailer carrying a 40 foot utility pole, that the warning flag at the end of the pole did not hang perpendicular for the statutory 12 inches, that the driver made a left turn into an intersecting highway without having a person to warn and stop following traffic, and that the following vehicle driven by intestate violently collided with the end of the pole, *held* sufficient to be submitted to the jury on the question of negligence and proximate cause.

7. Negligence § 26—

Nonsuit may not be properly entered on the ground of contributory negligence unless plaintiff's own evidence, when considered in the light

most favorable to him, establishes contributory negligence as one of the proximate causes of the injury so clearly as to admit no other reasonable conclusion.

8. Automobiles § 38—

The distance traveled by a vehicle after a collision does not establish that the vehicle was traveling at excessive speed prior to the collision when the evidence conclusively establishes that the driver was instantly incapacitated by the collision and that the collision impaled the vehicle upon the end of a 40 foot utility pole which was swinging in his direction of travel consequent to the left turn made by the vehicle pulling the trailer carrying the pole.

9. Automobiles § 42—

The evidence disclosed that the driver of a truck pulling a trailer carrying a 40 foot utility pole, having a flag at its end not hanging perpendicular for the statutory 12 inches, made a left turn into an intersecting highway, and that plaintiff's intestate, driving a following automobile, crashed into the end of the pole. There was no evidence that intestate was traveling at excessive speed. *Held:* The evidence does not warrant nonsuit on the ground of contributory negligence.

10. Trial § 33—

It is error for the court to state a contention containing an erroneous statement of the applicable law without correcting such error. It is preferable for the court to limit its statement of contentions only to the facts adduced by evidence and to state only the court's view of the legal principles applicable to such factual situation.

11. Automobiles § 46—

Where the evidence affirmatively discloses that the vehicle driven by defendant's employee came within the exemption of G.S. 20-116(e) and did not require a special permit, it is error for the court to submit the question of negligence in operating the vehicle without such permit.

12. Same—

It is error for the court to charge the law requiring a vehicle making a left turn into an intersecting highway to pass to the left of the center of the intersection when there is no evidence that the driver "cut the corner" at the intersection, or that, if he did so, such act could have been a proximate cause of the collision.

13. Automobiles § 8—

Failure of a driver of a truck pulling a trailer carrying a 40 foot utility pole, turning left into an intersecting highway, to drive to the left of the center of the intersection cannot be the proximate cause of an accident occurring when the driver of a following vehicle collides with the end of the pole in such driver's righthand lane of travel.

14. Negligence § 7—

The fact that the injury would not have occurred but for an asserted act of negligence does not constitute such act a proximate cause of the injury unless consequences of a generally injurious nature were reasonably foreseeable as a result of such act.

15. Trial § 33—

An erroneous instruction in regard to the law in the court's application of the law to the facts in evidence must be held prejudicial, notwithstanding that in other portions of the charge the court in stating the general principles of law gave correct instructions on the point in question.

APPEAL by defendant from *Crissman, J.*, at the March 1966 Session of WILKES.

This is a suit for damages for wrongful death resulting from injuries sustained by the deceased when the automobile driven by him collided with the end of a 40 foot pole being towed along the highway by a truck of the defendant. It is admitted that the truck was then being operated by an employee of the defendant in the course of his employment.

The complaint alleges that the defendant was negligent in that: (1) It failed to display a red flag upon the pole as required by G.S. 20-117; (2) it attempted to make a left turn without seeing that the movement could be made in safety and without a proper signal of such intention; (3) it transported the pole upon the highway without a permit in violation of G.S. 20-119; (4) it blocked both traffic lanes of the highway; (5) it failed to keep a proper lookout; (6) it failed to give warning to persons using the highway, including the deceased, of its operations so blocking the highway; and (7) it attempted to make a left turn without passing beyond the center of the intersection. Other general allegations of negligence, being mere statements of conclusions by the pleader, are not material to this appeal.

The answer denies all allegations of negligence by the defendant, alleges that the negligence of the deceased was the sole proximate cause of the collision and, if not, was contributory negligence, which bars the plaintiff's right of recovery. The deceased is alleged to have been negligent in that: (1) He drove his automobile at an excessive speed; (2) he failed to decrease the speed of his vehicle when confronted with a special hazard; (3) he failed to keep a proper lookout; (4) he failed to keep his automobile under control and bring it to a stop until the defendant's vehicle and pole had left the highway; and (5) followed the defendant's vehicle and pole closer than was reasonable and prudent.

The jury found the issues of negligence and contributory negligence in favor of the plaintiff and awarded damages in the sum of $20,000. From judgment entered upon the verdict, the defendant appeals, assigning as error the denial of its motion for judgment of nonsuit and alleged errors in the charge of the court to the jury.

The defendant offered no evidence at the trial, testimony of its

driver and three other employees being offered by the plaintiff in the form of transcripts of their adverse examinations.

The evidence offered by the plaintiff, in addition to the mortuary table contained in G.S. 8-46, and testimony as to the age, health, abilities and habits of the deceased, may be summarized as follows:

The collision occurred a few minutes before 1 p.m. on a clear day in the town of Roaring River at the right-angle intersection of Highway 268 and an unnumbered road. Highway 268 has a "black top" pavement and was dry.

The defendant's truck was 20 feet long. Attached to it was a two-wheel trailer, 20 feet long, six feet wide and three feet high, which had on it a partial bed for carrying tools. The pole, which was resting on the trailer, was 40 feet long and approximately 12 inches in diameter at the large end. It was fastened to the trailer with a chain one inch in diameter, and extended 10 or 12 feet beyond the rear end of the trailer.

A red flag, somewhat faded from use, bearing upon it the word "danger" in white letters, was attached to the pole. It was not offered in evidence. It was fastened to the pole with a wire running through a hole bored in the pole. The distance from the point of attachment to the end of the pole is variously stated. According to one of the defendant's employees riding upon the truck, the flag was 12 by 12 inches in size and was so affixed to the pole that several inches of its length lay flat on top of the pole, and about eight inches of its length hung downward over the rear end of the pole. Testimony by another of the defendant's employees indicates that the entire length of the flag was visible below the top of the end of the pole. Vibration of the pole in transit would cause the flag to flutter.

The truck, with the foreman of the crew riding in the cab with the driver, and three other employees of the defendant riding in the truck bed, proceeded eastwardly along Highway 268 to the intersection. The highway is straight for at least 600 feet west of the intersection and the pavement is 19 feet wide. Three hundred feet before reaching the intersection, the driver turned on the blinking lights indicating a left turn. There were two of these lights on the rear of the truck and one on the trailer. At that time, the driver looked in his rear view mirror and saw no vehicle behind the truck. Thirty feet from the intersection, he looked into the rear view mirror again and still saw no vehicle following the truck. At the time he turned on the signals indicating the left turn, the truck was traveling 20 miles per hour and the speed was gradually reduced so that when it was 30 feet from the intersection, the truck was traveling 10 miles per hour or less. Upon reaching the intersection, the driver

did not bring the truck to a full stop, but turned to the left so as to proceed along the intersecting road to the north. The effect was to swing the back end of the pole toward the south and thus, in the course of making the left turn, the truck, trailer and pole, in combination, blocked both lanes of travel on Highway 268.

On other occasions, but not on this occasion, the three employees riding in the back of the truck had been instructed to watch for oncoming traffic. No occupant of the truck saw or was otherwise aware of the presence of the vehicle of the deceased until it struck the end of the pole. No one was stationed by the defendant upon the highway at the intersection to warn motorists of the approach and contemplated movement of the truck and pole. The only other witness who saw the collision, a bystander observing the movement of the truck through a store window, did not see the automobile driven by the deceased until it was within five feet of the end of the pole, at which time his attention was directed to it by a "short squeak" of its brakes. Neither the driver nor the foreman had instructed the employees in the back of the truck to watch for the driver as he made the left turn on this occasion.

The pole smashed through the left side of the windshield of the automobile and struck the rear seat. The resulting glass and debris were found on the right lane of Highway 268 for eastbound traffic. The impact broke the chain fastening the pole to the trailer, and the front end of the pole, which had rested upon the trailer, fell off onto the road. It may be inferred from the record that the deceased was instantly killed.

At the moment of impact the truck, itself, had completed the left turn onto the northbound road. Its rear wheels were at the north edge of Highway 268. The trailer was then at about the middle of the highway and the pole extended to about its south edge.

The automobile of the deceased came to rest 137 feet east of the debris and headed back toward the west.

Deal, Hutchins and Minor for defendant appellant.
Moore & Rousseau for plaintiff appellee.

LAKE, J. There is no evidence whatever in the record before us to show that the defendant's truck was operated at a speed greater than was reasonable at or before the collision which caused the death of the plaintiff's intestate, nor is there any indication of any failure to give the signal required by statute of the driver's intent to turn left at the intersection.

The fact that, in the process of turning left, the combination of the truck, trailer and pole blocked both lanes of traffic upon the

highway does not constitute proof of negligence or other wrong doing *per se.* To so hold would mean that a truck towing a 40 foot pole could never make a left turn from a two lane highway.

However, the evidence, viewed in the light most favorable to the plaintiff, is sufficient to support a finding that the red flag attached to the pole was no more than 12 inches square, the statutory minimum, and was so affixed to the pole that it lay partially draped upon the top of the pole so that no more than eight inches of its length hung downward.

G.S. 20-117 provides:

> "Whenever the load on any vehicle shall extend more than four feet beyond the rear of the bed or body thereof, there shall be displayed at the end of such load, in such position as to be clearly visible at all times from the rear of such load, a red flag not less than twelve inches both in length and width, except that between one-half hour after sunset and one-half hour before sunrise there shall be displayed at the end of any such load a red light plainly visible under normal atmospheric conditions at least two hundred feet from the rear of such vehicle."

The obvious purpose of the statute is to promote the safety of one following such a vehicle upon the highway. Its clear meaning is that during daylight hours a red flag shall be displayed from the end of such projecting load so that there shall be visible to a user of the highway following the vehicle at least 12 inches of the flag's length and 12 inches of the flag's width. The requirement of the statute is not met by draping over the top of the load a red flag of the required dimensions so that only a fringe of it is visible to one following the vehicle upon the highway.

The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence *per se,* unless the statute, itself, otherwise provides, and such negligence is actionable if it is the proximate cause of injury to the plaintiff. *Carr v. Transfer Co.,* 262 N.C. 550, 138 S.E. 2d 228; *Murray v. Aircraft Corporation,* 259 N.C. 638, 131 S.E. 2d 367; *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560; *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273.

In *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733, this Court said that violation of this statute by failure to display at night a light, such as is required thereby, is negligence. The violation of the statute during the daylight hours, by failure to comply with its requirements applicable to such time, must lead to the same result. It is all the more imperative that the flag be displayed so as to catch the eye of the following motorist when the projecting load is a long

narrow object, such as a utility pole being towed lengthwise along the highway. Without such a warning device, all that is visible to the following motorist is the end of the pole, which is but a few inches in diameter and usually of a color not easily seen against the surface of a black-top highway or the rear of a towing vehicle.

G.S. 20-116 imposes maximum limits upon the dimensions, including length, of vehicles and combinations of vehicles which may be lawfully operated upon the highways of this State without a special permit, issued pursuant to G.S. 20-119. However, G.S. 20-116(e) provides that this length limitation "shall not apply to vehicles operated in the daytime when transporting poles." Thus, it was not unlawful, or negligence *per se,* for the defendant to transport this 40 foot pole along the highway or to make a left turn at an intersection of highways.

In making a left turn, a driver of a motor vehicle is required by G.S. 20-154 to "see that the turn can be made in safety" and to give the specified signal of his intent to turn. G.S. 20-154; *Oil Co. v. Miller,* 264 N.C. 101, 141 S.E. 2d 41. It is not necessarily enough, however, to absolve him from negligence that he looked and gave the statutory signal. A driver must always use the care which a reasonable man would use under like circumstances. The care which is reasonable in making a left turn at an intersection depends, in part, upon the nature and dimensions of the vehicle, or combination of vehicles, to be turned and of the load, if any, projecting from the rear thereof. When the turning vehicle is drawing behind it a 40 foot pole, it is obvious that a left turn at a right angle will involve some swinging of the end of the pole in an arc through part of the intersection. Evidence of such a turn with such a load is sufficient to permit, though not to require, the jury to find that reasonable care for the safety of other users of the highway demands the stationing of some person at the intersection to stop traffic which may otherwise be imperiled by the turn.

The evidence offered by the plaintiff, interpreted in the light most favorable to him, as is required in a motion for judgment of nonsuit, is sufficient to support, though not to require, a finding that the defendant was negligent and that such negligence was the proximate cause, or one of the proximate causes, of the collision and of the death of the plaintiff's intestate.

A judgment of nonsuit may not be entered in an action for wrongful death on the ground of contributory negligence by the deceased, unless the plaintiff's evidence, considered in the light most favorable to him, establishes negligence by the deceased and that such negligence was one of the proximate causes of the collision so clearly as to admit of no other reasonable conclusion. *Young v. R. R.,* 266

N.C. 458, 146 S.E. 2d 441; *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360.

The record discloses that no witness saw the automobile of the deceased until it was within five feet of the end of the pole. There is, therefore, no direct evidence as to its speed or as to the manner of his driving. G.S. 20-152 forbids the driver of a motor vehicle to follow another vehicle more closely than is reasonable and prudent, and a violation of this statute is negligence *per se. Hamilton v. McCash,* 257 N.C. 611, 127 S.E. 2d 214. However, though the mere fact of a collision with a vehicle furnishes some evidence of a violation of this statute, or of failure to keep a proper lookout, *Burnett v. Corbett,* 264 N.C. 341, 141 S.E. 2d 468, the mere proof of a collision with a preceding vehicle does not compel either of these conclusions. It merely raises a question for the jury to determine.

Evidence of the distance traveled after the collision by the automobile of the deceased is to be considered by the jury upon the question of the speed of his vehicle at the moment of the collision. The evidence in this record is not, however, sufficient to compel the conclusion that the deceased was driving at a speed in excess of that which was reasonable under conditions known to him, or which should have been known to him. The evidence shows that in the collision the pole smashed through the windshield and went on through the car, back to the rear seat. The car was thus impaled upon the end of a 40 foot pole which was then in the process of swinging through a 90 degree arc in the general direction of the car's previous travel. The reasonable inference from the evidence is that the driver of the car was instantly incapacitated, if not instantly killed. It would be a question for the jury to determine as to whether the continued forward progress of the deceased's car and its turning back toward the west were due to his speed prior to the collision, or to its being impaled upon and swung forward and around by the pole.

The defendant's exception to the denial of its motion for judgment of nonsuit cannot, therefore, be sustained either upon the issue of negligence or upon the issue of contributory negligence.

Turning to the exceptions by the defendant to the charge of the court to the jury, we find that the learned judge below instructed the jury as follows:

> "The plaintiff alleges * * * that this pole and the trailer and the truck were longer than is provided by law, and that no special permit to allow the driving or the operation of a rig so long as this was exhibited or was used; so the plaintiff has alleged that this amounted to negligence on the part of the Duke Power Company in the operation, and that was a proximate cause of this collision, this accident."

Again, the court instructed the jury:

"The plaintiff says and contends that this rig was in excess of 55 feet in length and that under the law that no person is supposed to have any rig of any kind out on the highway longer than 55 feet long, without a special permit, and that the defendant was negligent in not having that on this occasion."

Once more, the court instructed the jury:

"Now the plaintiff says and contends * * * that the plaintiff [*sic*] had not secured a permit as required in General Statute 20-119, which says that special permits shall be obtained when a vehicle is excessive in size or weight, and that this one was longer than was provided by law; and so the plaintiff says and contends that the defendant was in violation of those statutes and that this was a proximate cause of this collision and what took place."

There is in the charge no suggestion that such contention by the plaintiff as to the law was erroneous. At no point in the charge did the court instruct the jury that G.S. 20-119 has no application to this case since G.S. 20-116(e) exempts from the length limitations vehicles towing poles in the daytime. It is prejudicial error for the court, in its instructions to the jury, to make, even in the form of stating a contention of a party, an erroneous statement of the law applicable to an issue in the case without correcting such error. It would, of course, be preferable for the court, in stating the contentions of the parties, to limit such statement to their respective contentions as to the facts and to state only the court's view of the legal principles applicable to such factual situation.

The court also instructed the jury:

"Now, members of the jury, on this first issue the Court charges you that if you are satisfied from this evidence and by its greater weight * * * *or* if you are satisfied from this evidence and by its greater weight that he [the defendant's driver] failed in making the turn to make it as provided by statute in going out to the center before making the turn, and if you are further satisfied from this evidence and by its greater weight that such negligence or such violation of either of these statutes on the part of the defendant was the proximate cause or a proximate cause, *that is a cause without which the collision would not have occurred,* then it would be your duty to answer the first issue YES." (Emphasis added.)

There are three errors in this instruction. First, there is no evidence whatever in the record to show that the driver of the truck cut the corner at the intersection, and the jury should not have been permitted to decide the first issue on such an assumption. Second, if he did so, it could not have been a proximate cause of the collision, since the plaintiff's evidence shows clearly that it occurred while the end of the pole and his intestate's automobile were in the eastbound lane of Highway 268. Third, the definition of a proximate cause, here given, is incorrect.

An event which is a "but for" cause of another event — that is, a cause without which the second event would not have taken place — is not, necessarily, the proximate cause of the second event. While one event cannot be the proximate cause of another if, had the first event not occurred, the second would have occurred anyway, *Henderson v. Powell,* 221 N.C. 239, 19 S.E. 2d 876, the reverse is not necessarily true. A "but for" cause may be a remote event from which no injury to anyone could possibly have been foreseen. Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which the plaintiff seeks to recover damages. *Nance v. Parks,* 266 N.C. 206, 146 S.E. 2d 24.

The learned judge had, in an earlier portion of his charge, correctly defined proximate cause. However, this subsequent instruction, related as it was to a specific and final summation of what the jury must find in order to answer the first issue in the plaintiff's favor, was reasonably calculated to substitute in the mind of the jury the inaccurate definition of proximate cause for the correct definition previously given.

Finally, the court also instructed the jury:

> "If you are satisfied from this evidence and by its greater weight, that * * * *or* that the defendant had not complied with the requirements of the statute to obtain a proper permit for the length of the rig that was being driven, the Court charges you that if you are satisfied from this evidence and by its greater weight that such failure to comply with either of those statutes amounted to negligence, that that failure was such a failure as a reasonable and prudent man would not have been guilty of under the same and similar circumstances, and if you are further satisfied from this evidence and by its greater weight that such failure was a proximate cause, *that is a cause without which the collision would not have occurred,* then it would be your duty to answer the first issue YES." (Emphasis added.)

For the reasons above mentioned, this instruction is erroneous. It incorrectly states the law with reference to the defendant's need for a permit in order to operate this combination of vehicles on the highway, and it incorrectly defines proximate cause.

The defendant's assignments of error with reference to these portions of the court's instructions to the jury must be sustained. Consequently, the defendant is entitled to a new trial.

New trial.

LUCILLE W. SEIBOLD v. CITY OF KINSTON AND COUNTY OF LENOIR.

(Filed 14 December, 1966.)

1. Municipal Corporations § 4—

Municipal corporations have only those powers expressly conferred upon them by the General Assembly, and those necessarily implied from those expressly conferred, and those powers which are essential and indispensable to, and not merely convenient for, the accomplishment of the declared objects of the corporation.

2. Municipal Corporations §§ 5, 10—

A municipality may be held liable for a tort committed in the discharge of a governmental function only if it has waived its governmental immunity by procuring liability insurance as authorized by G.S. 160-191.1, and then only to the extent of the insurance so obtained and in force at the time.

3. Same—

G.S. 160-191.1 authorizes and empowers, but does not require, a municipality to waive its governmental immunity for a tort only in regard to those torts proximately caused by the negligent operation of a motor vehicle by an officer, agent or employee of such city, and does not authorize or empower a municipality to waive its governmental immunity for injuries to a person proximately caused by its operation of a public library, and an action for such injury is properly dismissed upon the plea in bar of governmental immunity.

4. Counties § 8—

A county is liable for torts committed by it in the discharge of its governmental functions only if and to the extent of statutory provision waiving such immunity.

5. Same—

G.S. 153-9(44) authorizes and empowers a county to waive its governmental immunity for negligent injury arising out of a governmental function only to the extent that the county is indemnified by insurance from such negligence or tort.

6. Same—

A policy of insurance affording protection to a county against liability caused by negligence of named personnel and employees of the county and covering listed and described premises does not waive the county's governmental immunity for negligence in the operation of a public library when the employees of the library and library premises are not included in the policy.

7. Same—

The plea by the county of governmental immunity in an action for negligent injury is a plea in bar to be determined by the court unless the county asks for a jury trial upon the question, and therefore if plaintiff asserts that the county had waived its governmental immunity by providing insurance covering the injury in suit, and the county does not ask for a jury trial upon the issue, plaintiff must offer in evidence or force discovery of such policy of insurance upon the hearing of the plea in bar, and the contention that plaintiff would compel the production of such a policy at the trial of the action is unavailing.

8. Appeal and Error § 49—

Where the court sustains the plea in bar of governmental immunity in an action for negligent injury brought against a municipality and a county, there being no request by the municipality or the county for a jury trial in respect to the plea in bar, it will be presumed that the court on proper evidence found facts sufficient to support its judgment, there being no request in the record that the court make findings of fact and there being no findings of record.

9. Counties § 8; Municipal Corporations § 10; Pleadings § 7—

A plea of governmental immunity in an action for negligent injury against a municipality and a county is a plea in bar which, if established, destroys plaintiff's cause of action.

10. Appeal and Error § 21—

A sole exception and assignment of error to the judgment or to the signing of the judgment presents only the face of the record proper for review, and when no error of law appears on the face of the record proper the judgment will be affirmed.

APPEAL by plaintiff from *Bundy, J.*, April 1966 Civil Session of LENOIR.

Action *ex delicto* to recover damages sustained in a fall. Plaintiff alleges in her complaint in substance: The city of Kinston and the county of Lenoir set up and organized a public library under Article 8, Chapter 160 of the General Statutes of North Carolina, and that said county and city duly appointed a board of trustees to administer the business of the library. The said board of trustees, as agents of the city of Kinston and the county of Lenoir, was operating said joint library before, on, and after 11 May 1962. "Entrance and egress from said Public Library is obtained by ascending a series of steps which reach from the ground level to a front porch and then traversing the front porch and entering the front door of

said Public Library; and the plaintiff used this method of obtaining entrance to the Public Library" on 11 May 1962 for the purpose of borrowing and returning books. After the plaintiff had completed her business in the library, she sought to leave the library building by the same manner in which she had entered it, by going out the front door, across the porch, and down the front steps, and while she was descending the steps the heel of her shoe became lodged in a crack of one of the masonry steps causing her to fall and suffer severe and permanent injuries. That the negligence of defendants, which proximately caused her injuries, was a large crack in one of the steps leading from the street to the public library building, which step was in an unsafe condition to the knowledge of defendants, and that defendants failed to give any warning of the unsafe condition of this step to plaintiff or to any other person using this library building, and the defendants maintained these steps with no guardrail or handrail. That plaintiff is informed and believes and upon such information and belief alleges that each defendant has waived any defense each defendant may have by reason of governmental immunity by each defendant's purchase of insurance to protect it from liability by reason of death or injury to persons or property caused by the negligence or tort of each of the defendants or by the negligence or tort of any official or employee of each defendant.

Summons was issued 10 May 1965 to the sheriff of Lenoir County for service on the defendants, and on said date the clerk of the Superior Court entered an order extending the time within which complaint might be filed until 30 May 1965. Service of summons and the order extending the time within which complaint might be filed until 30 May 1965 was made by the sheriff on the defendants on 13 May 1965. Plaintiff filed her complaint together with an order directing service of the same on defendants on 7 June 1965, and the same were served by the sheriff upon the defendants the same day. On 23 June 1965 defendants filed a motion that plaintiff's action be dismissed on the ground that plaintiff did not file her complaint within the time allowed in the order filed by the clerk on 10 May 1965, and contended that the statute of limitations barred her action.

On 18 November 1965, Edward B. Clark, judge presiding over a term of the Superior Court of Lenoir County, heard defendants' motion to strike the complaint filed by the plaintiff, for the reason that the same was filed seven days after the time to file the same, as extended by the clerk of the Superior Court, had expired. After hearing oral argument and considering an affidavit filed by plaintiff's attorneys, Judge Clark found as a fact that neither the plaintiff nor her attorneys have been guilty of laches, and that this is a situ-

ation which calls upon the court to exercise its discretion. Whereupon, in the exercise of his discretion he ordered that defendants' motion to strike the complaint be denied, and in the further exercise of his discretion he ordered that the time within which the plaintiff may file the complaint is extended to and includes 7 June 1965, and he further ordered that the defendants shall have 30 days from this order within which to file pleadings and that the defendants' motion to dismiss for improper service of process is denied. According to the record before us, defendants did not except to Judge Clark's order.

Thereafter, in apt time, each defendant filed individual answers. The answers are substantially the same, except as stated below. The answer of each defendant admits that the Kinston-Lenoir County Public Library was set up and organized under Article 8, Chapter 160 of the General Statutes of North Carolina, and denies that it was negligent. The answer of each defendant alleges four of what is described therein as a "further answer and defense as a bar to the action and as a motion." The first is that the plaintiff is guilty of contributory negligence as a matter of law upon the facts alleged in the complaint. The second sets up the three-year statute of limitations as a ground for dismissing the action, in that Judge Clark had no authority to extend the time within which the complaint might be filed. The third alleges governmental immunity and a nonwaiver of governmental immunity. The answer of the county of Lenoir alleges as a defense governmental immunity and a nonwaiver of governmental immunity by purchasing and having in force a liability insurance policy, No. XAP137544, issued by the Fidelity and Casualty Company of New York, in favor of "Board of Commissioners, Lenoir County, Kinston, North Carolina," affording protection to it from liability for bodily injury, within certain prescribed limits, caused by the negligence of certain named personnel and employees of Lenoir County and covering certain listed and described premises owned and operated by the insured, but this policy afforded no protection for alleged tortious acts of any employees or officials of the Kinston-Lenoir County Public Library, and said policy of insurance did not include, cover or embrace within its protection the premises known as Kinston-Lenoir County Public Library. The answer of the city of Kinston alleges that the operation of a public library is a governmental function and that it is immune to suit and liability in connection with the operation of the Kinston-Lenoir County Public Library by its board of trustees; that there is no statutory authorization for defendant city to be sued on account of the same; that the city has not at any time waived its governmental immunity from suit or liability for dam-

ages by reason of injury to a person caused by the negligence or tort of the city or of any of its employees or officials operating said library jointly with the county of Lenoir; and that the city is entitled to have this action dismissed and to resume its governmental immunity as provided in Section 2-4 of the Code of Ordinances of the city of Kinston. The fourth alleges the decision in *Seibold v. Kinston-Lenoir County Public Library and trustees of this Library,* 264 N.C. 360, 141 S.E. 2d 519, as *res judicata* as to all matters alleged in the complaint in the instant case.

At the April 1966 civil session of the Superior Court of Lenoir County, Bundy, J., presiding, the court heard defendants' motions to dismiss and pleas in bar, and after a review of the pleadings and hearing arguments of counsel, the court entered an order "that each of the motions and pleas in bar filed by each defendant be and the same are hereby allowed, that the plaintiff recover nothing of either defendant and that the alleged cause of the plaintiff is hereby dismissed and the cost taxed against the plaintiff." From this judgment, plaintiff appeals.

Turner and Harrison for plaintiff appellant.

Wallace, Langley & Barwick by F. E. Wallace, Jr., for defendant appellee City of Kinston.

Whitaker, Jeffress & Morris by A. H. Jeffress for defendant appellee County of Lenoir.

PARKER, C.J.

PLEA IN BAR OF GOVERNMENTAL IMMUNITY BY THE CITY OF KINSTON AND THE COUNTY OF LENOIR.

The city of Kinston is a municipal corporation. Municipal corporations have only those powers expressly conferred upon them by the General Assembly, and those necessarily implied from those expressly conferred, and those powers which are essential and indispensable to, and not merely convenient for, the accomplishment of the declared objects of the corporation. 3 Strong's N. C. Index, Municipal Corporations, § 4, and the same section of Municipal Corporations in Supplement to Vol. 3 of Strong's N. C. Index.

G.S. 160-191.1 reads as follows:

> "The governing body of any incorporated city or town, by securing liability insurance as hereinafter provided, is hereby authorized and empowered, but not required, to waive its governmental immunity from liability for any damage by reason of death, or injury to person or property, *proximately caused by the negligent operation of any motor vehicle* by an officer,

agent or employee of such city or town when acting within the scope of his authority or within the course of his employment. Such immunity is waived only to the extent of the amount of the insurance so obtained. Such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body." (Emphasis ours.)

G.S. 160-191.4 provides that a municipality may incur liability pursuant to this article only with respect to a claim arising after such city or such municipality has procured liability insurance pursuant to this article and during the time when such insurance is in force. G.S. 160-191.5 reads as follows:

"No part of the pleadings which relate to or alleges facts as to a defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this article. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury and such issues shall be heard and determined by the judge without resort to a jury and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto unless the defendant shall ask for a jury trial thereon.

"No plaintiff to an action brought pursuant to this article nor counsel, nor witness therefor, shall make any statement, ask any question, read any pleadings or do any other acts in the presence of the trial jury in such case so as to indicate to any member of the jury that the defendant's liability would be covered by insurance, and if such is done order shall be entered of mistrial."

On 14 November 1963 plaintiff instituted an action *ex delicto* against the Kinston-Lenoir County Public Library, and against its Trustees, Thomas Hewitt, W. A. Allen, Alex Howard, T. J. Turner, Mrs. Wooten Moseley, and Mrs. John Roland, seeking damages for personal injuries on the ground that when descending the steps of the public library on 11 May 1962 the heel of her shoe became lodged in a crack in one of the steps causing her to fall. Defendants demurred because, as they alleged, it affirmatively appears that the library is a governmental agency, and the individual defendants are public officials performing a governmental duty. This came on for hearing on defendants' demurrer at the September 1964 Session of Lenoir. The demurrer was sustained, and plaintiff excepted and appealed. The decision in this case, filed 28 April 1965, and reported

in 264 N.C. 360, 141 S.E. 2d 519, held the operation of a public library is a governmental function, and its officers are protected against plaintiff's claim of tort liability, and affirmed the judgment entered below. The instant case is to recover damages for the same fall as in her former case, and the allegations of fact in her complaint in respect to her fall are substantially the same as in the instant case.

Governmental immunity of the city of Kinston applies, under such circumstances as presented in the instant case, unless waived by the city of Kinston under the provisions of G.S. 160-191.1 *et seq.*, and then such immunity is waived only to the extent of the insurance so obtained and in force at the time. G.S. 160-191.1; *Clark v. Scheld,* 253 N.C. 732, 117 S.E. 2d 838; *Moore v. Plymouth,* 249 N.C. 423, 106 S.E. 2d 695; 29 N.C. Law Rev. 421.

The provisions of G.S. 160-191.1 provide that the city of Kinston is authorized and empowered, but not required, to waive its governmental immunity from liability for any damage by reason of death, or injury to person or property, *proximately caused by the negligent operation of any motor vehicle* by an officer, agent or employee of such city, etc. The General Assembly of North Carolina has not authorized and empowered the city of Kinston to waive its governmental immunity from liability for any injury to a person proximately caused by the negligent operation of the Kinston-Lenoir County Public Library. Further, in the hearing of the pleas in bar by Judge Bundy, there is no evidence of any liability insurance policy purchased by the city of Kinston. The plea in bar of the city of Kinston of governmental immunity is good, as Judge Bundy held in his judgment.

In *Keenan v. Commissioners,* 167 N.C. 356, 83 S.E. 556, it is said: "It is well settled that counties are instrumentalities of government, and are given corporate powers to execute their purposes, and are not liable for damages for the torts of their officials in the absence of statutory provisions giving a right of action against them."

G.S. 153-9(44) provides:

> "The board of county commissioners of any county, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive the county's governmental immunity from liability for damage by reason of death, or injury to person or property, *caused by the negligence or tort of the county or by the negligence or tort of any official or employee of such county* when acting within the scope of his authority or within the course of his employment. Such immunity

shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that the county is indemnified by insurance from such negligence or tort.

* * *

"A county may incur liability pursuant to this subdivision only with respect to a claim arising after the board of county commissioners has procured liability insurance pursuant to this subdivision and only during the time when such insurance is in force.

"No part of the pleadings which relates to or alleges facts as to a defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this subdivision. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury and such issues shall be heard and determined by the judge without resort to a jury and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto unless the defendant shall ask for a jury trial thereon." (Emphasis ours.)

G.S. 153-9(44) provides that the board of county commissioners is authorized and empowered to waive the county's governmental immunity from liability for damages by reason of death, or injury to person or property, caused by the negligence or tort of the county or by the negligence or tort of any official or employee of such county, etc. The same section provides such immunity shall be deemed to have been waived by the act of obtaining such insurance and such immunity is waived only to the extent that the county is indemnified by insurance from such negligence or tort. In the hearing before Judge Bundy of the pleas in bar, Lenoir County offered in evidence a liability insurance policy, No. XAP137544, issued by the Fidelity and Casualty Company of New York, in favor of "Board of Commissioners, Lenoir County, Kinston, North Carolina," affording protection to it from liability for bodily injury, within certain prescribed limits, caused by the negligence of certain named personnel and employees of Lenoir County and covering certain listed and described premises owned and operated by the insured, but this policy afforded no protection for alleged tortious acts of any employees or officials of the Kinston-Lenoir County Public Library, and said policy of insurance did not include, cover or embrace within its protection the premises known as Kinston-

Lenoir County Public Library. This is stated in plaintiff's brief: "The defendant County in support of its Motion to Dismiss and Plea in Bar introduced at the Hearing held in this matter Policy No. XAP137544 issued by Fidelity and Casualty Company, which policy does not afford protection for negligent acts occurring at the Library. However, there is another policy, the premiums of which have been paid with public funds derived from both the County and the City, which said policy does provide protection to both the City and the County for negligent acts occurring at the Library. The defendants have thus far prevented the plaintiff from procuring a copy of such policy. However she will take such means as are necessary to compel the production of this second policy at the trial of this action." Even if there was another policy as plaintiff contends, she had her day in court to compel its production by defendants, and she failed to do so. There is no evidence at the hearing before Judge Bundy that Lenoir County had purchased any other liability insurance policy which protected it from liability under the facts and circumstances of the instant case. Consequently, the plea in bar of governmental immunity by Lenoir County is good, as Judge Bundy held in his judgment.

According to the record before us, the defendants did not ask for a jury trial in respect to the pleas in bar of governmental immunity by each defendant here. Therefore, Judge Bundy had a right under G.S. 160-191.5 and under G.S. 153-9(44) to hear and determine without resort to a jury the pleas in bar of each defendant of governmental immunity. Judge Bundy in his judgment did not make any findings of fact and there was no request in the record before us that he make findings of fact. Consequently, it will be presumed that the court on proper evidence found facts sufficient to support the judgment. *Greitzer v. Eastham,* 254 N.C. 752, 119 S.E. 2d 884; *Paper Co. v. McAllister,* 253 N.C. 529, 117 S.E. 2d 431.

"A plea in bar is one that denies the plaintiff's right to maintain the action and which, if established, will destroy the action." 1 McIntosh, N. C. Practice and Procedure, 2d Ed., Trial Without Jury, § 1394, p. 773; *Gillikin v. Gillikin,* 248 N.C. 710, 104 S.E. 2d 861. Defendants' pleas in bar of governmental immunity, if established, will destroy plaintiff's action.

Plaintiff has one assignment of error: "1. That the court erred in returning and signing the order dismissing the plaintiff's cause of action for that the same is contrary to law." A sole exception and assignment of error to the judgment or to the signing of the judgment presents the face of the record proper for review. Supplement to 1 Strong's N. C. Index, Appeal and Error, § 21, p. 32. The effect of Judge Bundy's judgment, among other things, is that defendants

established their pleas in bar of governmental immunity in the instant case, and that destroys plaintiff's action, and supports his judgment. Therefore, it is not necessary that we pass on defendants' pleas in bar of contributory negligence, of their pleas in bar that the instant action is barred by the statute of limitations, and their pleas in bar of *res judicata*. Plaintiff's assignment of error is overruled. No error of law appears on the face of the record proper. The judgment below is

Affirmed.

NATIONAL FOOD STORES, T/A BIG BEAR SUPER MARKET, PETITIONER, v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL, RESPONDENT.

(Filed 14 December, 1966.)

1. Intoxicating Liquor § 2—

The fact that an employee of a licensee on a single occasion sold beer to a 17 year old boy does not establish the failure of the licensee to give the licensed premises proper supervision.

2. Statutes § 5—

Where one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted.

3. Intoxicating Liquor § 2—

G.S. 18-90.1(1) and G.S. 18-78.1(1) will be construed together and harmonized to give effect to a consistent legislative policy, and, so construed, the specific provisions of G.S. 18-78.1(1) prevail over the general provisions of 18-90.1(1) in regard to the sale at retail of beer and wine under a license from the A.B.C. Board.

4. Same—

Under the provisions of G.S. 18-78.1(1) the sale of beer or wine to a person under 18 years of age by a licensee or an employee of a licensee is ground for the suspension or revocation of the license only if the sale was knowingly made to such minor, and therefore evidence that an employee of the licensee sold beer on a single occasion to a 17 year old boy, without any evidence that the employee or the licensee knew the boy to be under 18 years of age, will not support order of the A.B.C. Board suspending the license. *Campbell v. Board of Alcoholic Control*, 263 N.C. 224, overruled to the extent of any conflict.

5. Same—

The fact that the A.B.C. Board proceeds under G.S. 18-90.1 instead of G.S. 18-78.1 in suspending a license to sell beer and wine cannot affect the rights of the parties and does not authorize the A.B.C. Board to suspend the license for violation of G.S. 18-90.1.

APPEAL by respondent from *Hubbard, J.*, 17 August 1966, Second August Non-Jury Assigned Civil Session of WAKE.

This proceeding was initiated by a petition for a judicial review, under G.S. 143-306 *et seq.*, of a final administrative decision by the North Carolina Board of Alcoholic Control suspending for a period of 45 days petitioner's off-premise retail beer permit #H-589 and off-premise 20% wine permit #H-4488 for its store situate at 4649 West Market Street, Greensboro, North Carolina.

On 24 February 1966 the North Carolina Board of Alcoholic Control, by Ray B. Brady, Director, notified petitioner by letter as follows: "This Board has information indicating that you violated the State Alcoholic Beverage Control laws and/or regulations by: 1. Selling and/or allowing the sale of beer to Bill Aycock, a minor (person under eighteen years of age) on your retail licensed premises on or about February 2, 1966 at 1:00 p.m. in violation of G.S. 18-90.1(1). 2. Failing to give your retail licensed premises proper supervision on or about February 2, 1966 at 1:00 p.m. G.S. 18-78." This letter notified petitioner to appear before the hearing officer of the North Carolina Board of Alcoholic Control on a certain date at a certain place to show cause why petitioner's beer and wine permits should not be revoked or suspended.

At the time and place fixed in this letter, Charles A. Dandelake, Assistant Director for the North Carolina Board of Alcoholic Control, held a hearing, when considerable evidence was offered by petitioner and respondent. The evidence is set out in the record before us. These are the crucial findings of fact made by Dandelake: William McAlpin Aycock, III, 17 years of age; Richard Lee Ketcham, 16 years of age; and Donald Evers, 16 years of age, on Wednesday, 2 February 1966, were in the tenth grade of a public school in the city of Greensboro. About 1 p.m. on this date these three boys went in an automobile to a store of petitioner located at 4649 West Market Street in Greensboro. The three of them chipped in to buy some beer. Aycock got out of the automobile, went into the store where beer is kept, got a "six-pak" containing 12-ounce size cans of Pabst Blue Ribbon beer, went to one of the check-out counters being operated by a white woman, paid her one dollar and sixty some cents for this beer, then left, and went to the car. When Aycock paid for the beer at the check-out counter, this white woman did not ask him for any identification. Aycock at the time was 5 feet 10

inches tall and weighed 130 pounds. He left the store and got in the automobile with the other two boys. They picked up another boy. The four of them drank the beer and returned to school. Aycock's testimony was corroborated by the testimony of Ketcham and Evers. Upon their return to school, two of the teachers smelled the odor of alcohol on Aycock's breath and turned him over to the assistant principal, Robert Glenn. Aycock told the assistant principal where they had purchased the beer and who was with him. The assistant principal contacted the police department, which conducted an investigation. On 7 February 1966 Aycock was carried by the police to respondent's store, and he pointed out the white woman who sold him the beer. This woman did not remember selling him any beer, but she did not deny selling him beer. The white woman identified by Aycock as the woman who sold him the beer testified she has always tried and checked persons very closely as to their age. Jonas W. Hill, manager of petitioner's store, testified that all of his check-out girls have been warned many times about checking minors or anyone looking to be under 21 years of age, and that he has observed the woman identified by Aycock on several occasions taking beer back when young-looking persons did not have the proper identification with them. The hearing commissioner further found as a fact that this is the first hearing offense against petitioner at this location, that this petitioner at this location has not received any written warnings, and that its beer and wine permits were issued to petitioner at this location on 27 February 1964. Based upon his findings of fact, Dandelake concluded that petitioner did allow the sale of beer to Aycock, a person under 18 years of age, on their retail licensed premises on 2 February 1966, in violation of G.S. 18-90.1(1); and that petitioner did fail to give their retail licensed premises proper supervision on 2 February 1966 by allowing the sale of beer to a minor, in violation of G.S. 18-78. Whereupon, he recommended to the North Carolina Board of Alcoholic Control that the beer and wine permits of petitioner at 4649 West Market Street, Greensboro, North Carolina, be suspended for a period of 45 days.

On 5 April 1966 the North Carolina Board of Alcoholic Control rendered a final administrative decision reviewing and approving the findings of fact of Dandelake as its own, and approved the recommendation of the Assistant Director, Dandelake. Whereupon, the North Carolina Board of Alcoholic Control suspended petitioner's retail beer and wine permits for a period of 45 days effective 19 April 1966.

On 19 April 1966 C. W. Hall, presiding judge of the Superior Court of Wake County, upon petitioner's petition stayed the order

of the North Carolina Board of Alcoholic Control suspending the retail beer and wine permits of petitioner, pending a hearing on the petition filed for judicial review of the final administrative decision of respondent.

On petitioner's appeal to the Superior Court of Wake County, Judge Hubbard, after examining, reviewing, and considering the final administrative decision of respondent, and the record and the evidence upon which the final administrative decision rests, concluded as a matter of law that there is no evidence in the record to show that petitioner's employee knowingly sold beer to a minor under 18 years of age, and that there is no competent evidence to support the order complained of by petitioner. Whereupon, he ordered and decreed that the order entered by respondent on 5 April 1966 suspending petitioner's retail beer and wine permits for 45 days be, and it hereby is, vacated, and the respondent shall pay the costs. From this judgment, respondent appealed to the Supreme Court.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for respondent appellant.

Purrington, Joslin, Culbertson & Sedberry by Charles H. Sedberry for petitioner appellee.

PARKER, C.J. There is not a scintilla of evidence in the record before us that petitioner "did fail to give their retail licensed premises proper supervision on February 2, 1966, by allowing the sale of beer to a minor in violation of G.S. 18-78," as concluded by the hearing officer, and as approved by respondent in its order. Surely, a sale of beer on one occasion to a minor under the circumstances here is not a failure to give the licensed premises proper supervision.

We have two statutes prohibiting the sale of beer to a minor under 18 years of age.

G.S. 18-90.1 provides in relevant part: "It shall be unlawful for: (1) Any person, firm or corporation to sell or give any of the products described in G.S. 18-64 and G.S. 18-60 to any minor under eighteen (18) years of age." Pabst Blue Ribbon beer is included in the description in G.S. 18-64. G.S. 18-90.1 as quoted above was enacted in the 1933 Session of the General Assembly in substantially the same words as quoted above. Public Laws of North Carolina, Session 1933, Ch. 216, Section 8, was codified as Section 3411(kk) in the 1933 supplement to the North Carolina Code of 1931; codified as the same section in the North Carolina Code of 1935; and codified in substantially the same language as G.S. 18-90.1, General Statutes of North Carolina 1959. The 1959 Session of the General

Assembly rewrote G.S. 18-90.1 in the form it now appears in G.S. 18-90.1, which is substantially as it was written by the 1933 General Assembly, and added Section 2 which appears in G.S. 18-90.1 which makes it unlawful for any minor under 18 years of age to purchase any of the products described in G.S. 18-64 and G.S. 18-60.

G.S. 18-78.1 reads in relevant part as follows: "No holder of a license authorizing the sale at retail of beverages, as defined in Section 18-64, and Article 5, for consumption on or off the premises where sold, or any servant, or agent or employee of the licensee, shall do any of the following upon the licensed premises: (1) Knowingly sell such beverages to any person under eighteen (18) years of age. . . ." Section (1) quoted above was enacted by the General Assembly in 1943 in substantially the same language as it is codified in G.S. 18-78.1(1). 1943 Session Laws of North Carolina, Ch. 400, Section 6. The statute enacted by the General Assembly in the 1943 Session was amended by the General Assembly in the 1945 Session, the 1949 Session, the 1959 Session, and the 1963 Session (as appears at the end of the statute codified as G.S. 18-78.1), but none of these amendments are relevant here.

G.S. 18-90.1(1) is a general statute which makes it unlawful for *any person, firm or corporation to sell or give* beer to any minor under 18 years of age. The words *knowingly sell* have never appeared in this statute since its original enactment in 1933. G.S. 18-78.1(1) is a special statute which prohibits the holder of a license authorizing the sale of beer for consumption on or off the premises where sold, or any servant, or agent or employee of the licensee, to *knowingly sell* beer to any person under 18 years of age. The words *knowingly sell* beer to any minor under 18 years of age have been in this statute from the date of its original enactment in the 1943 General Assembly until the present day. It would seem reasonable to assume that any holder of a license authorizing the sale at retail of beer and wine, and who is engaged in such business selling beer and wine by its employees, particularly in a large supermarket, runs a greater risk of selling beer or wine at retail by inadvertance or mistake to a minor under the age of 18 years than a person or corporation not coming within the specific provisions of G.S. 18-78.1, and that is the reason the General Assembly placed in G.S. 18-78.1(1) the words *knowingly sell.* The relevant part of G.S. 18-78.1(1) was enacted ten years after the relevant part of G.S. 18-90.1(1).

This is said in 82 C.J.S., Statutes, § 369, pp. 839-43:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way,

the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage."

It seems clear that the General Assembly did not intend to make the general act, to wit, G.S. 18-90.1(1), controlling in all cases of selling beer or wine to a minor under 18 years of age, "and this is true *a fortiori* when the special act," G.S. 18-78.1(1), was ten years later in point of time. It is our opinion that reading G.S. 18-90.1(1) and G.S. 18-78.1(1) together they can be harmonized with a view to giving effect to a consistent legislative policy by holding, as we do, that the specific provisions of G.S. 18-78.1(1) prevail over the general provisions of G.S. 18-90.1(1), in providing that "no holder of a license authorizing the sale at retail of beverages, as defined in § 18-64, and article 5, for consumption on or off the premises where sold, or any servant, or agent or employee of the licensee, shall . . . *knowingly sell* such beverages to any person under eighteen (18) years of age," (Emphasis ours.) and that in all other cases not included in the specific provisions of G.S. 18-78.1(1), the general provisions of G.S. 18-90.1(1) make unlawful the *mere selling or giving* of any of the products described in G.S. 18-64 and G.S. 18-60 to any minor under 18 years of age.

The Attorney General in his brief contends that the North Carolina Board of Alcoholic Control in its letter to petitioner charged a violation of G.S. 18-90.1(1), not G.S. 18-78.1(1); that the hearing officer found a violation by petitioner of G.S. 18-90.1(1), which was approved by respondent; and that G.S. 18-90.1(1) does not require "that knowledge be proven." He states in his brief: "Moreover, under G.S. 18-78(d), the Board of Alcoholic Control, among other powers, possesses the power to '. . . revoke or suspend the State permit of any licensee for a violation of the provisions of this article or of any rule or regulation adopted by the said Board . . .' G.S. 18-90.1 is within the same article as G.S. 18-78, to wit, Article 4." The fact that respondent charged a violation of the wrong statute, that the hearing officer found a violation of the wrong statute, which was approved by respondent, does not support respondent's order suspending petitioner's retail beer and wine permits for a period of 45 days.

There is no evidence in the record before us that petitioner *knowingly sold* beer to William Aycock, a minor under 18 years of age. The Attorney General states in his brief: "At the threshold, the appellant will admit that there was no finding by either the Hearing Officer or the Board, that the petitioner, through his employee, *knowingly* sold beer to the minor, William Aycock, age 17. What the Board did find was the permittee, through his agent, allowed the sale of beer to a minor (under eighteen years of age) on the licensed premises." The judgment of the court below overruling respondent's assignments of error, vacating the order entered by respondent suspending petitioner's retail beer and wine permits for 45 days, and taxing respondent with the cost, was correct, and is affirmed.

The respondent in its brief relies upon *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864. That case is not in point. Petitioner had a retail beer permit and had a drive-in curb service. A curb boy employee of petitioner sold an ABC investigator a half gallon jar of non-taxpaid whisky and arranged to sell him a case of whisky, and after closing hours another curb boy sold the same investigator a can of beer, which he drank on the premises. It did not involve the sale of any intoxicants to a minor under 18 years of age. The respondent relies upon *Campbell v. Board of Alcoholic Control,* 263 N.C. 224, 139 S.E. 2d 197. That case insofar as it conflicts with this case is overruled.

Affirmed.

JOHN DOUGLAS TILLEY, INDIVIDUALLY AND JOHN DOUGLAS TILLEY, EXECUTOR OF THE ESTATE OF CAREY C. TILLEY, DECEASED, v. MARY ANN HALL TILLEY.

(Filed 14 December, 1966.)

1. Pleadings § 30—

Judgments on the pleadings are not favored, and a motion for judgment on the pleadings admits for the purpose of the motion, the allegations of the adverse party and requires that such allegations be liberally construed.

2. Husband and Wife § 12—

While a deed of separation containing a complete property settlement between the parties is not affected by a subsequent reconciliation and resumption of the marital relations by them, the parties may, upon the resumption of the marital relations, rescind the agreement, even by parol, and make a new agreement in connection with the reconciliation.

3. Same; Wills § 60; Pleadings § 30— Allegations held to raise issue whether parties cancelled deed of separation by agreement after reconciliation.

This action was instituted by the executor for a judgment declaring that the widow was precluded from filing a dissent by a deed of separation embodied in a consent judgment under the terms of which the widow and testator agreed to live separate and apart and released all rights by reason of their marriage to any property then owned or thereafter acquired by the other, including any rights under the laws of distribution. The widow alleged in her answer that subsequent to the execution of the deed of separation the parties became reconciled, resumed cohabitation as husband and wife, and cancelled the contract and deed of separation. *Held:* Plaintiff is not entitled to a judgment on the pleadings, since the answer raises the question whether the deed of separation had been rescinded by the parties.

4. Wills § 60; Pleadings § 8—

In an action brought by an executor in his representative capacity and as an individual for a judgment declaring that the widow was precluded by a deed of separation from filing a dissent to the will, the widow may set up a counterclaim for sums allegedly due her under the terms of the deed of separation, since the widow is entitled to raise all questions relating to the respective rights of the parties growing out of the deed of separation.

5. Wills § 71—

Where an executor, a beneficiary under the will, brings an action in his representative capacity and as an individual against his testator's widow for judgment declaring the widow precluded from filing a dissent to the will, the executor in his representative capacity is a fiduciary and as such is interested only in obtaining a declaration and determination of the respective rights of the widow and of himself as individuals in and to the estate, and the action is the same as though the executor in his representative capacity was the plaintiff and, in his individual capacity, was a defendant with the widow.

APPEAL by defendant from *Crissman, J.*, June 13, 1966 Civil Session of GUILFORD, High Point Division.

Civil action in which plaintiff, as sole legatee and as executor under the terms of a paper writing dated March 6, 1964, and probated December 28, 1964, as the last will and testament of Carey C. Tilley, seeks to have adjudged void and of no effect a purported dissent filed by defendant to said will.

Judge Crissman, allowing plaintiff's motion therefor, entered judgment *on the pleadings* adjudging defendant's purported dissent void and of no effect.

The complaint incorporates attached exhibits, to wit, copies of (1) the consent judgment, (2) the contract and deed of separation, (3) the will, and (4) the dissent, referred to below. A demurrer to the complaint was overruled. Answering, defendant admitted the

facts stated below; and defendant alleged first, second and third further answers and defenses and also a "further answer and counterclaim."

On October 26, 1965, Judge Olive, allowing plaintiff's motion therefor, ordered (1) defendant's alleged first further answer and defense, and (2) defendant's "further answer and counterclaim," stricken from the answer. Defendant excepted to this order. On this appeal, defendant brings forward her exception to the portion of Judge Olive's order striking her "further answer and counterclaim." On May 19, 1966, plaintiff filed his motion for judgment on the pleadings. This motion came on for hearing before Judge Crissman at the above term on the complaint, the answer proper, and the second and third further answers and defenses.

On appeal, defendant assigns as error (1) the said judgment and (2) the portion of Judge Olive's order striking her "further answer and counterclaim."

Robert E. Lee and Schoch, Schoch & Schoch for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by James R. Turner for defendant appellant.

BOBBITT, J. Allegations and admissions in the pleadings establish the facts narrated below.

Carey C. Tilley and defendant were married July 20, 1962. They separated February 6, 1964. Defendant filed an action for alimony without divorce. Carey C. Tilley answered and alleged a cross action for divorce from bed and board. On April 27, 1964, a consent judgment was entered in said action and the parties executed a "Contract and Deed of Separation." Carey C. Tilley died December 23, 1964. Plaintiff qualified as executor on December 28, 1964. Defendant filed her purported dissent to said will on February 4, 1965.

The consent judgment, which was signed by His Honor Allen H. Gwyn, the presiding judge, and by the parties and their counsel, dismissed the action and the cross action "with prejudice." The judgment recites "a full and complete settlement of all matters and things in controversy" on the terms set forth in the "Contract and Deed of Separation."

The "Contract and Deed of Separation" were duly executed and acknowledged before Judge Gwyn, who, after examination of defendant separate and apart from Carey C. Tilley, her husband, found it was not unreasonable or injurious to her and so certified as provided in the statute then codified as G.S. 52-12.

The "Contract and Deed of Separation," in brief summary, provided: The parties agreed to continue to live separate and apart.

Carey C. Tilley agreed to execute and deliver to defendant a quitclaim deed to the homeplace in Jamestown, North Carolina, and to transfer to defendant's son all his right, title and interest in a certain automobile. They agreed upon a division of certain articles of personal property. Each released all rights by reason of their marriage to any and all property then owned or thereafter acquired by the other, "including the right to administer and the right by the laws of distribution to a part of the personal estate" of the other. Carey C. Tilley agreed to pay, "in full and complete discharge of all his obligation for her support, maintenance, subsistence and counsel fees," the sum of $8,625.00, of which $2,500.00 was to be paid immediately and Carey C. Tilley was to execute and deliver to defendant a note for $6,125.00 payable at the rate of $200.00 a month until the full sum of $6,125.00 was paid, without interest. It was provided that, "(u)pon execution and delivery of said note in the amount of $6,125.00, the party of the first part (Carey C. Tilley) is fully and completely discharged of and from any and all liability in connection with the support, subsistence, maintenance and counsel fees of the party of the second part (defendant)."

Defendant's right to dissent depends upon whether she would be entitled to a widow's share in Carey C. Tilley's estate had he died intestate. Nothing else appearing, the terms of the "Contract and Deed of Separation" constitute a bar to defendant's asserted right to a widow's share. Defendant does not attack the validity of the "Contract and Deed of Separation" when executed, acknowledged and approved by Judge Gwyn. She contends the provisions of the "Contract and Deed of Separation" that would otherwise bar her were nullified by subsequent events alleged in the second and third further answers and defenses.

"A motion for judgment on the pleadings admits, for the purpose of the motion, the allegations of the adverse party, and the pleading of the adverse party must be liberally construed." 3 Strong, N. C. Index, Pleadings § 30. Judgments on the pleadings are not favored. *Edwards v. Edwards,* 261 N.C. 445, 449, 135 S.E. 2d 18, 21.

In her second further answer and defense, defendant alleged: "Subsequent to April 27, 1964, the defendant and Carey C. Tilley became reconciled and lived together and cohabited as husband and wife in Jamestown, North Carolina and at other places." Defendant's third further answer and defense contains this allegation: "The defendant and Carey C. Tilley cancelled the separation agreement referred to in paragraph 9 of the plaintiff's complaint." Paragraph 9 of the complaint refers to said "Contract and Deed of Separation."

In the opinion of Ervin, J., in *Campbell v. Campbell,* 234 N.C. 188, 66 S.E. 2d 672, it is stated that "a separation agreement is an-

nulled, avoided, and rescinded, at least as to the future, by the act of the spouses in subsequently resuming conjugal cohabitation. *Reynolds v. Reynolds,* 210 N.C. 554, 187 S.E. 768; *S. v. Gossett,* 203 N.C. 641, 166 S.E. 754; *Moore v. Moore,* 185 N.C. 332, 117 S.E. 12; *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327, Ann. Cas. 1913 D, 261; *Smith v. King,* 107 N.C. 273, 12 S.E. 57." Later decisions contain similar general statements: *Turner v. Turner,* 242 N.C. 533, 538, 89 S.E. 2d 245, 248; *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227.

In *Jones v. Lewis,* 243 N.C. 259, 90 S.E. 2d 547, Denny, J. (later C.J.), stated: "It is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is terminated for every purpose in so far as it remains executory. (Citations) Even so, a reconciliation and resumption of marital relations by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties." This statement has been quoted with approval in *Hutchins v. Hutchins,* 260 N.C. 628, 133 S.E. 2d 459, and in *Joyner v. Joyner,* 264 N.C. 27, 140 S.E. 2d 714.

In *Stanley v. Cox,* 253 N.C. 620, 629, 117 S.E. 2d 826, 832, these statements appear: "For a discussion of the clear distinction between the provisions and considerations for a property settlement and those for alimony see 17A Am. Jur., Divorce and Separation, § 883 *et seq.* . . . See *Jones v. Lewis,* 243 N.C. 259, 90 S.E. 2d 547, to the effect that an executed property settlement is not affected by a mere reconciliation and resumption of cohabitation."

The legal principles on which plaintiff relies are stated in 24 Am. Jur. 2d, Divorce and Separation § 913, p. 1039, as follows: "Where the parties execute a true property settlement, as distinguished from a separation agreement, and they thereafter become reconciled and resume cohabitation, the preferred view is that the agreement is not thereby terminated; or, stated as a rule of evidence, proof of a reconciliation and resumption of cohabitation does not alone establish the termination of a true property settlement. The answer to the question depends largely upon the intention of the parties, and to some extent upon whether the settlement has been fully executed or is executory."

Plaintiff contends the "Contract and Deed of Separation" contains a property settlement in which defendant, in consideration of the benefits she received, released all her rights to Carey C. Tilley's property and estate; and that a *mere* reconciliation and resumption of cohabitation is insufficient to reinstate her original rights with reference thereto.

Defendant alleges somewhat more than a *mere* reconciliation and resumption of cohabitation. The allegation is that, subsequent to April 27, 1964, Carey C. Tilley and defendant "became reconciled and *lived together* and cohabited as *husband and wife* in *Jamestown,* North Carolina, and at other places." (Our italics.) In addition, defendant alleges explicitly that Carey C. Tilley and defendant *cancelled* said "Contract and Deed of Separation."

In 24 Am. Jur. 2d, Divorce and Separation § 914, p. 1041, this statement appears: "It is, of course, competent for the parties to make a new agreement, at the time of or in connection with a reconciliation, that a property settlement shall be rescinded, and an agreement to rescind may be oral even though the original contract states that it shall not be changed without the written consent of both parties." Reference is also made to the comprehensive annotation, "Reconciliation as affecting separation agreement or decree," 35 A.L.R. 2d 707, and decisions supplemental thereto.

The conclusion reached is that defendant's allegations, when considered in the light most favorable to her, are sufficient to withstand plaintiff's motion for judgment on the pleadings. Hence, the court erred in allowing said motion and entering judgment in accordance therewith.

There remains for consideration the assignment of error based on defendant's exception to the portion of Judge Olive's order striking defendant's "further answer and counterclaim." Defendant alleges she owns the note dated April 27, 1964, in the amount of $6,125.00, "issued by C. C. Tilley"; that no payment had been made thereon; and that she is entitled to recover thereon the full sum of $6,125.00 from the plaintiff-executor.

Plaintiff contends this "further answer and counterclaim" was properly stricken on the ground defendant's asserted action on the $6,125.00 note is not a permissible counterclaim. Plaintiff denominates his action as an action for a declaratory judgment under G.S. 1-253, *et seq.* Decision depends upon a determination of defendant's legal rights, if any, under the "Contract and Deed of Separation" as of the date it was executed and the effect, if any, of subsequent events thereon. We perceive no sound reason why all questions relating to the respective rights of the parties growing out of said "Contract and Deed of Separation" and the subsequent relationships between Carey C. Tilley and defendant should not be before the court for decision when the facts are fully developed at trial.

With reference to plaintiff's contention that the defendant, in her "further answer and counterclaim" seeks to recover a monetary judgment only against the plaintiff in his capacity as executor, it is

noted that John Douglas Tilley has *elected* to institute this action in his individual capacity and also in his capacity as executor. In his capacity as executor he is a fiduciary, and as such interested only in obtaining a declaration and determination of the respective rights of defendant and of himself as an individual in and to the estate of Carey C. Tilley. The questions for decision are the same as if John Douglas Tilley, Executor, were the plaintiff and John Douglas Tilley, individually, and Mary Ann Hall Tilley were defendants.

We do not consider now whether defendant's "further answer and counterclaim" is inconsistent with the position on which she bases her alleged right to dissent. We hold simply that defendant is entitled to have declared and determined herein her rights, if any, in respect of her asserted "further answer and counterclaim."

For the reasons indicated, this Court reverses (1) the order striking the "further answer and counterclaim" from defendant's answer, and (2) the judgment on the pleadings.

Reversed.

LAURA NELL LUTHER v. ASHEVILLE CONTRACTING COMPANY.

(Filed 14 December, 1966.)

1. Appeal and Error § 20—

Plaintiff may not object to the refusal of the court to strike answers in the transcript of her adverse examination of a witness when such answers were to questions propounded by the plaintiff and were responsive thereto.

2. Appeal and Error § 41.1—

The refusal of the court to strike from plaintiff's adverse examination of a witness answers of the witness on cross-examination will not be held prejudicial when such answers are merely repetitious of the witness' testimony upon direct examination by plaintiff.

3. Appeal and Error § 51—

Since defendant's evidence will not be considered upon motion to nonsuit unless it is favorable to plaintiff or is in explanation of plaintiff's testimony without contradiction thereof, in reviewing judgment of nonsuit it is not necessary to consider plaintiff's objections to evidence offered by defendant.

4. Highways § 7—

Even though the contract between the State Highway Commission and the contractor improving a highway obligates the contractor to erect

proper barricades, warning signs and flares, the Highway Commission may nevertheless assume responsibility therefor, G.S. 136-26, and when the evidence discloses that the Highway Commission did assume responsibility for the segment of highway in question, the contractor cannot be held liable for any negligence of the Commission in the location of barricades or in failing to place and maintain proper warning signs or lights or flares.

5. Same—

When the Highway Commission has barricaded a portion of the highway under improvement and closed it to the public, such segment of road is not a public highway until it is reopened by the Commission, and whether the contractor working on the project is negligent in parking its equipment at night on the road some 15 feet back of the barricade without placing lights thereon must rest upon common law principles of negligence.

6. Same— Contractor parking equipment on closed road is not under duty of anticipating that Highway Commission might fail to erect proper warning signs.

Parking of equipment without lights by a highway contractor some 15 feet back of a barricade erected by the State Highway Commission closing the road during construction cannot constitute a proximate cause of injury to a motorist crashing through the barricade and into the equipment when the Highway Commission has assumed the responsibility of erecting the barricade and necessary warning signs and flares, since the contractor cannot be held to the duty of anticipating that the Highway Commission would fail to discharge properly its duty in regard to warning signs and flares, and the placing of the unlighted equipment 15 feet behind the barricade could not be a proximate cause of injury if the Highway Commission properly discharged its obligations.

7. Negligence § 7—

Foreseeability of injury is an essential element of actionable negligence, and a person is not required to anticipate negligent acts or omissions on the part of others.

APPEAL by plaintiff from *Falls, J.*, at the 13 July 1966 Session of BUNCOMBE.

This is an action for damages for personal injuries sustained by the plaintiff and for damage to her automobile. The appeal is from a judgment of nonsuit.

The complaint alleges that the defendant was engaged in a highway construction project upon U. S. Highway 19-23, west of Asheville, pursuant to a contract with the North Carolina State Highway Commission. It alleges that the defendant erected a barricade across the highway and parked heavy earth moving equipment overnight just behind it, without adequate lights or other warning devices on the barricade or the equipment, and without providing a watchman to warn approaching motorists of the obstruction. It then alleges that the plaintiff, driving westward along the highway at 3 a.m.,

drove through the barricade and struck the defendant's equipment so parked, causing the injuries and damage of which she complains.

The answer denies all of the allegations of negligent acts and omissions by the defendant. It alleges that the highway east of the point of collision was under the exclusive control of the State Highway Commission; that the defendant had no duty to erect signs, lights or barricades thereon and that the barricade was erected by the Commission, which also erected, at various points along the highway, signs warning of the barricade and detour. The answer further pleads contributory negligence by the plaintiff in driving at a speed in excess of that which was prudent, and in failure to keep a proper lookout.

The plaintiff offered in evidence the adverse examination of the defendant's vice president. The substance of his testimony was:

The defendant had a contract with the State Highway Commission for the grading, excavation and drainage work in connection with a highway construction project three miles west of Asheville. The standard specifications for such contract provide that the contractor shall erect and maintain necessary barricades and suitable lights, danger signals and other signs for the protection of the work and the safety of the public. They also provide that highways closed to traffic shall be protected by barricades, and that obstructions shall be illuminated at night.

After this project got under way, the defendant and the division engineer and the resident engineer of the Highway Commission conferred, and the Highway Commission assumed full responsibility for the diversion of the traffic around this project and for the erection, maintenance and lighting of signs.

Pursuant to this agreement, the State Highway Commission employees erected a wooden barricade across the highway. The defendant did not participate in the erection of this barricade, which closed the highway at that point and diverted westbound traffic at an angle of 60 degrees onto a bypass around the construction in progress. Prior thereto, the defendant erected a sign 2,000 feet east of the construction area stating, "Construction Ahead 2,000 Feet." All other signs east of the barricade were constructed by the Highway Commission. These included signs reading, "Construction Ahead 1500 Feet", "Construction Ahead 1,000 Feet", "Construction Ahead 500 Feet", "Detour Ahead."

The defendant did not make any inspection of the barricade or of lights or signals thereon at night, relying upon the State Highway Commission to do so. It did not have lights on its earth moving equipment parked behind the barricade. The Commission had agreed to assume the responsibility for the erection and maintenance of

signs and barricades. The Commission, and not the defendant, replaced the barricade through which the plaintiff drove her automobile.

The plaintiff, herself, testified in substance as follows:

At approximately 3 a.m. on 31 January 1965, she was driving her automobile westward from Asheville on U. S. Highway 19-23 as a result of information that a member of her family was seriously ill. She did not know of the construction project or of the existence of the barricade and detour. She was driving 35 to 40 miles an hour. Her lights were on the low beam. Due to a blustery wind blowing previously fallen snow across the highway, she could see better with the lights on the low beam than with them on the high beam. There was no other vehicle meeting her. There were no lights or other warning devices upon the barricade, the equipment behind it, or the highway approaching it. She did not observe any signs upon the highway approaching the barricade and did not discover the barricade or the detour to her right until she was 30 to 35 feet from the barricade. She could not then make the turn into the detour and, though she applied her brakes, her car went through the barricade and struck the defendant's equipment parked approximately 15 feet behind the barricade. The barricade was painted silver and black, the silver reflecting light. The snow did not obstruct her view and the surface of the highway was clean and dry. There were no lights around the barricade and no watchman was present. As a result of the collision with the equipment of the defendant, the plaintiff's automobile was damaged and she sustained serious injuries.

A passing motorist carried the plaintiff to the hospital and testified that there were no lights at the barricade and that none were observed by this witness along the highway.

An investigating deputy sheriff testified that there was no lighting whatsoever at the barricade and that the defendant's equipment was parked 15 feet behind it. The barricade was entirely across the highway and four feet in height. It closed the highway. The highway curved slightly and proceeded down a slight grade approaching the barricade.

Evidence offered by the defendant, exclusive of that tending to contradict the testimony of the plaintiff and her witnesses, tended to show:

The barricade was erected approximately three weeks prior to this occurrence. Westbound traffic detoured to the right at that point to bypass the construction project. The signs upon the highway approaching the barricade, indicating that the construction project and the detour lay ahead, were reflectorized.

Parker, McGuire & Baley for plaintiff appellant.
Meekins and Roberts for defendant appellee.

LAKE, J. The plaintiff offered in evidence the transcript of her adverse examination of Sam Bushnell, Vice President of the defendant, and of the cross examination of this witness by the defendant. She now assigns as error the refusal of the court to strike certain answers of this witness contained therein. Three of these were answers to questions propounded by the plaintiff and were responsive thereto. The other two were responses by the witness to questions by the defendant on cross examination. At the most, these are merely repetitious of his testimony upon direct examination by the plaintiff concerning the assumption by the State Highway Commission of responsibility for the erection and maintenance of the barricade and of signs giving warning of it and of the detour. There is no merit in any of these assignments of error.

The plaintiff's assignments of error 6, 7 and 8 relate to the overruling of her objection to evidence offered by the defendant. In passing upon a motion for judgment of nonsuit, evidence offered by the defendant is not to be considered, except insofar as it is favorable to the plaintiff or is in explanation of the plaintiff's testimony without contradiction thereof. *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872; *Moss v. Tate,* 264 N.C. 544, 142 S.E. 2d 161; *Fox v. Hollar,* 257 N.C. 65, 125 S.E. 2d 334. Accordingly, the testimony to which these assignments of error are directed has not been included in the foregoing statement of facts and has not been considered by us in passing upon the correctness of the judgment of nonsuit. In the absence of contrary indication in the record, it must be assumed that the trial judge observed this rule in passing upon the motion for judgment of nonsuit at the close of all the evidence. See *Construction Co. v. Crain and Denbo, Inc.,* 256 N.C. 110, 123 S.E. 2d 590. It is, therefore, not necessary for us, upon this appeal, to consider the validity of the objections by the plaintiff to this testimony.

We come, therefore, to the question of whether the evidence, viewed in the light most favorable to the plaintiff, is sufficient to withstand the motion for judgment of nonsuit.

Her evidence fails completely to establish her allegation that the defendant constructed the barricade across the highway or was under a duty to place flares, lights or other signs or signals warning of its presence. On the contrary, the evidence offered by the plaintiff establishes that the barricade was placed across the highway by the State Highway Commission to close the road west of the barricade to traffic, and that the Commission assumed the responsibility

for the erection of necessary signs, warnings and signals at and along the highway approaching the barricade.

The State Highway Commission was clearly acting within its authority when it determined, through its engineers, to erect a barricade across the highway so as to close the portion to the west of the barricade to public travel and to divert such traffic onto the bypass around the construction project. G.S. 136-26. Under this statute, the authority of the Commission, acting through its division engineer and its resident engineer, to contract with the defendant that the Commission would assume the responsibility for the erection of the barricade and for giving the appropriate warnings of its presence, can not be doubted. The defendant cannot be held liable for any neglect of the Commission in the location or the construction of the barricade, or in placing or maintaining lights or other devices to warn motorists of its presence upon the highway. See *Moss v. Tate, supra.* Thus, but for the parking of the defendant's equipment west of the barricade, the plaintiff's evidence clearly failed to show any breach of duty by the defendant.

When the barricade was erected by the Commission, three weeks prior to this occurrence, that portion of the highway west of the barricade was closed to the public. It thereupon ceased to be a highway until it was reopened by the Commission, insofar as the right of the public to travel upon it, and the duty of the defendant to anticipate travel upon it were concerned. Consequently, the rule stated in *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551, that a highway contractor owes a duty to exercise ordinary care for the safety of the public traveling over the road on which he is working, has no application.

In parking its equipment west of the barricade, the defendant was not obstructing a public highway, and its liability to one driving a motor vehicle into such equipment must rest upon the common law principles of negligence. There is no evidence in the record to show how long this equipment had been so parked. There is no evidence to show that, on any other night during the three weeks that this barricade had been in place, the barricade and warning signs along the highway approach to it were not well lighted. The plaintiff's evidence that there were no flares or other lights in front of the barricade, or in the vicinity of the warning signs along the highway as she approached the scene of the accident, is not sufficient to support an inference that this condition prevailed on other nights, or at the time the equipment was parked by the defendant, or at the time its employees left the construction site. There is no evidence whatever in the record to show that the defendant knew, or should have known, that the Highway Commission would not put or had

not put sufficient lights or other warnings in front of or upon the approaches to this barricade on the night in question. The plaintiff's evidence shows that the Highway Commission assumed this responsibility.

To park unlighted equipment 15 feet behind a barricade, which, itself, is properly lighted by flares or other signal devices and of the presence of which barricade due notice is given to approaching motorists by signs erected along the highway approach, is not actionable negligence. There could be no injury therefrom unless a motorist drove through the lighted barricade, which act the owner of the equipment is not required to foresee. Likewise, the defendant was not required to foresee that the Highway Commission would not, on this night, properly light the barricade and the warnings thereof erected along the highway, there being no evidence that it had ever failed to do so before. In *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733, Parker, J., now C.J., said for the Court:

> "It is a well settled principle of law that a person is not bound to anticipate negligent acts or omissions on the part of others; but, in the absence of anything which gives, or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person."

Foreseeability of injury to another is an essential element of actionable negligence. *Allen v. Sharp,* 267 N.C. 99, 147 S.E. 2d 564; *Pinyan v. Settle,* 263 N.C. 578, 139 S.E. 2d 863. Since no injury to a motorist using the highway could result from the parking of the defendant's unlighted equipment 15 feet west of the barricade unless the motorist ran through the barricade, which, in turn, could not be foreseen unless the Highway Commission failed to perform its duty to give adequate warning of the presence of the barricade, which duty it had assumed, the plaintiff's evidence fails to show actionable negligence by the defendant in so parking its equipment, and the judgment of nonsuit was properly entered.

Affirmed.

EDDIE F. DAY v. PATRICIA ANN DAVIS, A MINOR, AND WILLIAM B. DAVIS.

(Filed 14 December, 1966.)

1. Automobiles § 27—

While the violation of the provision of G.S. 20-141(c) requiring a motorist to decrease speed when approaching and crossing an intersection, is negligence *per se*, such violation must be a proximate cause of the injury in suit, including the essential element of foreseeability, in order to be actionable.

2. Automobiles § 17—

The driver of a vehicle along a dominant highway is not required to anticipate that a driver approaching along an intersecting servient highway will fail to stop before entering the intersection, but is entitled to assume and act on the assumption, even to the last moment, that the operator of the vehicle along the servient highway will stop in obedience to the statute and will not enter the intersection until he ascertains, in the exercise of due care, that he can do so with reasonable assurance of safety.

3. Automobiles § 42g—

Where the evidence discloses that the driver along a dominant highway saw that a vehicle approaching along the servient highway had stopped before entering the intersection, the question of whether the failure of the driver along the dominant highway to reduce speed was a proximate cause of injury resulting when the driver along the servient highway suddenly entered the intersection in the path of the other vehicle, is a question for the jury.

4. Automobiles § 19—

A party may not be deprived of his right to have the doctrine of sudden emergency presented to the jury on the ground that his negligence contributed to the creation of the emergency when the question of whether his negligence was a proximate cause of the injury is for the determination of the jury upon the evidence.

5. Automobiles § 46— Plaintiff held entitled to instruction on doctrine of sudden emergency upon evidence in this case.

The evidence tended to show that plaintiff was traveling west on a dominant highway, that defendant, traveling north, was stopped on the servient highway, that defendant entered the intersection and turned left so closely in front of plaintiff's vehicle that plaintiff swerved to his left to avoid striking defendant's vehicle, passed defendant's vehicle in safety, but that when he then swerved back to his right side of the highway, he lost control, causing the injury in suit. *Held:* The question whether plaintiff's failure to reduce speed in approaching the intersection was a proximate cause of the injury being a question for the jury, plaintiff is entitled to an instruction on the doctrine of sudden emergency with reference to the issue of contributory negligence.

6. Same—

Where the court in stating the general principles of law applicable to the evidence, instructs the jury that such principles, including *inter alia*

the doctrine of sudden emergency, were applicable both to the issue of negligence and contributory negligence, but later in charging upon the issue of contributory negligence instructs the jury to answer that issue in the affirmative if they found that plaintiff was negligent in stated respects, but without relating the doctrine of sudden emergency to any of the particular acts relied on by defendant as constituting contributory negligence, the charge must be held prejudicial.

7. Appeal and Error § 42—

Where the court charges the jury on the doctrine of sudden emergency in stating the general principles of law applicable to the evidence but then charges the jury explicitly that it should answer the issue of contributory negligence in the affirmative if it found plaintiff was negligent in any of the aspects presented by the evidence, without relating the issue of plaintiff's plea of sudden emergency specifically to the issue of contributory negligence, the error is not cured by contextual construction.

APPEAL by plaintiff from *Copeland, S.J.*, February 1966 Civil Session of WAYNE.

Civil action to recover damages for injuries to the person and property of the plaintiff.

Plaintiff offered evidence which tended to show that he was traveling west on U. S. 70 Bypass near Goldsboro approaching the intersection of Banks Avenue with U. S. 70. He was operating his Volkswagen automobile at approximately 60 miles per hour when he saw the Oldsmobile operated by defendant Patricia Ann Davis (Jones) at the intersection, headed north on Banks Avenue. Plaintiff testified: "The car was stopped and as I approached the intersection the Oldsmobile pulled out. There was a center line like this (indicated diagonally headed west), all of a sudden it jumped out in front of me, and all I could do was pull to the left and try to straighten up, which I could not do. When they pulled out it was so close I had to whip my car. I didn't have time to hit my brakes or anything so I swerved to the left and I don't remember where I went." He further testified as to personal injuries and property damage to his automobile.

There was other evidence offered which tended to show that the traffic on Banks Avenue was controlled by stop signs making U. S. 70 the dominant road. The speed limit on U. S. 70 Bypass in the area was 60 miles per hour.

The investigating officer testified that when he arrived at the scene the Oldsmobile was pulled off on the right-hand shoulder of U. S. 70, approximately 75 to 100 feet west of the intersection, and plaintiff's automobile was approximately 50 feet south of the eastbound lane of U. S. 70 and 240 feet west of the intersection; there were tire marks, "not skid marks" which began on the east side of the intersection and led to the defendant's automobile; approxi-

mately 170 feet west of the intersection the tire marks became "skid marks" going from the northern lane of U. S. 70 to the southern lane and then off the road onto the shoulder, and from the shoulder the skid marks ran another 50 feet to the plaintiff's automobile.

The *feme* defendant testified and offered evidence which tended to show that she was operating the automobile belonging to defendant William B. Davis on Banks Avenue in a northerly direction towards its intersection with U. S. Highway 70. She stopped at the intersection to allow traffic to pass, pulled up closer to the intersection and again stopped to allow more traffic to pass. Before entering the highway, she could see to the east on U. S. 70 a distance of approximately 1200 feet, and the plaintiff was not in sight at the time she entered the intersection. Upon looking both ways and seeing no approaching traffic, she turned left onto U. S. 70; while making the turn at a speed of about five miles an hour, she looked to the right and saw plaintiff's car about 500 feet away, approaching at a speed of approximately 65 miles per hour. She quickly straightened the Oldsmobile into her lane, and after traveling about 20 feet the plaintiff's car passed on her left, "normally, but fast." Plaintiff's car did not change speed, and upon pulling into its right lane skidded across the road and turned over.

Lynda Sue Wade, sister of defendant Patricia Ann Davis, was a passenger in the Oldsmobile at the time of the accident. She testified she first observed the plaintiff's car 1200 feet away as it approached, and, in her opinion, the plaintiff was traveling at a speed of 65 miles per hour, and he at no time slowed down.

The jury answered the first issue as to negligence of the defendants and the second issue as to contributory negligence of the plaintiff in the affirmative. From judgment entered accordingly, the plaintiff appeals, assigning error.

Sasser and Duke and Herbert B. Hulse for plaintiff appellant.
Dees, Dees, Smith and Powell for defendant appellees.

BRANCH, J. Plaintiff challenges the trial judge's instructions in that he failed to properly relate the doctrine of sudden emergency to the issue of contributory negligence. First, we must determine if plaintiff was entitled to any instructions on the doctrine.

This Court, considering this doctrine in the case of *Cockman v. Powers*, 248 N.C. 403, 103 S.E. 2d 710, stated: " 'One who is required to act in an emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have done.' . . . True, one cannot escape liability for acts otherwise negligent because done un-

der the stress of an emergency if such emergency was caused, wholly or in material part, by his own negligent or wrongful act."

There is a lack of evidence or conflicting evidence regarding all the allegations of contributory negligence except as to the alleged violation of G.S. 20-141(c), which provides in part as follows: "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection. . . . or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care." There is a line of cases in North Carolina holding that the violation of G.S. 20-141(c) constitutes negligence *per se*. However, these cases hold further that in order for there to be actionable negligence such violation must be a proximate cause of the injury in suit, including the essential element of foreseeability. *Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205; *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273.

It is also well-established law in North Carolina that the driver of a vehicle on a dominant highway is not under duty to anticipate that a driver on a servient highway will fail to stop as required by statute before entering the intersection, and, in the absence of anything which gives notice to the contrary, may assume and act on the assumption, even to the last moment, that the operator along the servient highway will stop in obedience to the statute, and will not enter the intersection until he ascertains, in the exercise of due care, that he can do so with reasonable assurance of safety. *Hawes v. Refining Co.,* 236 N.C. 643, 74 S.E. 2d 17.

The duty of the plaintiff to decrease his speed was governed by the duty of all persons to use "due care," and is tested by the usual legal requirements and standards such as proximate cause. In order for there to be any legal significance in a civil action for violation of the statutes, it must be shown that the violation proximately caused the injury. *Cassetta v. Compton,* 256 N.C. 71, 123 S.E. 2d 222.

We would not be constrained to say that the failure of the plaintiff to decrease his speed as he approached or entered the intersection, standing alone, would preclude him from the benefits of the instruction on sudden emergency. Certainly, if plaintiff had approached the intersection at ten miles per hour, he would not have *per se,* wholly or in material part, caused the emergency because he failed to reduce

his speed. Thus, whether plaintiff had the right to assume that the defendant would not enter the intersection until she could safely do so, and whether plaintiff's failure to decrease his speed upon approaching or entering the intersection constituted negligence, are questions of fact to be determined by the jury.

Considering the evidence in the light most favorable to the plaintiff, which we must do, *Hunt v. Truck Supplies*, 266 N.C. 314, 146 S.E. 2d 84, we hold that *all* of the evidence does not show that the plaintiff by his negligence brought about or contributed to the emergency. These matters are for jury determination under proper instructions, applying the doctrine of sudden emergency. Hence, it becomes necessary to determine if the trial judge properly related his instructions as to sudden emergency to the second issue.

The court made no reference to the doctrine of sudden emergency while instructing on the second issue (contributory negligence). While charging on the first issue, the court made the general statement: "Now, further, with respect to the general propositions of law, the court further wishes to tell you that the law goes further with respect to this and you will also consider what I am about to tell you later on with regard to the second issue, which is contributory negligence; but what I am going to tell you now you will consider in respect to this issue and you will also consider it with respect to the second issue." After making this statement, the judge charged on several other matters before he mentioned the doctrine of sudden emergency in his charge on the first issue. Later, while charging on contributory negligence, he instructed the jury to answer the second issue "Yes" if they found, *inter alia*, that plaintiff was negligent in that he failed to keep a proper lookout or that he failed to keep his automobile under proper control, or that he operated his automobile at a greater rate of speed than allowed by law, or he operated his motor vehicle at a greater rate of speed than was reasonably prudent under existing conditions, considering any special hazards that may have existed at the time in question, and particularly in regard to an intersection.

In the recent case of *Hunt v. Truck Supplies, supra,* this Court held that although it is well established that a charge must be considered and interpreted contextually, the failure to relate defendant's plea of sudden emergency and the evidence pertinent thereto to the proper issue was erroneous and prejudicial, and was not cured by a later general instruction on the doctrine of sudden emergency not related to the particular issue.

In the instant case the instructions given on the first issue as to the doctrine of sudden emergency were not clearly related to the second issue (contributory negligence). Therefore, we cannot assume

that the jury understood that the explicit instructions to answer the second issue "Yes" would be in any way altered by the previous instructions on the doctrine of sudden emergency. The trial judge failed to properly relate the doctrine of sudden emergency to the issue of contributory negligence.

For reasons stated, plaintiff is entitled to a

New trial.

STATE v. OZIE CARTER
AND
STATE v. RICHARD WILLIAM TOYER.

(Filed 14 December, 1966.)

1. Criminal Law § 71—

Where the officer testifying to incriminating statements made by defendants states that each defendant was warned of his constitutional right to remain silent, that anything he said might be used against him, that he was entitled to a lawyer before answering any questions, and there is nothing in the record to suggest any force, threat, intimidation or promise inducing defendants' statements, the lower court's ruling that the confessions were competent will not be disturbed. *Miranda v. Arizona*, 384 U.S. 436, is not applicable to this prosecution occurring prior to the rendition of that decision.

2. Same; Criminal Law § 108—

A statement by the court in the presence of the jury that he had found incriminating statements made by defendants to be voluntary, *held* to constitute an expression by the court that the statements introduced in evidence were in fact made by defendants, and is prejudicial error. G.S. 1-180.

3. Criminal Law § 161—

Error of the court in expressing an opinion on the evidence in the presence of the jury cannot be corrected by an instruction of the court that the statement by the court was inadvertent and should not be considered.

4. Constitutional Law § 31—

The court should allow a defendant's request for permission to examine notes used by a State's witness to refresh his recollection in regard to matters contained in his testimony.

5. Criminal Law § 87—

Indictments charging several defendants with committing the same offense based upon a single occurrence are properly consolidated for trial.

STATE *v.* CARTER AND STATE *v.* TOYER.

APPEALS by the defendants from *Burgwyn, E.J.,* at the 11 April 1966 Criminal Session of JOHNSTON.

These defendants, and two others, Ulice Perry and Vernon Smith, were charged in separate indictments, proper in form, with the offense of robbery with the use of firearms. All indictments relate to the same occurrence. It is charged by the State, as to each defendant, that on 22 February 1966, with the use of a sawed-off shotgun whereby the life of Eldridge Narron was endangered and threatened, he feloniously took and carried away from the place of business of Farmers Paradise money in the approximate amount of $100.

Each defendant entered a plea of not guilty. At the close of the State's evidence, Perry changed his plea to *nolo contendere.* Over the objection of Toyer, the four cases were consolidated for trial. The jury found each defendant "guilty as charged." Carter was sentenced to imprisonment for a term of 20 to 25 years. Toyer was sentenced to imprisonment for a term of 15 to 25 years. Carter and Toyer appealed. Perry and Smith did not.

Each defendant filed a separate appeal and a separate record. Some evidence set forth in the record filed by Toyer does not appear in that filed by Carter and vice versa. Their assignments of error are not identical. Nevertheless, a question which is determinative of each appeal is common to both and no useful purpose will be served by separate discussions of the cases. For a clearer presentation of the material facts, use has been made of both records.

Wilbert Eldridge Narron testified for the State to the effect that at approximately 9:40 p.m. on 22 February 1966, he was working as a clerk in the store known as Farmers Paradise. At that time three colored men entered the store. One of these was Ulice Perry. Another was Carter. The witness was not able to identify the third man. Perry pointed a sawed-off shotgun at Narron, who was ordered to proceed to the back of the store and lie down. Then Carter took the gun. The men tied up Narron with a clothesline cord and compelled him to tell them how to open the cash register. They opened it, removed the contents, and fled.

Deputy Sheriff Moore testified that on 2 March 1966 he stopped an automobile driven by Perry, in which Toyer, Carter and Smith were passengers. They were all arrested. A sawed-off shotgun, identified by Narron as the one pointed at him in the course of the robbery, several lengths of cord similar to that used to tie up Narron, and numerous Maryland license plates were found in the car. Toyer carried a pistol in his pocket.

While these men were in custody, they were interrogated by Robert D. Emerson, Special Agent of the North Carolina State

Bureau of Investigation. Emerson was called as a witness for the State and testified, over objection by each of the appellants, to conversations had by him with each defendant separately, in which each defendant confessed to participation in the robbery, Perry's statement being that he was the driver of the automobile used in the robbery.

Before Emerson testified as to the statement made to him by Perry, this being the first statement mentioned, the solicitor, in the presence of the jury, asked the witness whether he warned Perry of his constitutional rights. Thereupon, the attorney for Carter, stated, "I think the court ought to inquire into this in the absence of the jury, your Honor," to which the judge replied, "No, I think not; go ahead." The inquiry then proceeded and, in the presence of the jury, the witness testified concerning the warnings given by him to the defendants Perry and Carter and as to the statement made to the witness by each of them. This was over the objection of all of the defendants.

Emerson then testified, in the presence of the jury, as to the warnings given by him to Toyer concerning his constitutional rights with reference to interrogation. Thereafter, the jury was excused from the courtroom and, in the absence of the jury, Toyer's counsel cross examined Emerson with reference to the procedure followed by him in his interrogation of Toyer. At the conclusion of this cross examination, Toyer moved to suppress the testimony of Emerson, which motion was denied.

The jury was then recalled to the courtroom and the court made the following statement, in the presence of the jury:

> "The court finds as a fact that the defendant Toyer made the alleged statements made by him to the officer freely and voluntarily without coercion or intimidation or without holding out any promise of leniency, and that his waiver of counsel as testified to was made freely and voluntarily and was made intelligently. That applies to each of the other defendants about whom Mr. Emerson has testified."

The jury was then again excused from the courtroom and the court conducted, in the absence of the jury, an inquiry into the interrogation procedure used by Emerson with reference to the fourth defendant, Smith. In the absence of the jury, the court made appropriate findings with reference to this procedure and overruled the objection to the introduction of testimony by Emerson concerning the statement of Smith.

The jury was then returned to the courtroom and the court made the following statement to the jury:

"Ladies and Gentlemen of the jury, a few minutes ago the court inadvertently made a statement with respect to having found the alleged statements made by the four defendants to the officers, including the S.B.I. Agent, Mr. Emerson, to have been voluntary statements. *I charge you now you will not consider that statement made by the court in any way whatsoever, either for the State or against the defendants or any of them.*" (Emphasis added.)

As Emerson testified concerning the statement made to him by each defendant, the court instructed the jury that such statement was received, and was to be considered by the jury, as evidence against the defendant making the statement and not as against any of the codefendants.

At the close of the State's evidence, the defendant Perry, having changed his plea to "*nolo contendere*," took the stand in his own behalf and testified that he drove the automobile in which the four defendants rode to the Farmers Paradise store and in which they fled from it on the night of the robbery. He testified that he remained in the automobile while the other three defendants went into the store. After they came out and told him they had robbed the store, they all drove away together and divided the money.

Attorney General Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State in Case No. 579.

Albert A. Corbett for defendant appellant Carter.

Attorney General Bruton and Assistant Attorney General Bullock for the State in Case No. 580.

Spence & Mast for defendant appellant Toyer.

LAKE, J. Prior to his testimony with reference to the statement made to him by each defendant, the witness Emerson testified concerning his interrogation procedure and the warnings given by him to that defendant concerning his rights. As to each defendant, he testified that he first identified himself as a special agent with the State Bureau of Investigation, and then told the defendant that he did not have to answer any question or make any statement whatsoever, that anything he did say could be used against him in a court, that he was entitled to a lawyer at any time he so desired and had the right to have an attorney of his own choice present before he answered any question. There is nothing in the record of either appeal to suggest any force, threat, intimidation, promise or hope of reward inducing any of these statements. No defendant testified concerning his interrogation by Emerson or any other officer.

There is, therefore, nothing in the record on either appeal to suggest that any of these statements was incompetent evidence, *per se. State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. This trial having occurred prior to the decision in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. ed. 2d 694, the statements by Mr. Emerson to the respective defendants, concerning their constitutional rights, complied with the applicable interpretation by the Supreme Court of the United States of the Fourteenth Amendment to the Constitution of the United States.

There was, however, error in conducting the preliminary inquiry, concerning the statement by Carter, in the presence of the jury, and there was also error in the court's announcement, in the presence of the jury of its findings with reference to the statements of the several defendants. The defendants having objected to evidence concerning the alleged confessions, and having requested the court to make inquiry in the absence of the jury concerning the admissibility of these statements, the court should have sent the jury out and, in its absence, inquired into the circumstances under which the statements were given, so as to determine whether or not they were voluntary. Upon such inquiry, the court should have made its findings of fact, concerning the admissibility of the proposed testimony relating to the alleged confessions, in the absence of the jury. *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51; *State v. Gray, supra; State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344.

The finding by the court, in the presence of the jury, that a statement, said to have been made by the defendant, was made voluntarily is the expression of an opinion by the court that the statement was made. See *State v. Walker, supra.* Whether the statement was or was not made is a question for the jury. *State v. Gray, supra.* The expression by the court in the presence of the jury of an opinion concerning a fact to be found by the jury is forbidden by G.S. 1-180.

The learned trial judge, having slipped inadvertently into this error in announcing, in the presence of the jury, his finding that the statements by the four defendants were voluntary, sought to correct the error, and to remove its prejudicial effect, by instructing the jury that the statement had been made by him inadvertently and that they were not to consider it. This Court has said, however, many times that once the trial judge has given, in the presence of the jury, the slightest intimation, directly or indirectly, of his opinion concerning a fact to be found by the jury or concerning the credibility of testimony given by a witness, such error can not be corrected by instructing the jury not to consider the expression by the

court. *State v. Canipe,* 240 N.C. 60, 81 S.E. 2d 173; *State v. Bryant,* 189 N.C. 112, 126 S.E. 107; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381; *State v. Cook,* 162 N.C. 586, 77 S.E. 759; *State v. Dick,* 60 N.C. 440. As Ervin, J., speaking for the Court, said in *State v. Canipe, supra:*

> "The judge occupies an exalted station, and jurors entertain a profound respect for his opinion. [Citation.] As a consequence, the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation."

This is especially true where, as here, the presiding judge is one who is well known throughout the State, and so presumably to the jurors, as a result of a long career of distinguished service upon the Bench.

This inadvertent expression of the opinion that the witness for the State had correctly recounted statements made to him by the defendants was prejudicial to both of the appellants, and each of them must, on this account, be granted a new trial.

During his testimony, Mr. Emerson referred to notes of his conversations with the defendants for the purpose of refreshing his recollection. Counsel for Toyer, in the course of his cross examination of this witness, requested permission to examine these notes. Upon objection by the State, the court refused him permission to examine them. This was error as to the defendant Toyer. Stansbury, North Carolina Evidence, § 32.

There was no error in the consolidation of the four cases for trial. *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128. However, for the reasons above mentioned, each of these appellants is entitled to a new trial.

As to the Defendant Carter, Case No. 579, New trial.

As to the Defendant Toyer, Case No. 580, New trial.

ROBERT LEE HARRIS AND ERNEST A. TURNER, ADMRS. OF THE ESTATE OF EMMIT ALSTON, JR., v. ROBERT WRIGHT AND JOHN CALVIN UPCHURCH.

(Filed 14 December, 1966.)

1. Negligence §§ 16, 26—

Since a nine-year old boy is rebuttably presumed incapable of contributory negligence, nonsuit may not be allowed in an action for his wrongful death on the issue of contributory negligence.

2. Automobiles § 12—

It is not negligence *per se* to back a car, but the operator is required in the prudent operation of the vehicle to look back when he commences such operation and continue to look back in order that he may not collide with or injure others, and to give timely warning of his intention to back when a reasonable necessity therefor exists.

3. Same; Automobiles § 24—

The fact that the operator of a truck is prevented by barrels loaded thereon from looking through the back window of the truck does not establish negligence of the operator in backing the truck when he takes reasonable caution before backing by looking to the right, left, and backward, and, opening his door, continued to look back while backing.

4. Trial § 21—

Conflicts in plaintiff's evidence must be considered in the light most favorable to plaintiff on motion to nonsuit.

5. Automobiles § 12—

The failure of the driver to give warning before backing his vehicle cannot be the proximate cause of injury to a person run over by the backing vehicle when the evidence discloses that such person knew of the movement and that, after the vehicle had begun to move backward, left a place of safety and tried to jump on the rear of the truck, since, in such instance, the injury could not result from any lack of warning.

6. Negligence § 24a—

In order to recover for wrongful death resulting from negligent injury, plaintiff must establish negligence on the part of defendant and that such negligence was a proximate cause of the injury, including the essential element of foreseeability.

7. Automobiles §§ 34, 41m— Evidence held insufficient to show negligence in backing truck causing injury to child attempting to board its rear.

The evidence tended to show that after defendant driver had stopped in a driveway, permitting children riding on the body of the truck to descend, that he waited for some five minutes and then started backing the vehicle after looking to his right, left, and backward, and ascertaining that all of the children were clear of the movement, that he continued to look backward, and that after the vehicle had started to move one of the children left a place of safety, ran from the right side of the vehicle to its rear, and attempted to board the truck several times as it was moving,

fell and was fatally injured when he was run over by the rear wheels of the truck. *Held:* The evidence fails to disclose actionable negligence on the part of the driver, and nonsuit was properly entered.

APPEAL by plaintiffs from *Braswell, J.*, April 20, 1966 Session of FRANKLIN.

Action for wrongful death of nine-year old Emmit Alston, Jr., allegedly caused by the negligent act of defendant Wright while operating a truck owned by defendant Upchurch.

The evidence, taken in the light most favorable to plaintiffs, tends to show: On 16 May 1963, plaintiffs' intestate and three of his brothers and sisters had been doing farm work with the defendant Wright. Wright returned the Alston children to their home at about seven o'clock p.m., while it was still light. He pulled up in the driveway in front of the Alston home, and the four Alston children and three of his children alighted from the truck. Wright remained in the truck, which was sitting in the driveway, for about five minutes while the children played in the yard. The plaintiffs offered in evidence the adverse examination of defendant Wright, in which Wright stated that he started the truck to go and pick up his wife and make a telephone call, at which time he looked and saw all the children; "When I started to crank up I looked to my right and Emmit was over there, then I opened my door, cranked up, and was looking back when I started backing. . . . I did not start backing before I looked. . . . It was not dark enough for me to have parking lights on the car. . . . There was no traffic coming up the highway because I was looking back. I looked back before I started backing. I could have seen if there was anything. . . . I *did not* blow my horn. There were children in front of me, and some were to the right of me, and I said I was going to back up and turn around. As I was backing I heard a barrel fall off and I stopped to pick up the barrel. When I did, the children hollered that I had run over one of them. When I started backing up I saw my son on the ground. I looked and saw all of them on the ground I turned around and looked down the road and saw some of them down the road, then I opened my left door and looked back to see if anything was coming. I couldn't see through the back glass because of the barrels. . . . I didn't tell anyone I was going."

The plaintiffs offered as a witness Lewis Burt, who testified in part as follows: "I was present when Mr. Wright came to let the children off that afternoon. He came down the road and stopped to put off the children, he waited five or ten minutes, then he started to backing up. Emmit, Jr. . . . was on the passenger side. He was playing with the rest of the children. . . . After playing for about

four minutes, I saw him run toward the truck. Mr. Wright started up and he came over on the side of the truck, the side the passenger sat on, and Mr. Wright cranked up and backed one or two feet, then he ran behind the truck on the passenger side. . . . He was trying to jump up on there. He made a motion three times to jump up on it. The third time he fell. . . . The truck had already started moving back when Emmit started jumping on it. It was moving slowly."

Rosetta Alston, sister of plaintiffs' intestate, testified for the plaintiffs, in part as follows: "My brother (Emmit) was standing on the right side with me and Lewis Burt, and my brother wanted to ride back to the store with him to get his wife, but Mr. Wright did not know that. My brother ran to the truck to get on, and he was hopping trying to get on, but it was too late because he had already did it, and when I saw him again he was down under the truck dead. Mr. Wright's automobile was in motion when my brother jumped or was trying to jump on it. It was moving back toward the right. He was moving slowly . . . At the time Mr. Wright started backing the truck up, he told us, I think, to get out of the way, he was going to back up the road to get his wife. He was talking to me, my sisters and brother and his children."

Plaintiffs introduced other witnesses who testified to substantially the same facts as the above witnesses.

At the close of plaintiffs' evidence the defendants moved for judgment as of nonsuit. The motion was allowed, and plaintiffs appealed.

Clayton & Ballance and Mitchell & Murphy for plaintiffs.

Teague, Johnson and Patterson and Joseph E. Johnson for defendants.

BRANCH, J. The motion for judgment as of nonsuit could not have been allowed on the basis of contributory negligence on the part of plaintiffs' intestate, since a nine-year old boy is rebuttably presumed incapable of contributory negligence. *Hamilton v. McCash*, 257 N.C. 611, 127 S.E. 2d 214. Therefore, we must determine if there was sufficient evidence of actionable negligence on the part of defendants to withstand the motion for involuntary nonsuit.

Plaintiffs in their complaint allege that the defendant Wright was negligent in that (1) he operated the motor vehicle in a careless and reckless manner, (2) he failed to keep and maintain his vehicle under control, (3) he operated the same with unsafe equipment, to-wit, faulty brakes, (4) he operated the vehicle at a rate of speed in excess of that warranted by conditions and surrounding

circumstances, (5) he gave no warning to said minor that he was about to move his vehicle, either by sounding his horn or other audible signal, and (6) he maintained barrels on the rear of the truck, which made it impossible for him to see to his rear.

It is not negligence *per se* to back a car upon a highway. *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384. In discussing requirements for prudent operation while backing a motor vehicle, this Court in the case of *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330, stated: "The requirements of prudent operation are not necessarily satisfied when a 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. . . . 'It is his positive duty to look backward for approaching vehicles and to give them timely warning of his intention to back, when a reasonable necessity for it exists; and he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway. . . .' " (Italics ours)

The evidence offered in the instant case shows that defendant Wright looked back before he put the truck in motion and continued to look backward in his direction of travel until the child was injured.

The plaintiffs offered evidence which would tend to show that there were barrels on the rear of the truck which prevented the defendant Wright from seeing through the rear window of the truck. We would not hold that the mere fact that Wright could not see *through the back window* of the truck would, in itself, convict him of negligence in backing the truck, when he took reasonable precautions before so doing by looking to the right, left and backward. To so hold would be to ignore the accepted principles of negligence, particularly proximate cause. Further, it is common knowledge that many modern trucks and tractor-trailer combinations do not have rear windows, and such a holding would make every operator of such vehicles negligent as a matter of law when he backed the vehicle.

Plaintiffs offered no other evidence to sustain the allegations of their complaint, except as to the allegation that defendant Wright gave no warning to the said minor that he was about to move his vehicle, either by sounding his horn or other audible signal. There is conflict in plaintiffs' evidence as to whether a verbal warning of his intention to move the vehicle was given by defendant, and on motion for involuntary nonsuit the conflict in evidence would be considered in the light most favorable to the plaintiff. *Brewer v.*

Green, 254 N.C. 615, 119 S.E. 2d 610. However, the purpose of sounding a warning is to put a person on notice and to keep him from being taken by surprise. All of the evidence shows that plaintiffs' intestate was not injured by a sudden movement of the motor vehicle or because of any lack of warning. To the contrary, the evidence reveals that after the truck began to slowly move, the plaintiffs' intestate left a place of safety and tried to jump on the rear of the truck. Unless the child was injured *because* of absence of signal or warning, it is plain under recognized principles of law that a verdict could not be founded on this omission.

"In an action for recovery of damages for wrongful death, resulting from alleged actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed plaintiff's intestate under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury which produced the death — 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. *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84; *Murray v. R. R., supra,* (218 N.C. 392, 11 S.E. (2d) 326); *Mills v. Moore,* 219 N.C. 25, 12 S.E. (2d) 661; *White v. Chappell,* 219 N.C. 652, 14 S.E. (2d) 843, and cases cited." *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239.

We are advertent to the principle that a motorist must recognize that children have less judgment and capacity to appreciate and avoid danger than adults, and that children are entitled to a care in proportion to their capacity to foresee, to appreciate and to avoid peril. *Pope v. Patterson,* 243 N.C. 425, 90 S.E. 2d 706. However, considering the evidence in the light most favorable to the plaintiffs, it is our opinion that the evidence adduced in the trial below is insufficient to establish actionable negligence on the part of the defendants. The judgment of nonsuit entered below is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES HENRY SMITH.

(Filed 14 December, 1966.)

1. Homicide § 20—

Where the evidence tends to show that deceased died from a wound defendant intentionally inflicted with a pistol, defendant's motions for nonsuit are properly denied.

2. Homicide §§ 9, 20—

The credibility and sufficiency of defendant's evidence to establish his plea of self-defense are for the jury to evaluate under proper instructions from the court, and cannot warrant nonsuit.

3. Criminal Law § 139—

The verdict of the jury upon supporting evidence is conclusive in the absence of error of law in the trial.

4. Jury § 6—

Where, upon an indictment charging homicide, the solicitor announces that he is not seeking a higher verdict than murder in the second degree, the prosecution is no longer for a capital offense, and it is not required that the jury be again sworn to try the particular prosecution, but under the provisions of G.S. 11-11 it is sufficient that the jurors and all others summoned as jurors for the session of court were administered oath to truly try all issues which should come before the jury during the term.

APPEAL by defendant from *Carr, J.*, April 25, 1966 Criminal Session of HOKE.

Defendant, James Henry Smith, was indicted for the first-degree murder of Arthur Burroughs Rabon on December 28, 1965. When the case was called for trial, the solicitor announced that he would not seek a higher verdict than murder in the second degree.

Evidence for the State tended to show: The deceased (Rabon, Sr.) and defendant's father were first cousins. The deceased was an elderly man with white hair; defendant was 32 years old. Deceased's daughter, Helen, had been living in the home of defendant and his wife for the past two years. In January 1965, she had given birth to an illegitimate child, which — deceased thought — defendant had fathered. As a result, there was bad blood between defendant and the Rabon family. On the morning of the shooting, Robert Rabon, a son of deceased, had been convicted of assaulting defendant. The Rabon family had attended the trial. After it was over, decedent's son, Arthur Burroughs Rabon, Jr. (Rabon, Jr.), took Rabon, Sr., to his home on Highway No. 211 preparatory to a trip to Greensboro. While Rabon, Jr., sat in the car waiting for his father to come out, defendant passed by. Three of his children, along with Helen Rabon and her child, were in the car with him. Rabon, Sr., emerged about that time and they "pulled out to Greensboro on Highway 211."

Rabon, Jr., overtook defendant's car and passed it at a speed of about 70 MPH. He then slowed down and defendant passed him. As defendant passed, he pointed a pistol at the occupants of the Rabon car. Rabon, Jr., made no further attempt to pass defendant. About 10 miles from the Rabon home, with his tires squealing, defendant drove off the highway into Wilson's Shell Service Station. He appeared to the occupants of the station to be frightened and he hollered, "Call the law," but no one called. Rabon, Jr., testified that he pulled in and stopped 4-5 feet behind defendant's vehicle so that his father could call the sheriff. Neither Rabon, Sr., nor his son was armed. When Rabon, Sr., got out of the automobile, defendant got out of his car, stood at the door, and started shooting. After the first shot, Rabon, Sr., grabbed his arms and defendant shot again. Deceased had not moved from the spot at which he was shot the first time.

When deceased fell, Rabon, Jr., opened the door of his car and started to get out. Defendant said, "Burroughs, if you get out, I will shoot you too." Seeing the pistol in defendant's hand, Rabon, Jr., "ducked back in the seat." Defendant fired, and the bullet made a hole in the windshield over the steering wheel. Rabon, Jr., "peeped out" and defendant told him to get out where he could see him; that he wanted to kill him too. Defendant added, "You didn't think I was going to do it." Rabon, Jr., still crouched, backed his car out into the street where he sat until the officers arrived approximately 20 minutes later. During that time he watched defendant drink a soft drink. Immediately after the shooting, defendant said to a bystander, "I'll swan, I sure hated to kill that old man but he would have killed me." Several months earlier, defendant, referring to deceased, had said that "he would get the white-headed rascal sooner or later."

Defendant's evidence tended to show: On the morning of the shooting, defendant had requested the Chief of Police of Raeford to protect him from the Rabons. Because he was afraid to go alone, he had asked the Chief to accompany him to the courthouse where he was to appear as a witness against Robert Rabon, whom he had charged with assault. The Chief stayed near him until after the trial when he "told him to pick up his children and get out of town." Defendant was following this advice when the Rabon car came up behind him on Highway No. 211 at a high rate of speed. Defendant slowed down in the hope that the Rabons would pass him. They slowed down too, however, and followed him so closely that the two cars were traveling bumper to bumper. Defendant then tried to outrun the Rabon automobile, but they pursued him at a speed of 85-90 MPH. Once, when the Rabon car came alongside defendant's

automobile, Rabon, Sr., pointed his finger at defendant and said, "Boy, I am going to get you yet." In July or August, Rabon, Sr., had threatened defendant's life, saying, *inter alia,* that he was a better man than defendant and that he settled his disputes rather than let the law settle them for him.

Defendant denied that he ever drew a pistol on the Rabons until he went into the service station. He testified that when they came in, Rabon, Sr., opened the car door on his side and said, "You've had it." At the same time, Rabon, Jr., was attempting to get out of the automobile on his side. Defendant hollered for help and for someone to get the law. When nobody answered, he thought the service station was deserted. He told Rabon, Sr., to go on and leave him alone. Instead of doing so, however, he came on him and defendant shot him because, he said, Rabon, Sr., would have killed him had he not done so. He then shot at Rabon, Jr., to keep him from jumping out of the car and attacking him. He never saw any weapon of any kind in the hands of either Rabon, Jr., or Rabon, Sr., on that day. On an earlier occasion, however, he had seen Rabon, Jr., with a pistol. After the shooting defendant stayed at the station, with his pistol in his hand, until the officers arrived. When he drank a soft drink, he continued to hold the pistol in his hand.

A maid, Lula Bell Purcell, who worked at the house across the street from the Wilson Service Station, was cleaning some rugs on the front porch when defendant's automobile and the Rabon vehicle came into the service station. She testified that the Rabon car "was chasing" defendant's car; that the man in the rear car had a pistol; and that he was shooting when the two cars drove up. She went into the house and locked the door. No other witness put a weapon in the possession of the Rabons.

The jury returned a verdict of guilty of murder in the second degree. From a judgment that defendant be confined in the State's prison for not less than twelve nor more than fifteen years, defendant appeals.

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

Egerton, Alspaugh & Rivenbark by Laurence Egerton, Jr., and W. Douglas Albright for defendant.

SHARP, J. Both the State's and defendant's evidence tended to show that deceased died from a wound which defendant intentionally inflicted with a pistol. Defendant's motions for nonsuit were, therefore, properly denied. *State v. Redfern,* 246 N.C. 293, 98 S.E. 2d 322; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; 2 Strong, N. C.

Index, Homicide § 20 (1959). The credibility and sufficiency of defendant's evidence to establish his plea of self-defense were for the jury to evaluate in the light of the court's instructions. The judge's charge embraced all the applicable principles of law relating to self-defense, *State v. Marshall,* 208 N.C. 127, 179 S.E. 427, and it fairly presented all of appellant's contentions. Defendant was unable to satisfy the jurors, who heard him and his witness testify and observed their demeanor, that the homicide was excusable. Under the evidence, the jury might well have returned a different verdict. Defendant's guilt or innocence, however, could only be determined by the twelve, and their verdict must stand unless some error of law appears in the trial.

In a last-ditch effort to escape the verdict, defendant now contends — for the first time — that it is invalid because the jurors were not sworn to try this particular case after they had been selected and impaneled for it. At the beginning of the term, however, the Clerk of the Superior Court had administered to the individual jurors who tried this case, and to all others who had been summoned as jurors for that week of the Session, the following oath, which G.S. 11-11 prescribes for the "jury, in criminal actions not capital":

> "You and each of you swear (or affirm) that you will well and truly try all issues in criminal actions which shall come before you during this term, and true verdicts give according to the evidence thereon; so help you God. (The same oath to talesmen by using the word 'day' instead of 'term'.)"

For the "jury, in a capital case," G.S. 11-11 prescribes a specific oath which must be administered to each juror before he is seated on the panel to try the case. Defendant here was indicted for a capital crime, but when the solicitor announced to the court as the case was called for trial that the State would not seek a verdict of murder in the first degree, the case became a "criminal action not capital." It was after this announcement that defendant entered his plea and the jury was selected.

Defendant correctly asserts that under the common law it was essential "that the jury be duly sworn to try *the cause.*" 31 Am. Jur., Jury § 242 (1958). (Emphasis added.) See also 50 C.J.S., Juries § 294 (1947). Where, however, the statute so provides, a general oath may be administered to jurors at the opening of a court for the trial of issues, and it is not necessary that they should be sworn in each cause in which they are called. *The People, on the relation of Wands, vs. Albany C. P.,* 6 Wend. (N.Y.) 548; 31 Am. Jur., Jury § 242, *supra.*

In North Carolina, the common-law requirement that jurors be sworn to try the cause was changed with reference to civil cases "At a General Assembly, begun and held at Fayetteville on the First Day of November, in the Year of our Lord, One Thousand Seven Hundred and Ninety, and in the Fifteenth Year of the Independence of the said State: Being the First Session of the said Assembly." Preamble to the Laws of North Carolina (1790). Chapter IX of these Laws provided:

> "WHEREAS the present method practised in the courts of law in this state of swearing the petit jury in every cause, in some measure retards the business in said Courts, and such frequent use of oaths in a great measure destroys their solemnity:
>
> "I. *Be it therefore enacted by the General Assembly of the State of* North Carolina, *and it is hereby enacted by the authority of the same,* That from and after the first day of June next, the clerks of the respective courts of law, shall at the beginning of their courts, swear or cause to affirm such of the petit jury as are of the original pannel, well and truly to try all civil causes that shall come before them according to the evidence given thereon, and if there should not be enough of the original pannel, talismen shall take a similar oath or affirmation to try such causes as shall come before them during the day. *Provided always* . . . that nothing herein contained shall be construed to alter the present method of swearing petit jurors on state trials, but the same shall continue in the usual form as heretofore practised."

In Taylor's Revisal of 1827, Chapter 1133, it was enacted,

> "That in the trial of all pleas and prosecutions for offences not capital, unless in cases where the courts may otherwise direct, petit jurors, as well (as) talismen, as those of the original pannel, shall be sworn or affirmed, (as the case may be,) well and truly to try all issues of traverse, that shall come before them *during the day.*" (Italics ours.)

Thus, instead of swearing jurors in *every criminal case,* in 1827 they were sworn only *once a day.* In the Revised Code of North Carolina, enacted by the General Assembly of 1854, Chapter 76 (30), we find the same oath provided for "criminal cases not capital" which is now incorporated in G.S. 11-11. Thus, in 1854, the "method of swearing petit jurors on State trials" other than capital (which the General Assembly of 1790 had refused to alter when it changed the method of swearing jurors in civil actions) became the same as

that prescribed in civil trials. Since 1827 the statute — not the common law — has governed the procedure in cases such as this.

The method employed by the Clerk of the Superior Court in swearing the jurors who tried this case has had the sanction of the law for more than one hundred years. We have known of no other procedure in our lifetime.

In the trial below, we find

No error.

EUNICE MAI GARNER v. ROBERT JOHN GARNER.

(Filed 14 December, 1966)

1. Divorce and Alimony § 1; Judgments § 28—

The doctrine of *res judicata* applies to divorce actions as well as other civil actions.

2. Divorce and Alimony § 1—

The fact that the wife has the alternate remedy of independent action or a cross-action to secure alimony without divorce, G.S. 50-16, has no effect on the principles of *res judicata*, and does not authorize her to bring an independent action based upon abandonment when the issue of abandonment has theretofore been determined adversely to her by verdict of the jury in the husband's action for divorce on the grounds of separation.

3. Judgments § 28—

A judgment estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings which the parties, in the exercise of reasonable diligence, could and should have brought forward.

4. Judgments § 30—

Where, in the husband's action for divorce on the ground of separation, the wife sets up the defense that the husband had abandoned her on a specified date, and the issue of abandonment is determined adversely to her by verdict of the jury, she may not assert an abandonment occurring at a later date as the basis for an independent action instituted by her three days after the judgment in the first action, since it is apparent that the wife, by the exercise of due diligence, must have known the actual date of abandonment, if any, and that any evidence in support of her independent action must have been available to her in the first action.

5. Judgments § 38—

The rule that the plea of *res judicata* cannot be determined without an examination of the evidence and the judge's charge applies to a second action entered after involuntary nonsuit and does not apply to a final judgment entered on the verdict of a jury, and therefore when defendant introduces the pleadings, issues, verdict and judgment in a prior action

and it appears therefrom that the parties are identical, and that the identical issue sought to be raised in the second action was determined by final judgment in the prior action, the court properly allows the motion of defendant in the second action to dismiss that action on the ground of *res judicata.*

APPEAL by plaintiff from *Hubbard, J.,* 15 August 1966 Regular Civil Non-jury Session of WAKE.

Plaintiff instituted this action for divorce *a mensa et thoro* and for other related relief on the ground of abandonment.

Plaintiff's husband, who is the defendant in this action, brought suit for absolute divorce on 27 July 1965, alleging one-year separation from 26 July 1964. Plaintiff, as the defendant in the first action, answered and counterclaimed for alimony *pendente lite* and alimony without divorce, alleging adultery and *abandonment* by her husband on *29 November 1964.* The first action came on for trial on 24 June 1966. The jury answered pertinent issues as follows: "3. Have the plaintiff and defendant lived separate and apart from each other continuously for more than one year next preceding the institution of this action, as alleged in the complaint? Answer: No. 4. Did the plaintiff wilfully abandon the defendant as alleged in the answer and cross-action? Answer: No."

Upon the foregoing verdict judgment was entered denying relief to both parties. No appeal was taken by either party. On 27 July 1966 plaintiff filed suit against her husband in Wake County Superior Court for divorce from bed and board, alleging that her husband had wrongfully abandoned her on or about *1 January 1965.* The husband answered and moved to dismiss the present action on the ground of *res judicata.* The defendant introduced the pleadings, issues, verdict and judgment in the prior action. Upon consideration of the record proper of the previous trial (and not the evidence or charge to the jury) the trial judge held the former judgment was *res judicata* as to the present suit and dismissed the action. Plaintiff appealed.

Robert T. Hedrick and John V. Hunter III for plaintiff.
Liles & Merriman for defendant.

BRANCH, J. The sole question presented is whether the court below erred in dismissing plaintiff's cause of action on the ground of *res judicata.*

The doctrine of *res judicata* applies to divorce actions as well as other civil cases. *Thurston v. Thurston,* 99 Mass. 39; *Miller v. Miller,* 92 Va. 196; *Dwyer v. Dwyer,* 26 Mo. App. 647; *Ford v. Ford*

(Okla.) 108 P. 366; *Prall v. Prall,* 50 S. 867 (Fla.); Lee: N. C. Family Law, Vol. 1, Sec. 51, p. 213 — Joinder of Causes.

The appellant contends that the provision of G.S. 50-16 (as amended in 1955) granting the wife the remedy of independent action or cross-action where the husband sues for divorce, precludes application of the principle of *res judicata.* The statute provides, *inter alia,* that where a husband wrongfully abandons his wife, "the wife may institute an action in the Superior Court of the county in which the cause of action arose to have reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, or she may set up such a cause of action as a cross action in any suit for divorce, either absolute or from bed and board." Thus, the wife has an *alternate* method of procedure which she may use *at her election. Beeson v. Beeson,* 246 N.C. 330, 98 S.E. 2d 17. The right to choose procedure has no effect on the principles of *res judicata.* Therefore, this portion of the appellant's contention is without merit.

The appellant also contends that the court erred in dismissing the action because the second action was based on an alleged abandonment occurring at a date later than the abandonment alleged in the first action. This contention is not tenable.

" 'The principles governing estoppels by judgment are established by a long line of decisions in this and other states, and we have no desire to take a new departure which will shake the long-settled law as to *res judicata.* This rule is thus stated in 1 Herman Estoppel, sec. 122, and is fortified by a long list of leading authorities there cited: "The judgment or decree of a court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle extends further. It is not only final as to matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided. . . . This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive. It might tend to unsettle all the determinations of law and open a door for infinite vexation. The rule is founded on sound principle." ' " *Moore v. Harkins,* 179 N.C. 167, 101 S.E. 564. This principle was again recognized by this Court when Barnhill, J. (later C.J.), speaking for the Court in the case of *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 622, said: "A judgment rendered in an action estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, *in the exercise of reasonable diligence, could and should have brought forward.* . . . The whole tendency of our

decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can neither *split up his claim nor divide the grounds of recovery.*" (Emphasis ours) See also *Gaither Corp. v. Skinner,* 241 N.C. 532, 85 S.E. 2d 909, and *Wilson v. Hoyle,* 263 N.C. 194, 139 S.E. 2d 206.

In the instant case plaintiff filed verified pleadings on 12 October 1965, stating "that the plaintiff abandoned the cross-complainant on the 29th day of November 1964, and has lived continuously separate and apart from the cross-complainant since that time." The plaintiff stood by this allegation for more than eight months, and after the jury returned a verdict finding that the defendant did not abandon the plaintiff, she three days later commenced an action based on the same cause, between the same parties, only stating a different date of abandonment. It is apparent that the plaintiff by exercising a reasonable degree of attention or vigilance must have known the actual date of abandonment, if any. *There is no evidence to be offered in the second action that was not available to her, by the exercise of ordinary diligence and attention, in the first action.* After a full hearing on the merits, the jury returned a verdict against the plaintiff on the issue of abandonment, which she now seeks to re-litigate between the same parties.

Finally, the plaintiff contends that the trial judge erred in dismissing the action without examining the evidence and the judge's charge. This Court in the recent case of *Powell v. Cross,* 268 N.C. 134, 150 S.E. 2d 59, again recognized that when the prior action results in an involuntary nonsuit, the trial judge must consider evidence in the second action so as to ascertain that not only the allegations but the evidence in the two actions are substantially identical. Also, in the case of *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125, the Court held: "And in determining whether a judgment constitutes *res judicata,* the judgment must be interpreted with reference to the pleadings, the evidence, the judge's charge and the issues submitted to and answered by the jury."

However, a distinction has been made where the identity of the parties is clearly established and it appears from the pleadings that a final judgment has determined substantially identical issues. One of the leading cases making this distinction is the case of *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234, where the defendant offered the judgment roll of a prior action in evidence upon the plea of *res judicata.* The Court held: "A jury has heard the facts, determined them adversely to the present plaintiff, and judgment has been entered on that verdict. This judgment is conclusive and prevents further inquiry into the facts forming the basis of the present action. . . . There is nothing in *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d

125, in conflict with what is here said. In that case the plea of *res judicata* did not establish the identity of the parties or the identity of the controversial facts in the two suits. Here, the parties are identical, and an examination of the pleadings in the two suits shows that the issue of the defendants' negligence is the same in each suit."

The Court again recognized these distinctions in the case of *Walker v. Story,* 256 N.C. 453, 124 S.E. 2d 113, where Bobbitt, J., speaking for the Court, said: "Reference is made in *Hayes v. Ricard, supra* (251 N.C. 485, 112 S.E. 2d 123), to the well established rule that '(a) judgment rendered in an action estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward.' *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822. But this rule is applicable where, as held in *Hayes v. Ricard, supra,* the judgment in the prior action constitutes an adjudication thereof upon the merits, *not to a judgment of involuntary nonsuit entered on account of the insufficiency of plaintiff's evidence.*" (Emphasis ours)

The ultimate issue in both actions considered in the instant case was whether the defendant abandoned the plaintiff. A final judgment adverse to the plaintiff was entered on this issue in the first action. This judgment is *res judicata* and constitutes a bar to the present action.

Affirmed.

THE MICHIGAN NATIONAL BANK v. JOHN C. HANNER.

(Filed 14 December, 1966.)

1. Courts § 9—

No appeal lies from one Superior Court judge to another, and therefore an order striking certain matter from a pleading with permission to the pleader to file further pleadings, if so advised, does not authorize the pleader to file a subsequent amendment repleading verbatim or in substance the matter ordered stricken.

2. Pleadings § 30—

A motion to strike a further answer and counterclaim in its entirety is in substance a demurrer to such counterclaim, and the allowance of the motion to strike is proper when the allegations of the counterclaim, construed in the light most favorable to defendant, fail to state a defense or facts sufficient to entitle defendant to any affirmative relief.

3. Usury § 1—

Usury is the charging of interest in excess of the legal rate for the hire or use of money, and must be predicated upon a loan and not a *bona fide* purchase, and the usury statutes do not preclude a seller from charging a higher price for sale on credit than the cash price, even though the difference between the credit price exceeds the cash price by more than six per cent.

4. Same—

In an action to recover the amount due on a note given for the balance of the purchase price of a chattel, allegations in purchaser's counterclaim for usury, that the parties entered into a contract to purchase and sell, that the purchaser signed a conditional sales contract and note which was later filled in by the seller in an amount more than six per cent in excess of the cash price, and that the chattel was delivered to the purchaser, discloses a *bona fide* credit sale upon an installment payment basis, and the allegations are insufficient to support the counterclaim.

APPEAL by defendant from *May, S.J.*, June 1966 Assigned Non-jury Civil Session of WAKE.

Action to recover deficiency on note after foreclosure and sale under a conditional sales contract. The note, payable in sixty consecutive monthly instalments and secured by a conditional sales contract, was made payable to vendor, Graubart Aviation, Inc. The note and contract were assigned by Graubart to Appliance Buyers Credit Corp., which in turn assigned them to plaintiff before maturity of the first instalment payment. Defendant made only the February 1963 and March 1963 payments on the note.

This action was brought by plaintiff on 27 December 1963. Defendant demurred to the complaint, which demurrer was denied. Subsequently, defendant petitioned this Court for *certiorari*, which was denied. The defendant then filed answer to plaintiff's complaint, including a "further answer and counterclaim." The "further answer and counterclaim," in substance, alleged the following: That on 14 January 1963 the defendant agreed to purchase a certain airplane and accessories from Graubart Aviation, Inc., for a purchase price of $59,520.00, and partially paid the purchase price by trade-in allowance on another plane in the amount of $5,000.00; that defendant signed in blank a conditional sales agreement and note and left them with Graubart Aviation, Inc., and that Graubart filled in the contract, raising the purchase price to $69,500.00; that in addition, a finance charge in the amount of $19,365.00 to cover the financing of said sales price was assessed; that the plane was purportedly sold at public auction in June 1963 for $40,000.00, which amount was first applied to finance charges and overcharges or raises in the purchase price, and the remaining amount was applied to principal. This left a balance due of $41,117.78, on which interest is claimed

by plaintiff from 14 March 1963; that plaintiff had collected $29,365.00, knowing the same to be usurious. Defendant prayed for recovery of $59,370.00 in his "further answer and counterclaim." There were allegations in other portions of the pleadings that defendant took possession of the plane in January 1963 and relinquished it to the vendor in April 1963.

On motion of plaintiff, portions of defendant's pleadings, including his "further answer and counterclaim" in its entirety, were struck by Judge Bailey on 22 July 1965. Thereupon, defendant filed amended answer. Upon motion of the plaintiff, Judge May on 23 June 1966 struck portions of defendant's amended answer, including all of defendant's "further answer and counterclaim," which alleged usury. Defendant appeals from that portion of the order striking his "further answer and counterclaim."

Maupin, Taylor & Ellis and Frank W. Bullock, Jr., for plaintiff.
Vaughan S. Winborne for defendant.

BRANCH, J. The sole question presented by this appeal is: Did the court err in striking from defendant's amended answer the "further answer and counterclaim"?

In allowing the motion to strike from the amended answer the defendant's "further answer and counterclaim" the trial judge found, *inter alia*, "that a similar further answer and counterclaim in almost identical language was heretofore stricken by order of Honorable James H. Pou Bailey at the July 1965 Regular Civil Session, Wake Superior Court."

The power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term of court has no power to review a judgment rendered at a former term on the ground that the judgment is erroneous. No appeal lies from one superior court judge to another. Thus an order striking certain matter from a pleading with permission to the pleader to file further pleadings, if so advised, does not authorize the pleader to file a subsequent amendment repleading verbatim or in substance the matter ordered stricken. *Wall v. England,* 243 N.C. 36, 89 S.E. 2d 785. The record in this case reveals that the only change in the defendant's "further answer and counterclaim" was an allegation that the conditional sales contract and note were on a single sheet of paper, forming one instrument, and therefore any taker or holder would be put on notice of the character of the transaction. This was not sufficient to materially change the amended "further answer and counterclaim" from the pleadings ordered stricken by Judge Bailey. However, the reason assigned by the trial judge becomes academic

since both of the pleadings are essentially the same and this particular finding is not decisive on this appeal.

"A motion to strike a pleading in its entirety is in substance, if not in form, a demurrer to the pleadings. . . . 'a demurrer to a complaint for failure to state facts sufficient to constitute a cause of action admits the truth of every material fact properly alleged. . . . However, it is to be noted that on demurrer only facts properly pleaded are to be considered, with legal inferences and conclusions of the pleader to be disregarded.' . . . G.S. 1-151 requires us to construe the allegations of the challenged pleading liberally with a view to substantial justice between the parties." *Johnson v. Johnson,* 259 N.C. 430, 130 S.E. 2d 876.

Construing defendant's "further answer and counterclaim," as we are required to do, we note the defendant alleges in paragraph (BB) "that in January 1963 the defendant agreed to *purchase a certain airplane* with equipment and accessories thereto from Graubart Aviation, Inc., for a purchase price of $59,520.00 and partially paid said purchase price with a trade-in allowance of another plane of $5,000.00," and in paragraph (DD) alleged "that said Graubart Aviation, Inc., completed and filled in the blank spaces in said conditional sales contract, *raising the purchase price* to $69,500.00. . . . *and said increase in the sale price* was done for the sole purpose and with intent to evade the usury laws. . . ." and in section (EE) "that in addition to the above *overcharge or raise in sale price* of said airplane, Graubart Aviation, Inc., assessed in the conditional sales contract and note a *finance charge* in the amount of $19,563.00. . . ." (Emphasis ours)

The case of *Bank v. Merrimon,* 260 N.C. 335, 132 S.E. 2d 692, is very similar factually to the instant case. This case is recognized as a landmark case in North Carolina on the question here presented, and Moore, J., speaking for the Court, very exhaustively and clearly enunciated the applicable principles of law, some of which we here quote:

> "To maintain an action for the usury penalty the claimant must show: (1) That there was a loan, express or implied. (Or a forbearance of money, *Miller v. Dunn,* 188 N.C. 397, 124 S.E. 746; *Churchill v. Turnage,* 122 N.C. 426, 30 S.E. 122). (2) That there was an understanding between the parties that the money lent would be returned. (3) That for such loan or forbearance a greater rate of interest than is allowed by law was paid. (4) That there was a corrupt intent to take more than the legal rate for the use of the money. *Preyer v. Parker,* 257 N.C. 440, 125 S.E. 2d 916; *Loan Co. v. Yokley,* 174 N.C. 573, 94 S.E. 102; *Doster v. English,* 152 N.C. 339, 67 S.E. 754. If in fact the trans-

action is a bona fide sale and not a loan of money, it is not usurious. *Yarborough v. Hughes,* 139 N.C. 199, 51 S.E. 904. But if the form of the transaction is a subterfuge to conceal an exaction of more than the legal rate of interest on what is in fact a loan and not a sale, the transaction will be regarded according to its true character and will be held usurious. *Ripple v. Mortgage Corp.,* 193 N.C. 422, 137 S.E. 156. . . .

". . . A vendor may fix on his property one price for cash and another for credit, and the mere fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties and not to the courts, barring evidence of bad faith. . . . The General Assembly has provided that time prices for supplies advanced for cultivation of crops shall not exceed ten per cent over the retail cash prices. G.S. 44-54. But there is no statute regulating time prices in general retail credit sales payable in instalments. . . . Usury cannot be predicated upon the fact that property is sold on a credit at an advance over what would be charged in case of a cash sale so long as it appears that the price charged *is in fact fixed for the purchase of goods on credit* with no intention or purpose of defeating the usury laws, even though the difference between the cash price and the credit price, if considered as interest, amounts to more than the legal rate. . . . A *bona fide* credit sale upon an instalment payment basis does not involve a loan of money or a forbearance of a debt within the meaning and application of the usury laws. . . . 'If there is a real and *bona fide* purchase, not made as the occasion or pretext for a loan, the transaction will not be usurious even though the sale be for an exorbitant price, and a note is taken, at legal rates, for the unpaid purchase money. The reason is that the statute against usury is striking at, and forbidding, the extraction or reception of more than a specified legal rate for the hire of money, and not for anything else; and a purchaser is not, like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price asked by the seller.' *General Motors Acceptance Corp. v. Weinrich,* 262 S.W. 425 (Mo. 1924)." (Emphasis ours) See also *Hendrix v. Cadillac Co.,* 220 N.C. 84, 16 S.E. 2d 456.

Defendant relies heavily on the case of *Ripple v. Mortgage Corp.,* 193 N.C. 422, 137 S.E. 156; however, an examination of the facts in that case does not show a sale. The facts reveal that the motor company purchased automobiles from the manufacturer, who shipped them to the motor company with drafts attached. The motor company paid the drafts with its checks. Title to the automobiles never

passed to nor vested in the defendant mortgage company, either actually or constructively. The conditional sales contracts describing the motor company as purchaser and the mortgage company as vendor were used for the purpose of concealing the real nature of the transactions. In the instant case there are affirmative allegations of an agreement to purchase, a partial payment, an execution of a conditional sales contract and note, and delivery of the property. This is the usual and complete procedure involved in a *bona fide* credit sale upon an instalment payment basis. The pleadings do not allege a loan. The pleadings do not show the extraction of more than a specified legal rate for the hire of money.

We hold that the plaintiff's pleadings make out a sale and instalment credit transaction, and not a loan. Thus, there can be no cause of action for usury.

The order of the court below striking defendant's "further answer and counterclaim" is

Affirmed.

ATWATER-WAYNICK HOSIERY MILLS, INC., v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 14 December, 1966.)

1. Taxation § 15—

There is a distinction between a sales tax, which is a tax on the purchase price of property imposed at the time of sale, and a use tax, which is imposed on the use of property and cannot take effect before such use begins.

2. Same—

The purchaser of mill machinery from an out of state dealer is subject to the use tax imposed by G.S. 105-164.4(h), notwithstanding that the contract to purchase was executed prior to the effective date of the statute, when the property is not delivered and its use by the purchaser does not begin until after the effective date of the statute.

APPEAL by defendant from *Morris, E.J.*, May 1, 1966, Assigned (Non-Jury) Civil Session, WAKE Superior Court.

The plaintiff instituted this civil action on November 20, 1963, to recover from the defendant, Commissioner of Revenue, the sum of $1,297.11 assessed and paid under protest as an excise or use tax on 30 hosiery mill machines manufactured in Philadelphia by Singer Fidelity, Inc., a Delaware corporation, and shipped to and

received by the plaintiff at its manufacturing plant in Reidsville, North Carolina. The contract for the machines was dated May 15, 1961, and accepted on that date by the manufacturer at its plant in Philadelphia. The machines were manufactured and delivered as they were completed — 10 in September, 1961, and like numbers in October and November following. All were manufactured after July 1, 1961. The plaintiff, at the time the manufacturer accepted the contract, made an initial deposit of $11,902.50 which was ten per cent of the total cost of all machines.

After the parties filed pleadings they waived a jury trial, agreed on all material facts, stipulated that all procedural steps had been followed, leaving for the court's decision this one question of law: "Is the taxpayer subject to the 1% North Carolina use tax on its purchase of hosiery mill machinery from an out-of-State vendor for use in this State where the contract to purchase is entered into prior to July 1, 1961, but the production and delivery of the hosiery machinery to the taxpayer does not occur until after July 1, 1961?"

The parties stipulated that if the trial judge should hold the tax collectible, the plaintiff's action should be dismissed at its cost. On the other hand, if the court concludes that the tax is not collectible, then judgment ordering a refund of $1,297.11, with interest from August 19, 1963, at six per cent, should be entered and the defendant charged with the costs.

Judge Morris, after hearing, concluded the tax is not due and collectible and entered judgment ordering the refund. The defendant excepted and appealed.

McMichael & Griffin by Hugh P. Griffin, Jr., and Albert J. Post for plaintiff appellee.

T. W. Bruton, Attorney General, Charles D. Barham, Jr., Assistant Attorney General for the State.

HIGGINS, J. All critical facts in this case were stipulated. Decision, therefore, involves the proper application of the North Carolina taxing statutes to the stipulated facts. G.S. 105-164.6 authorizes an excise tax "on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State." G.S. 105-164.4 authorizes a tax of one per cent of the sales price subject to a maximum of $80.00 per article on (h) mill machinery sold to manufacturing industries and plants. As applied to the facts here involved, the taxing statutes became effective July 1, 1961.

The use tax here involved was designed to complement the sales tax and to reach transactions which could not be subject to a sales

tax by reason of its burden on interstate commerce. *Johnston v. Gill, Commissioner of Revenue,* 224 N.C. 638, 32 S.E. 2d 30; *McLeod v. Dilworth Co.,* 322 U.S. 327, 88 L. ed. 1304; *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 82 L. ed. 823, 115 A.L.R. 994. "While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. . . . A sales tax is a tax on the freedom of purchase and, when applied to interstate transactions, it is a tax on the privilege of doing interstate business, creates a burden on interstate commerce and runs counter to the commerce clause of the Federal Constitution. . . . Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character." *Johnston v. Gill, Commissioner, supra.*

The parties stipulated the plaintiff, a North Carolina corporation engaged in the hosiery business, ordered for use in its business 30 machines from the manufacturer in Philadelphia. The order was accepted May 15, 1961. At that time the machines were not in existence. They were manufactured and delivered over a three months period beginning in September, 1961. The plaintiff contends the critical date is May 15, 1961, when the contract was accepted and the initial installment paid on the purchase price. Admittedly, on that date the use tax here involved was not in effect. It became effective on July 1, 1961. Obviously a use tax could not take effect before the use began. As to all machines the use was subsequent to July 1, 1961. "It (use tax) does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relationship to interstate commerce arises from the fact that immediately preceding the transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing of title, the merchandise had been transported in interstate commerce and brought to its journey's end." *McGolderick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 84 L. ed. 565; *Henneford v. Silas Mason Co.,* 300 U.S. 577, 81 L. ed. 814; *Halliburton Oil Well Co. v. Reiley,* 373 U.S. 64, 10 L. ed. 2d 202; *Johnston v. Gill, supra.*

We conclude the tax here involved was properly levied and collected by the Commissioner of Revenue. It follows that Judge Morris committed error in ordering the refund. The cause is remanded to the Superior Court of Wake County for the entry of judgment dismissing the action. The judgment entered in the Superior Court of Wake County is

Reversed.

MRS. LOUISE GAME v. CHARLES STORES COMPANY, INC., AND KING'S DEPARTMENT STORES OF RALEIGH, INC.

(Filed 14 December, 1966.)

1. Pleadings § 19—

Demurrer for failure of the complaint to allege facts sufficient to constitute a cause of action must be overruled if the complaint, in any portion or to any extent, presents facts entitling plaintiff to any relief, or if facts sufficient for that purpose can be fairly gathered from it.

2. Negligence § 37a—

A person in using a parking lot provided by the store owner for use of patrons, and in walking from his parked vehicle to the store is an invitee.

3. Negligence § 37b—

While the doctrine of *res ipsa loquitur* does not apply to injuries to an invitee on the premises of a store, the store owner is liable for injuries resulting from its failure to exercise ordinary care to keep in a reasonably safe condition that part of the premises where, during business hours, invitees are expected.

4. Negligence § 37d— Complaint held to state cause of action to recover for injury to patron from bottle thrown by wheel of car using parking lot.

Allegations that plaintiff parked her vehicle in a parking lot provided by a store and walked to the store in that portion of the driveway parallel to the store building, which was the only approach to the entrance of the store, that the store owner had permitted bottles and other trash to accumulate and remain in the parking lot after notice and after ample time had elapsed for their removal, and that the moving wheel of a vehicle using the driveway caused a bottle to be thrown against plaintiff, inflicting serious and permanent injuries, *held* sufficient to state a cause of action and defendant's demurrer thereto should have been overruled, since it could have been anticipated that the wheel of a moving vehicle might impel a loose bottle and cause injury to a customer using the premises.

APPEAL by plaintiff from *May, S.J.*, June, 1966 Assigned Civil (Non-Jury) Session, WAKE Superior Court.

In this civil action the plaintiff alleged that on June 27, 1964, the defendant, Charles Stores Company, Inc., operated a retail department store in the City of Raleigh, and provided and maintained for its customers a parking area in front of the store. The area was marked by painted lines designating parking and driving areas. The driving area was parallel with and adjacent to the front of the store. Subsequent to the above date, Charles Stores Company, Inc., sold the entire business to King's Department Stores of Raleigh, Inc., which assumed all obligations and liabilities of the store.

Here, in short summary, are the plaintiff's further allegations: About 4:00 p.m. on June 27, 1964, the plaintiff parked her automo-

bile in one of the designated parking spaces for the purpose of entering the store as a customer. Charles Stores had placed wooden boxes containing potted plants in that part of the driveway adjacent to the front of the store. Plaintiff's "direct path to the front door . . . was blocked by these plant boxes." As the plaintiff walked along the driveway near the boxes, an automobile driven by a customer entered the parking area over the driveway, ran over a soft drink bottle and "caused the bottle to be thrown with terrific force," striking the plaintiff and causing severe, painful, and permanent injuries.

More particularly the plaintiff alleged:

> "9. That the bottle that was thrown against the plaintiff's foot and other bottles and trash were lying around the driving area and had been allowed to accumulate and to remain in the driving area and parking lot for a considerable period of time and that the defendant Charles Stores Company, Inc. had carelessly and negligently allowed said bottles and other trash and material to remain in the parking area when it and its employees had ample notice of the existence and location of the bottles and trash or when exercising due care the defendant Charles Stores Company, Inc. and its employees should have known that bottles and trash were lying on and near the driveways of the parking lot and when the defendant Charles Stores Company, Inc. had had ample time and opportunity to clean up the parking and driving areas and to remove the bottles and trash that had been allowed to accumulate.
>
> "10. That the plaintiff's injury was solely and proximately caused by the carelessness and negligence of the defendant Charles Stores Company, Inc. in allowing the bottle and other bottles and trash to remain in and on the driving area in a place where they could be struck and run over by vehicles and thereby thrown against pedestrians lawfully using the parking area and driveways, when the said defendant had had notice and knowledge of the condition that existed and had failed to remove the bottles and trash, even though it had had ample opportunity to do so."

The defendants filed a demurrer upon the ground the complaint failed to allege facts sufficient to constitute a cause of action. The court entered judgment sustaining the demurrer and dismissing the action. The plaintiff excepted and appealed.

Smith, Leach, Anderson & Dorsett for plaintiff appellant.
Broughton & Broughton for defendant appellees.

HIGGINS, J. The plaintiff has appealed from a judgment sustaining the demurrer and dismissing the action upon the ground the complaint failed to state a cause of action. In passing on the appeal, this Court is required to examine the complaint and to determine as a matter of law whether it contains sufficient factual averments to survive the demurrer. "If the complaint, in any portion of it or to any extent, presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, it will survive the challenge of a demurrer based on the ground that it does not allege a cause of action. *Bailey v. Bailey, supra;* (243 N.C. 412)" *Murphy v. Murphy,* 261 N.C. 95, 134 S.E. 2d 148.

The facts alleged are sufficient to permit a finding the plaintiff was an invitee on the defendants' premises at the time of her injury. This relationship does not constitute the defendants insurers of her safety, and *res ipsa loquitur* is not applicable; nevertheless, liability attaches for injuries resulting from the defendants' actionable negligence. *Morgan v. Tea Co.,* 266 N.C. 221, 145 S.E. 2d 877; *Long v. Food Stores,* 262 N.C. 57, 136 S.E. 2d 275. The owner of a store must exercise ordinary care to keep in a reasonably safe condition that part of the premises where during business hours invitees are expected. The owner's duty extends to a parking lot provided by the owner for the use of the invitees. *Berger v. Cornwell,* 260 N.C. 198, 132 S.E. 2d 317.

The driveway into and out of the parking lot parallels the front of the store. At the time of plaintiff's injury, that portion of the driveway adjacent to the building was used for the display of azaleas and other plants. These were contained in wooden boxes placed on that portion of the driveway nearest the wall of the building. An automobile operated on the driveway by another customer ran over one of the soft drink bottles. The moving wheel caused the bottle to be thrown with "terrific" force against the plaintiff, inflicting serious and permanent injuries. Charles Stores Company, Inc., had carelessly and negligently permitted the bottles and other trash and material to accumulate and to remain in this parking area after it had notice of their presence and location and had ample time and opportunity to remove them. The plaintiff's injuries required hospitalization and surgery. As a result of the cost of treatment, the loss of time from work, and other elements of damage, the plaintiff alleges she is entitled to recover $25,000.00.

From the facts alleged, it may be inferred the defendant, Charles Stores, should have anticipated (1) an invitee would use the only approach from the parking area to the entrance into the store; (2) that a customer would or might be on the driveway near the empty bottles and other debris the defendants had negligently permitted to

accumulate and to remain in the driveway; (3) that customers would operate their motor vehicles over the driveway entering and leaving the parking area; (4) that the wheel of a moving automobile would, or might, make a missile out of one of the loose bottles and injure another customer attempting to enter the store from the parking area.

We think the facts alleged and the legitimate inferences from them meet the minimum standards, and state a cause of action.

This case is now in the pleading stage and the discussion involves allegations only. This decision now goes no further than to hold that if the plaintiff proves all she has alleged she will be entitled to have the jury pass on appropriate issues. The judgment sustaining the demurrer is

Reversed.

SUE JOHNSON GILBERT v. BLANCHE H. MOORE.

(Filed 14 December, 1966.)

1. Appeal and Error § 19—

An assignment of error should disclose the question sought to be presented without the necessity of going beyond the assignment itself.

2. Trial § 50—

Where the court offers to recall the jury and instruct them to disregard improper argument of plaintiff's attorney with reference to liability insurance but defendant's counsel refuses the court's offer and enters no exception to the argument and makes no motion for mistrial, and takes a chance on a favorable verdict, defendant may not, after the verdict has been rendered, object to the court's refusal to set aside the verdict because of the improper remarks of plaintiff's counsel.

APPEAL by defendant from *Hall, J.*, August, 1966 Session, HARNETT Superior Court.

The plaintiff instituted this civil action to recover for personal injuries received in a collision between two automobiles — one driven by the plaintiff and the other by the defendant. The defendant denied negligence, pleaded contributory negligence, and set up a counterclaim. The pleadings consist of the complaint, the amended answer, and the reply to the counterclaim.

At the trial both parties testified. Their evidence was conflicting. The court submitted issues of negligence, contributory negligence, and the plaintiff's damages. During the argument to the jury, according to the record, plaintiff's counsel made this statement:

"Mr. Morgan argued to you that the damages in this action were not more than four or five thousand dollars. We all know what he meant. I'm nobody's fool. And I tell you that this is not a $5,000 minimum injury lawsuit. This is a $25,000 minimum injury lawsuit, and I know what I'm talking about."

The following, with reference thereto, is stated in the defendant's brief:

"Defendant's counsel brought to the attention of the Court the remarks of plaintiff's counsel immediately after the jury retired, and the Court offered to recall the jury and instruct them to disregard the argument. The defendant chose not to have this done."

The jury answered all issues in favor of the plaintiff. From judgment in accordance therewith, the defendant appealed.

Bryan & Bryan, Robert C. Bryan, D. K. Stewart for plaintiff appellee.

Charles R. Williams, Robert B. Morgan, Robert H. Jones, Gerald Arnold, Morgan, Williams and Jones for defendant appellant.

HIGGINS, J. The defendant's Assignment of Error No. 1 involves the court's denial of the motion to nonsuit. The evidence in the light most favorable to the plaintiff is sufficient to go to the jury and to sustain the verdict. *Bennett v. Young,* 266 N.C. 164, 145 S.E. 2d 853; *Bongardt v. Frink,* 265 N.C. 130, 143 S.E. 2d 286; *Moss v. Tate,* 264 N.C. 544, 142 S.E. 2d 161. The motion was properly denied.

Assignment of Error No. 2 with respect to the exclusion of evidence requires a voyage of discovery through the record in order to ascertain what is involved. *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829. Actually the voyage of discovery discloses nothing of consequence. Assignment of Error No. 2 is not sustained.

The defendant places her main reliance for a new trial on the court's refusal to set aside the verdict because of the improper and prejudicial remarks to the jury "which [according to the defendant's brief] implied that the defendant had certain limits to his [*sic*] liability insurance." The remarks to which the assignment is addressed are quoted in the statement of facts. By inference, at least, it appears the presiding judge did not hear the remarks. However, in the brief, defendant's counsel admitted that "Judge Hall was advised of what had been said while the jury was out and offered to recall the

jurors and instruct them to disregard the argument. *The defendant chose not to have this done.*" (emphasis added)

By failing to move for a mistrial and by deciding to leave the jury uninstructed further with reference to the argument, the defendant took her chances on a favorable verdict. She may not be heard to complain when the verdict was returned against her. The rule in such cases is stated by Stacy, J., later C.J., in *Allen v. Garibaldi*, 187 N.C. 798, 123 S.E. 66: "There was no motion for a mistrial, or *venire de novo*, because of these improper questions (liability insurance). Defendant elected to proceed with the trial and to take his chances with the jury as then impaneled." The motion for a new trial was denied.

The defendant did not except to the argument by plaintiff's counsel. She attempts to make use of it as ground for a motion to set the verdict aside. The motion was addressed to the court's sound discretion, reviewable only for abuse. *Goldston v. Wright*, 257 N.C. 279, 125 S.E. 2d 462; *Pruitt v. Ray*, 230 N.C. 322, 52 S.E. 2d 876.

No error.

MARY EVELYN McBRIDE v. NORMA GOODNIGHT FREEZE, EXECUTRIX OF THE ESTATE OF MARVIN AMBROSE GOODNIGHT, DEFENDANT, AND ROBERT HOOVER BUTLER, ADDITIONAL DEFENDANT.

(Filed 14 December, 1966.)

1. Automobiles § 17—

Electric traffic control signals have a recognized meaning, and while a driver faced with the green light is permitted to proceed into the intersection, the green light is not a command to go but a qualified permission to do so, and such driver remains under the fundamental duty of using due care.

2. Automobiles § 41g—

Plaintiff's evidence was to the effect that the vehicle in which she was a passenger was in a funeral procession, that it was standing or moving slowly almost in the middle of a busy intersection with its lights burning in the middle of the afternoon, that the car entered the intersection on the green light, that upon the changing of the lights, defendant's car entered the intersection from the intersecting street on the "go" light, and that plaintiff's car was struck on its left side by the automobile driven by defendant. *Held:* Nonsuit was improperly entered, since defendant, in the exercise of reasonable diligence, should have seen the standing vehicle and acted accordingly.

APPEAL by plaintiff from *May, S.J.,* at the March 1966 Session of ROWAN County Superior Court.

The plaintiff seeks to recover damages for personal injuries and property damages alleged to have been sustained by her, resulting from a two-car intersectional collision. The original defendant, Goodnight, died before the case came to trial, and his executrix assumed the defense.

The plaintiff alleges and offers evidence tending to show that on 27 September, 1961, at approximately 2:30 P.M., she was a passenger in the left rear seat of her automobile, going west in a funeral procession in the city of Salisbury. Her car was struck in the left side by an automobile driven by the defendant at the corner of Innis and Lee Streets. Plaintiff's evidence shows that the funeral procession was being escorted through the city by a policeman and at the time of the collision her car was about one or two car lengths behind the preceding car and that her headlights were on. Plaintiff's car entered the intersection on a red traffic light and was stopped or moving slowly through the intersection at the time of the impact. It is admitted that the defendant, going north on Lee Street, entered the intersection on a green light. There was a car directly behind the plaintiff's car and that car had its headlights on.

The plaintiff offered Article VII, Sec. 10-53 of the City Code of Salisbury which reads as follows: "Driving through funeral processions. No vehicle shall be driven through a funeral procession except Fire Department vehicles, Police vehicles and Ambulances when the same are responding to calls (1941)."

She also offered evidence of her injuries and damage.

In his answer the defendant alleged that he was without knowledge that plaintiff's car was in a funeral procession; that said automobile gave no notice that it was a part of a funeral procession; that it had no lights burning that were visible to the defendant and was not proceeding close behind any other automobible as a part of a procession.

As a further defense the defendant alleges that he entered the intersection when the traffic signal for his street was green or "Go". He filed a cross-complaint against the driver of the plaintiff's automobile alleging that if the defendant was liable in any respect then the cross-defendant was guilty of negligence which was the proximate cause of the collision and injury and damage suffered by the plaintiff.

At the close of plaintiff's evidence the trial judge granted defendant's motion for nonsuit.

Plaintiff appealed.

John D. Warren for plaintiff appellant.
Shuford, Kluttz & Hamlin for defendant appellee.
Woodson, Hudson & Busby for additional defendant.

PLESS, J. Innis Street is described in the plaintiff's evidence as the main street running east and west in the city of Salisbury, and the scene of this accident was at its intersection with Lee Street near the "Square". During the trial the plaintiff drew a diagram of the intersection and placed her car at the time of the collision. It was over a third through the intersection with its front about the center of Lee Street. While the evidence showed that the defendant entered the intersection on a green light, we think the following excerpt from *Morris v. Johnson*, 246 N.C. 179, 97 S.E. 2d 773, is applicable here: "* * * the collision occurred at or near the center of the intersection. It is not asserted that the view of the drivers was obstructed. The jury might find from the evidence that one of the vehicles negligently entered the intersection when warned not to do so by a red light, but the operator of the other vehicle, by exercising a proper lookout, could and should have seen the disobedience to the signal command in time to avoid the collision. If so, the failure to maintain a proper lookout proximately causing damage created liability."

In many of our decisions the Court has dealt with the legal effect of traffic lights. In *Hyder v. Battery Co.*, 242 N.C. 553, 89 S.E. 2d 124, the Court quoted with approval the rule stated in 60 C.J.S. 855: "'A green traffic light permits travel to proceed and one who has a favorable light is relieved of some of the care which otherwise is placed on drivers at intersections, since the danger under such circumstances is less than if there were no signals. * * * However, a green or "Go" signal is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated. In other words, notwithstanding a favorable light, the fundamental obligation of using due and reasonable care applies.'"

In *Funeral Service v. Coach Lines*, 248 N.C. 146, 102 S.E. 2d 816, Judge Rodman, speaking for the Court, said: "The use of traffic lights is so general and the meaning of each color so well understood that one who operates his motor vehicle in disregard of these well-understood meanings cannot be said to be a prudent person; one who operates in accord with these meanings is not to be condemned for so doing. 'A red light is recognized by common usage as a method of giving warning of danger * * *.' *Weavil v. Trading Post*, 245 N.C. 106, 95 S.E. 2d 533. 'A green or "Go" signal is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated.'"

Sloss-Sheffield Steel & Iron Co. v. Allred, 25 So. 179, states the Alabama ruling in a case quite similar to this, which was approved by this Court in *Cogdell v. Taylor,* 264 N.C. 424, 142 S.E. 2d 36: "'If the car of plaintiff was in a funeral procession and this was reasonably apparent to the public, then it had the right to enter the intersection on the red light by virtue of Section 5920 of the City Code dealing with driving through a procession.' Again: 'So far as the defendant is concerned, the green light did not authorize the driver of its truck to enter the intersection and drive through the funeral procession if the driver either knew or from the surrounding facts and circumstances should have known that a funeral procession was passing through the intersection.'"

Taken in the light most favorable to the plaintiff a car sixteen or eighteen feet long is standing almost in the middle of a busy intersection with its lights burning, in the middle of the afternoon. To say that a person in the exercise of reasonable diligence would not be expected to see it, and to act accordingly, is, in our opinion, incorrect.

The case should have been submitted to the jury. In sustaining the defendant's motion for judgment as of nonsuit the court erred, and the judgment is hereby

Reversed.

RONALD LYNN BULLARD, BY HIS NEXT FRIEND, SYLVESTER H. BRANTLEY, v. EVA SHEFFIELD, HOBART SHEFFIELD, ROBERT WAYNE ADKINS, BY HIS GUARDIAN AD LITEM ODELIA A. WILLIAMS, AND JAMES MONROE WILLIAMS.

(Filed 14 December, 1966.)

Automobiles §§ 41g, 43— Act of driver turning left into side of vehicle traveling in opposite direction held sole cause of intersection accident.

Plaintiff was a passenger in one of the cars involved in the collision and sued the drivers of both the vehicles. Plaintiff's evidence tended to show that the vehicle in which he was riding was traveling east, that the other driver was traveling west on the same street, and that after the vehicle in which plaintiff was riding entered the intersection the other driver turned his vehicle to the left into the side of the car in which plaintiff was riding. *Held:* Nonsuit should have been entered in favor of the driver of the car in which plaintiff was riding, since such driver was not required to anticipate and guard against the other driver's negligent act, and therefore the negligence of the driver turning left into the side of the ve-

hicle in which plaintiff was riding was the sole proximate cause of the injury.

PARKER, C.J., and BOBBITT and SHARP, J.J., concur in the result.

APPEAL by defendants Robert Wayne Adkins, by his Guardian *ad litem,* and James Monroe Williams from *Hall, J.,* at August 1966 Civil Term of LEE County Superior Court.

The plaintiff alleges that on 16 June, 1965, at about 11:30 P.M., he was riding as a passenger in the right front seat of a 1960 Chevrolet automobile going east on McIver Street in Sanford. The car was owned by the defendant J. M. Williams as a family purpose car and was being operated at that time by the defendant Robert Wayne Adkins, a member of his household. Defendant Eva Sheffield was operating the other car going west on McIver Street. It was owned by the defendant Hobart Sheffield as a family purpose car. As the two cars approached the intersection of McIver and Market Streets, and each other, the defendant Sheffield was driving her car to and fro across and to the left of the center line of McIver Street, and the two cars collided in the intersection. As a result of the impact the plaintiff alleged that he was seriously and permanently injured.

All the defendants deny the specific allegations of negligence, and pray that plaintiff recover nothing.

Pending the trial the plaintiff took the adverse examination of defendant Adkins. When it was offered at the trial several questions arose, but in view of our determination of the case it is not necessary to consider them.

Adkins testified, in his adverse examination, that when both cars were some distance from Market Street that he noticed the Sheffield car weaving across the center of McIver Street. He proceeded along McIver Street at 20 to 25 miles an hour until he was within 15 or 20 feet of Market Street when he applied his brakes and slowed down. He then proceeded to cross Market Street, but when he was near the center thereof the Sheffield car, without giving any signal, suddenly turned to its left into the left side of the Adkins car. As a result of the impact the Adkins car was knocked upon the curbing of the southeastern corner of Market and McIver Streets.

The plaintiff offered no other evidence as to the event, but did offer Mr. Conder, a police officer who arrived shortly after the collision. He testified as to the location of the cars, etc., all of which corroborated Adkins.

Mrs. Sheffield was not examined by the plaintiff, nor did she testify in her own behalf.

At the conclusion of plaintiff's evidence the defendants Adkins

and Williams made motions for judgment as of nonsuit, which were denied.

The defendants offered no evidence and renewed their motions for judgment as of nonsuit. The motions were overruled and the issues were submitted to the jury. They returned a verdict in favor of the plaintiff for $19,500.00.

Defendants Adkins and Williams appealed.

Pittman, Staton & Betts for plaintiff appellee.
Holding, Harris, Poe & Cheshire for defendant appellants.

PLESS, J. All of the tire marks and debris, as well as the location of the vehicles after the accident indicated that Adkins was at all times on his right side of the street. His car was damaged at the left front door, thus bearing out his testimony that Mrs. Sheffield turned to the left. He said she gave no signal — nobody said she did. To let the case go to the jury as to Adkins would mean that he was negligent in not foreseeing that she would turn suddenly into the side of his car, and that to avoid this he should have stopped somewhere prior to entering the intersection. We cannot so hold.

Aldridge v. Hasty, 240 N.C. 353, 82 S.E. 2d 331, is quite similar to this case. In the following excerpt we have substituted the names of the parties in this case for those in the opinion. Otherwise the quotation is exact. "The defendant was traveling • • • in the line of travel which was the right side of the highway. Sheffield cut her car to the left across and upon the Adkins lane of travel at a time when Adkins' vehicle was only 20 or 25 feet away. The road was straight * * * no special hazards existed which required Adkins to reduce his speed below the maximum provided by law. And in the absence of warning he was not required to anticipate and guard against the negligent conduct of Sheffield. Under those circumstances Adkins, irrespective of his speed, could not have avoided a collision with the Sheffield car * * * The conduct of Sheffield rendered the collision unavoidable, insulated any prior negligence of Adkins, and must be held to be the sole proximate cause of the collision."

Butner v. Spease, 217 N.C. 82, 6 S.E. 2d 808, contains a fine compilation of various decisions in automobile accident cases. Its brilliant author, the late Chief Justice Stacy, put into concise and pithy form the import of many rulings. Two of them are particularly applicable here: " 'The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of prox-

imate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.' " Also, "The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising."

Applying these principles, we are of the opinion that the motions of defendants Adkins and Williams for judgment as of nonsuit should have been allowed.

Reversed.

PARKER, C.J. and BOBBITT and SHARP, J.J., concur in the result.

STATE v. LUBY WORLEY.

(Filed 14 December, 1966.)

1. Criminal Law § 25—

Defendant's plea of *nolo contendere*, accepted by the court, authorizes the court to pronounce judgment in the particular case in the same manner as though there had been a conviction by verdict or plea of guilty.

2. Escape § 1—

Under G.S. 148-45, a second escape is a felony irrespective of whether the original sentence was imposed upon conviction of a misdemeanor or a felony, and it is not required that the indictment name the particular offense for which the defendant was imprisoned, and therefore an indictment charging a second escape after a first escape occurring while defendant was serving a lawful sentence for a misdemeanor, charges a felonious escape.

APPEAL by defendant from *Carr, J.*, September 1966 Session of BRUNSWICK.

Defendant was indicted in a bill charging that on December 13, 1965, "while he, the said Luby Worley, was then and there lawfully confined in the North Carolina State Prison System in the lawful custody of John R. Crouse, Superintendent, State Prison Camp No. 025, and while then and there serving sentences for the crime of temporary larceny, which is a misdemeanor under the laws of the State of North Carolina, imposed at the November 1965 Term of Criminal Superior Court in Wayne County, North Carolina, and also while serving a sentence for the crime of Aiding and Abetting in Larceny, which is a misdemeanor, and which was imposed at the December 1965 session of Criminal Superior Court in Sampson

County, North Carolina, then and there unlawfully, willfully and feloniously did attempt to escape and did escape from the said North Carolina State Prison System, Prison Camp No. 025, this being his second offense of escape, he the said Luby Worley, having been heretofore convicted of escape at the December 9, 1965 session of Recorder's Court of New Hanover County," etc.

Defendant tendered, but the State refused to accept, "a plea of guilty to misdemeanor escape." Thereafter, defendant tendered, and the State accepted, "a plea of *nolo contendere* to the charge in the Bill of Indictment."

Judgment imposing a prison sentence of nine months was pronounced, this sentence "to begin at the expiration of a sentence imposed in the Superior Court of Sampson County on December 2, 1965 in Case #5066 on a charge of aiding and abetting in larceny."

Defendant excepted and appealed.

Attorney General Bruton and Staff Attorney Brown for the State.
Sullivan & Horne for defendant appellant.

BOBBITT, J. In the record on appeal, defendant sets forth two assignments of error: (1) "The action of the State and Court in refusing to accept defendant's plea to guilty of misdemeanor escape"; and (2) "(t)he action of the Court in entering and signing the judgment of record."

In a criminal prosecution, if the State elects to accept the defendant's plea of *nolo contendere,* the court's authority to pronounce judgment in that particular case is the same as if there had been conviction by verdict or plea of guilty. *S. v. Stone,* 245 N.C. 42, 44, 95 S.E. 2d 77, 79, and cases cited; *S. v. Stevens,* 252 N.C. 331, 113 S.E. 2d 577. Defendant having tendered, and the State having accepted, a plea of *nolo contendere* "to the charge in the Bill of Indictment," the sole question is whether the indictment charges a criminal offense punishable as provided in the judgment.

The State having refused to accept "a plea of guilty to misdemeanor escape," we assume, for present purposes, that the court, in pronouncing judgment, considered the indictment charged a felony escape. Too, it is assumed the alleged prior conviction for escape "at the December 9, 1965 session of the Recorder's Court of New Hanover County" was for a misdemeanor escape.

G.S. 148-45 in pertinent part provides: "(a) Any prisoner serving a sentence imposed upon conviction of a misdemeanor who escapes or attempts to escape from the State prison system shall *for the first such offense* be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than

three months nor more than one year. Any prisoner serving a sentence imposed upon conviction of a felony who escapes or attempts to escape from the State prison system shall *for the first such offense* be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than two years. Any prisoner convicted *of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom* shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than three years." (Our italics.)

The indictment charged: (1) Defendant's escape on December 13, 1965, was from lawful custody of the named superintendent of State Prison Camp No. 025; (2) defendant, when he escaped, was serving sentences imposed in misdemeanor cases at November 1965 Session of Wayne Superior Court and at December 1965 Session of Sampson Superior Court; and (3) defendant had theretofore been convicted of escape at the December 1965 Session of the Recorder's Court of New Hanover County.

Defendant contends the words "temporary larceny" and the words "Aiding and Abetting in (misdemeanor) larceny" do not sufficiently define criminal offenses. The term "temporary larceny" is inexact. An aider and abetter in the commission of misdemeanor larceny is guilty as a principal. Be that as it may, a description of the criminal offenses for which defendant was serving sentences was unnecessary. In *S. v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252, it was held: (1) "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"; (2) that the reference in the indictment to "the crime of robbery with force" was surplusage; and (3) that the material averment was that defendant "was serving a sentence imposed by judgment pronounced in the Superior Court of Wake County for a felony." In the present case, the indictment alleges plainly that the defendant at the time of his escape on December 13, 1965, then in lawful custody, was serving sentences imposed by judgments pronounced in the superior courts of the named counties in misdemeanor cases.

Defendant contends the third sentence in the portion of G.S. 148-45 quoted above, to wit, "(a)ny prisoner convicted of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom shall be guilty of a felony and, upon conviction thereof,

shall be punished by imprisonment for not less than six months nor more than three years," refers only to "a second (subsequent) escape from a felony conviction." The contention is without merit. Each of the two preceding sentences classifies the crime and defines the punishment for the "first such offense." The third sentence classifies the crime and defines the punishment for a subsequent offense of escape, irrespective of whether such prior escape occurred while defendant was serving a misdemeanor or a felony sentence.

It was stated in *S. v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497, that "a second escape is a felony, punishable by imprisonment for not less than six months nor more than three years, irrespective of whether the original sentence was imposed upon conviction of a misdemeanor or of a felony." Although unnecessary to decision in *Jordan,* the quoted statement is approved and adopted as a correct statement of the law applicable to the present case.

Consideration has been given to all questions presented by defendant's assignments of error. No error appearing, the judgment of the court below is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. CHARLES GREEN.

(Filed 14 December, 1966.)

1. Criminal Law § 107—

The court is required to charge upon the law of alibi only if defendant offers evidence that he was at some other specific place at the time of the commission of the crime, and if defendant's evidence does not reasonably exclude the possibility of his presence at the scene of the alleged crime at the time of its commission, it is not error for the court to fail to instruct the jury on the law of alibi.

2. Criminal Law § 94—

A remark of the court with reference to the testimony of a State's witness is not ground for a new trial when such remark, considered in the light of the circumstances under which it was made, could not have prejudiced defendant.

APPEAL by defendant from *Burgwyn, E.J.,* April 1966 Criminal Session of DURHAM.

Defendant was tried upon an indictment which charged him with an assault with a deadly weapon upon Alwilda Williams on May 9, 1965.

The prosecuting witness testified as follows: She and defendant Charles Green, although not married to each other, were living together in a roominghouse. On Sunday, May 9, 1965, defendant had been drinking. He left the house where they had been staying. She caught up with him at Hillside Park and said, "Charles, why don't you go home?" Defendant then cut her across the face with a knife. She went to the hospital, where 60 stitches were required to close the wound. The cutting took place "during the daytime." Swannie Hester, their landlady, testified that both Alwilda and defendant were there on Sunday, May 9th; that defendant went out first — before noon, she thought. Alwilda left the house shortly thereafter. She returned about two hours later with her face bandaged and said that defendant had cut her. The investigating officer said that defendant told him that Alwilda had cut herself while she was trying to take a knife from defendant over in the Hillside Park.

Defendant, the only witness for the defense, testified: He had not been living with Alwilda. His parole officer had been questioning him about marrying her, and he had intended to marry her. He did not cut Alwilda; he did not see her at all on the day she was cut. On that day he had worked until 2:30 "that evening" cleaning up the house on Fayetteville Road which he had intended to rent when he and Alwilda were married. From there he went to Chapel Hill, and he did not return to Durham until about 8:30.

The jury returned a verdict of guilty as charged. From a judgment of imprisonment, defendant appeals.

T. W. Bruton, Attorney General; Millard R. Rich, Jr., Assistant Attorney General for the State.

Jerry L. Jarvis for defendant.

SHARP, J. Defendant assigns as error the failure of the judge to charge on alibi substantially as set out in *State v. Spencer*, 256 N.C. 487, 489, 124 S.E. 2d 175, 177:

> "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal."

The evidence in this case did not require the court to give the above charge. "To constitute an alibi, it must appear that the ac-

cused was at some other *specified* place at the time of the commission of the crime. . . ." 22 C.J.S., Criminal Law § 40 (1961). (Italics ours.) Furthermore, a defendant's mere denial that he was at the place when the crime was committed is insufficient to justify the giving of an instruction on alibi. 53 Am. Jur., Trial § 653 (1945). In such case, the general charge of the court that the jury should acquit defendant unless they are satisfied from the evidence beyond a reasonable doubt that he committed the assault is sufficient. *Byas v. Texas,* 41 Tex. Crim. 51, 51 S.W. 923, 96 Am. St. Rep. 762.

Defendant's testimony as to his whereabouts on the day Alwilda was cut was merely incidental to his denial that he cut her and to his assertion that both she and the investigating officer had testified falsely. His statements with reference to his movements on the Sunday in question were not sufficiently definite to establish his presence at any specified place elsewhere at the time the crime was committed. The State's evidence did not fix the exact time Alwilda was cut. It was — according to her — during the daylight hours of Sunday, May 9, 1965. Swannie Hester *thought* that Alwilda left the house before noon, that she was gone two hours, and that she then came back with her face cut. In view of this uncertainty, even if defendant's testimony as to his whereabouts be accepted as true, the jury might still have found that he was in Hillside Park when Alwilda was cut. If the evidence does not reasonably exclude the possibility of the presence of defendant at the scene of the alleged crime, it is not error to fail to instruct the jury on the law of alibi. *Ethridge v. State,* 163 Ga. 186, 136 S.E. 72; *State v. Davenport,* 208 Iowa 831, 224 N.W. 557.

In *People v. Lucas,* 16 Cal. 2d 178, 105 P. 2d 102, 130 A.L.R. 1485, defendant claimed that on the day in question he was visiting San Quentin Prison and therefore could not have been in Modesto, where the crime was committed. In holding that the trial court did not err in refusing to instruct the jury as to the law of alibi, the California court said:

> "(T)here is nothing in the record to show that appellant could not have been in San Quentin and still have reached Modesto by 8 o'clock in the evening of the day in question. It is upon that testimony appellant has based his defense of an alibi. . . . No witness, other than the defendant, testified as to his whereabouts at the time of the alleged crime. It very probably was true that defendant was at San Quentin on the day in question, but still he could have been in Modesto at the time charged by the prosecution." *Id.* at 181, 105 P. 2d at 103.

In *Commonwealth v. McQueen*, 178 Pa. Super. 38, 112 A. 2d 820, defendant testified that he could not say definitely where he was on the night in question but that he was probably at the movies or at home in bed. In holding that, with this evidence, "defendant was not attempting to establish an affirmative defense of alibi," the court said:

> "If a person says 'I was not at the scene of the crime but I do not remember where I was,' he is not attempting to prove an alibi, even though he naturally had to be elsewhere if he was not at the scene of the crime. What is known in law as an alibi is an attempt by the defendant to prove that he could *not* have been at the scene of the crime *because* he was (at) some other definite place. There is a marked difference between saying, 'I was not at the scene of the crime, and therefore I must have been some other place,' and saying, 'I could not have been at the scene of the crime because I was (at) some other specified place.'
>
> "The first is a negative contention. It is not an alibi. The second is an effort to establish his presence *at a particular time and place,* which would make it impossible for him to have committed the crime. It is an affirmative contention. It is an alibi." *Id.* at 40-1, 112 A. 2d at 822.

Accord, State v. Wagner, 207 Iowa 224, 222 N.W. 407.

In this case, Judge Burgwyn charged the jury as follows:

> "Now, if you have a reasonable doubt about him (defendant) having cut this woman, gentlemen of the jury, it would be your duty to find him not guilty. If you are satisfied beyond a reasonable doubt that he did cut her with a knife inflicting this wound with the scar you see resulting from it now, or she alleges resulting from it now, it would be your duty to find him guilty."

The foregoing charge was a sufficient compliance with G.S. 1-180. In order to convict defendant of the assault charged, the State was required to prove beyond a reasonable doubt that he was present at the time and place it occurred and that he committed it. *State v. Malpass* and *State v. Tyler,* 266 N.C. 753, 147 S.E. 2d 180.

Defendant complains that in stating the State's contention with reference to Alwilda's testimony that she and defendant had been living together as man and wife, Judge Burgwyn added the gratuitous comment, "as unfortunately a good many people seem to be now doing without any marriage ceremony." This remark, of course, had no place in the charge. It is not approved, but we do not think

it warrants a new trial. *Upchurch v. Funeral Home*, 263 N.C. 560, 140 S.E. 2d 17. The observation was made with reference to the testimony of a State's witness. Defendant himself denied any illegal association with Alwilda, and the court instructed the jury at length with reference to his denial and his contentions based upon it. "(R)emarks of the court during the trial will not entitle defendant to a new trial unless they tend to prejudice defendant, considering the remarks in the light of the circumstances under which they were made. . . ." 1 Strong, N. C. Index, Criminal Law § 94. Defendant has the burden of showing prejudice, and we perceive none.

In the trial below, we find

No error.

STATE v. CLAIBORNE LEE SHERRON.

(Filed 14 December, 1966.)

Constitutional Law § 32—

In a prosecution for a misdemeanor it is within the discretion of the trial judge whether an indigent defendant should be appointed counsel, and the mere fact that defendant is silent in regard to the appointment of counsel has no tendency to show that the court abused its discretion in failing to appoint counsel.

APPEAL by defendant from Hobgood, J., at 30 May, 1966 Term of Criminal Court of DURHAM County.

At the term of criminal court in Durham County which began on Monday, 30 May, 1966, and at which Hon. Hamilton H. Hobgood was the presiding judge, the defendant was tried and convicted in two misdemeanors. He was acquitted upon a third which was tried at the same time. It was a charge of assault upon a female, to wit: Bobby Jean Vess. The other cases were charges of malicious injury to personal property (damaging the right front door of a 1964 Ford belonging to Bobby Jean Gordon, and the left front door of a 1958 Thunderbird belonging to M. F. House, Jr.).

The State's evidence tended to show that the defendant and Bobby Jean Vess had an argument which resulted in a fight wherein each slapped the other. At the time, they were parked in the Gordon car at a drive-in eating place. When he was ordered out of the car by Gordon the defendant threw a glass milk jar at the car but it was caught by Bobby Jean Vess and did no damage. The defendant then threw a soft drink bottle through Gordon's car window, breaking it

and damaging House's Thunderbird which was standing next to the Gordon car.

The defendant testified that he was mad, that he threw the bottle because he was angry, but he did not break the car window intentionally, that he just "throwed" the bottle.

Upon his conviction Judge Hobgood consolidated the two malicious injury cases for judgment and imposed a prison sentence of 90 days.

The following week a new term of court was convened in Durham County at which the Hon. John R. McLaughlin was the presiding judge. The defendant gave notice of appeal to the Supreme Court before Judge McLaughlin. At that time, at the defendant's request, the court appointed an attorney, Mr. Anthony Brannon, who perfected the appeal and represented the defendant in this Court.

Until then (before Judge Hobgood) the defendant had not been represented by an attorney, the record showing no request or state of indigence.

The defendant's appeal is based exclusively upon his claim that the court should have appointed counsel to represent him.

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

Anthony M. Brannon for defendant appellant.

PLESS, J. G.S. 15-4.1. When a defendant charged with a felony is not represented by counsel, before he is required to plead, the judge of the Superior Court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant but the defendant may waive the right to counsel in all cases except a capital felony by a written waiver executed by the defendant, signed by the presiding judge and filed in the record in the case. The judge may in his discretion appoint counsel for an indigent defendant charged with a misdemeanor if in the opinion of the judge such appointment is warranted unless the defendant executes a written waiver of counsel as above specified.

Interpreting the statute, it is clearly apparent that the Legislature intended to make a distinction between the right of one charged with a felony to have court-appointed counsel and the duty to appoint attorneys for persons charged with a misdemeanor. It places upon the judge the affirmative duty to advise the defendant in felony cases that he is entitled to counsel and to appoint counsel for him if he is indigent, or unless the defendant executes a written waiver of his right thereto. None of these provisions are included as to misde-

meanors, and even for an indigent defendant the judge may exercise his discretion as to appointing counsel, and shall do so only when the judge is of the opinion that the appointment is warranted.

In the recent case of *S. v. Bennett,* 266 N.C. 755, 147 S.E. 2d 237, we said: "We do not concede it to be the absolute right of a defendant charged with a misdemeanor, petty or otherwise, to have court-appointed and-paid counsel * * * The statute * * * leaves the matter to the sound discretion of the presiding judge. Some misdemeanors and some circumstances might justify the appointment of counsel, but this is not true in all misdemeanors."

Until the Supreme Court of the United States holds otherwise, we shall continue to follow the ruling in the *Bennett* case, *supra.*

That Court had the opportunity in the recent case of *Winters v. Beck,* 35 Law Week 3139 (October, 1966) to hold that all persons charged with any kind of misdemeanor were entitled to court-appointed counsel, but declined to do so.

There the defendant was charged with a violation of an Arkansas statute against immorality, a misdemeanor, for which the punishment could have been as much as three years. He was not represented by counsel, was convicted, and received a sentence of some nine months. The Supreme Court of Arkansas held that his constitutional rights had not been violated. He sought *certiorari* to the Supreme Court of the United States, which was denied. It is difficult to believe that this North Carolina defendant would be looked upon more favorably than the Arkansas defendant when his complaint was the same and his sentence was only 90 days out of a possible four years.

The defendant, quoting from *Carnley v. Cochran,* 369 U.S. 506 (1962), and referring to *Gideon v. Wainwright,* 372 U.S. 335 (1963), says: "Presuming waiver from a silent record is impermissible, the record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver."

Both the cited cases deal with felonies. The Court has made no such statement regarding misdemeanors. Neither has it in any case we can find put a responsibility on a State court greater than that imposed by its State statute.

Here, with no record to support it, the defendant can prevail only if we hold that the silence of the record must be interpreted to mean that the judge should have found that the appointment of counsel was warranted, that the defendant was indigent, and that the Court abused his discretion in failing to appoint counsel.

It is apparent that the defendant has been treated with consideration and he cannot complain at the result. Upon his own state-

ment he is guilty of the two charges of malicious injury to personal property, and is quite fortunate to receive such a light sentence. One who is reckless enough to throw two glass bottles at a car with three occupants cannot claim he was mistreated by the sentence pronounced. We doubt if any lawyer, regardless of experience or ability, could have obtained a better result for him.

In the view of the defendant's unquestioned guilt and the very considerate sentence imposed, he would have nothing to gain if awarded a new trial.

No error.

JAMES W. SMITH, ELIZABETH W. SMITH AND ELIZABETH N. WALL, v. CITY OF ROCKINGHAM.

(Filed 14 December, 1966.)

1. Injunctions § 13—

In a suit to permanently enjoin a municipality from placing plaintiffs' property on an assessment roll for public improvements, defendant municipality's denial that it intended to place plaintiffs' name upon an assessment roll raises an issue of fact precluding a permanent injunction until resolution of such issue upon the trial upon the merits.

2. Municipal Corporations § 20—

G.S. 160-89 does not limit the property owner's appeal from an assessment for public improvements solely to the amount to be charged against his land, but, if the municipality's failure to comply with the statutory requirements is jurisdictional, the property owner may seek relief against a void assessment after the assessment roll is made up.

3. Injunctions § 14; Trial § 7—

A permanent injunction is an extraordinary remedy which will be granted only in those cases where adequate relief cannot be otherwise had and is a final judgment in equity which may be granted only at the final trial of the action, and it is error for the court to issue a permanent injunction upon the pretrial conference of the cause.

APPEAL by defendant from *McLaughlin, J.*, 18 July 1966 Civil Session of RICHMOND.

Action to obtain a permanent injunction to enjoin defendant from placing plaintiffs' property on an assessment roll and assessing plaintiffs' property for improvements made.

In response to petition filed by property owners, not including the plaintiffs, the defendant undertook improvements on Stanley Avenue which abutted on plaintiffs' property. Before plaintiffs'

property was placed on an assessment roll for improvements on Stanley Avenue, this action was instituted. The plaintiffs allege, *inter alia,* that defendant failed to comply with Article 9 of the General Statutes and G.S. 143-129. The action was regularly calendared for trial at the July Civil Session, and when the case was reached, defendant's counsel moved for a pre-trial hearing. During the course of the pre-trial hearing the pleadings were read and defendant's counsel admitted that no advertisement for bids was published pursuant to G.S. 143-129. The recorded minutes show no formal adoption of resolution, and it was admitted that the resolution was not published as required by Article 9 of the General Statutes.

The defendant denied those portions of plaintiffs' pleadings which stated: "11. . . . and (defendant) now intends through its city council to prepare an assessment roll of property fronting on Stanley Avenue, including the plaintiffs' property, and assess the plaintiffs on Stanley Avenue for a total sum in excess of $5,000.00 to help pay for the improvements on Stanley Avenue. If permitted to make such assessments, the city would obtain a lien against the property of the plaintiffs for the said assessments and such lien will constitute an encumbrance upon the title of the property of the plaintiffs. . . . 13. If the defendant is permitted to place the plaintiffs' property on an assessment roll for improvements on Stanley Avenue the plaintiffs will be irreparably injured and damaged because such assessments would constitute a lien on the plaintiffs' estate thereby making it more difficult to sell. The plaintiffs are informed and believe that if they wait for an assessment roll to be made up and appeal from the decision of the City Board, they may be restricted to appeal only on the question of the amount of the assessment in view of N. C. G.S. 160-89 and therefore, if the defendant is permitted to assess their property for improvements on Stanley Avenue they will be permanently and irreparably damaged."

The court at the pre-trial conference stated that he would enter judgment for the plaintiffs, permanently enjoining defendant from assessing any of plaintiffs' property fronting on Stanley Avenue for any part of the improvements made on Stanley Avenue between February 1, 1965 and August 31, 1965. It was agreed that judgment could be entered in Richmond County during the term of court to be held on July 25, 1966, and that motions and objections could be entered at that time. Defendants appealed.

Page & Page for plaintiffs.
Jones & Deane for defendant.

BRANCH, J. The judgment entered in this cause was a final judgment, entered in equity, and should have been granted only by the *judge at the final trial of the action. Hamilton v. Icard,* 112 N.C. 589, 17 S.E. 519.

G.S. 160-90 provides: "Power to Adjust Assessment: — The governing body may correct, cancel or remit any assessment for a local improvement, and may remit, cancel or adjust the interest or penalties on any such assessment. The governing body has the power, when in its judgment there is any irregularity, omission, error or lack of jurisdiction in any of the proceedings relating thereto, to set aside the whole of the local assessment made by it, and thereupon to make a reassessment. In such case there shall be included, as a part of the costs of the public improvement involved, all interest paid or accrued on notes or certificates of indebtedness, or assessment bonds issued by the municipality to pay the expenses of such improvement. The proceeding shall be in all respects as in case of local assessments, and the reassessment shall have the same force as if it had originally been properly made."

Plaintiffs brought this action before any assessment was made or before their names were placed on an assessment roll. The defendant by virtue of G.S. 160-90 had authority to correct, cancel or remit the assessment. In its pleadings defendant denied the plaintiffs' allegation that the defendant intended to place their names on an assessment roll. This raised an issue of fact. The record does not reveal that jury trial was waived, nor that this was a proceeding referred to under G.S. 1-513.

The plaintiffs further allege that they *may* be restricted to appeal only on the question of *amount* by virtue of G.S. 160-89. This statute sets out the method of appeal under Article 9, and if defendant's failure to comply with the statute is jurisdictional, as plaintiffs allege, they do not lose their right to seek equitable relief against a *void* assessment after the assessment roll is made up. *Winston-Salem v. Smith,* 216 N.C. 1, 3 S.E. 2d 328. Thus plaintiff's mere apprehension that injury *may* occur presents a serious question as to whether plaintiffs have alleged sufficient facts to entitle them to injunctive relief at this time.

" 'It is not enough for the plaintiff to allege simply that the commission or continuance of the act will cause him injury, or serious injury, or irreparable injury; but he should allege the facts, from which the court may determine whether or not such injury will result.' McIntosh, North Carolina Practice and Procedure, § 853(2)." *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18.

The injunction is an extraordinary remedy and will not be granted

except in cases where adequate relief cannot be had without it. *Frink v. Stewart,* 94 N.C. 484.

In the case of *Whitaker v. Beasley,* 261 N.C. 733, 136 S.E. 2d 127, this Court considered the authority of the trial judge in pre-trial hearings under G.S. 1-169.1, and stated:

> "A pre-trial conference under G.S. 1-169.1 is just what the name implies. Its purpose is to *consider* specifics mentioned in the statute; among them, motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the disposition of the cause. '7. In the discretion of the presiding judge, the hearing and determination of any motion, or the entry of any order, judgment or decree, which the presiding judge is authorized to hear, determine, or enter at term.' No. 7, above quoted, fits into the framework of the pre-trial procedure. It is not a grant of authority to hear and determine disputed facts. Its order is interlocutory in nature. *Green v. Ins. Co.,* 250 N.C. 730, 110 S.E. 2d 321. 'Following the hearing the judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case *unless in the discretion of the trial judge* the ends of justice require its modification. After the entry of the pre-trial order, the case shall stand for trial and may be tried at the same . . . or at a subsequent term, as ordered by the judge.' (Emphasis added).
>
> "In many cases, certain facts necessary to be shown to make out a complete case are actually not in dispute. These may be stipulated, narrowing the controversy to the matters actually controverted. The facts stipulated are available for inclusion in the record in case of appellate review.
>
> "From the foregoing, it is apparent the judge at the pre-trial exceeded his authority in finding facts, establishing defenses pleaded but not admitted, *and in entering a final judgment in the case.*" (Emphasis ours)

Injunctive relief should be exercised cautiously, after thoughtful deliberation, and with a full conviction of its urgent necessity. In the instant case the trial judge found its necessity, determined issues of fact, and pronounced the final judgment at the pre-trial conference. By so doing he exceeded his authority.

The judgment entered below is reversed and vacated.

Reversed.

K. D. JONES AND WIFE, MARY P. JONES, v. D. A. JONES, JR., AND WIFE, MILDRED W. JONES, NOLAN W. JONES AND OLEN R. FULP.

(Filed 14 December, 1966.)

1. Frauds, Statute of § 5—

Persons who sign a note with the original makers, the note being complete except for the insertion of the name of the payee, may not contend that their obligation was to answer on a special promise for the debt of another within the protection of the statute of frauds, since the writing is a sufficient memorandum within the purview of the statute. G.S. 22-1.

2. Evidence § 27—

Persons who sign with the primary makers a note complete except for the insertion of the name of the payee, with the understanding that the primary makers would fill in the name of the payee when they found someone willing to loan money upon the note, may not object to the introduction in evidence of testimony of conversations between one of the primary makers and themselves with reference to the purpose for which the note was executed and the authority of the primary makers to fill in the name of the payee, since the payees of the note were in no way involved in these conversations and the testimony does not in any way contradict or vary the terms of the writing.

3. Bills and Notes § 5—

Parties signing a note with others as makers, the note being complete except for the insertion of the name of the payee or payees, clothe the primary makers with authority to complete the instrument by inserting the name of the payees.

4. Signatures—

Conflicting evidence as to whether appellants did in fact sign the note in suit raises an issue of fact for the jury.

APPEAL by defendants Nolan W. Jones and Olen R. Fulp from *Brock, Special Judge,* April 4, 1966 Civil Session (second week) of GUILFORD, Greensboro Division.

Plaintiffs, as payees, instituted this action to recover $5,000.00 plus interest on the note described below.

Defendants D. A. Jones, Jr., and Mildred W. Jones, did not answer; and, as to them, judgment by default final was entered. Defendants Nolan W. Jones and Olen R. Fulp filed separate answers. Each denied he had signed the note and averred his purported signature thereon was a forgery.

Evidence was offered by plaintiff and by appellants.

The note, when admitted in evidence over appellants' objections, was in words and figures as follows:

"$5000.00 STOKESDALE, N. C., *6-28* 19*63*

Ninety days after date, without grace.....

as principal, and.....

as sureties, promise to pay to *K. D. Jones & Mary P. Jones* or order, *Five Thousand and no/100*.....Dollars, for value received, negotiable and payable without offset at the STOKESDALE COMMERCIAL BANK, of Stokesdale, N. C., with interest from date at the rate of six per cent per annum until paid. The makers, endorsers and sureties hereto severally waive presentment for payment, protest, and notice of protest and non-payment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them.

Power is hereby given to the holder hereof to call for additional security any time it shall be deemed this note not sufficiently secured, and on failure to give such satisfactory additional security this note shall be deemed to be due and payable on demand or notice.

This note, or any part thereof, at maturity, or any time thereafter, may be charged to account of principal, but a failure to so charge shall not in any way affect the liability of any of the makers, sureties or endorsers of this note.

Witness	*D. A. Jones, Jr.*	(SEAL)
No. ..... Due ....., 19.....	*Mildred W. Jones*	(SEAL)
For 500 Shares Stock in	*Nolan W. Jones*	(SEAL)
Stokesdale Enterprises, Inc.	*Olen R. Fulp*	(SEAL)"

The italicized words and figures were handwritten; all others were printed.

Evidence offered by plaintiffs tended to show K. D. Jones made a $5,000.00 loan to D. A. Jones, Jr., on said note on or about June 28, 1963; that D. A. Jones, Jr., delivered the note to K. D. Jones in the same condition as when offered in evidence; and that D. A. Jones, Jr., delivered to K. D. Jones simultaneously a certificate for 500 shares of (worthless) stock in Stokesdale Enterprises, Inc., made out to K. D. Jones and signed by D. A. Jones, Jr., as president, and by Mildred W. Jones, as secretary, of said corporation.

D. A. Jones, Jr., a witness for plaintiffs, testified in substance: He and his wife signed the note. Thereafter, he presented it to Nolan W. Jones and later to Olen R. Fulp. It was signed in his presence (on separate occasions) by each of them. The face of the note then appeared as set forth above with one exception, to wit, the space for the name(s) of the payee(s) was blank. It was understood and agreed by Nolan W. Jones and Olen R. Fulp that he (D. A. Jones, Jr.) would fill in the name(s) of the payee(s) when he found a party who would lend him $5,000.00 thereon. Upon learning that he could obtain the $5,000.00 loan from K. D. Jones, he inserted the names K. D. Jones and Mary P. Jones in said note as payees. The

loan was then consummated. He made payments of interest, a total of $225.00, covering interest for nine months, that is, to March 28, 1964.

Appellants offered evidence substantially as follows: The purported signature of each appellant on said note is a forgery. He (each appellant) did not sign the note or authorize anyone to sign his name thereto. He made no payment thereon. He had no knowledge or notice of the existence thereof until receipt of a letter dated March 9, 1965, in which plaintiffs made demand on him for payment; and that upon receipt of such letter he denied liability on the ground he had not signed the note and had no knowledge or information with reference thereto.

The jury found (answering a separate issue as to each) that appellants executed the note as alleged, and that appellants were indebted to plaintiffs thereon in the amount of $5,000.00 plus interest from March 28, 1964. Judgment that plaintiffs have and recover of defendants Nolan W. Jones and Olen R. Fulp, jointly and severally, the sum of $5,000.00 plus interest and costs, was entered. Defendants Nolan W. Jones and Olen R. Fulp excepted and appealed.

Hoyle, Boone, Dees & Johnson for plaintiff appellees.
Clyde A. Shreve and Robert A. Merritt for defendant appellants.

PER CURIAM. Appellants contend their motion(s) for judgment of nonsuit should have been granted. They assert plaintiffs seek to charge them on a special promise to answer for the debt of D. A. Jones, Jr., and that the note is not a sufficient memorandum to constitute compliance with the provision of the statute of frauds codified as G.S. 22-1. The contention is untenable. The writing itself (note) charges appellants with liability for such amount, if any, as may be recoverable thereon against D. A. Jones, Jr., and Mildred W. Jones. It is clear the jury found appellants authorized D. A. Jones, Jr., to use the note in order to obtain a $5,000.00 loan thereon.

Appellants assert the court should have sustained their objection to the testimony of D. A. Jones, Jr., as to his conversations with appellants with reference to the purpose for which the note was executed, the insertion of the name(s) of the payee(s) if and when he obtained the $5,000.00 loan, etc. The contention that this evidence was violative of the parol evidence rule is untenable. Plaintiffs were in no way involved in these conversations. They relate to authority granted by appellants to D. A. Jones, Jr., to take the signed note and deliver it to a person from whom he could borrow $5,000.00. Moreover, this testimony did not in any way contradict or vary the terms of the writing (note) appellants had signed.

With reference to blank spaces in the note when signed by appellants and now, G.S. 25-20 in pertinent part provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. . . ." In 11 Am. Jur. 2d, Bills and Notes § 75, this statement appears: "The presumptive authority to fill blanks extends to every incomplete feature of the instrument. The authority is to fill all blanks in general conformity to the character of the paper or as the person in possession thinks proper. Any and all blanks may be filled in which are necessary and proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be." In 11 Am. Jur. 2d, Bills and Notes § 81, it is stated that, under the implied power to fill blanks, the pronoun "I" or "We" may be inserted. Appellants do not contend the authority of D. A. Jones, Jr., or of plaintiffs, with reference to filling the blanks in the note, was restricted in any manner. They contend they did not sign the note and had no conversation with anybody with reference thereto.

Under all the evidence, plaintiffs are entitled to recover on said note the sum of $5,000.00 with interest thereon from March 28, 1964 at six per cent per annum. Appellants contend plaintiffs should recover only against D. A. Jones, Jr., and Mildred W. Jones and that they (appellants) are not liable.

The crucial question(s) was whether appellants signed the note. On sharply conflicting evidence, the issues relating thereto were answered in favor of plaintiffs. Although all assignments of error discussed in appellants' brief and the decisions therein cited have been considered, further discussion is deemed unnecessary. Suffice to say, we find no error of such prejudicial nature as to warrant a new trial.

No error.

STATE OF NORTH CAROLINA v. ALBERT J. VAILLANCOURT, JR.

(Filed 14 December, 1966.)

Escape § 1—

While it is error in a prosecution for escape to permit the assistant superintendent of a prison to testify over objection as to the contents of the commitment, instead of introducing the commitment itself in evidence, where the defendant himself testified that at the time of his escape he was serving a life sentence, defendant's testimony cures the error, it not being necessary that the State show the exact felony for which defendant was committed.

APPEAL by defendant from *Cowper, J.,* at the August 1966 Session of NORTHAMPTON.

The defendant was tried under an indictment charging that while he was lawfully confined in the North Carolina State Prison System, "serving a sentence for the crime of Murder in the 1st degree (Sentence life) which is a Felony," he "unlawfully, wilfully, and feloniously did attempt to escape and escaped." To this indictment he entered a plea of "not guilty." The jury returned a verdict of "guilty." The judgment of the court was that he be committed to the county jail and assigned to work under the supervision of the State Prison Department for a term of one year, to begin at the expiration of the sentence which he was serving at the time of the escape.

Donald E. Batton, a witness for the State, testified that he is the assistant superintendent of the Odom Prison Unit of the State Prison Department and that the defendant was imprisoned there on 13 June 1966. The testimony of this witness and of two other officers of the State Prison Department is to the effect that on that date the defendant, without permission, left the field of the Odom Prison Farm, in which he was assigned to work, and some four hours later was recaptured by a searching party in a wooded area a mile beyond the limits of the Odom Prison Farm.

The witness Batton further testified that he was the custodian of the records of the Odom Prison Camp, which records he had present in the courtroom and which records were "certified." Over objection by the defendant, this witness was then permitted to read "the commitment," as follows:

> "November 9, 1960, Davidson County Superior Court, North Carolina, No. 9963, charged with murder in the first degree, and sentenced for the remainder of his natural life."

The defendant, called as a witness in his own behalf, testified on direct examination:

"I am serving a life sentence. I was tried in November 1960 in Davidson County Superior Court by Judge Don Phillips. I had been at Odom Prison Farm five years next month before I left."

On cross examination the defendant testified that he did not intend to return to the farm when he left, but intended to escape, and that he left the farm "to keep from doing something that would have given me another life sentence or the gas chamber."

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

Perry W. Martin and Felton Turner, Jr., for defendant.

PER CURIAM. The defendant having entered a plea of not guilty, it was necessary for the State to prove beyond a reasonable doubt each element of the offense charged in the bill of indictment. *State v. Mason,* 268 N.C. 423, 150 S.E. 2d 753. One of these was the fact that at the time of the escape the defendant was serving a sentence imposed upon conviction of a felony. *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252. While a properly certified copy of the commitment, under which the defendant was in custody at the time of the escape, is competent evidence to show the lawfulness of the custody and the type of offense for which he was committed, *State v. Stallings, supra,* the record here does not show that the commitment, itself, was introduced in evidence. While it was error to permit the assistant superintendent, over objection, to testify as to the contents of the commitment, the defendant's own testimony shows that he was serving a life sentence. This clearly establishes that he was in custody "serving a sentence imposed upon conviction of a felony." It is not necessary for the State to show the exact felony for which he was committed. *State v. Stallings, supra.* The defendant's testimony cured the error in admitting the testimony offered by the State. *State v. Adams,* 245 N.C. 344, 95 S.E. 2d 902.

We have carefully considered the exceptions by the defendant to the charge of the court to the jury. When the charge is considered in its entirety, we find no prejudicial error therein.

No error.

STATE v. CLIFTON A. PEARCE.

(Filed 14 December, 1966.)

1. Criminal Law § 162—

Where excluded evidence does not appear in the record, it cannot be ascertained that its exclusion was prejudicial.

2. Criminal Law § 70—

Letters written by a State's witness to defendant while he was in jail awaiting trial are properly excluded when they do not tend to impeach the testimony of the witness at the trial.

3. Criminal Law § 131—

When a sentence is set aside on defendant's application, the former judgment does not necessarily fix the maximum punishment which may be imposed upon a second conviction, and when the court, in imposing the second sentence, takes into consideration the time served by defendant upon the former conviction, defendant has no ground to complain, even though the second sentence, together with the time served, exceeds the minimum sentence imposed in the first trial.

APPEAL by defendant from *McLaughlin, J.*, June, 1966 Conflict Session, DURHAM Superior Court.

The defendant, Clifton A. Pearce, was tried at the May Term, 1961, Durham Superior Court on a charge of rape. Upon arraignment the solicitor elected to try the defendant only for an assault on Betty Louise Honeycutt with intent to commit rape. The jury returned a verdict of guilty of assault with intent to commit rape. Judge Williams imposed a prison sentence of 12-15 years.

In 1965 the defendant applied for and obtained a post conviction review which was held on May 10, 1965, by Johnson, J., who entered an order denying relief. This Court granted *certiorari* to review the order. After consideration, a new trial was awarded upon the ground the trial court committed error in admitting, over defendant's objection, a confession made to the investigating officer, Detective Morris.

The defendant was again tried, though upon a new bill of indictment returned by the grand jury at the March Session, 1966. The new bill charged assault with intent to commit rape, whereas the original bill charged rape. The jury returned a verdict of guilty as charged. A prison sentence of eight years was imposed. The defendant excepted and appealed.

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

Wade H. Penny, Jr., for defendant appellant.

PER CURIAM. The evidence adduced at the trial in 1961 and considered by Judge Johnson at the Post Conviction Hearing is reviewed in this Court's opinion reported in 266 N.C. 234. The evidence on the new trial was not essentially different. It was sufficient to survive the motion to dismiss and to sustain the verdict.

During the new trial the court sustained the solicitor's objection to certain impeaching questions asked the State's witness, Laura Mae Lassiter. However, counsel failed to insert in the record what the witness would have testified to if permitted to answer. In the absence of such answer the Court may only guess whether its exclusion was prejudicial. The record fails to make a showing of prejudice. Likewise prejudice is not shown by the court's exclusion of two love letters written by the same State's witness to the defendant while he was in jail awaiting the second trial. She was examined about the contents of the letters which she admitted writing. These did not tend to impeach her testimony at the new trial. One of the letters contained a statement reflecting on the conduct of the prosecutrix. Prejudice in the exclusion is not shown.

After verdict, the court tendered this judgment:

> "It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined in the State's Prison for a period of eight years."

The defendant excepted to the judgment, contending that on the first trial Judge Williams imposed a sentence of 12-15 years; that the evidence then was essentially the same as that produced at the trial before Judge McLaughlin, who should not have increased the punishment over the minimum imposed by Judge Williams; that credit for the time served should be applied on the sentence of 12 years. Otherwise the defendant will be penalized by his appeal.

If a sentence is set aside on a defendant's application, the former judgment does not necessarily fix the maximum punishment which may be imposed after a second conviction. *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633. The defendant contends that any increase in the punishment is in the nature of a penalty and is in violation of his constitutional rights, citing *Patton v. North Carolina,* 256 F. Supp. 255. We adhere to our former decisions. In the trial and judgment we find

No error.

ELOUISE WILLETTS CONNOR v. DEXTER ROBBINS, JR., AND DAVID EARL ROBBINS.

(Filed 14 December, 1966.)

1. Automobiles §§ 41i, 42c—

Plaintiff's evidence to the effect that she blew her horn and turned to the left side of the highway to pass two vehicles proceeding ahead of her on the highway, and that as she had almost cleared the second vehicle the driver thereof turned to his left, that she saw no left turn signal from his car, and that the left front of his car struck the right rear of plaintiff's car, causing the injury in suit, *held* sufficient to be submitted to the jury on the issue of negligence and not to show contributory negligence on the part of plaintiff as a matter of law.

2. Negligence § 26—

Defendant's evidence may not be considered as a basis for nonsuit on the ground of contributory negligence.

APPEAL by defendant, Dexter Robbins, Jr., from *McKinnon, J.*, at the 25 April 1966 Session of BRUNSWICK.

At the close of her evidence, the plaintiff took a voluntary nonsuit as to the defendant David Earl Robbins.

The complaint alleges that the plaintiff sustained personal injuries as the result of a collision between an automobile driven by her and one driven by Dexter Robbins. It alleges that as the plaintiff's vehicle was passing that of Robbins, he turned to the left, across the center of the highway, and the left front of his vehicle collided with the right rear of that driven by the plaintiff. The plaintiff alleges that Robbins was negligent in that he failed to yield the right of way to the plaintiff's vehicle; he turned from a direct line without seeing that such movement could be made in safety and without signal of his intention to do so; and he failed to keep a proper lookout. These acts and omissions are alleged to have been the proximate causes of the collision and of the resulting injuries to the plaintiff.

The answer denies all allegations of negligence by the defendant and alleges that the plaintiff was negligent in that she failed to keep a proper lookout, drove at a speed greater than was reasonable under the circumstances, attempted to pass the Robbins vehicle without giving a signal or warning of her intent to do so and without ascertaining that it was safe to do so, and failed to heed the defendant's signal for a left turn. These acts and omissions by her are alleged to have been the sole proximate causes of the collision and, if not, to have constituted contributory negligence by the plaintiff.

The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and awarded damages in the sum of $5,000. Judgment was entered in accordance with the verdict.

Evidence offered by the plaintiff, other than that relating to the extent of her injuries, tended to show:

At about 2 p.m. on 2 May 1965, the plaintiff was proceeding south on Highway 17. Two other vehicles were in front of her, moving in the same direction, the defendant's automobile being the vehicle in front. The weather was good. The road was flat and straight. The defendant's car and the intermediate car were driving about 45 miles per hour. The plaintiff drove over to the left side of the road in order to pass, sounded her horn, and went on to pass the other two vehicles at a speed between 50 and 55 miles per hour. She saw no turn signal of any sort from the defendant's vehicle. When she had almost cleared the defendant's car, he turned to his left and the left front of his car struck the right rear of the plaintiff's car, causing it to leave the road and collide with two other vehicles parked in a yard adjoining the highway. As a result of the collision, the plaintiff sustained certain injuries. Prior to turning out to pass, she had been driving about one and one-half car lengths behind the intermediate vehicle. She blew her horn as she pulled out to pass. The distance between the intermediate car and the Robbins car was too small for her to cut back in between them.

The defendant's evidence tended to show:

Prior to the accident he was driving 45 miles per hour, and the intermediate vehicle was approximately 50 feet behind him. As he approached a service station, he turned on his left turn signal and looked in his rear view mirror. He saw the intermediate car but not the plaintiff's car. He turned to his left and went off on the shoulder of the road to his left. Thereafter, the plaintiff came up upon his left side and struck him. He heard no horn blow. His electric turn signal was "clicking" for 250 feet before he began his turn.

Marshall & Williams for defendant appellant.
Herring, Walton, Parker & Powell for plaintiff appellee.

PER CURIAM. There was no error in overruling the motion by the defendant for judgment of nonsuit. The plaintiff's evidence, which the jury believed, was sufficient to establish the cause of action alleged in her complaint. Conflicts between her evidence and that of the defendant were for the jury to determine. The plaintiff's evidence, considered alone, does not show contributory negligence by her. The defendant's evidence may not be considered as a basis for judgment of nonsuit on the ground of contributory negligence. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360.

We have carefully considered the exceptions by the defendant to the charge of the court to the jury and find no error therein.

No error.

STATE v. CHARLIE EDWARD KING.

(Filed 14 December, 1966.)

Obscenity—

Evidence that defendant intentionally exposed himself while sitting in a car parked in a parking lot of a store and was so seen by a patron of the store using the parking lot, is sufficient to overrule nonsuit in a prosecution under G.S. 14-190.

APPEAL by defendant from *McConnell, J.*, at 19 September, 1966 Criminal Session of GUILFORD Superior Court.

The defendant was convicted of indecent exposure in violation of G.S. 14-190. He was first tried in the Municipal-County Court of Guilford County, and upon appeal was again tried and convicted in the Superior Court. From judgment of six months imprisonment, he appealed to this Court.

The evidence for the State tended to show that defendant was sitting in his car in the parking lot at Golden Gate Shopping Center about 3:00 P.M., on 9 August, 1966, and that Mrs. Ann Warmouth parked her car beside his in front of the A & P Store, where she made some purchases. As she returned, she passed King; he was exposing himself, his private parts were out, and he was playing with himself. She saw his penis.

The defendant did not testify or offer other evidence.

He assigns as error the failure of the Court to allow his motion for judgment of nonsuit and the charge of the Court to the effect that a wilful exposure of his private parts in the shopping center where they were visible to people passing through the parking lot would be sufficient to constitute a violation of G.S. 14-190.

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

Herman L. Taylor for defendant appellant.

PER CURIAM. " 'Public place' means a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have resort, a place which is accessible to the public and visited by many persons. *Ellis v. Archer*, 161 N.W. 192; *People v. Lane*, 32 N.Y.S. 2d 61. A mercantile establishment and the premises thereof is a public place during business hours when customers are coming and going." *S. v. Fenner*, 263 N.C. 694, 140 S.E. 2d 349.

We said in the recent case of *S. v. Lowery*, 268 N.C. 162, 150 S.E. 2d 23: "Intentional exposure of private parts while sitting in

an automobile on a public street in such manner that they could be seen by members of the passing public using the street and were seen by a passerby constitutes common law offense of indecent exposure."

"It is not essential to the crime of indecent exposure that someone shall have seen the exposure provided it was intentionally made in a public place and persons were present who could have seen if they had looked." 33 Am. Jur. 19.

"The offense does not depend upon the number of people present and an intentional act of lewd exposure offensive to one or more persons is sufficient." 67 C.J.S. 26.

It appears from the above that all the elements necessary to constitute the crime of indecent exposure were shown by the State's evidence. The jury accepted it as true, and in the trial there was

No error.

STATE v. WILLIAM HENDERSON FREEDLE.

(Filed 14 December, 1966.)

Municipal Corporations §§ 24, 34—

A municipality is without power, in the absence of special legislative authority, to impose criminal liability for acts committed beyond the city limits, and therefore a warrant charging that defendant violated a municipal ordinance by operating a taxi cab carrying alcoholic beverage within the limits of the city, or within one mile thereof, or within designated townships, when there was no passenger in the cab, fails to charge an offense, and judgment quashing the warrant should have been entered.

APPEAL by defendant from *Burgwyn, E.J.*, July 18, 1966 Criminal Session, GUILFORD Superior Court — High Point Division.

In this criminal prosecution the warrant issued by the Municipal Court of the City of High Point charged that the defendant "On or about the 30 day of Oct., 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 Vio. City Ord. 21-46.1, by operating a Taxi Cab, the property of Red Bird Cab Co. with alcoholic beverage in his possession, to-wit: 1 case of beer, he not having a *bona fide* passenger in the Taxi Cab at the time . . ." From a verdict of guilty and jail sentence of 30 days suspended, the defendant appealed to the Superior Court of Guilford County.

In the Superior Court the defendant moved to quash the warrant upon the ground (1) the warrant did not charge a criminal offense; and (2) the High Point City Ordinance, Ch. 21, § 46.1, is unconstitutional. The parties stipulated the pertinent part of the ordinance provides: "It shall be unlawful for a driver to operate or drive a taxicab, whether on duty or off duty, with any alcoholic beverage in his possession, either on his person or in the taxicab, provided that this section shall not apply to alcoholic beverages in the possession of a *bona fide* passenger."

The court overruled the motions to quash. The defendant entered a plea of not guilty. From a verdict of guilty and the imposition of a fine of $200.00 and an order that the beer be confiscated, the defendant appealed.

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

Clarence C. Boyan for defendant appellant.

PER CURIAM. The warrant charged that the defendant unlawfully operated a taxicab, with a case of beer as his only passenger, within the city limits of High Point, or within one mile of said city limits *or* within High Point, Deep River, *or* Jamestown Township. (emphasis added) The case is controlled by our decision in *State v. Furio*, 267 N.C. 353, 148 S.E. 2d 275. The Attorney General properly concedes: "The warrant does not on its face charge the commission of a crime and the Attorney General is unable to distinguish the warrant in *Furio* from the warrant under question."

The City of High Point, in the absence of legislative authority, is without power to impose criminal liability for acts committed beyond the city limits. The court should have allowed the motion to quash on the first ground assigned. In the absence of a valid charge against the defendant, the constitutionality of the ordinance is not at issue in the case.

The verdict and judgment are set aside. The cause is remanded to the Superior Court for the entry of a judgment quashing the warrant.

Error and remanded.

ROBERT P. SHANNON v. BETTY Z. SHANNON.

(Filed 14 December, 1966.)

Divorce and Alimony § 18—

In the husband's action for divorce the law demands that the wife have equal facilities for presenting her defense, and therefore the allowance of counsel fees to the wife's attorney *pendente lite* will not be disturbed in the absence of a showing of abuse of discretion.

APPEAL by plaintiff from *McLaughlin, J.,* May 16, 1966 Non-jury Session of GUILFORD, Greensboro Division.

Divorce action upon ground of one-year separation. Plaintiff and defendant, his wife, entered into a separation agreement dated 17 September 1965, which was prepared by defendant's attorney. Defendant filed an answer to plaintiff's complaint, alleging that the separation was not voluntary on her part and that plaintiff abandoned her on 21 December 1964. She further alleged that the separation agreement was procured by threat, that plaintiff had failed to make payments according to the separation agreement, and prayed for support *pendente lite,* counsel fees, and for such other relief as might be just and proper. Defendant's lack of ability to pay counsel is not controverted. Plaintiff filed motion asking that portions of defendant's answer be stricken. The trial judge entered an order striking portions of the answer, denying defendant's motion for alimony *pendente lite,* and ordering plaintiff to pay the sum of $200 to defendant's attorneys. Thereupon, both plaintiff and defendant appealed to the Supreme Court. Only the plaintiff perfected his appeal.

Jordan, Wright, Henson & Nichols by Luke Wright for plaintiff.
Cahoon & Swisher for defendant.

PER CURIAM. The sole question presented is: Did the trial judge err in awarding fees to defendant's counsel?

" 'Natural justice and the policy of the law alike demand that in any litigation between the husband and the wife they shall have equal facilities for presenting their case before the tribunal. This requires that they shall have equal command of funds, so that if she is without means, the law having tested the acquisitions of the two in him, he shall be compelled to furnish them to her to an extent rendering her his equal in the suit.' " *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436. See also *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24.

The amount of the allowance to defendant for her subsistence *pendente lite* and her counsel fees is in the discretion of the trial judge. He has full power to act without the intervention of a jury,

and his discretion in this respect is not reviewable, except in case of abuse. In this action for absolute divorce the defendant was within her rights to defend and assert such rights as she may be entitled to.

We find no abuse of discretion by the trial judge.

The order entered below is

Affirmed.

CURTIS LEIGH UNDERWOOD v. ROBERT HENRY GAY, WILSON KELL GAY, AND MARVIN NEAL GAY, INDIVIDUALLY AND DOING BUSINESS AS GAY BROTHERS IMPLEMENT COMPANY, A PARTNERSHIP, AND HOWARD J. WILLIAMS.

(Filed 14 December, 1966.)

APPEAL by defendants from *Carr, J.*, March 1965 Civil Session, and from *Hall, J.*, April 1966 Regular Civil Session, of WAKE.

Plaintiff instituted this civil action to recover for personal injuries and damage to his car allegedly caused by the negligent operation by defendant Williams of a truck of his employers, defendants Gay, partners doing business as Gay Brothers Implement Company.

Plaintiff, in substance, alleged: On January 9, 1963, about 7:40 a.m., plaintiff was driving his car and Williams was driving his said employers' truck south on U.S. Highway No. 1 towards Raleigh. There were two lanes for southbound traffic, the truck being in the left (east) lane and plaintiff's car being in the right (west) lane. Plaintiff blew his horn, increased his speed and was beginning to pass the truck when Williams, without giving any signal of his intention to do so, suddenly cut to his right towards the front of plaintiff's car, thereby forcing plaintiff off the highway onto the right (west) shoulder thereof and into a ditch and causing him to overturn. (Note: There was no collision or contact between the vehicles.) Defendants' negligence, in particulars set forth, proximately caused personal injuries to plaintiff and damage to his car. Defendants were negligent, *inter alia,* in that Williams made the alleged sudden right turn from a direct line without first seeing that such movement could be made in safety and without giving signal of his intention to make such movement as required by G.S. 20-154.

Defendants, in a joint answer, denied all allegations as to their alleged negligence, pleaded that plaintiff's negligence was the sole proximate cause of his injuries and damage and, conditionally, pleaded that plaintiff was guilty of contributory negligence.

In the trial at March 1965 Civil Session, before Carr, J., the jury answered the first and second issues, which related to the alleged negligence of defendants, "Yes," and answered the third issue, which related to the alleged contributory negligence of plaintiff, "No," and awarded damages of $575.00 for personal injuries and $150.00 for property damage.

Judge Carr accepted the verdict as to the first three issues but, in the exercise of his discretion, set aside the portion of the verdict (answer to fourth issue) relating to damages and ordered a new trial relating solely to that issue.

The trial at April 1966 Regular Civil Session before Judge Hall related solely to the issue of damages. The jury's verdict awarded damages of $7,577.00 for personal injuries and $515.00 for property damage.

Based upon said verdicts, judgment was entered by Judge Hall providing that plaintiff have and recover of defendants $8,092.00 and that defendants pay the costs of the action to be taxed by the clerk. Defendants excepted and appealed, assigning errors based on exceptions taken during the trial before Judge Carr and on exceptions taken during the trial before Judge Hall.

Boyce, Lake & Burns for plaintiff appellee.

Broughton & Broughton and John D. McConnell, Jr., for defendant appellants.

PER CURIAM. Defendants' principal assignments of error are based on exceptions taken during the trial before Judge Carr.

Defendants contend the evidence was insufficient to show *their* truck was involved in any way in any incident such as that referred to in plaintiff's allegations and evidence. Williams testified he had no knowledge of such an incident. We have examined the evidence, both direct and circumstantial, in close detail. When considered in the light most favorable to plaintiff, it was sufficient to support jury findings that the truck involved was that of defendants Gay and that the negligence of their agent, Williams, proximately caused plaintiff's injury and damage.

Defendants' contention that Judge Carr failed to apply general principles of law to the factual situation disclosed by the evidence is without merit. Careful reading of the charge shows compliance with G.S. 1-180 in such manner as to merit commendation.

All assignments, including those based on exceptions taken at the trial before Judge Carr and also at the trial before Judge Hall, have received careful consideration. Although defendants' counsel have explored with diligence and have discussed *in extenso* all

possibilities of error, prejudicial error has not been shown and further discussion is deemed unnecessary. Hence, the verdicts and judgment will not be disturbed.

No error.

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

GEORGE C. CONNOR, JR. v. DONALD WILLIAM CONRAD.

(Filed 14 December, 1966.)

APPEAL by defendant from *Crissman, J.*, 13 June 1966 Regular Civil Session of GUILFORD, High Point Division.

This action was begun in the municipal court of the city of High Point, North Carolina, small claims division. The summons issuing from the municipal court of the city of High Point stated in substance that defendant was summoned to appear at a certain date before the judge of the municipal court of the city of High Point to answer the complaint of George C. Connor, Jr., for the nonpayment of the sum of $1,724.50, and it is further stated in the summons that a brief statement of said cause of action is as follows: "By specific and express contract with defendant, the plaintiff provided architectural services for defendant, and after due demand the defendant has wilfully refused to make payment of same." Defendant filed an answer in which he denied that any specific, express or other contract was made between him and plaintiff and that he owes the plaintiff nothing, and that any services rendered to defendant of any value, which he denies, were not rendered by plaintiff. By further answer and defense defendant alleged in substance: He requested Eccles Everhart to draw some plans and specifications for a house to cost no more than $40,000, which Everhart agreed to do. Subsequent thereto Everhart died. The plans and specifications for a house delivered to defendant by the plaintiff, or any associate of his, were such that no house could be completed for $40,000, and the plans and specifications furnished him were of no use to him. Consequently, defendant has not received what he bargained for and what he contracted for with Everhart, and these facts were known and should have been known to the plaintiff.

The judge of the municipal court entered judgment in which he recites that after considering the pleadings and hearing the evidence

and argument of both sides, the following issue was answered by the court:

"(1) In what amount, if any, is the defendant indebted to the plaintiff?

"ANSWER: $750.00."

Whereupon, he entered judgment upon the verdict. [1955 Session Laws of North Carolina, Ch. 1092, is entitled, "An act to amend Chapter 569 of the Public-Local Laws of 1913, and all acts amendatory thereto relating to the municipal court of the city of High Point." Section 1 of this act provides rules and regulations for the trial of civil cases in the municipal court of the city of High Point wherein, *inter alia,* the sum demanded, exclusive of interest, does not exceed $2,000. Section 4(b) of this act states in substance that every summons issued by the court shall state briefly the nature of the cause of action in which the same is issued and the amount sought to be recovered. Section 6(a) of this act provides in substance that the judge of said court shall hear and determine all such civil actions instituted in said court, or removed to said court, and there shall be no trial by jury in said court of said civil actions set forth in Section 1 thereof. Section 8 of this act provides in substance: From any judgment rendered in said court in any such civil action, any party may appeal to the Superior Court of Guilford County, High Point Division, where the trial shall be *de novo.*] In open court plaintiff and defendant appealed to the Superior Court of Guilford County, High Point Division.

Upon appeal to the Superior Court, this case was tried *de novo* before a jury. The following issues were submitted to the jury and answered as indicated:

"1. Did the plaintiff and defendant enter into a contract for the preparation of house plans as alleged by the plaintiff?

"ANSWER: Yes.

"2. If so, in what amount is defendant indebted to the plaintiff?

"ANSWER: $1,724.50."

From a judgment upon the verdict, defendant appeals.

J. W. Clontz for defendant appellant.
Bencini & Wyatt by Frank B. Wyatt for plaintiff appellee.

PER CURIAM. Plaintiff and defendant introduced evidence. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit entered at the close of all the evidence. A study

of the evidence in the record before us shows that plaintiff's evidence, considered in the light most favorable to him, and giving him the benefit of every legitimate inference to be drawn therefrom, is sufficient to carry the case to the jury. The court correctly denied the motion for judgment of compulsory nonsuit.

The jury, under application of settled principles of law, resolved the issues of fact against the defendant. While the appellant's brief presents contentions involving fine distinctions and close differentiations, a careful examination of all of his assignments of error discloses no question or feature requiring extended discussion. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment below will be upheld.

No error.

STATE v. THOMAS F. WILLIAMS.

(Filed 14 December, 1966.)

APPEAL by defendant from *Copeland, S.J.*, July, 1966 Session, DURHAM Superior Court.

T. W. Bruton, Attorney General, Andrew A. Vanore, Jr., Theodore C. Brown, Jr., Staff Attorneys for the State.

W. G. Pearson, II, Mitchell & Murphy for defendant appellant.

PER CURIAM. The defendant, Thomas F. Williams, was tried, convicted, and sentenced in six cases at the January, 1965 Criminal Session, Durham Superior Court. Each of the indictments contained two counts: (1) the felonious breaking and entering of a specifically described building; (2) the larceny of designated personal property of a value not in excess of $200.00. The indictments failed to charge the larcenies resulted from, or were connected with, a felonious breaking and hence were misdemeanors. *State v. Williams*, 267 N.C. 424, 148 S.E. 2d 209. The Court remanded the cases to the Superior Court for resentence on the larceny counts.

Judge Copeland followed the mandate of this Court and imposed valid sentences on the larceny charges. The judgments provided the defendant should have credit (1) for time served; (2) time spent in jail awaiting trial and decision on appeal; and (3) allowance for good behavior. Counsel excepted and appealed, feeling there was some uncertainty whether Judge Copeland's order applied the credits to

the proper sentences and commitments thereon. However, the order is specific. The prison authorities will, no doubt, implement it by applying the credits to the proper judgment or judgments, in the order of the time of service.

Affirmed.

D & W, INC., T/A MERRY GO-GO ROUND, ON BEHALF OF ITSELF, AND DIAB, INC. T/A PECAN GROVE SUPPER CLUB, AND SUCH OTHER CITIZENS AND PLAINTIFFS OF MECKLENBURG COUNTY, NORTH CAROLINA, AFFECTED BY THE TURLINGTON ACT AND THE ALCOHOLIC BEVERAGE CONTROL ACT OF NORTH CAROLINA, v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, THE COUNTY OF MECKLENBURG, CLAWSON WILLIAMS, CHAIRMAN OF THE ALCOHOLIC BEVERAGE CONTROL BOARD OF THE STATE OF NORTH CAROLINA, JONES Y. PHARR, CHAIRMAN OF THE MECKLENBURG COUNTY ALCOHOLIC BEVERAGE CONTROL BOARD, HENRY SEVERS, JOHN HORD, ERNEST SELVY, GEORGE STEPHENS, W. FLEMING TALMAN, SR., LAWRENCE C. ROSE, G. W. BIRMINGHAM, JR., ROBERT I. CROMLEY, SR., RAY B. BRADY, CHARLES E. KNOX AND FRED C. COCHRANE.

(Filed 19 December, 1966.)

1. Appeal and Error § 59—

The decision of the Supreme Court reversing the judgment of the Superior Court granting an injunction is self-executing and has the effect of dissolving the injunction, and no order of the Superior Court is necessary to implement the decision, G.S. 1-221, G.S. 1-298 and G.S. 7-12 are not applicable.

2. Same—

Mandate of the Supreme Court upon appeal is binding upon the Superior Court and must be strictly followed without variation or departure, and no other judgment than that directed or permitted by the appellate court may be entered.

3. Appeal and Error §§ 1, 2—

After certification of a decision of the Supreme Court to the Superior Court the Supreme Court retains jurisdiction of the cause for the purpose of effectuating its mandate, and when the decision on appeal is self-executing and the judge of the Superior Court has refused to enter judgment in accordance with the mandate of the Supreme Court, the Supreme Court, in the exercise of its supervisory jurisdiction, may order that the decision be entered upon the judgment roll in the county in order that the decision be given effect forthwith.

ON motion in the cause by the Attorney General.

On November 30, 1966, this Court rendered its opinion in the

above-entitled case reversing the judgment entered on April 18, 1966, by Riddle, J., in which he restrained defendants from enforcing the criminal law with reference to the transportation, possession, and consumption of alcoholic beverages, as defined by G.S. 18-60, except in conformity with his interpretation of the law as contained in his judgment. *D. & W., Inc., v. Charlotte,* 268 N.C. 577, ... S.E. 2d ..... The Riddle judgment, by its terms, applied in all counties of the State which have elected to come under the provisions of the ABC Act of 1937. On December 12, 1966, our decision in this cause was certified to the Superior Court of Mecklenburg County as provided by G.S. 7-16 and Rule 38, Rules of Practice in the Supreme Court.

It is now made to appear by motion of the Attorney General: Certification of the opinion was received by the Superior Court of Mecklenburg County on December 13, 1966. On December 14, 1966, a member of the staff of the Attorney General appeared in that court before his Honor, Hugh B. Campbell (one of the resident superior court judges of the Twenty-sixth Judicial District, who, on that date, was regularly assigned to and presiding over the courts of the district), and moved the court for judgment in accordance with the opinion of the Supreme Court of North Carolina. Judge Campbell heard the motion, denied it, and declined to sign the tendered order. Instead, citing G.S. 1-221, G.S. 1-298, and G.S. 7-12, he entered an order decreeing that the judgment of Riddle, J., "as entered in this cause on April 19, 1966, is, and continues to be, in force until entry of judgment in conformity with the opinion of the North Carolina Supreme Court as certified to this court." He directed the parties or their counsel to appear at 10:00 a.m. on January 3, 1967, before the judge presiding at the January 2, 1967 nonjury session of the Superior Court (the first civil term *to begin* after the receipt of this Court's mandate) for the purpose of having judgment *then* entered in this cause "consistent with the opinion of the North Carolina Supreme Court." The Attorney General objected and excepted to this order. He now moves that we declare our judgment final and that of Campbell, J., a nullity.

PER CURIAM. Judge Riddle's order decided a purely legal question and restrained defendants, "until further order of the court," from conducting themselves except in accordance with the law as announced therein. It was, in its effect and scope, a final judgment granting for an indefinite period the only relief sought by plaintiffs, *i. e.,* injunction. Our opinion, in addition to holding that the remedy of injunction was not available to plaintiff, declared the law of this State with respect to the purchase, transportation, possession, and

use of alcoholic beverages as defined by G.S. 18-60, reversed the judgment of Riddle, J., and was likewise a final judgment. Judge Campbell should have allowed the motion of the Attorney General and entered the order which he tendered. Neither G.S. 1-221, G.S. 1-298, nor G.S. 7-12 authorized him to delay the enforcement of an order of this Court.

G.S. 1-221 provides: "Every judgment given in a court of record having jurisdiction of the subject is, and continues to be, in force until reversed according to law." The judgment of the Superior Court entered by Judge Riddle from which defendants appealed was reversed by this Court "according to law" on November 30, 1966. G.S. 1-298 applies only to judgments of the Superior Court which have been affirmed or modified on appeal; it has no application to a decision of this Court *reversing* the judgment of the lower court. G.S. 7-12 applies only to appeals from interlocutory judgments. As heretofore pointed out, the judgment appealed from in this case was a final judgment.

Our decision in this case was that "the judgment of the court below is Reversed"; the opinion states the reason for the decision. McIntosh, North Carolina Practice and Procedure, § 26 (1st Ed. 1929). Our mandate vacated the injunction just as effectively as if we had said, "The injunction rendered by Riddle, J., on April 18, 1966, is hereby dissolved." To reverse an injunction is to vacate it. This Court may dissolve as well as issue restraining orders, *Robinson v. Robinson,* 123 N.C. 136, 31 S.E. 371, and, when it does so, no order of the Superior Court is necessary to implement its decree. In such case it is self-executing. "A reversal, when filed in the lower court, automatically sets the lower court's decision aside without further action by that court. . . ." 5 Am. Jur. 2d, Appeal and Error § 990 (1962).

> "'When the Supreme Court reversed the judgment of the circuit court, . . . and its mandate was filed in the lower court, . . . the judgment was reversed, whether the lower court afterwards made any order conforming its judgment to that of the Supreme Court or not.'" *Cowdery v. London & San Francisco Bank,* 139 Cal. 298, 304, 73 Pac. 196, 198. *Accord, Smith v. Garbe,* 86 Neb. 91, 124 N.W. 921.

In our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. "Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority

over inferior tribunals." *Collins v. Simms,* 257 N.C. 1, 11, 125 S.E. 2d 298, 306; *Tussey v. Owen,* 147 N.C. 335, 61 S.E. 180; *Stephens v. Koonce,* 106 N.C. 222, 10 S.E. 996; *Murrill v. Murrill,* 90 N.C. 120; *Ex Parte Sibbald,* 37 U.S. (12 Pet.) 488, 9 L. Ed. 1167; 5 Am. Jur. 2d, Appeal and Error § 991 (1962). That this Court retains jurisdiction of the original cause in every case for the purpose of effectuating its mandate cannot be questioned. *Union Trust Co. v. Curtis,* 186 Ind. 516, 116 N.E. 916; *Raht v. Southern Railway Co.,* 387 S.W. 2d 781 (Tenn. Sup. Ct.). The issuance of the mandate from this Court did not exhaust its jurisdiction to enforce its orders. *Pierce v. Box,* 284 S.W. 231 (Tex. Ct. Civ. App.); *Home Owners Loan Corp. v. Wiggins,* 188 Miss. 750, 196 So. 240. It may issue any appropriate writ or take the necessary steps to compel obedience to its mandate. If it has not already done so, the appellate court may proceed to enter final judgment and, in a proper case, award execution. *United States v. Pink,* 36 N.Y.S. 2d 961.

In *Collins v. Simms, supra* at 10, 125 S.E. 2d at 304, Moore, J., speaking for this Court, said:

> "When it comes to our attention that a lower court has failed to comply with the opinion of this Court, whether through insubordination, misinterpretation or inattention, this Court will, in the exercise of its supervisory jurisdiction, *ex mero motu* if necessary, enforce its opinion and mandate in accordance with the requirements of justice. N. C. Constitution, Art. IV, § 8; *Wescott v. Bank,* 227 N.C. 644, 43 S.E. 2d 844."

In *Bond v. Wool,* 113 N.C. 20, 18 S.E. 77, this Court affirmed an order of the Superior Court dissolving an injunction. The opinion was certified to the Superior Court in due course, but "no judgment was written and signed by the presiding judge." In holding that its mandate terminated the case, Clark, J. (later C.J.), speaking for the Court, said:

> "While it is more regular and, for many reasons, the better course, that judgments should always be signed by the judge, it has been repeatedly held that this is not mandatory. . . .
>
> "The subsequent judgment in the Superior Court added no validity to the former judgment of that court, nor to the judgment in the Supreme Court. Its office was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued." *Id.* at 21, 18 S.E. at 78.

It is the practice of the Superior Court to enter judgment in accordance with the opinion of this Court — a practice which should be continued in the interest of clarity, continuity, and for the con-

venience of those who may examine the records thereafter —, but the efficacy of our mandate does not depend upon the entry of an order by the court below. Where such an order has been entered it "neither added to nor took from the rights of either party." *Strickland v. Jackson,* 260 N.C. 190, 191, 132 S.E. 2d 338, 339. The only order which the Superior Court is now empowered to enter in this case is one dismissing it from the docket at the cost of plaintiffs. Such an order will, of course, refer to our opinion in this case.

While we cannot suppose that Judge Campbell had any purpose to set at nought and disregard the decree of this Court, his attempt to postpone its enforcement was beyond his authority and his order to that effect is a nullity. The decision in this case declares the law *now* in force in this State with respect to the purchase, transportation, possession, and use of alcoholic beverages. It dissolved the injunction issued by Judge Riddle in the judgment appealed from, and that injunction remains dissolved. Law enforcement officers may forthwith enforce the statutes relating to alcoholic beverages as defined by G.S. 18-60.

The Clerk of the Supreme Court of North Carolina shall forthwith certify this supplemental mandate to the Superior Court of Mecklenburg County, and the Marshal of this Court is directed forthwith to deliver it directly to that court. Its clerk will immediately enter the decision heretofore certified, together with this supplemental decision, upon the judgment roll of Mecklenburg County. At the next session the judge will enter an order dismissing this action at the cost of plaintiff.

Motion granted.

STATE v. MARSHALL D. HAY AND RICHARD LEE ANTHONY.

(Filed 19 December, 1966.)

Constitutional Law § 33; Criminal Law § 77—

Where photostats of medical records have been obtained under order of the court, further order of the court directing the clerk to turn over to the solicitor such photostatic copies may not be staid on petition of the custodian of the records when the order stipulates that such records should not be used against the custodian in any prosecution against him. The defendants, although given notice, did not appear at the hearing and did not challenge the order of the court.

PER CURIAM. John William Baluss, through his Attorney, Barry T. Winston, has filed in this Court a petition to stay the execution

of an order entered on December 10, 1966, by Special Superior Court Judge Latham in the Superior Court of Orange County. Judge Latham's order directed the Clerk Superior Court to turn over to the Solicitor of District 10-A photostatic copies of petitioner's medical records made in the University of North Carolina Infirmary by Dr. Joseph L. DeWalt. The photostats were obtained by the Sheriff pursuant to an order entered by Judge Latham on November 22, 1966, based on affidavits that the above medical records "are in danger of being destroyed." The order directed the Sheriff to have photostatic copies made of the records which contained statements made by Hay and Anthony and deliver them to the Clerk Superior Court of Orange County. That order has already been executed.

At the November Session, 1966, Orange Superior Court, Hay and Anthony were indicted for having in possession hypodermic syringe for use in administering "stimulant drugs." Judge Latham held a hearing in Graham on December 10, 1966, at which Cooper, Solicitor, and Winston, Attorney for Baluss, stipulated "(a) the records sought to be examined by the State were the medical records of Mr. John Baluss." The records contained statements by Baluss involving the defendants Hay and Anthony. The order contains the following:

"That the portions of said records desired to be examined by the Solicitor are the statements of Marshall D. Hay and Richard Lee Anthony. . . . That ..... Hay and ..... Anthony, through their attorney have knowledge of this hearing and have not appeared, . . . and have not objected to said examination by the State."

"9. That nothing in said records shall be used in any prosecution by the State of North Carolina against the said John Baluss, to which conclusion the State, through its Solicitor, agrees."

In reply to a question by the Solicitor, Attorney Winston stated that he is making a special appearance and moving to dismiss the order on behalf of his client, John Baluss. However, he admitted that he also represents Hay and Anthony.

From the foregoing it appears the photostats of the Baluss medical records cannot be used in any court against Baluss (this by stipulation and agreement). The Solicitor has seen the photostats, perhaps has them now. The court's order appears to protect Baluss from any use of the records against him. If and when the Solicitor or State attempts to use the Baluss records in any manner prejudicial to Baluss, or in violation of the stipulation, he will have opportunity to be heard. Hay and Anthony do not challenge the order.

Baluss does not show any cause which entitles him to challenge it. His petition to stay its execution is dismissed.

Petition dismissed.

APPENDIX.

ADVISORY OPINION IN RE WORK RELEASE STATUTE.

Convicts and Prisoners § 2—

There is a fundamental distinction between the "farming out" of convicts within the purview of Article XI, § 1, of the State Constitution, under which the State for all practical purposes relinquished all control of the convicts so "farmed out," and the work release program set up by G.S. 148-33.1, under which the prison authorities maintain supervision and control of the convicts except for the time necessary for them to follow gainful employment and then return to the quarters designated by prison authorities, and therefore the limitations prescribed by Article XI, § 1, as to prisoners who may be "farmed out" has no application in the determination by the prison authorities of prisoners who may be selected for work release.

STATE OF NORTH CAROLINA
GOVERNOR'S OFFICE
RALEIGH

DAN K. MOORE
GOVERNOR

November 2, 1966

HONORABLE R. HUNT PARKER
Chief Justice
HONORABLE WILLIAM H. BOBBITT
HONORABLE CARLISLE W. HIGGINS
HONORABLE SUSIE SHARP
HONORABLE I. BEVERLY LAKE
HONORABLE J. WILL PLESS, JR.
HONORABLE JOSEPH BRANCH
Associate Justices
Raleigh, North Carolina

MY DEAR SIRS:

The Attorney General has advised the Chairman of the Board of Paroles that Article XI, Section 1 of the Constitution of North Carolina prohibits the Board of Paroles from authorizing the State Prison Department to grant work release privileges, in accordance with the provisions of G.S. 148-33.1, to prisoners sentenced on a charge of Murder, Manslaughter, Rape, Attempt to Commit Rape, or Arson. This opinion has resulted in the withdrawal of work release privileges from 136 inmates of the State Prison System. These inmates had been working at regular jobs, paying taxes on their earnings, paying the costs of their prison keep, contributing to the support of their dependents, and accumulating savings to be paid to them upon discharge. They are now back behind bars, a burden

to the taxpayers. Employers throughout the State have been deprived of highly-valued employees.

In addition to the immediate impact, the opinion of the Attorney General would bar an incalculable number of prisoners from work release privileges in the future, and these prisoners will be deprived of the demonstrated advantages of a gradual return of the privileges and responsibilities of freedom over the system of sudden release on parole or final discharge.

The public interest is so gravely affected by the consequences following from the opinion of the Attorney General that I feel justified in requesting an advisory opinion from the Justices of the Supreme Court of North Carolina.

The letter from the Board of Paroles and the reply from the Attorney General are enclosed, together with a memorandum from the Institute of Government, dated September 27, 1966.

None of the enclosures refer to Article III, Section 6 of the Constitution of North Carolina which was amended in 1953 to authorize the General Assembly to create a Board of Paroles and to enact suitable laws defining the duties and authority of the Board. It would appear that Article III, Section 6 authorizes the General Assembly to empower the Board of Paroles to grant paroles under such terms and conditions as would be appropriate to protect the interest of the public by supervised freedom prior to final release.

In view of the fact that the work release program as authorized by the General Assembly, is a pre-parole and pre-release program, it occurred to me that the provisions of the 1953 amendment to Article III, Section 6 might well be construed under the Constitution as permitting the employment of those persons convicted of Murder, Manslaughter, Rape, Attempt to Commit Rape, or Arson, under the work release program authorized by the General Assembly under the provisions of G.S. 148-33.1, and it is this question which I submit to you for an advisory opinion, if, in your discretion, you are disposed to render one to me.

> *Question:* Does the provision of Article XI, Section 1, of the Constitution of North Carolina, prohibiting the *farming out* of prisoners sentenced on charges of Murder, Manslaughter, Rape, Attempt to Commit Rape, or Arson, prohibit such prisoners from participation in the Work Release Program authorized by G.S. 148-33.1?

I shall await your response.

Sincerely and respectfully,
DAN MOORE

ADVISORY OPINION IN RE WORK RELEASE STATUTE.

November 29, 1966

THE HONORABLE DAN K. MOORE
Governor of North Carolina
Raleigh, North Carolina

DEAR GOVERNOR:

Your letter of the 2nd of November, 1966, requesting an advisory opinion from the members of the Supreme Court as to whether "the provision of Article XI, Section 1, of the Constitution of North Carolina, prohibiting the *farming out* of prisoners sentenced on charges of Murder, Manslaughter, Rape, Attempt to Commit Rape, or Arson, prohibits such prisoners from participation in the Work Release Program authorized by G.S. 148-33.1," has been received and considered by the members of the Court.

Article XI, Section 1, of the North Carolina Constitution, 1868, originally read: "The following punishments only shall be known to the laws of this State, viz.: death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State."

As far as our research discloses, the General Assembly first addressed itself to "farming out" convicts by enacting on 12 February 1872 Chapter CCII of the Public Laws of North Carolina, Session 1871-72, Section 8 of which directs and authorizes prison authorities "to farm out to railroad companies or other public corporations, each and every able-bodied convict who cannot be employed to advantage on the work above mentioned, on such terms as will best promote the interest of the state, for consideration not less than food and clothing. And the party so hiring shall provide a good and sufficient guard to prevent the escape of such convicts, and shall give bond for their safe keeping and proper treatment and return to the penitentiary on the termination of the contract: *Provided,* That no convict shall be farmed out who has been sentenced on a charge of murder and manslaughter and rape, attempts to commit rape or arson." It seems that this is the first time the prohibition against "farming out" convicts sentenced for these enumerated crimes appears in the law of North Carolina.

Public Laws of North Carolina, Session 1874-75, Chapter CCXLVI, and Public Laws of North Carolina, Session 1876-77, Chapter LXXIV, repeat this prohibition against the farming out of convicts sentenced on a charge of murder, manslaughter and rape, attempt to commit rape, or arson.

The Constitutional Convention of 1875 added all of Section 1, Article XI, of the State Constitution after the first sentence, which is above quoted, which addition reads in relevant part as follows:

"The foregoing provision for imprisonment with hard labor shall be construed to authorize . . . the farming out thereof, where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson. . . ."

Chapter 137, Public Laws of North Carolina, Session 1879, authorizes the presidents and boards of directors of various railroad companies to transfer farmed-out convicts from one of said railroad companies to another.

Salient features of "farming out" convicts as revealed by the Acts of the General Assembly quoted above, and also by Public Laws of North Carolina, Session 1876-77, Chapters 123, 125, 127, 128, 132, 144, and 146, were a saving to the taxpayers of the cost of maintaining the convicts (Ashman, Memorandum on the "farming out" proviso of Article XI, Section 1, of the North Carolina Constitution, Institute of Government, University of North Carolina, 27 September 1966) and a furnishing of a labor force for use in railroad construction by private corporations and a furnishing of a labor force for other private corporations. The convicts were required to labor until their sentences expired or until the contract of lease or "farming out" terminated, and then they were returned to the appropriate authority. It seems the county and State authorities had little or no discretion as to which convicts would be farmed out except those prohibited to be farmed out. The convicts received no compensation for their services, and the State received very little other than its loss of responsibility for maintaining the convicts. Under this "farming out" program, State control of the convicts for all practical purposes ended, *S. v. Sneed,* 94 N.C. 806, 809, and no measures were adopted by the State to rehabilitate them for a return to a free society.

Salient features of the work release program set up by G.S. 148-33.1, some of which are set forth in your letter to us, are as follows: This program operates under close supervision and orderly administration of the prisoners by the State. G.S. 148-33.1; General Policies, Rules and Regulations, North Carolina Prison Department, Section 3-101 *et seq.;* North Carolina Prison Department Guidebook, pp. 81-91. An eligible prisoner assigned to the program "may be released from actual custody during the time necessary to proceed to the place of his employment, perform his work, and return to quarters designated by the prison authorities." G.S. 148-33.1(d). Convicts on work release work at regular jobs, receive wages comparable to those received by free men performing similar work, pay taxes on their earnings, pay the cost of their prison keep, contribute to the support of their dependents, and accumulate savings to be

paid to them upon their discharge. G.S. 148-33.1(f); North Carolina Prison Department Guidebook, p. 89. All this has for its goal rehabilitation of a prisoner and placing upon him the kind of responsibility which prepares him for a return to a free community to assume the responsibilities of a free man and to live as a law-abiding citizen. No such features as set out above are provided in the "farming out" or lease of convict labor.

In our opinion, there is a fundamental difference, as set forth above, in the work release program as authorized by G.S. 148-33.1 and the "farming out" of convict labor as authorized in Article XI, Section 1, of the North Carolina Constitution, and, therefore, in our opinion the work release program as authorized by G.S. 148-33.1 does not come within the purview and meaning and intent of the words "farming out" as set forth in Article XI, Section 1, of the North Carolina Constitution. This advisory opinion relates solely to the constitutional question submitted to us. Policy considerations are for determination by the legislative and executive departments of the government.

In the opinion of the Chief Justice and of the undersigned Associate Justices, you are advised that the answer to the question you propound to us is, No.

Respectfully yours,
R. HUNT PARKER,
Chief Justice
WM. H. BOBBITT,
Associate Justice
CARLISLE W. HIGGINS,
Associate Justice
SUSIE SHARP,
Associate Justice
J. WILL PLESS, JR.,
Associate Justice
JOSEPH BRANCH,
Associate Justice

29 November 1966

HONORABLE DAN K. MOORE
Governor of North Carolina
Raleigh, North Carolina

DEAR GOVERNOR:

In your letter of 2 November 1966 you request an advisory opinion from the members of the Supreme Court on the following question:

Does the provision of Article XI, Section 1, of the Constitution of North Carolina, prohibiting the farming out of prisoners sentenced on charges of Murder, Manslaughter, Rape, Attempt to Commit Rape, or Arson, prohibit such prisoners from participation in the Work Release Program authorized by G.S. 148-33.1?

It is my opinion that the question should be answered, "Yes."

The determination of the answer to the question does not, of course, turn upon the social or economic benefits or detriments anticipated to result from participation by such prisoners in the Work Release Program. The prohibition of Article XI, Section 1, means the same thing today as in 1875 when it was placed in the Constitution. Therefore, the answer to your question lies in the purpose for which the prohibition was then proposed and adopted.

Obviously, work release was unknown in 1875 and the program authorized by G.S. 148-33.1 differs in many respects from the farm-out system of that time. The two programs have, however, at least one very important similarity. Under each, the prisoner, during working hours, is outside the confines of the prison and is not under prison guard.

The purpose of prohibiting the farming out of prisoners in these specified categories was not to protect these prisoners from the evils of the farm-out system, nor was it to deny them whatever benefits it may have offered or to deprive the State of the economic fruits of their labor. The purpose, obviously, was to protect the public against the danger that a prisoner, so working without a prison guard, may escape and commit another crime. The possibility of escape appears no less under the Work Release Program described in G.S. 148-33.1 than under the farm-out program. In my opinion, the intent of the prohibition was and is to forbid the sending of prisoners, serving sentences for one or more of the specified offenses, out of the confines of the prison to work at jobs upon which they will not be under prison guard. Therefore, it prohibits the participation by these categories of prisoners in the Work Release Program described in G.S. 148-33.1.

It is the meaning of the provision, not its wisdom, as to which you have asked the opinions of the members of the Court. Consequently, it is not material to the inquiry that individuals serving sentences for other crimes may be more dangerous to society than certain individuals serving sentences for one or more of the specified crimes.

Article III, Section 6, of the Constitution, as amended in 1953,

has no bearing upon the question, in my opinion, the assignment of a prisoner to the Work Release Program not being a parole.

Respectfully yours,
I. BEVERLY LAKE,
Associate Justice

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

Amend Article VI, Section 5 as appearing in 221 N.C. Reports 582 by adding at the end thereof a new paragraph designated as "g" and succeeding paragraphs as follows:

g. The Committee on Legal Aid to indigents and referrals consisting of not less than five Councilors and officers of the Council.

1. For the purpose of implementation of these rules the Council shall establish a standing committee to be designated as the Committee on Legal Aid to Indigents and Referrals, whose duties shall consist of aiding and assisting any and all districts of The North Carolina State Bar in establishing a plan for the representation of indigents in civil and certain criminal cases and lending assistance and advice in the carrying out of these programs in accordance with the laws of the State of North Carolina and the ethics of the legal profession. Such plans shall include not only matters involving litigation, but also matters involving consultation, advice, drafting of legal instruments and other legal services customarily rendered by attorneys to clients.

2. Any District Bar as provided in G.S. 84-18 may adopt a plan for the naming and designation of the attorneys to serve as counsel for indigents in civil cases or in criminal cases not covered by Chapter 1080 of the Session Laws of 1963. Such plan may be applicable to the entire district or at the election of the District Bar separate plans may be adopted by the District Bar for use in each separate county within the district.

(a) Prior to the appointment of counsel in any civil case on grounds of indigency there shall first be a determination of indigency by a committee of the District Bar appointed for such purpose by the officers of the District Bar. In emergency situations, such as in the case of injunctions or *habeas corpus* proceedings to determine custody, and other similar situations where time is of the essence, the legal aid committee shall have authority to appoint counsel without awaiting a determination of indigency.

(b) For the purpose of determining indigency the District Bar shall appoint a committee or committees of its members to serve as a committee of the District Bar to be designated as Legal Aid Committee which shall determine upon appropriate forms whether or not an individual who has requested representation on the grounds of indigency is in fact an indigent. This committee may utilize as advisory members public offi-

cials of the community, or their designees, who may render assistance to the committee as they are called upon.

(c) An individual who desires representation of counsel upon the grounds that he is an indigent shall complete forms provided by the committee of legal aid for the district and the same shall be forwarded to the Legal Aid Committee for their consideration.

(d) Upon the basis of the individual's representations of indigency and such other information as may be brought to the attention of the Legal Aid Committee, the committee shall determine whether or not the individual is in fact an indigent, and if he is determined to be an indigent the committee shall appoint counsel to represent the individual in accordance with the plan so adopted for this purpose by the District Bar. Nothing contained herein shall require any attorney to accept appointment to represent an indigent person in any case. Any attorney accepting appointment to represent an indigent person under these Rules and Regulations shall stand in the attorney-client relationship to such indigent person in the same manner as if privately employed, and such attorney may withdraw from such representation in the same manner as attorneys privately employed.

3. Such plan or plans as adopted by the District Bar shall be certified to the Council of The North Carolina State Bar before such plans are put into effect. Thereafter all appointments of counsel for indigents in said District shall be made in conformity with such plan or plans, unless in the exercise of the sound discretion of the Legal Aid Committee they deem it proper in the furtherance of justice to appoint as counsel for an indigent some lawyer or lawyers residing and practicing in the judicial district who is or are not on the plan or list certified to the Council of The North Carolina State Bar, and if so, the committee is authorized to appoint as counsel to represent said indigent some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

No attorney shall be appointed as counsel for an indigent in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

No indigent shall be entitled or permitted to select or specify the attorney who shall be assigned to represent him.

The special committee of the District shall maintain and keep current the plan for the assignment of counsel applicable to said county as certified by the district bar in which such county is located.

All orders for the appointment of counsel shall be made a part of the file maintained by the special committee with appropriate copies being forwarded to the attorney so assigned.

4. If the special committee shall so find that the request of the individual is not a proper one for representation as an indigent according to the plan of the district, then the individual shall be offered the services of a referral plan whereby the individual is referred to a lawyer or lawyers from a list of attorneys maintained for the purpose of referrals in such cases so provided.

The determination of whether or not the case is a proper one for representation as an indigent or on a referral basis shall be according to the rules prescribed by the district; provided, however, no fee producing case, workmen's compensation case, contingent fee case or the like, shall entitle such indigent to appointment of counsel.

5. Representation of indigents under these Rules and Regulations shall be performed by attorneys at law duly licensed and authorized to practice in the State of North Carolina. The District Bar may receive any and all funds, including but not limited to those emanating from the Federal Government or any agency thereof, appropriated, bequeathed or given to the District Bar for the purpose of funding the cost of rendering legal services to the poor. Any and all funds so appropriated, bequeathed or given shall be deposited in a special account with the Secretary or Treasurer of the District Bar acting as custodian of said funds to be disbursed in such manner as the Committee on Legal Aid and Referrals of the District Bar may determine by rules and regulations concerning the same.

6. Nothing herein shall prevent any attorney at law duly licensed and authorized to practice law in the State of North Carolina, or association of such attorneys, from conducting a legal aid clinic or legal aid programs, with or without compensation, for indigent persons separate and apart from the program of the District Bar, so long as such legal aid clinic or legal aid program is conducted in accordance with the laws of the State of North Carolina and the Canons of Ethics and Rules and Regulations of The North Carolina State Bar.

7. Nothing contained in these Rules and Regulations shall in any way restrict the right of any attorney at law duly licensed and authorized to practice law in the State of North Carolina to render gratuitous legal services to any person whom he considers to be indigent, without the requirement of prior determination of indigency by such committee of the District Bar.

8. Nothing contained in these rules shall in any wise affect the

inherent powers of the courts of this State to deal with such matters and with attorneys, as officers of the courts of this State.

NORTH CAROLINA
WAKE COUNTY

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do certify that the foregoing pages containing amendments to the rules and regulations of The North Carolina State Bar were duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of the Council held according to law.

Given over my hand and seal of The North Carolina State Bar, this the 2nd day of November, 1966.

EDWARD L. CANNON, Secy.

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar as adopted by The Council of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto — Chapter 84, General Statutes.

This the 14th day of November, 1966.

R. HUNT PARKER,
Chief Justice
For the Court.

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 14th day of November, 1966.

BRANCH, J.
For the Court.

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Witness—Defendant held entitled to ask witness on cross-examination whether defendant acted like person temporarily insane, *S. v. Moore*, 124; party may ask witness on cross-examination in regard to irrelevant instances in order to refresh witness' memory, *Harvel's, Inc., v. Eggleston*, 388; defendant is entitled to explain admissions on cross-examination, *S. v. Calloway*, 359; defendant is entitled to see notes used by witness to refresh his recollection, *S. v. Carter*, 648; lay witness may testify from observation that defendant was intoxicated, *S. v. Mills*, 142; testimony that door was bruised as though someone had been beating it held competent as shorthand statement of fact, *S. v. Nichols*, 152; hypothetical question to expert may not assume facts not in evidence, *Petree v. Power Company*, 419; *Hubbard v. Oil Co.*, 489; instruction that jury should scrutinize defendant's testimony, *S. v. Choplin*, 461; expression of opinion by court in remark on testimony of State's witness, *S. v. Green*, 690; competency of child as witness, *S. v. Turner*, 225.

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ANALYTICAL INDEX

ACTIONS.

§ 2. Right of Nonresident to Maintain Action in This State.

A foreign corporation does not transact business in this State solely by maintaining an action here, G.S. 55-131, and therefore the court correctly refuses to dismiss the action on a note by a foreign corporation on the ground that it was an undomesticated corporation transacting business in this State. *Leasing Corp. v. Service Co.*, 601.

§ 4. Lawful Act With Wrongful Motive — Damnum Absque Injuria.

Costs incurred by a railroad company in widening its crossings pursuant to lawful order of Highway Commission are *damnum absque injuria*, there being no contention of a "taking." *R. R. v. Highway Comm.*, 92.

§ 10. Commencement of Action and Time From Which Action is Pending.

An action is commenced as to each defendant when summons is issued against him. *Acceptance Corp. v. Spencer*, 1.

ADMINISTRATIVE LAW.

§ 4. Appeal and Review.

Administrative ruling will not be disturbed in absence of abuse of authority or disregard of law. *Yancey v. Haefner*, 263.

AGRICULTURE.

§ 7. Agricultural Tenancies.

Where an agriculture lease provides for a specified rental, with the sole provision for the reduction of rent in the event the tobacco acreage should be reduced over five per cent, the putting into effect of the "acreage-poundage control" cannot entitle lessee to a reduction in rent, it being admitted that the parties did not anticipate the putting into effect of the "acreage-poundage control" and that the lease contained no provision in regard thereto. *Taylor v. Gibbs*, 363.

APPEAL AND ERROR.

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

After certification of a decision of the Supreme Court to the Superior Court the Supreme Court retains jurisdiction of the cause for the purpose of effectuating its mandate. *D & W, Inc., v. Charlotte*, 720.

§ 2. Supervisory Jurisdiction of Supreme Court and Matters Cognizable Ex Mero Motu.

Even though an action for injunctive relief is subject to dismissal on the ground that the relief is inapposite, the Supreme Court, on appeal from the granting of the injunction, may determine the merits of the controversy in the exercise of its discretionary jurisdiction when a question of great public interest is involved. *D & W, Inc., v. Charlotte*, 577.

APPEAL AND ERROR—*Continued.*

When the decision on appeal is self-executing and the judge of the Superior Court has refused to enter judgment in accordance with the mandate of the Supreme Court, the Supreme Court, in the exercise of its supervisory jurisdiction, may order that the decision be entered upon the judgment roll in the county in order that the decision be given effect forthwith. *D & W, Inc., v. Charlotte,* 720.

§ 3. Judgments Appealable.

Where a motion to strike a further answer and defense amounts to a demurrer thereto, the order allowing the motion is immediately appealable. *Ins. Co. v. Bottling Co.,* 503.

Order overruling demurrer for misjoinder of parties alone is not immediately appealable but may be reviewed only by *certiorari. Miller v. Jones,* 568.

§ 10. Frivolous Appeals.

An appeal from the denial of a motion in proper form for change of venue is not subject to dismissal as frivolous. *Doss v. Nowell,* 289.

§ 12. Jurisdiction and Powers of Lower Court After Appeal.

Upon the entering of an appeal the trial court is *functus officio* and has no further jurisdiction except to enter orders affecting the judgment during the term when the judgment is *in fieri,* to adjudge an appeal abandoned after notice and on a proper showing, and to settle the case on appeal, which he may do only in the event of timely service of exceptions or countercase to appellant's statement of case on appeal. *Pelaez v. Carland,* 192.

Order awarding custody of minor children should not be held in abeyance pending review. *Chriscoe v. Chriscoe,* 554.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

The rules of Court regarding the form and sufficiency of assignments of error are mandatory. *Lewis v. Parker,* 436; *In re Will of Adams,* 565.

An assignment of error which fails to disclose the question sought to be presented without the necessity of going beyond the assignment itself will not be considered. *Long v. Honeycutt,* 33; *In re Will of Adams,* 565; *Gilbert v. Moore,* 679.

An assignment of error to the court's denial of appellant's motion for a new trial for errors committed during the course of the trial is a broadside assignment of error. *Lewis v. Parker,* 436.

An assignment of error which is not based on an exception duly appearing in the record is ineffectual. *Langley v. Langley,* 415; *In re Will of Adams,* 565.

§ 20. Parties Entitled to Object or Take Exception.

Plaintiff may not object to the refusal of the court to strike answers in the transcript of her adverse examination of a witness when such answers were to questions propounded by the plaintiff and were responsive thereto. *Luther v. Contracting Co.,* 636.

§ 21. Exceptions to Judgment or to Signing of Judgment.

An assignment of error to the signing of judgment presents only the record proper for review, and the record proper does not include the evidence and charge of the court. *Lewis v. Parker,* 436; *In re Will of Adams,* 565; *Seibold v. Kinston,* 615.

APPEAL AND ERROR—*Continued.*

§ 22. Exceptions and Assignments of Error to Findings of Fact.

In the absence of objection or exception to the admission or exclusion of evidence, findings of fact which are supported by the evidence must be sustained. *Wall v. Colvard Co.*, 43.

An exception to the judgment is sufficient basis for consideration of an assignment of error that the court erred in failing to find facts sufficient to support its order denying defendant's motion to vacate the judgment. *Langley v. Langley*, 415.

Defendant moved to vacate judgment for plaintiff, entered by the court upon waiver of jury trial, on the ground that she had not authorized her attorney to abandon her defense. The court denied the motion without finding the facts and there was no request for findings. *Held:* It will be presumed that the court on proper evidence found facts sufficient to support the judgment, including a finding that defendant's attorney was authorized to abandon defendant's defense, and the denial of the motion to vacate the judgment will not be disturbed. *Ibid.*

Where there are no exceptions to any finding by the trial court, an assignment of error that the evidence was insufficient to support the findings is ineffectual and does not present this question for review. *Supply Co. v. Hight*, 572.

§ 24. Exceptions and Assignments of Error to the Charge.

An assignment of error to the charge with a mere reference to the record page where the asserted error may be discovered is insufficient, it being required that the assignment of error show within itself the asserted error sought to be presented. *Lewis v. Parker*, 436.

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. *Ibid.*

§ 25. Objections, Exceptions and Assignments of Error to Issues.

Where there is no objection or exception in the lower court to the issue submitted or the court's refusal to submit an issue tendered, appellant may not challenge the issues for the first time on appeal in his assignments of error. *Wooten v. Cagle*, 366.

§ 29. Making Out and Service of Case on Appeal.

The inability of appellant to obtain a transcript of the evidence from the court reported within the time limited does not excuse his failure to make out and serve statement of case on appeal. *Peleaz v. Carland*, 192.

§ 35. Conclusiveness of Record and Presumptions in Regard to Matters Omitted.

Where the charge of the court is not set forth in the record, it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts. *Long v. Honeycutt*, 33.

§ 38. Form and Contents of Brief.

Assignments of error not brought forward in the brief are deemed abandoned. *Wall v. Colvard Co.*, 43; *Mathis v. Siskin*, 119; *McDonald v. Heating Co.*, 497.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

An exception to the exclusion of evidence will not be sustained when it

is not made to appear what the excluded evidence would have been. *Heating Co. v. Construction Co.*, 23; *Gibbs v. Light Co.*, 188.

The exclusion of evidence will not justify a new trial when the record discloses that appellant's cause would be in no way benefited had such evidence been admitted. *Long v. Honeycutt*, 33.

The refusal of the court to strike from plaintiff's adverse examination of a witness answers of the witness on cross-examination will not be held prejudicial when such answers are merely repetitious of the witness' testimony upon direct examination by plaintiff. *Luther v. Contracting Co.*, 636.

The exclusion of evidence cannot be prejudicial when all the evidence, including the excluded evidenc, is insufficient to take the issue to the jury. *Bentley v. Ins. Co.*, 155.

Exception to the admission of testimony is waived when testimony of the same import is thereafter admitted without objection. *Harvel's v. Eggleston*, 388.

The exclusion of evidence is not prejudicial when other witnesses testify fully in regard to the matter. *Gibbs v. Light Co.*, 186.

Error in the admission or exclusion of evidence relating to an issue answered in appellant's favor cannot be prejudicial to appellant. *Wooten v. Cagle*, 366.

Permitting an attorney to cross-examine plaintiff when an attorney-client relationship had theretofore existed between them cannot be held prejudicial when none of the evidence elicited by the attorney was relevant to the issues, and therefore could not have affected the judgment. *Gibbs v. Light Co.*, 186.

§ 42. Harmless and Prejudicial Error in Instructions.

An erroneous instruction on a material aspect of the cause must be held for prejudicial error, notwithstanding that in another part of the charge the court correctly states the law in regard thereto. *Williams v. Boulerice*, 62.

Where the court charges the jury on the doctrine of sudden emergency in stating the general principles of law applicable to the evidence but then charges the jury explicitly that it should answer the issue of contributory negligence in the affirmative if it found plaintiff was negligent in any of the aspects presented by the evidence, without relating the issue of plaintiff's plea of sudden emergency specifically to the issue of contributory negligence, the error is not cured by contextual construction. *Day v. Davis*, 643.

§ 47. Review of Orders Relating to Pleadings.

The striking of a portion of the complaint cannot be prejudicial when the matter alleged therein is stipulated by the parties. *R. R. v. Highway Comm.*, 92.

Since relief is dependent upon the facts alleged and not the pleader's conclusion of law from such facts, the striking from the complaint of plaintiff's averment that the interest recoverable should be compounded cannot be prejudicial. *Bank v. Casualty Co.*, 234.

§ 49. Review of Findings or Judgments on Findings.

Findings of fact by the trial court which are supported by evidence are conclusive on appeal. *Mills v. Transit Co.*, 313; *Truck Service v. Charlotte*, 374.

Where the court sustains the plea in bar of governmental immunity in an action for negligent injury brought against a municipality and a county, there being no request by the municipality or the county for a jury trial in respect to the plea in bar, it will be presumed that the court on proper evi-

APPEAL AND ERROR—*Continued.*

dence found facts sufficient to support its judgment, there being no request in the record that the court make findings of fact and there being no findings of record. *Seibold v. Kinston*, 615.

§ 51. Review of Judgments on Motions to Nonsuit.

Incompetent evidence admitted at the trial must be considered for whatever it is worth in passing upon the lower court's refusal of defendants' motions for nonsuit. *Hubbard v. Oil Co.*, 489.

Judgment of nonsuit in the lower court must be reversed on appeal if the evidence considered in the light most favorable to plaintiff is sufficient to permit the jury to find all facts necessary to constitute a cause of action in plaintiff's favor. *Forbis v. Walsh*, 514.

On appeal from judgment of nonsuit, the Supreme Court will discuss the evidence only to the extent necessary to determine its sufficiency to go to the jury and may refrain from discussing or deciding any other question. *Ibid.*

Since defendant's evidence will not be considered upon motion to nonsuit unless it is favorable to plaintiff or is in explanation of plaintiff's testimony without contradiction thereof, in reviewing judgment of nonsuit it is not necessary to consider plaintiff's objections to evidence offered by defendant. *Luther v. Contracting Co.*, 636.

§ 53. Petitions to Rehear.

The Supreme Court may grant a petition to rehear in order to clarify a former decision by deleting therefrom words unnecessary to the decision. *Utilities Comm. v. R. R.*, 204.

§ 59. Force and Effect of Decision of Supreme Court in General.

The decision of the Supreme Court reversing the judgment of the Superior Court granting an injunction is self-executing and has the effect of dissolving the injunction, and no order of the Superior Court is necessary to implement the decision. *D & W, Inc., v. Charlotte*, 720.

Mandate of the Supreme Court upon appeal is binding upon the Superior Court and must be strictly followed without variation or departure, and no other judgment than that directed or permitted by the appellate court may be entered. *Ibid.*

APPEARANCE.

§ 1. Distinction Between Special and General Appearance.

The appearance of a party under order of court for the purpose of a pretrial examination does not amount to a waiver of service of summons, since the appearance is not voluntary. *Acceptance Corp. v. Spencer*, 1.

ARREST AND BAIL.

§ 3. Right of Officer to Arrest Without Warrant.

Where it is made to appear that the arresting officer knew that a robbery had been committed by one who had fled, that the officer found defendant at the location described in the officer's information, that defendant fitted the general description of the felon and had property on his person similar to that taken at the robbery, the circumstances justify the arrest of defendant by the officer without a warrant. *S. v. Grier*, 296.

ASSAULT AND BATTERY.

§ 4. Criminal Assault in General.

It is not required in order to constitute the offense of assault that actual force be used, it being sufficient if defendant evinces violence sufficient to put a reasonable man in fear which coerces him from pursuing lawful conduct. *S. v. Douglas*, 267.

§ 8. Self-Defense and Defense of Home.

In a prosecution for felonious assault and for assault with a deadly weapon, defendant's right of self-defense is not limited to his right to defend himself against a felonious assault, but defendant is entitled to repel a non-felonious assault, and an instruction to the effect that defendant could not lawfully use force in self-defense unless he was threatened with death or great bodily harm must be held for prejudicial error. *S. v. Fletcher*, 140.

Where defendant denies the assault and contends that all she did was to try to stop a fight between two others, the right of self-defense is not presented. *S. v. Fields*, 456.

§ 9. Defense of Others.

A private citizen does not have the right to interfere in a fight between third persons unless he has a well-grounded belief that a felonious assault is about to be committed on one of them. *S. v. Fields*, 456.

§ 12. Presumptions and Burden of Proof.

In a prosecution for felonious assault and for assault with a deadly weapon, the burden does not rest upon defendant to satisfy the jury of his plea of self-defense but the burden rests upon the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim. *S. v. Fletcher*, 140.

§ 14. Sufficiency of Evidence and Nonsuit.

The evidence in this case held sufficient to be submitted to the jury upon the question of defendant's guilt of assault with a deadly weapon. *S. v. Smith*, 167; *S. v. Douglas*, 267.

The evidence in this case *held* sufficient to be submitted to the jury on the issue of the male defendant's guilt of assault on a female, he being a man over 18 years of age, and on the issue of the *feme* defendant's guilt of assault with a deadly weapon. *S. v. Marshburn*, 558.

§ 15. Instructions.

Where defendant contends that she did not assault the prosecuting witness in any way and that all she did was try to stop a fight between the prosecuting witness and a third person, the evidence does not require the court to instruct the jury on defendant's right to fight in self-defense or in defense of another. *S. v. Fields*, 456.

ATTORNEY AND CLIENT.

§ 3. Scope of Authority of Attorney.

On appeal from the refusal of defendant's motion to vacate a judgment on the ground that defendant did not authorize her attorney to abandon her defense, it will be presumed, in the absence of findings of record or request for findings, that the court duly found that the attorney was authorized to abandon the defense. *Langley v. Langley*, 415.

ATTORNEY AND CLIENT—*Continued.*

An attorney may not during a spontaneous exchange between the attorney and the court during the progress of the charge and without opportunity for a conference with the client, waive or surrender the requirement that the State prove one of the essential elements of the offense charged. *S. v. Mason*, 423.

AUTOMOBILES.

§ 6. Safety Statutes and Ordinances.

The regulations of the State Highway Commission as to the maximum load of vehicles on bridges is a safety regulation, and its violation is negligence *per se*. *Byers v. Products Co.*, 518.

The violation of a safety statute is negligence *per se* unless the statute provides to the contrary, and such violation is actionable, if it is the proximate cause of injury to the plaintiff. *Ratliff v. Power Co.*, 605.

§ 7. Attention to Road, Look-Out and Due Care in General.

While the motor vehicle statutes are not applicable when the vehicles in question are being operated upon private property, the common law rules of liability for injury proximately caused by negligence do apply, and therefore conduct which, in the absence of statute, would constitute negligence if occurring on a public highway will also be deemed negligence if occurring while vehicles are moving upon private property through a tunnel leading to a highway in the same manner as upon a heavily congested public highway. *McDonald v. Heating Co.*, 496.

§ 8. Turning and Turn Signals.

The fact that a truck towing a trailer carrying a 40 foot utility pole, in making a left turn into an intersecting road, necessarily blocks both lanes of the two-lane highway on which it was traveling, does not constitute negligence or wrong doing *per se*. *Ratliff v. Power Co.*, 605.

The fact that a driver looks and gives the statutory signal before making a left turn does not necessarily absolve him of negligence in making such turn, but he is also required to use the care a reasonably prudent man would use under like circumstances, and whether the circumstance of making a left turn with a truck pulling a trailer carrying a 40 foot utility pole demands, in the discharge of the duty to use due care, the stationing of some person at the intersection to stop following traffic, is a question for the jury. *Ibid.*

Failure of a driver of a truck pulling a trailer carrying a 40 foot utility pole, turning left into an intersecting highway, to drive to the left of the center of the intersection cannot be the proximate cause of an accident occurring when the driver of a following vehicle collides with the end of the pole in such driver's righthand lane of travel. *Ibid.*

§ 9. Stopping, Parking, Signals and Lights.

Where the intersection of streets in a municipality has authorized electric traffic signals, requirements in regard to stopping are controlled by the traffic lights and not by G.S. 20-154(b). *Jones v. Holt*, 381.

§ 10. Following Vehicles and Negligence and Contributory Negligence in Hitting Vehicles Stopped or Parked.

Where a motorist is traveling within the statutory speed limit, G.S. 20-141(b), his failure to stop his vehicle within the radius of his lights or the range of his vision will not be held for negligence or contributory negligence

AUTOMOBILES—*Continued.*

per se, but is only evidence to be considered with other circumstances in the case. *Bass v. McLamb*, 395.

While not conclusive, the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or in following too closely or in failing to keep a proper lookout. *Champion v. Waller*, 426.

§ 12. Backing.

It is not negligence *per se* to back a car, but the operator is required in the prudent operation of the vehicle to look back when he commences such operation and continue to look back in order that he may not collide with or injure others, and to give timely warning of his intention to back when a reasonable necessity therefor exists. *Harris v. Wright*, 654.

The fact that the back window of a truck is obstructed by barrels loaded on the body does not render the backing of the truck negligence when the driver looks backward around the side, and the failure to give warning cannot be the proximate cause of injury to a person who knew that the vehicle was backing. *Ibid.*

§ 17. Intersections.

Where the intersection of streets in a municipality has authorized electric traffic signals, requirements in regard to stopping are controlled by the traffic lights and not by G.S. 20-154(b). *Jones v. Holt*, 381.

When a motorist is faced by an amber light it cautions him that the red signal is about to appear and that it is hazardous to enter, and he may proceed into the intersection only if a stop at the stop line cannot be made in safety, and a provision of an ordinance that the driver of a vehicle faced with the amber light must stop before the nearest crosswalk if indicated by a stop line, but if the stop cannot be made in safety the driver might proceed cautiously across the intersection, will not be construed to require a driver "to run on the yellow" even though he may not be able to stop before encroaching upon the crosswalk when this may be done in safety. *Ibid.*

The driver of a vehicle along a dominant highway is not required to anticipate that a driver approaching along an intersecting servient highway will fail to stop before entering the intersection, but is entitled to assume and act on the assumption, even to the last moment, that the operator of the vehicle along the servient highway will stop in obedience to the statute and will not enter the intersection until he ascertains, in the exercise of due care, that he can do so with reasonable assurance of safety. *Day v. Davis*, 643.

Electric traffic control signals have a recognized meaning, and while a driver faced with the green light is permitted to proceed into the intersection, the green light is not a command to go but a qualified permission to do so, and such driver remains under the fundamental duty of using due care. *McBride v. Freeze*, 681.

§ 19. Sudden Emergencies.

A driver faced with a sudden emergency caused by the negligence of another is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made, and ordinarily the factual determination of the reasonableness of the choice is a question for the jury. *Williams v. Boulerice*, 62.

A party may not be deprived of his right to have the doctrine of sudden emergency presented to the jury on the ground that his negligence contributed to the creation of the emergency when the question of whether his negligence

AUTOMOBILES—*Continued.*

was a proximate cause in creating the emergency is for the determination of the jury upon the evidence. *Day v. Davis*, 643.

§ 21.1. Oversize and Overweight Vehicles.

Violation of posted regulation as to maximum load on bridge is negligence *per se*. *Byers v. Products Co.*, 518.

Vehicles transporting poles in the daytime are exempt from the requirements of G.S. 20-116(e), and therefore during the daytime it is not negligence *per se* to transport without a special permit a 40 foot pole on a trailer. *Ratliff v. Power Co.*, 605.

§ 24. Loading and Protruding Objects.

The requirement of G.S. 20-117 that a red flag not less than 12 inches both in length and width should be displayed at the end of a load extending more than four feet beyond the rear of a vehicle traveling during daylight hours is not met by a flag of the statutory dimensions when the top of such flag is draped over the load so that less than 12 inches of the flag hangs perpendicular, and failure to meet the requirement of the statute is negligence *per se*. *Ratliff v. Power Co.*, 605.

The fact that the operator of a truck is prevented by barrels loaded thereon from looking through the back window of the truck does not establish negligence of the operator in backing the truck when he takes reasonable caution before backing by looking to the right, left, and backward. *Harris v. Wright*, 654.

§ 25. Speed in General.

The operation of a truck in excess of 45 miles per hour on a public highway in violation of G.S. 20-141(b)(3) is negligence *per se*. *Smart v. Fox*, 284.

Any speed may be unlawful if the driver of a motor vehicle sees, or in the exercise of due care should see, a person or vehicle in his line of travel. *Champion v. Waller*, 426.

§ 27. Speed at Intersections.

While the violation of the provision of G.S. 20-141(c) requiring a motorist to decrease speed when approaching and crossing an intersection, is negligence *per se*, such violation must be a proximate cause of the injury in suit, including the essential element of foreseeability, in order to be actionable. *Day v. Davis*, 643.

§ 32. Bicycles.

The presence of a young boy riding a bicycle on a highway is, in itself, a danger signal to a motorist approaching the bicycle from the rear. *Champion v. Waller*, 426.

§ 34. Children.

Evidence held not to show negligence in striking child attempting to board rear of backing truck. *Harris v. Wright*, 654.

§ 39. Physical Facts at the Scene.

The distance traveled by a vehicle after a collision does not establish that the vehicle was traveling at excessive speed prior to the collision when the evidence conclusively establishes that the driver was instantly incapacitated by the collision and that the collision impaled the vehicle upon the end of a 40 foot utility pole which was swinging in his direction of travel consequent to the left turn made by the vehicle pulling the trailer carrying the pole. *Ratliff v. Power Co.*, 605.

AUTOMOBILES—*Continued.*

§ 40. Relevancy and Competency of Declarations and Admissions.

Plaintiff had jacked up a rear wheel of defendant's car, which was stuck in the snow, and was partially under the car attempting to put chains on the wheel, when he was injured by the car rolling or falling upon him. Plaintiff contended defendant was negligent in failing to keep the brakes on as she had been instructed to do by plaintiff. *Held:* A statement by defendant that she "could have released her foot off the brake" is not sufficiently definite to constitute substantive evidence and a statement by defendant that "I feel like this is my fault, or it would never have happened," amounts to nothing more than a legal conclusion, and defendant's statements are insufficient to require submission of the issue of negligence to the jury. *Mabe v. Hill*, 459.

§ 41a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Negligence may be established by circumstantial evidence, including physical facts at the scene, either alone or in combination with direct evidence, which permits the legitimate inference of negligence as a proximate cause. *Jackson v. Baldwin*, 149.

§ 41b. Sufficiency of Evidence of Negligence in Failing to Use Due Care and in Traveling at Excessive Speed.

Whether excessive speed was proximate cause of sideswiping accident held for jury. *Smart v. Fox*, 284.

§ 41d. Sufficiency of Evidence of Negligence in Passing Vehicles Traveling in Same Direction.

Evidence tending to show that the driver of a car attempted to pass a preceding vehicle when the left side of the highway was not clearly visible and free of oncoming traffic for a sufficient distance to permit him to pass in safety, and that such violation of G.S. 20-150(a) was a proximate cause of the injury when the driver lost control of the vehicle in attempting to avoid a headon collision with a third vehicle approaching from the opposite direction, is sufficient to be submitted to the jury on the issue of the driver's negligence. *Duckworth v. Metcalf*, 340.

§ 41e. Sufficiency of Evidence of Negligence in Stopping Without Signal or Parking Without Lights.

Evidence that defendant was sitting in his car in a snow storm, that the car was standing in the ruts in the snow for traffic going in his direction and was covered with snow, and that defendant took no precaution to warn travelers of the presence of his car, *is held* sufficient to be submitted to the jury on the issue of negligence proximately causing an accident when plaintiff's vehicle collided with the rear of defendant's vehicle. *Bass v. McLamb*, 395.

§ 41g. Sufficiency of Evidence of Negligence at Intersections.

The physical facts at the scene tending to show that intestate was driving east on a through street and that defendant was driving north on the intersecting street, and that the collision occurred in the southeast quadrant of the intersection between the right rear of the truck intestate was driving and the front of the automobile driven by defendant, together with other evidence, *is held* sufficient to be submitted to the jury on the question of negligence and proximate cause. *Jackson v. Baldwin*, 149.

Plaintiff's evidence was to the effect that the vehicle in which she was a passenger was in a funeral procession, that it was standing or moving slowly

almost in the middle of a busy intersection with its lights burning in the middle of the afternoon, that the car entered the intersection on the green light, that upon the changing of the lights, defendant's car entered the intersection from the intersecting street on the "go" light, and that plaintiff's car was struck on its left side by the automobile driven by defendant. *Held:* Nonsuit was improperly entered, since defendant, in the exercise of reasonable diligence, should have seen the standing vehicle and acted accordingly. *McBride v. Freeze*, 681.

Act of driver in turning left at intersection into side of car which had approached the intersection from opposite direction *held* sole proximate cause of collision. *Bullard v. Sheffield*, 684.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Evidence that the driver of defendant's truck was pulling a trailer carrying a 40 foot utility pole, that the warning flag at the end of the pole did not hang perpendicular for the statutory 12 inches, that the driver made a left turn into an intersecting highway without having a person to warn and stop following traffic, and that the following vehicle driven by intestate violently collided with the end of the pole, *held* sufficient to be submitted to the jury on the question of negligence and proximate cause. *Ratliff v. Power Co.*, 605.

Evidence that defendant turned left without signal to enter a filling station, and struck the right rear of plaintiff's car as plaintiff was passing, *held* to take the issue of defendant's negligence to the jury. *Connor v. Robbins*, 709.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

Evidence permitting the inference that defendant was driving some 45 miles per hour on the highway when he saw or should have seen, several hundred feet in front of him, a boy riding a bicycle on the right edge of the pavement in his lane of travel, and that without sounding his horn or reducing his speed he struck the bicycle in the rear, resulting in the death of the boy, *is held* sufficient to be submitted to the jury on the questions of defendant's negligence in failing to sound his horn and in maintaining an unreasonable speed under the prevailing circumstances. *Champion v. Waller*, 426.

Evidence held insufficient to show negligence in backing truck causing injury to child attempting to board its rear. *Harris v. Wright*, 654.

§ 41r. Sufficiency of Evidence of Negligence in Operating Defective or Improperly Loaded Vehicle.

Evidence held insufficient to show actionable negligence in causing plank to fall from defendant's truck and strike passenger in following vehicle. *McDonald v. Heating Co.*, 496.

§ 41v. Sufficiency of Evidence of Negligence in Acting in Emergency.

Whether defendant's choice of conduct when confronted by sudden emergency was that of a reasonably prudent man held for jury. *Williams v. Boulerice*, 62.

§ 41y. Sufficiency of Negligence in Operating Overweight Vehicles on Bridges.

Evidence that defendant's employee drove vehicle in excess of maximum posted weight on bridge *held* to take issue to jury in action for wrongful death of workman on bridge, fatally injured when bridge collapsed. *Byers v. Products Co.*, 518.

AUTOMOBILES—*Continued.*

§ 42d. Nonsuit for Contributory Negligence in Hitting Preceding Vehicle.

Evidence held not to show contributory negligence as matter of law in hitting rear of vehicle covered with snow stopped on highway. *Bass v. McLamb*, 395.

The evidence disclosed that the driver of a truck pulling a trailer carrying a 40 foot utility pole, having a flag at its end not hanging perpendicular for the statutory 12 inches, made a left turn into an intersecting highway, and that plaintiff's intestate, driving a following automobile, crashed into the end of the pole. There was no evidence that intestate was traveling at excessive speed. *Held:* The evidence does not warrant nonsuit on the ground of contributory negligence. *Ratliff v. Power Co.*, 605.

§ 42e. Contributory Negligence in Passing Vehicles Traveling in Same Direction.

Evidence *held* not to show contributory negligence as a matter of law on part of plaintiff in passing vehicles traveling in same direction. *Connor v. Robbins*, 709.

§ 42g. Nonsuit for Contributory Negligence at Intersection.

Where the evidence discloses that the driver along a dominant highway saw that a vehicle approaching along the servient highway had stopped before entering the intersection, the question of whether the failure of the driver along the dominant highway to reduce speed was a proximate cause of injury resulting when the driver along the servient highway suddenly entered the intersection in the path of the other vehicle, is a question for the jury. *Day v. Davis*, 643.

§ 42k. Contributory Negligence of Pedestrians.

Plaintiff's evidence tended to show that her intestate was employed by the Highway Commission as a skilled bridge man, that defendant's driver arrived at the bridge with a truck greatly in excess of the posted weight limit for the bridge and that the driver stopped and descended from the truck and talked to plaintiff's intestate, that thereafter the driver drove upon the bridge as intestate was some 18 feet onto the bridge, and that the bridge collapsed, resulting in fatal injury to intestate. *Held:* Intestate will not be held guilty of contributory negligence as a matter of law, the purport of the prior conversation between intestate and the driver being in the realm of speculation. *Byers v. Products Co.*, 518.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Act of driver turning left into side of vehicle traveling in opposite direction held sole cause of intersection accident. *Bullard v. Sheffield*, 684.

§ 44. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

The burden is upon defendants upon the issue of contributory negligence and defendants must allege and prove facts sufficient to raise the inference of contributory negligence as a reasonable conclusion and not a mere conjecture in regard thereto. *Jones v. Holt*, 381.

Evidence held insufficient to raise issue of contributory negligence in stopping suddenly when faced with amber traffic signal. *Ibid.*

AUTOMOBILES—*Continued.*

§ 46. Instructions in Auto Accident Cases.

It is error for the court to fail to charge law of safety statute when presented by evidence. *Smart v. Fox*, 284.

The court's instruction to the jury in this case *held* to have properly placed the burden of proof on the plaintiff upon the issue of negligence and on the defendant upon the issue of contributory negligence. *Wooten v. Cagle*, 366.

Where the evidence affirmatively discloses that the vehicle driven by defendant's employee came within the exemption of G.S. 20-116(e) and did not require a special permit, it is error for the court to submit the question of negligence in operating the vehicle without such permit. *Ratliff v. Power Co.*, 605.

It is error for the court to charge the law requiring a vehicle making a left turn into an intersecting highway to pass to the left of the center of the intersection when there is no evidence that the driver "cut the corner" at the intersection, or that, if he did so, such act could have been a proximate cause of the collision. *Ratliff v. Power Co.*, 605.

Plaintiff held entitled to instruction on doctrine of sudden emergency upon evidence in this case. *Day v. Davis*, 643.

Where the court in stating the general principles of law applicable to the evidence, instructs the jury that such principles, including *inter alia* the doctrine of sudden emergency, were applicable both to the issue of negligence and contributory negligence, but later in charging upon the issue of contributory negligence instructs the jury to answer that issue in the affirmative if they found that plaintiff was negligent in stated respects, but without relating the doctrine of sudden emergency to any of the particular acts relied on by defendant as constituting contributory negligence, the charge must be held prejudicial. *Day v. Davis*, 643.

§ 54f. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

Proof that the vehicle negligently operated by the driver was owned by and registered in the name of another makes out a *prima facie* case against the owner under G.S. 20-71.1 and requires the submission of the issue of *respondeat superior* to the jury, but such *prima facie* case does not compel a verdict against the owner on that issue. *Duckworth v. Metcalf*, 340.

Uncontradicted evidence that driver was on personal mission entitles owner to peremptory instruction notwithstanding G.S. 20-71.1. *Ibid.*

§ 71. Competency of Evidence in Prosecution Under G.S. 20-138.

A witness may testify from his observation of defendant that in his opinion defendant was under the influence of intoxicating liquor at the time in question. *S. v. Mills*, 142.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions Under G.S. 20-138.

The evidence in this case *held* sufficient to sustain conviction of defendant for operating a motor vehicle on a public highway while under the influence of intoxicating liquor. *S. v. Mills*, 142; *S. v. Poole*, 463.

§ 85. Unlawful Taking of Automobile.

The State's evidence tending to show that an automobile was taken in the absence and without the consent of the owner from its parking place, that in less than ten hours defendants were occupants of the car stopped at a stop light and that both defendants fled from the car precipitously upon the mere

AUTOMOBILES—*Continued.*

approach of officers, is sufficient to support findings by the jury that the vehicle was in the joint possession of both defendants, and that both were guilty of taking the vehicle in violation of G.S. 20-105. *S. v. Frazier*, 249.

The unlawful and unexplained possession of an automobile recently and unlawfully taken from the actual or constructive possession of the owner gives rise to an inference to be considered with other circumstances disclosed by the evidence in determining the question of guilt, but an instruction that such recent possession raises a presumption justifying a conviction is erroneous. *Ibid.*

BASTARDS.

§ 4. Failure to Support — Burden of Proof.

In a prosecution under G.S. 49-2, the burden is upon the State upon defendant's plea of not guilty to prove not only that defendant is the father of the child and had refused or neglected to support the child, but further that his refusal or neglect was wilful. *S. v. Mason*, 423.

§ 7. Instructions in Prosecutions for Failure to Support.

In a prosecution under G.S. 49-2, an instruction that the jury should find defendant guilty if it found from the evidence beyond a reasonable doubt that defendant was the father of the child, without submitting the question of whether defendant wilfully refused to support the child, must be held for prejudicial error, and the fact that defendant's counsel, during a spontaneous exchange between the counsel and the judge in the course of the charge, assented that the question of paternity was the sole question to be decided by the jury, does not affect this result. *S. v. Mason*, 423.

BILL OF DISCOVERY.

§ 2. Examination of Adverse Party to Obtain Information to Draft Pleading.

Motion and affidavit disclosing that plaintiff had given defendant a preferred right to buy at the market price certain lands whenever defendants desired to sell, and that defendants had sold the optioned property to a third person without giving plaintiff an opportunity to purchase, *held* sufficient to invoke the discretionary power of the court to grant an inspection of documents to disclose the purchase price of the tract of land, which included the parcel of land in question, which defendants had sold to the third person, for the purpose of enabling plaintiff to prepare its complaint. *Duff-Norton Co. v. Hall*, 275.

BILLS AND NOTES.

§ 5. Alteration and Completion.

Parties signing a note with others as makers, the note being complete except for the insertion of the name of the payee or payees, clothe the primary makers with authority to complete the instrument by inserting the name of the payees. *Jones v. Jones*, 701.

§ 17. Defenses and Competency of Parol Evidence.

Where, in an action on a note by the holder, the answer admits the execution of the note by defendants and the balance due thereon for the purchase price of machinery, and alleges as a counterclaim and cross-action

BILLS AND NOTES—*Continued.*

against the holder and the manufacturer and the parent corporation of the manufacturer, joined as additional parties, fraud and breach of warranty in the sale of the machinery, but fails to allege that plaintiff holder knew anything about the alleged false warranties and false representations or participated in them in any way, the counterclaim is fatally deficient in substance, and the granting of judgment on the pleadings in favor of the holder is correct. *Acceptance Corp. v. Spencer*, 1.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 2.2. Presumptions and Burden of Proof.

Presumption of guilt from possession of recently stolen property does not obtain upon proof of defendant's possession of property of same classification or make without evidence identifying the property as the very property stolen by breaking and entering, and possession of property recently stolen without breaking and entering raises no presumption of guilt of burglary, even though other property had been stolen by breaking and entering the same night. *S. v. Foster*, 480.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to support conviction of felonious breaking and entering. *S. v. Majors*, 146.

Evidence that defendant and his accomplice unlawfully broke open the door of a supermarket in the middle of the night is sufficient to sustain a conviction of breaking and entering, notwithstanding they did not physically enter the building, since the fact that the parties were frustrated before the accomplishment of the intended larceny does not exculpate them. *S. v. Nichols*, **152.**

Circumstantial evidence of defendant's guilt of breaking and entering *held* sufficient to be submitted to the jury. *S. v. Morgan*, 214.

There being no evidence of defendant's possession of identical property stolen by breaking and entering, nonsuit should have been granted. *S. v. Foster*, 480.

There being no direct evidence that defendant was the possessor of recently stolen property, the circumstantial evidence of guilt was insufficient to be submitted to the jury. *S. v. Parker*, 258.

§ 9. Prosecutions for Possession of Implements of Burglary.

Evidence that gloves, tape, chisels, crowbars, hammers and punches were found in the middle of the night in a vehicle which had been parked near a supermarket, and that defendant had at least constructive possession of the implements, is sufficient to sustain a conviction of defendant of unlawful possession of implements of housebreaking. *S. v. Nichols*, 152.

In a prosecution under G.S. 14-55, the State has the burden of showing defendant's possession without lawful excuse of the items enumerated in the statute or items coming within the generic term "implements of housebreaking," and while gloves, flashlight, socks, a tire tool and small screwdriver are not implements of housebreaking within the intent of the statute, a crowbar and big screwdriver are such implements. *S. v. Morgan*, 214.

The State's evidence tending to show that defendant had in his possession a big screwdriver and crowbar and that defendant had actually used the big screwdriver and crowbar to break and enter a store building, is sufficient to be submitted to the jury on the question of defendant's guilt of possession of implements of housebreaking without lawful excuse. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS—*Continued.*

An indictment under G.S. 14-55 is not fatally defective because of its failure to enumerate any of the articles specified in the statute as implements of housebreaking when it does specify implements coming within the generic term of "implements of housebreaking." *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 3. Rescission for Mental Incapacity and Undue Influence.

In an action to rescind a transaction, plaintiff's evidence that her intestate was mentally incompetent on the date he executed the agreement places the burden upon defendant to show that defendant was ignorant of the mental incapacity, had no notice thereof such as would put a reasonably prudent person upon inquiry, paid a fair and full consideration, that defendant took no unfair advantage of the incompetent, and that plaintiff could not restore the consideration or make adequate compensation therefor. Failure of defendant to establish any one of these factors entitles plaintiff to the relief. *Chesson v. Ins. Co.*, 98.

§ 8. Pleadings and Issues.

Mere averment that a party's signature to the instrument in suit was procured by fraud is insufficient, but it is required that the facts constituting the fraud as well as fraudulent intent affirmatively appear from the pleading. *C. I. T. Corp. v. Tyree*, 562.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 2. Description of Chattel.

Where at the time of the execution of a chattel mortgage the mortgagor owns merchandise and equipment on the premises at a specified location, a chattel mortgage listing the chattels by quantity, as "one cigarette machine; two cold drink machines;" etc., and covering "also, all merchandise, supplies and equipment now located" at the designated business address, is held to identify the property with sufficient certainty. *Wall v. Colvard Co.*, 43.

§ 15. Default and Repossession for Purpose of Sale.

Upon default, the chattel mortgagee is entitled to possession of the property. *Wall v. Colvard Co.*, 43.

§ 17. Foreclosure and Sale.

Where the assignee of a chattel mortgage and note securing same grants an extension of time for payment upon notification by the mortgagor that the chattel had had a breakdown in breach of the seller's warranty, but upon later default the mortgagor surrenders the vehicle to the assignee, who proceeds to foreclose and sell the vehicle under the terms of the instrument and in conformity with law, *held*, the foreclosure sale cannot constitute a legal wrong, and the mortgagor may not hold the assignee liable in damages regardless of motive, assignee not being a party to the warranty. *Evans v. GMC Sales*, 544.

CLAIM AND DELIVERY.

§ 5. Judgment for Defendant and Liabilities on Plaintiff's Bond.

Where the holder of a junior chattel mortgage seizes the property under claim and delivery and refuses the demand for the surrender of the property

CLAIM AND DELIVERY—*Continued.*

by the holder of a senior registered chattel mortgage in default, there is a conversion of the property by the junior mortgagee, and the senior mortgagee is entitled to recover from him the value of the property at the time of its conversion, with interest. *Wall v. Colvard Co.*, 43.

CONSPIRACY.

§ 1. Elements and Essentials of Civil Conspiracy.

An action for civil conspiracy will not lie for a mere conspiracy alone, but only to recover the damages resulting from wrongful or unlawful acts committed pursuant to the conspiracy. *Shope v. Boyer*, 401.

An agreement to do a lawful act cannot constitute grounds for civil conspiracy regardless of the motives of the parties, since an action for civil conspiracy will lie only when there is damage resulting from an unlawful act done pursuant to an unlawful conspiracy. *Evans v. GMC Sales*, 544.

Where the allegations are insufficient to state a cause of action for civil conspiracy as to one of the two alleged conspirators, the action for civil conspiracy must fail as to the other alleged conspirator, since a confederation of two or more persons is necessary to constitute a conspiracy. *Ibid.*

§ 2. Actions for Civil Conspiracy.

Plaintiff alleged that he was employed by a distributor, that defendants were customers of the distributor and under obligation to maintain a deposit with the distributor to guarantee payment for such items as the customers desired from time to time to purchase from the distributor, and that defendants entered into an unlawful conspiracy to bankrupt the distributor, and thus injure plaintiff in his contract of employment with the distributor by depriving it of its customers, and that defendants purchased stock in a competing business. *Held:* In the absence of allegation that the defendants failed to place such orders with the distributor as they desired, that they failed to maintain the deposit required by the contract, or did any overt wrongful act pursuant to the conspiracy, the complaint fails to state a cause of action and demurrer was properly sustained. *Shope v. Boyer*, 401.

§ 6. Sufficiency of Evidence and Nonsuit in Prosecutions.

Circumstantial evidence held sufficient to be submitted to jury on charge of criminal conspiracy. *S. v. Oliver*, 280.

CONSTITUTIONAL LAW.

§ 1. Supremacy of Federal Constitution.

Confession must meet requirements of Due Process Clause as interpreted by Supreme Court of the United States in order to be competent in prosecution by the State. *S. v. Gray*, 69.

§ 10. Judicial Power.

The courts have the power and duty to determine whether a legislative body has exceeded its delegated or constitutional authority, but if the legislative act in question is within the constitutional powers of the legislative body, the courts cannot inquire into the motives, wisdom, or expediency which prompted its enactment, and must declare the law as written. *Clark's v. West*, 527.

Public policy is the exclusive prerogative of the General Assembly, and the courts may judicially interfere with acts of the legislative body only when

CONSTITUTIONAL LAW—*Continued.*

they are beyond the bounds prescribed by the constitution. *D & W, Inc., v. Charlotte*, 577.

§ 23. Due Process and Vested Rights.

While there is no vested right in the provisions of a statute, where a person has leased the bottom of waters from the State for oyster beds pursuant to G.S. 113-176 *et seq.*, the lease constitutes a contract between the lessee and the State, and the State may not by subsequent statute abrogate the terms of the contract, either as to duration and renewals or the amount of rent. *Oglesby v. Adams*, 272.

§ 25. Impairment of Obligations of Contract.

The State may not by subsequent statute abrogate the terms of a lease of oyster beds executed by it either as to duration and renewals or the amount of rent. *Oglesby v. Adams*, 272.

§ 26. Full Faith and Credit to Foreign Judgments.

The Full Faith and Credit Clause of the Federal Constitution does not preclude the courts of this State from modifying the provision of a foreign divorce decree awarding custody of the minor children of the marriage for change of conditions subsequent to the entry of the decree. *In re Marlowe*, 197.

§ 30. Due Process in Prosecutions in General.

Every person charged with crime is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. *S. v. Belk*, 320.

Defendant's contention that he did not receive a fair and impartial trial, based solely on informal remarks made by the judge at the time of pronouncing sentence, is feckless when the sentence of the court is for a term greatly less than the permissible maximum and refutes any claim that defendant was not treated fairly. *S. v. Sullivan*, 571.

§ 31. Right to Confrontation and to Access to Evidence.

The court should allow a defendant's request for permission to examine notes used by a State's witness to refresh his recollection in regard to matters contained in his testimony. *S. v. Carter*, 648.

§ 32. Right to Counsel.

In a prosecution for a misdemeanor it is within the discretion of the trial judge whether an indigent defendant should be appointed counsel, and the mere fact that defendant is silent in regard to the appointment of counsel has no tendency to show that the court abused its discretion in failing to appoint counsel. *S. v. Sherron*, 694.

§ 33. Right Not to Incriminate Self.

When the order of the court directing the custodian of records to turn them over to the solicitor expressly provides that such records should not be used in any prosecution against the custodian, the custodian may not stay the order on the ground of self-incrimination. *S. v. Hay*, 724.

§ 36. Cruel and Unusual Punishment.

Punishment within the statutory maximum cannot be cruel or unusual in the constitutional sense. *S. v. Bruce*, 174.

CONSTITUTIONAL LAW—*Continued.*

§ 37. Waiver of Constitutional Guarantees.

A defendant may waive certain constitutional safeguards in a prosecution for a misdemeanor, including the right to trial by jury, either by express consent or by failure to assert such constitutional rights in apt time, or by conduct inconsistent with a purpose to insist upon such rights. *S. v. Cooke*, 201.

After plea of not guilty, defendant may not, without changing his plea, waive his constitutional right of trial by jury. *S. v. Mason*, 423.

CONTEMPT OF COURT.

§ 2. Direct or Criminal Contempt.

Criminal contempt is a proceeding to punish an act accomplished which tended to interfere with the administration of justice. *Mauney v. Mauney*, 254.

§ 3. Civil Contempt.

Civil contempt is a proceeding to preserve and enforce the rights of private parties by compelling obedience to orders and decrees made for the benefit of such parties. *Mauney v. Mauney*, 254.

§ 6. Hearings on Orders to Show Cause, Findings and Judgment.

A finding that defendant presently possesses the means to comply with the order for the payment of alimony, or that he possessed such means at some time within the period in which he was in arrears, is necessary to support a sentence of confinement for contempt. *Mauney v. Mauney*, 254.

CONTRACTS.

§ 1. Nature and Essentials of Contracts in General.

Ordinarily, when competent parties who are on an equal footing enter into an agreement on a lawful subject fairly and honorably, the law will not inquire as to whether the contract was good or bad or whether it was wise or foolish. *Heating Co. v. Board of Education*, 85.

An agreement may be executed by the duly authorized agent of the principal, and conflicting evidence on the question of the agent's authority raises a question for the jury. *Mathis v. Siskin*, 119.

§ 7. Contracts in Restraint of Trade.

An agreement of an employee, imposed as a condition of his continued employment, that he would not engage in work for any competitor of the employer for a period of five years after termination of the employment, without territorial restrictions, would be unenforceable for failure of consideration and for unreasonableness as to territory. *Engineering Associates v. Pankow*, 137.

Where an employee is forced to resign for his refusal to sign an agreement that in the event he left the employment he would not work for any competitor of the employer for a period of five years, the employer is not entitled to restrain him from working for a competitor, even though he uses knowledge and skill acquired in the former employment, there being no evidence that the employee acquired his knowledge in bad faith or carried from the employment anything except the skill and knowledge acquired during his tenure. *Ibid.*

§ 12. Construction and Operation of Contracts in General.

The courts must construe an unambiguous contract as written and may

CONTRACTS—*Continued.*

not under the guise of construction insert therein or delete therefrom any material provision. *Taylor v. Gibbs*, 363.

An agreement to maintain a deposit with the seller in an ascertainable sum to guarantee payment for such goods as the purchaser might desire to purchase from time to time does not obligate the purchaser to purchase exclusively from the seller, and the act of the purchaser in subscribing to stock in a competing business does not constitute a breach. *Shope v. Boyer*, 401.

§ 21. Performance or Breach.

Where the court clearly states what acts by defendant constitute a breach of contract by repudiation of it in advance of an attempt by plaintiff to perform, an excerpt from the charge containing an inaccurate definition of an anticipatory breach of a contract is not prejudicial. *Mathis v. Siskin*, 119.

The complaint alleged that customers of a distributing company desiring from time to time to purchase some of their requirements from the named distributor agreed to maintain on deposit with the distributor an ascertainable sum to guarantee payment. *Held:* The obligation of the customers was to maintain the required deposits to guarantee payment of those purchases the customers desired to make from time to time, and in the absence of allegation that the customers failed to maintain the required deposits or failed to purchase from the distributor some of their requirements or such of them as they desired, the complaint fails to allege breach of the contract. *Shope v. Boyer*, 401.

Where customers obligate themselves to maintain a deposit to guarantee payment of such items as they desire to purchase from the named distributor, allegations that the customers subscribed to stock in a competing business does not allege any unlawful or tortious act or breach of contract. *Ibid.*

§ 26. Competency and Relevancy of Evidence in Actions on Contract.

Where plaintiff sues on a contract for the purchase and delivery of goods in a large sum, and defendant denies the contract, plaintiff is entitled to testify that defendant represented to him that he had a large monthly income and produced his bankbook in substantiation of the statement, since such testimony tends to show that defendant thus induced plaintiff to extend him credit and is a relevant circumstance in the negotiation of the contract as alleged by plaintiff. *Harvel's v. Eggleston*, 388.

Where plaintiff sues on an alleged contract of defendant to purchase furnishings for a house which he was providing for the benefit of his daughter, and that defendant constituted his daughter his agent for the selection of the furnishings, defendant's denial that he had ever told his daughter he was giving her a home and furnishings renders competent testimony by the daughter that defendant had told her he intended to remarry and that he and his prospective bride would occupy a certain bedroom in the house, since such testimony tends to establish the circumstances surrounding the negotiation of the alleged agreement. *Ibid.*

§ 29. Measure of Damages for Breach of Contract.

Provisions of a contract relating to the measure of damages for breach are as binding as any other of its terms. *Leggett v. Pittman*, 292.

§ 33. Construction Contracts — Decision of Architect.

Ordinarily, provisions in a construction contract that all disputes and misunderstandings between the parties relative to the performance of the contract should be determined by the architect or engineer and that his decision

CONTRACTS—*Continued.*

should be conclusive upon the parties, is valid in the absence of fraud or mistake, or unless the architect, unknown to the contractor, has guaranteed to keep the cost of the work below a stated sum. *Heating Co. v. Board of Education*, 85.

Subcontractor may not recover of owner sums withheld in accordance with decision of architect binding on parties under the contract. *Ibid.*

§ 34. Construction Contracts — Damages.

Where a construction contract provides that any defects in materials or workmanship would be repaired, replaced, or adjusted by the contractor at no cost to the owner, the measure of damages for defective workmanship or materials is limited to the cost of making the work conform to the contract, and the owner may not maintain that he is entitled to recover the difference between the value of the house as contracted for and the value of the house as built. *Leggett v. Pittman*, 292.

CONVICTS AND PRISONERS.

§ 2. Discipline and Management.

There is a fundamental distinction between the "farming out" of convicts within the purview of Article XI, § 1, of the State Constitution, under which the State for all practical purposes relinquished all control of the convicts so "farmed out," and the work release program set up by G.S. 148-33.1, under which the prison authorities maintain supervision and control of the convicts except for the time necessary for them to follow gainful employment and then return to the quarters designated by prison authorities, and therefore the limitations prescribed by Article XI, § 1, as to prisoners who may be "farmed out" has no application in the determination by the prison authorities of prisoners who may be selected for work release. *Advisory Opinion*, 727.

CORPORATIONS.

§ 1. Incorporation and Corporate Existence and Entity.

Ordinarily, a corporation and its subsidiaries maintain their separate legal entities notwithstanding that the parent corporation owns all of the capital stock of the subsidiaries and the corporations have identical membership on their boards of directors; in order to establish responsibility on the part of the parent corporation for the acts of its subsidiaries there must be additional circumstances showing fraud, actual or constructive, or agency so that the subsidiary is merely an instrumentality of the parent corporation. *Acceptance Corp. v. Spencer*, 1.

Allegations that subsidiary corporations were merely agents and *alter egoes* of the parent corporation, without allegation of facts tending to show that the parent corporation had complete dominion of the finances, policies, and practices in respect to the transaction in question, constitute mere conclusions and cannot justify disregard of the separate corporate identities. *Ibid.*

Acquisition of the entire capital stock by one person does not affect the corporate entity. *Wall v. Colvard Co.*, 43.

§ 6. Powers and Authority of Officers and Agents in General.

Acquisition of the entire capital stock of a corporation by one person does not affect the corporate entity, and the execution in the name of the corporation by such person of a chattel mortgage is a corporate act and binding, pro-

CORPORATIONS—*Continued.*

vided the rights of its then existing creditors are not affected. *Wall v. Colvard Co.*, 43.

COSTS.

§ 3. Apportionment of Costs.

In proceedings for the award of the custody of minor children, the court has the discretionary power to apportion the costs among the parties. *Chriscoe v. Chriscoe*, 554.

COUNTIES.

§ 8. Liability for Torts.

A county is liable for torts committed by it in the discharge of its governmental functions only if and to the extent of statutory provision waiving such immunity. *Seibold v. Kinston*, 615.

G.S. 153-9(44) authorizes and empowers a county to waive its governmental immunity for negligent injury arising out of a governmental function only to the extent that the county is indemnified by insurance from such negligence or tort. *Ibid.*

A policy of insurance affording protection to a county against liability caused by negligence of named personnel and employees of the county and covering listed and described premises does not waive the county's governmental immunity for negligence in the operation of a public library when the employees of the library and library premises are not included in the policy. *Ibid.*

The plea by the county of governmental immunity in an action for negligent injury is a plea in bar to be determined by the court unless the county asks for a jury trial upon the question, and therefore if plaintiff asserts that the county had waived its governmental immunity by providing insurance covering the injury in suit, plaintiff must offer in evidence or force discovery of such policy of insurance upon the hearing of the plea in bar, and the contention that plaintiff would compel the production of such a policy at the trial of the action is unavailing. *Ibid.*

COURTS.

§ 7. Appeals and Transfer of Causes from Inferior Court to Superior Court.

Recordari to the Superior Court is properly denied when the application therefor merely alleges merit without specifying facts supporting this conclusion, fails to negate laches, and the application is not made to the next succeeding term of the Superior Court. *Redevelopment Comm. v. Capehart*, 114.

After appeal and the fixing of time for service of case on appeal from a general county court to the Superior Court, the trial court granted successive extensions of time, one with the consent of appellee, and then granted further extension of time without appellee's consent. *Held:* No case on appeal having been served within the time fixed or within the extension agreed upon by counsel, the Superior Court could review only the record proper, and, no error appearing on the face thereof, should have dismissed the purported appeal, and objection that the motion to dismiss was broadside is untenable, the matter being a question of jurisdiction. *Pelaez v. Carland*, 192.

Waiver of right to appeal to Superior Court by defendant. *S. v. Cooke*, 201.

COURTS—*Continued.*

§ 9. Jurisdiction After Order or Judgment of Another Superior Court Judge.

No appeal lies from one Superior Court judge to another, and therefore an order striking certain matter from a pleading with permission to the pleader to file further pleadings, if so advised, does not authorize the pleader to file a subsequent amendment repleading verbatim or in substance the matter ordered stricken. *Bank v. Hanner*, 668.

CRIME AGAINST NATURE.

§ 2. Prosecutions.

The punishment of a fine or imprisonment in the discretion of the court prescribed by G.S. 14-177, as amended, is not a "specific punishment" within the meaning of G.S. 14-2, and the maximum lawful imprisonment is ten years. *S. v. Thompson*, 447.

CRIMINAL LAW.

§ 9. Aiders and Abettors.

Persons present aiding and abetting each other in the commission of the offense are equally guilty without regard to which one actually commits the offense. *S. v. Nichols*, 152.

Where the perpetration of a felony has been entered upon, a person who, with full knowledge of the purpose of the actual perpetrators, aids and encourages the commission of the offense is guilty as a principal, and the effect of his acts in aiding and encouraging continues until he renounces the common purpose and makes it plain to the others that he does not intend to participate further. *S. v. Spears*, 303.

A person is not liable for a criminal act committed by another when he does not participate in the commission of the act, directly or indirectly, but he is a party to the offense without regard to any previous confederation or design if he is present and actually aids or abets the perpetrator in the commission of the offense. *S. v. Keller*, 522.

§ 18. Appeals to Superior Court from Inferior Courts.

Where, in a prosecution in the recorder's court for wilful failure to support his illegitimate child, defendant complies with the terms of the suspended judgment by making two payments according to its terms, paying the costs of court, and by executing a compliance bond pursuant to the terms of the judgment, he will be deemed to have knowingly and intelligently waived his statutory right to appeal to the Superior Court. *S. v. Cooke*, 201.

§ 23. Plea of Guilty.

A plea of guilty knowingly and voluntarily entered obviates the necessity of proof of the offense by the State, and defendant may not assert variance between the bill of indictment and the proof as to the ownership of the property stolen. *S. v. Dye*, 362.

§ 24. Plea of Not Guilty.

Defendant's plea of not guilty puts in issue each element of the crime charged. *S. v. Mason*, 423.

A plea of not guilty by reason of temporary insanity is not a judicial admission that the defendant committed any unlawful act, and the burden re-

CRIMINAL LAW—*Continued.*

mains upon the State to prove defendant's guilt of all elements of the offense charged. *S. v. Moore*, 124.

§ 25. Plea of Nolo Contendere.

Defendant's plea of *nolo contendere*, accepted by the court, authorizes the court to pronounce judgment in the particular case in the same manner as though there had been a conviction by verdict or plea of guilty. *S. v. Worley*, 687.

§ 26. Plea of Former Jeopardy.

Where judgments as in case of nonsuit are entered in a criminal prosecution on the ground that the evidence offered by the State was insufficient to warrant its submission to the jury, defendants have been subjected to jeopardy. *S. v. Vaughan*, 105.

Plea of former jeopardy is valid upon second trial ordered over defendant's objection. *S. v. Case*, 330.

§ 32. Presumptions and Burden of Proof.

An inference or presumption must stand on direct evidence and may not be based on another inference or presumption. *S. v. Parker*, 258.

The burden on defendant to prove matters constituting an affirmative defense to the satisfaction of the jury requires no greater degree of proof than by the greater weight of the evidence. *S. v. Fowler*, 430.

§ 33. Competency and Relevancy of Evidence in General.

Evidence of defendant's membership in the K.K.K. is properly excluded. *S. v. Marshburn*, 558.

§ 50. Expert and Opinion Evidence in General.

Testimony of a witness that he observed the door of the building in question after the alleged offense and that the door was bruised as if someone had been beating on it, *is held* competent as a shorthand statement of fact. *S. v. Nichols*, 152.

§ 62. Evidence as to Sanity.

A lay witness, from observation, may form an opinion as to a person's mental condition and testify thereto before the jury. *S. v. Moore*, 124.

The State's witness testified to the effect that defendant, in an intoxicated condition, lay down on a couch for about ten minutes and remained motionless, apparently asleep or passed out on the couch, at a time when an African wildlife program was showing on a television in the room, that defendant suddenly raised up from the couch with a shotgun in his hands and said, "Don't nobody crowd me, the first one that does, I will down him." *Held:* It was prejudicial error to exclude the question asked on cross-examination, pertinent to defendant's plea of temporary insanity, as to whether defendant at that time was not acting like a man out of his right mind. *Ibid.*

§ 70. Hearsay Evidence in General.

Letters written by a State's witness to defendant while he was in jail awaiting trial are properly excluded when they do not tend to impeach the testimony of the witness at the trial. *S. v. Pearce*, 707.

§ 71. Confessions and Admissions.

Where defendant is not an indigent, mere fact that defendant was not advised that if he were an indigent the State would provide counsel does not

CRIMINAL LAW—*Continued.*

render confession incompetent, defendant having been advised of all other constitutional rights. *S. v. Gray*, 69; Prior to *Miranda*, mere fact that defendant was not represented by counsel at time of voluntary confession does not render the confession incompetent. *S. v. Mills*, 142; Findings by court upon *voir dire* are conclusive when supported by competent evidence. *S. v. Majors*, 146; Evidence held sufficient to support findings supporting conclusion that confession was voluntary. *S. v. Bruce*, 174.

Where the court finds upon competent supporting evidence that defendants' statements were made freely and voluntarily after they had been fully advised of their constitutional rights, such findings are conclusive and the admission of the statements in evidence will not be disturbed. *S. v. Spears*, 303.

Where the evidence upon the *voir dire* supports the court's findings that defendant's statements were made after he had been fully advised of his constitutional rights and that the statements were freely and voluntarily made without inducement by threat or promise, the court's findings are conclusive on appeal, and the admission in evidence of testimony of defendant's statements will not be disturbed. *S. v. Cade*, 438; *S. v. Carter*, 648.

The evidence on the *voir dire* in regard to the voluntariness of a confession is solely for the court for the purpose of determining the competency of the confession in evidence; upon the admission of the confession in evidence, it is for the jury to determine whether the statements referred to in the testimony were in fact made by the defendant, and the weight, if any, to be given such statements. To this end evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury, but the testimony on the *voir dire* may not be brought out before the jury. *S. v. Barber*, 509; *S. v. Carter*, 648.

Where the evidence supports the court's finding that the defendant's confession was freely and voluntarily made after defendant had been advised of his constitutional rights to remain silent and to have counsel, the admission of the confession in evidence cannot be disturbed notwithstanding defendant's testimony at the trial to the contrary. The trial having occurred prior to the announcement of the decision in *Miranda v. Arizona*, 384 U.S. 436, that decision has no application. *S. v. Bullock*, 560.

§ 77. Privileged Communications.

Where photostats of medical records have been obtained under order of the court, further order of the court directing the clerk to turn over to the solicitor such photostatic copies may not be staid on petition of the custodian of the records when the order stipulates that such records should not be used against the custodian in any prosecution against him. *S. v. Hay*, 724.

§ 83. Cross-Examination.

Where defendant on cross-examination has admitted indictment, trial and conviction in nine other prosecutions of like nature, it is error for the court to exclude defendant's testimony in explanation that upon appeal in all of the convictions they were reversed or the charges dropped. *S. v. Calloway*, 359.

§ 87. Consolidation and Severance of Counts and Indictments for Trial.

The consolidation of indictments, charging defendant with rape and kidnapping, based upon a single occurrence, rests within the discretionary power of the trial court. *S. v. Turner*, 225.

Indictments charging several defendants with committing the same of-

CRIMINAL LAW—*Continued.*

fense based upon a single occurrence are properly consolidated for trial. *S. v. Carter*, 648.

§ 90. Evidence Competent for Restricted Purpose.

The extra-judicial confession of one defendant is competent against him, and objection of codefendants on the ground that the statements also implicated them cannot be sustained when the court properly limits the admission of the testimony solely against the defendant making it, and therefore the fact that the witness in giving the testimony pointed toward the codefendants is not ground for objection, the witness' testimony being properly limited. *S. v. Taborn*, 445.

§ 91. Withdrawal of Evidence.

The admission of testimony of a statement made by defendant during the assault to the effect that it did not matter what defendant did to his victims since defendant was being sought in another state for murder, *held* not prejudicial when the court immediately withdraws the statement and instructs the jury to dismiss it from their minds, since it must be presumed that the jurors are men of character and sufficient intelligence to understand and comply with the instruction withdrawing the evidence. *S. v. Bruce*, 174.

§ 94. Expression of Opinion on Evidence by Court During Progress of Trial.

A remark of the court with reference to the testimony of a State's witness is not ground for a new trial when such remark, considered in the light of the circumstances under which it was made, could not have prejudiced defendant. *S. v. Green*, 690.

§ 96. Custody and Conduct of Jury.

Upon objection of one defendant, the court properly refuses the jury's request to take with them into the jury room a typewritten statement introduced in evidence, and such action by the court is not grounds for objection by another defendant, even though such other defendant consented that the jury might take such statement into the jury room. *S. v. Spears*, 303.

§ 99. Consideration of Evidence on Motion to Nonsuit.

Where one defendant moves for nonsuit and offers no evidence after the denial of the motion, the sufficiency of the evidence must be determined upon the facts in evidence when the State rested its case against such defendant, and subsequent testimony in the trial of the other defendant may not be considered. *S. v. Frazier*, 249.

On motion to nonsuit, the State's evidence must be considered in the light most favorable to it, and defendant's evidence which is not in conflict with that of the State, but tends to explain or make clear the State's evidence, may also be considered. *S. v. Spears*, 303; *S. v. Cade*, 438.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

The trial court is under duty to submit the question of guilt to the jury if there is material evidence of each essential element of the offense charged and that defendant was the perpetrator of the offense; this rule applies whether the evidence is circumstantial, direct, or a combination of both, it being for the jury and not the court in passing upon circumstantial evidence to determine if it excludes every reasonable hypothesis of innocence. *S. v. Morgan*, 214; *S. v. Parker*, 258.

The victim's positive identification of defendant as the person who had robbed her, such identification being made some four days after the offense, is sufficient to take the issue to the jury, notwithstanding discrepancies in the victim's testimony as to identity and the fact that defendant did not fit the description given by the victim immediately after the offense. *S. v. Hanes*, 335.

§ 104.1. Effect of Judgment of Nonsuit.

A judgment of nonsuit entered for insufficiency of the State's evidence to warrant its submission to the jury has the force and effect of a verdict of not guilty of the offense charged in the warrant or indictment. *S. v. Vaughan*, 105.

§ 106. Instructions on Burden of Proof and Presumptions.

An additional instruction to the effect that defendant had pleaded not guilty by reason of insanity and that the court charged the jury that defendant had the duty of satisfying the jury of this defense, and that there had been no legal competent evidence of insanity offered by defendant in the cause, must be held for prejudicial error as permitting the jury to decide the question of defendant's guilt solely upon whether he had proved his insanity. *S. v. Moore*, 124.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

The court is not required to define "reasonable doubt" when request for special instructions thereon is not aptly made. *S. v. Broome*, 298.

The court is required to charge upon the law of alibi only if defendant offers evidence that he was at some other specific place at the time of the commission of the crime, and if defendant's evidence does not reasonably exclude the possibility of his presence at the scene of the alleged crime at the time of its commission it is not error for the court to fail to instruct the jury on the law of alibi. *S. v. Green*, 690.

§ 108. Expression of Opinion by Court on Evidence.

Defendant was charged with rape of an eight-year old child. The testimony of the child and the child's mother at the trial that at the time of the occurrence she was eight years of age was uncontradicted, and defendant objected to the child's testimony on the ground that she was too young to be a competent witness. *Held:* A statement of the court as to the law applicable to an attack upon a child under the age of 12 years "as is true here" cannot have been prejudicial. *S. v. Turner*, 225.

Statement of contentions held expression of opinion by court in ridiculing defendant's plea of not guilty. *S. v. Douglas*, 267.

The trial judge is forbidden by G.S. 1-180 to express an opinion upon the evidence in any manner during the course of the trial or in his instructions to the jury. *S. v. Belk*, 320.

Reference by the trial court to defendants as "three black cats in a white Buick" must be held for prejudicial error as affecting the credibility of the defendants as witnesses and injecting a prejudicial opinion of the court into the court's instructions. *Ibid.*

Defendant did not testify upon the *voir dire* but testified at the trial to the effect that the incriminating statements attributed to him and admitted in evidence were induced by threats and promises. *Held:* An instruction not based on any testimony before the jury that the officer said that he used no threats and made no promises to induce the statements is error in inadvertently advising the jury as to the testimony upon the *voir dire*, and such error,

in connection with the subsequent charge that the court had determined that the confession was freely and voluntarily given, must be held for prejudicial error as an expression of opinion by the court. *S. v. Barber*, 509.

A statement by the court in the presence of the jury that he had found incriminating statements made by defendants to be voluntary, *held* to constitute an expression by the court that the statements introduced in evidence were in fact made by defendants, and is prejudicial error. *S. v. Carter*, 648.

§ 109. Instructions on Less Degrees of Crime and Possible Verdicts.

An instruction will not be held for prejudicial error upon the contention that the court, in stating that the two offenses charged were separate and distinct and that defendant might be found guilty of the one and not guilty of the other, failed to charge that the defendant might be found not guilty of both charges when the court thereafter instructs the jury separately as to each count in the indictment that it would be the duty of the jury to render a verdict of not guilty if it had a reasonable doubt as to defendant's guilt on that charge. *S. v. Gray*, 69.

The court is required to submit the question of defendant's guilt of less degrees of the crime included in the indictment only in those instances in which there is evidence which would permit a conclusion of defendant's guilt of such less degrees. *S. v. Smith*, 167.

§ 111. Charge on Credibility of Defendant.

An instruction to the effect that the jury should scrutinize defendant's testimony because of his interest in the verdict, but that if, after such scrutiny, the jury should find that defendant had told the truth to give his testimony the same weight and credibility as that of any disinterested witness, *is held* not to constitute prejudicial error. *S. v. Choplin*, 461.

§ 113. Requests for Special Instructions.

A request not in writing and first made after the court had concluded its charge that the court define "reasonable doubt" is addressed to the sound discretion of the trial court, and the refusal of the court to recall the jury and give the requested instruction is not error. *S. v. Broome*, 298.

§ 116. Additional Instructions.

Additional instruction held prejudicial as coercing jury to reach verdict notwithstanding conscientious convictions of minority. *S. v. McKissick*, 411.

§ 118. Sufficiency and Effect of Verdict in General.

Where an indictment contains several counts and the evidence applies to one or more but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates. *S. v. Foster*, 480.

§ 120. Unanimity of Verdict, Polling the Jury, and Acceptance of Verdict.

Where there is confusion in the verdict of the jury as to whether it related to one or another of the lesser offenses embraced in the indictment and submitted by the court, it is proper for the court to clarify for the jury the possible verdicts and ascertain the verdict upon which all the jurors agreed, and thereupon to accept the verdict as thus ascertained. *S. v. Miller*, 532.

§ 121. Arrest of Judgment.

A motion in arrest of judgment must be based on matters appearing on the face of the record proper or on matters which should but do not so appear,

and cannot be based on the evidence, which is not a part of the record proper. *S. v. Morgan*, 214.

Where the indictment is sufficient and no defect appears on the fact of the record proper, defendant's motion in arrest of judgment is properly overruled. *S. v. Cade*, 438.

§ 122. Discretionary Power of Trial Court to Set Aside Verdict and Order a New Trial.

Where defendant by *habeas corpus* attacks validity of indictments under which he had been convicted, but does not seek to set aside the verdict or allege facts pertinent to the granting of a new trial, the court is without authority to force a new trial upon him over his objection. *S. v. Case*, 330.

§ 131. Severity of Sentence.

When a sentence is set aside on defendant's application, the former judgment does not necessarily fix the maximum punishment which may be imposed upon a second conviction, and when the court, in imposing the second sentence, takes into consideration the time served by defendant upon the former conviction, defendant has no ground to complain, even though the second sentence, together with the time served, exceeds the minimum sentence imposed in the first trial. *S. v. Pearce*, 707.

When the sentence imposed is well below the maximum permitted by the applicable statutes, the contention that the sentence is unduly severe must be addressed to the power of executive clemency. *S. v. Gray*, 69.

The imposition of sentence of life imprisonment upon conviction of the offense of kidnapping, the sentence to run consecutively after sentence of life imprisonment theretofore entered in a prosecution of defendant for rape, is not cruel or unusual punishment and is not forbidden by constitutional provisions. *S. v. Bruce*, 174.

Defendant's contention that he did not receive a fair and impartial trial, based solely on informal remarks made by the judge at the time of pronouncing sentence, is feckless when the sentence of the court is for a term greatly less than the permissible maximum and refutes any claim that defendant was not treated fairly. *S. v. Sullivan*, 571.

The hearing before the court to fix punishment after a plea of guilty is informal; however, it would seem advisable that the court see that the evidence adduced at such hearing is placed in the record so that the appellate court may have the information that was available to the lower court. *S. v. Jones*, 160.

A statutory punishment by fine or imprisonment in the discretion of court is not a "specific punishment" within the meaning of G.S. 14-2, and the maximum lawful punishment is ten years. *S. v. Thompson*, 447.

If defendant believes that the sentence imposed upon his plea of guilty, understandingly and voluntarily made, is excessive, his sole recourse is to executive clemency, the sentence being within the statutory maximum. *S. v. Baugh*, 294; *S. v. Newell*, 300.

Where defendant enters pleas of guilty to two separate offenses he may not contend that the consecutive sentences entered by the court were excessive when the sentences are within the limits of the applicable statutes, since the court has authority to provide that such sentences run consecutively. *S. v. Dawson*, 603.

After a plea of guilty knowingly and voluntarily entered it is not error for the court, in fixing punishment, to permit the introduction of a record compiled by the Federal Bureau of Investigation concerning the defendant, the

CRIMINAL LAW—*Continued.*

record being received in open court in the presence of defendant and there being no suggestion that the contents of the report were withheld from him or were not correct. *S. v. Dye*, 362.

The fact that the sentences imposed upon conviction of defendants for a crime jointly committed by them are not equal does not constitute cruel and unusual punishment, the length of sentences to be imposed being within the sound discretion of the trial court. *S. v. Taborn*, 445.

§ 133. Concurrent and Consecutive Sentences.

Where consecutive sentences are imposed upon two convictions and the first sentence exceeds the statutory maximum, the cause must be remanded for proper sentence on the first indictment with credit for the time served, defendant not having yet served as long under that sentence as he might have been legally imprisoned, and the second sentence will commence as provided therein at the expiration of the proper sentence on the first. *S. v. Thompson*, 447.

§ 139. Nature and Extent of Appellate Jurisdiction in General.

An appeal from a sentence imposed upon defendant's plea of guilty, voluntarily and understandingly made, presents only the face of the record proper for review. *S. v. Newell*, 300; *S. v. Dawson*, 603.

The Supreme Court must perforce sustain a conviction in the absence of error of law in the trial, it not being the function of the Supreme Court to pass on the credibility of witnesses or to weigh the testimony. *S. v. Hanes*, 335.

The verdict of the jury upon conflicting evidence is conclusive on appeal in the absence of any prejudicial error committed during the trial. *S. v. Miller*, 532; *S. v. Smith*, 659.

§ 142. Right of State to Appeal.

An appeal may be taken by the State in criminal prosecutions only in those instances specified in G.S. 15-179. *S. v. Vaughan*, 105.

Nonsuit in a prosecution for hunting deer at night in violation of G.S. 113-109(b), entered on the ground that there was insufficient evidence without the aid of the presumption created by statute and that the statutory presumption was unconstitutional, *held* not appealable by the State. *Ibid.*

§ 143. Right of Defendant to Appeal.

Where, in a prosecution in the recorder's court for wilful failure to support his illegitimate child, defendant complies with the terms of the suspended judgment by making two payments according to its terms, paying the costs of court, and by executing a compliance bond pursuant to the terms of the judgment, he will be deemed to have knowingly and intelligently waived his statutory right to appeal to the Superior Court. *S. v. Cooke*, 201.

§ 147. Case on Appeal.

Where two defendants are jointly tried for the same offense upon a joint indictment, only a single transcript should be docketed upon their respective appeals. *S. v. Frazier*, 249.

§ 149. Certiorari.

The denial of *certiorari* in a *habeas corpus* proceeding imports no expression of opinion upon the merits. *S. v. Case*, 330.

§ 151. Conclusiveness of Record and Matters Not Appearing Therein.

The Supreme Court is limited to the record in the prosecution in which

the appeal is taken and cannot consider defendant's contention that he thought his plea of guilty in such prosecution would wipe the slate clean in regard to other prosecutions pending against him. *S. v. Jones*, 160.

The record imports verity and the Supreme Court is bound thereby. *S. v. Case*, 330.

§ 154. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

The rules of court governing appeals are mandatory and are as binding upon an indigent defendant as any other. *S. v. Douglas*, 267.

In the absence of assignments of error in the record or brief, the judgment below will be sustained in the absence of error appearing on the face of the record proper. *S. v. Williams*, 295.

An assignment of error should show within itself the error relied upon. *S. v. Oliver*, 280; *S. v. Cade*, 439; *S. v. Foster*, 480.

§ 156. Exceptions and Assignments of Error to Charge.

An assignment of error to the charge should set forth in the assignment that portion of the charge defendant contends was erroneous. *S. v. Douglas*, 267; *S. v. Spears*, 303.

§ 159. The Brief.

Exceptions not brought forward and discussed in the brief are deemed abandoned. *S. v. Majors*, 146; *S. v. Spears*, 303.

§ 160. Presumptions and Burden of Showing Error, and Harmless and Prejudicial Error in General.

The test whether technical error is prejudicial is to be determined upon the basis of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises, and a new trial will not be granted for mere technical error which could not have possibly affected the result. *S. v. Turner*, 225.

§ 161. Harmless and Prejudicial Error in Instructions.

A *lapsus linguae* in the charge not called to the attention of the court at the time will not be held for prejudicial error when it is apparent from the record that the jury could not have been misled thereby. *S. v. Gray*, 69.

Where defendant asserts prosecutrix was too young to testify and uncontradicted evidence was that she was eight years old, statement in charge as to law applicable to attack on child under 12 years "as is true here", *held* not prejudicial. *S. v. Turner*, 225.

Error of the court in expressing an opinion on the evidence in the presence of the jury cannot be corrected by an instruction of the court that the statement by the court was inadvertent and should not be considered. *S. v. Carter*, 648.

§ 162. Harmless and Prejudicial Error in Admission and Exclusion of Evidence.

The refusal to permit questions designed solely to elicit repetition of the witness' testimony theretofore entered cannot be held for prejudicial error. *S. v. Gray*, 69.

Any error in sustaining the objection to a question asked a witness is cured when the witness is immediately thereafter allowed to testify in regard to the matter. *Ibid.*

CRIMINAL LAW—*Continued.*

Where defendant himself testifies he shot the deceased, the admission of the declaration of deceased that defendant had shot him cannot be prejudicial even though proper predicate for the admission of the declaration as a dying declaration was not made. *S. v. Dunlap*, 301.

The withdrawal by the court of evidence competent for the purpose of corroborating a State's witness cannot be prejudicial to defendant. *Ibid.*

Where excluded evidence does not appear in the record, it cannot be ascertained that its exclusion was prejudicial. *S. v. Pearce*, 707.

§ 164. Whether Error Relating to One Count is Prejudicial.

Where defendant is tried under an indictment charging several offenses and the cases are consolidated for the purpose of judgment and but one sentence is pronounced upon verdict of guilty of each offense, any error relating solely to the misdemeanor charged cannot entitle defendant to a new trial when the sentence is within the maximum provided for the felony offenses in regard to which no error was committed in the trial. *S. v. Morgan*, 214.

§ 173. Post Conviction Hearing.

Where defendant files a petition in *habeas corpus* attacking the validity of the indictments under which he had been convicted (even though on feckless grounds) and does not seek to set aside the verdict or allege facts pertinent to the granting of a new trial, the court is without authority to force a new trial upon him over his objection, and upon appeal from denial of defendant's plea of former jeopardy, the cause will be remanded with instructions to reinstate the prior sentence to the end that defendant may complete the unexpired portion of it. *S. v. Case*, 330.

DAMAGES.

§ 12. Competency and Relevancy of Evidence on Issue of Damages.

While ordinarily defendant's ability to respond in damages is incompetent when punitive damages are not apposite, where defendant's representations of financial worth constitute an inducement to plaintiff to sell defendant goods on credit, defendant's representations are competent in evidence as a relevant circumstance in the negotiation of the contract of sale. *Harvel's v. Eggleston*, 388.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

The personal representative may sue a hospital and its staff physician jointly for the death of testator allegedly resulting from defendants' separate failure to treat intestate when they knew that his condition was serious. *McEachern v. Miller*, 591.

DECLARATORY JUDGMENT ACT.

§ 2. Proceedings.

If the complaint in a proceeding under the Declaratory Judgment Act alleges facts disclosing a justiciable controversy, a demurrer should be overruled, notwithstanding that plaintiff may not be entitled to a favorable declaration on the facts stated in his complaint, since the demurrer merely challenges the sufficiency of the complaint to state a cause of action cognizable under the

DECLARATORY JUDGMENT ACT—*Continued.*

statute, and does not present the merits of the controversy for decision. *Walker v. Charlotte*, 345.

DEEDS.

§ 17. Covenants to Support Grantor.

Contemporaneously with plaintiff's execution of deed to defendants, defendants executed a contract to furnish plaintiff maintenance and support in accordance with her then standard and custom of living, and to reconvey upon request upon their failure to perform in any respect the acts specified in the contract. Plaintiff's evidence tended to show that she left the premises some ten months thereafter as a result of fear induced by threats and abuse of the *feme* defendant, that plaintiff had demanded a reconveyance, and that the request was refused. *Held:* The evidence raised an issue for the determination of the jury and judgment of nonsuit was error. *Forbes v. Walsh*, 514.

DIVORCE AND ALIMONY.

§ 1. Nature and Requisites of Right of Action in General.

The doctrine of *res judicata* applies to divorce actions as well as other civil actions. *Garner v. Garner*, 664.

The fact that the wife has the alternate remedy of independent action or a cross-action to secure alimony without divorce, G.S. 50-16, has no effect on the principles of *res judicata*, and does not authorize her to bring an independent action based upon abandonment when the issue of abandonment has theretofore been determined adversely to her by verdict of the jury in the husband's action for divorce on the grounds of separation. *Ibid.*

§ 2. Requirement that Facts be Found by Jury.

In an action for divorce on the ground of separation, the parties may waive a jury trial. *Langley v. Langley*, 415.

§ 8. Divorce on Ground of Abandonment.

There is an abandonment of the wife within the purview of G.S. 50-7 if the husband without consent of the wife and without justification ceases cohabitation without the intention of renewing it, and while his failure to provide her adequate support thereafter may be evidence of abandonment, the mere fact that he does provide adequate support for her does not negate abandonment, abandonment under G.S. 50-7 not being synonymous with the offense of abandonment as defined in G.S. 14-322. *Richardson v. Richardson*, 538.

§ 13. Divorce on Grounds of Separation.

In a suit for divorce on the grounds of separation, defendant having been personally served with summons, the judge, in the absence of a request for a jury trial filed prior to the call of the action for trial, has authority to hear the evidence, answer the issues, and render judgment thereon. G.S. 50-10 as amended by Chapter 540, Session Laws of 1963. This rule applies equally to contested and uncontested divorce actions. *Langley v. Langley*, 415.

§ 16. Alimony Without Divorce.

A wife is entitled to alimony without divorce under G.S. 50-16 if the husband separates himself from her and fails to provide her and the children of the marriage with necessary subsistence, and the wife is also entitled to relief thereunder if the husband is guilty of misconduct that would constitute

DIVORCE AND ALIMONY—*Continued.*

cause for divorce, either absolute or from bed and board, including abandonment as defined by G.S. 50-7, and therefore if the husband abandons the wife within the purview of G.S. 50-7 she is entitled to alimony without divorce, notwithstanding that he may continue to provide support for her and the children of the marriage. *Richardson v. Richardson*, 538.

§ 18. Alimony and Subsistence Pendente Lite.

In the husband's action for divorce the law demands that the wife have equal facilities for presenting her defense, and therefore the allowance of counsel fees to the wife's attorney *pendente lite* will not be disturbed in the absence of a showing of abuse of discretion. *Shannon v. Shannon*, 714.

§ 21. Enforcing Payment of Alimony.

Upon the hearing of an order to show cause why defendant should not be held in contempt for failure to make payments of alimony *pendente lite* as decreed by the court, findings of the court that defendant is healthy and able-bodied, had been employed, and has the ability to earn good wages, without finding that defendant presently possessed the means to comply with the order of the court or that at any time during the period in which he was in arrearage he had been able to make said payments, does not support a sentence of confinement in jail for contempt. *Mauney v. Mauney*, 254.

§ 24. Effect and Modification of Custody Orders.

The provision of a final decree of divorce awarding the custody of the minor children of the marriage is subject to modification for subsequent change of condition as often as the facts justify. *In re Marlowe*, 197.

EJECTMENT.

§ 7. Pleadings.

Demurrer is properly entered in an action in ejectment to a complaint setting forth the plaintiff's claim under a deed void on its face for indefiniteness of description, and the insufficiency of the description cannot be aided by allegations that defendants were in possession under a deed containing sufficient description of the land. *Boone v. Pritchett*, 211.

ELECTRICITY.

§ 5. Position and Condition of Wires.

It is not negligence *per se* for a power company to maintain an uninsulated wire 19 feet above the ground along its right of way across a farm, and it may not be held liable for the death of a workman electrocuted while engaged in filling a feed tank constructed under such wire when the evidence discloses that the feed tank was constructed after the power line was in use, and there is no evidence that the power company knew that the feed tank had been constructed on its right of way. *Floyd v. Nash*, 547.

§ 8. Injury to Persons — Contributory Negligence.

The evidence disclosed that plaintiff was an employer of a subcontractor and that plaintiff was an experienced electrical worker, that in the performance of his work he was in contact with a ground wire less than two feet from a "hot" wire, that employees of the contractor came upon the scene and one of them permitted a loose wire to form a connection between the "hot" wire and the ground wire, resulting in severe injury to plaintiff. The evidence

further tended to show that the subcontractor furnished safety equipment, that plaintiff had rubber gloves within his reach, and that the injury would not have occurred had plaintiff worn the rubber gloves. *Held:* The evidence discloses contributory negligence as a matter of law on the part of plaintiff in adopting a dangerous manner of handling a dangerous instrumentality when a safe manner of conduct was known and available to him. *Gibbs v. Light Co.*, 188.

Evidence held to disclose contributory negligence on part of workman in coming in contact with wire he knew to be charged. *Floyd v. Nash*, 547.

EMINENT DOMAIN.

§ 2. Acts Constituting a "Taking."

The Highway Commission took an easement for a limited access highway which traversed plaintiff's land, leaving two parcels without access to each other except by a secondary road along the southern boundary, and with access to the limited highway only at points some four or five miles distant. *Held:* The deprivation of access should be considered in determining the value of the lands remaining, G.S. 136-89.52, and an instruction to the effect that the denial of access should not be taken into consideration must be held for prejudicial error. *Highway Comm. v. Gasperson*, 453.

§ 5. Amount of Compensation.

Respondents, in an action to take land under eminent domain, are entitled to interest from the date the petitioner acquires the right to possession and not from the date the proceedings were instituted. *Light Co. v. Briggs*, 158.

In determining the compensation to be paid for the taking of a portion of land or an interest therein, all factors pertinent to the fair market value of the remaining land immediately after the taking should be considered. *Highway Comm. v. Gasperson*, 453.

§ 9. Report of Appraisers, Confirmation, Exceptions and Appeal.

The landowner must file exceptions to the final report of the commissioners within 20 days after the report is filed, with right to appeal to the Superior Court at term, G.S. 40-19, and when the landowner files no exceptions and does not appeal from the order of confirmation by the clerk *recordari* is properly refused by the Superior Court. *Redevelopment Comm. v. Capehart*, 114.

§ 14. Persons Entitled to Compensation Paid.

Where land subject to a life estate is taken by eminent domain the compensation paid represents the realty, and the life tenant is not entitled to the cash value of her life estate out of the proceeds, but only to the interest or income for life from the total amount of the award. *Redevelopment Comm. v. Capehart*, 114.

ESCAPE.

§ 1. Elements of and Prosecutions for Escape.

Under G.S. 148-45, a second escape is a felony irrespective of whether the original sentence was imposed upon conviction of a misdemeanor or a felony, and it is not required that the indictment name the particular offense for which the defendant was imprisoned, and therefore an indictment charging a second escape after a first escape occurring while defendant was serving a

ESCAPE—*Continued.*

lawful sentence for a misdemeanor, charges a felonious escape. *S. v. Worley*, 687.

While it is error in a prosecution for escape to permit the assistant superintendent of a prison to testify over objection as to the contents of the commitment, instead of introducing the commitment itself in evidence, where the defendant himself testified that at the time of his escape he was serving a life sentence, defendant's testimony cures the error, it not being necessary that the State show the exact felony for which defendant was committed. *S. v. Vaillancourt*, 705.

ESTATES.

§ 7. Sale and Transfer of Estates — Division of Sale Price.

Where land subject to a life estate is taken by eminent domain the compensation paid represents the realty, and the life tenant is not entitled to the cash value of her life estate out of the proceeds, but only to the interest or income for life from the total amount of the award. *Redevelopment Comm. v. Capehart*, 114.

ESTOPPEL.

§ 6. Necessity for Pleading an Estoppel.

The facts constituting the basis of an equitable estoppel must be pleaded. *Acceptance Corp. v. Spencer*, 1.

EVIDENCE.

§ 23.1. Telephone Conversations.

The admission of testimony of a telephone conversation by plaintiff with defendant relative to the contract in suit will not be held for prejudicial error when defendant does not aptly seek permission to examine plaintiff as to the identification of the caller, and plaintiff's later testimony on cross examination that he did not know defendant's voice well enough to identify it positively it goes to the credibility of plaintiff's earlier identification of the caller, but does not require allowance of defendant's motion to strike the direct testimony. *Mathis v. Siskin*, 119.

§ 27. Parol or Extrinsic Evidence Affecting Writings.

Where a party signs an instrument clearly setting forth his liabilities thereunder he may not claim that he was induced to sign it by representation that he would not be bound, since such prior parol representations are in direct conflict with the terms of the written instrument. *C. I. T. Corp. v. Tyree*, 562.

Persons who sign with the primary makers a note complete except for the insertion of the name of the payee, with the understanding that the primary makers would fill in the name of the payee when they found someone willing to loan money upon the note, may not object to the introduction in evidence of testimony of conversations between one of the primary makers and themselves with reference to the purpose for which the note was executed and the authority of the primary makers to fill in the name of the payee, since the payees of the note were in no way involved in these conversations and the testimony does not in any way contradict or vary the terms of the writing. *Jones v. Jones*, 701.

EVIDENCE—*Continued.*

§ 51. Examination of Experts.

A hypothetical question to an expert may not assume as true a fact which is not in evidence. *Petree v. Power Co.*, 419; *Hubbard v. Oil Co.*, 489.

§ 54. Rule That Party May Not Impeach His Own Witness.

A party offering the testimony of witnesses is not entitled to impeach their testimony by showing that they made different statements at other times. *Moore v. Moore*, 110.

§ 55. Evidence Competent for Purpose of Corroboration.

Where witnesses have testified as to the mental incapacity of the person in question, affidavits made by the witnesses in prior proceedings to have the person in question committed to a state hospital are competent for the purpose of corroborating their testimony. *Chesson v. Ins. Co.*, 98.

§ 58. Cross-Examination.

Where defendant denies many of the conversations asserted by plaintiff in the negotiations which plaintiff asserts resulted in the contract in suit, plaintiff is entitled to ask defendant on cross-examination in regard to an incident occurring at the time of one of the conversations in order to refresh defendant's memory. *Harvel's v. Eggleston*, 388.

EXECUTORS AND ADMINISTRATORS.

§ 9. Control and Management of Estate.

Executor must give effect to intention of testator unless contrary to some rule of law or at variance with public policy. *Lichtenfels v. Bank*, 467.

§ 24a. Actions for Personal Services Rendered Decedent.

Allegations that the personal services rendered decedent were under an express contract to reimburse plaintiff therefor does not preclude recovery on *quantum meruit* under an implied promise to pay for such services. *Brown v. Hatcher*, 57.

In an action to recover for personal services rendered a decedent prior to her death, plaintiff has the burden of showing, even in the absence of a presumption that the services were gratuitous, that the circumstances under which the services were rendered were such as to raise the inference that they were rendered and received with the mutual understanding that they were to be paid for, and the circumstances must be such as to put a reasonable person on notice that the services were not gratuitous. *Ibid.*

Expressions of appreciation for kindnesses do not, without more, amount to an implied promise to pay for personal services. *Ibid.*

Evidence held insufficient to show that personal services were rendered under mutual understanding that they should be paid for. *Ibid.*

§ 24c. Presumption that Services Were Gratuitous.

The relationship of mother-in-law and daughter-in-law does not raise a presumption that personal services rendered by the daughter-in-law were gratuitous. *Brown v. Hatcher*, 57.

FORGERY.

§ 1. Nature and Elements of the Offense.

The false making of checks with fraudulent intent, which checks are capable of effecting a fraud, constitutes forgery. *S. v. Keller*, 522.

FORGERY—*Continued.*

§ 2. Prosecutions.

Evidence tending to show that defendant participated in conversations in which plans were formulated to steal a check-writing machine and blank printed checks of a corporation, that thereafter defendant stated the check-writing machine and checks had been taken, and that defendant drove two others in a car from place to place where they alighted, filled in, endorsed and cashed the checks, which were falsely signed with the purported signature of the president of the corporation, *held* sufficient to support defendant's conviction as an aider and abettor in the forgery of the checks. *S. v. Keller*, 522.

FRAUDS, STATUTE OF.

§ 5. Promise to Answer for Debt or Default of Another.

Persons who sign a note with the original makers, the note being complete except for the insertion of the name of the payee, may not contend that their obligation was to answer on a special promise for the debt of another within the protection of the statute of frauds, since the writing is a sufficient memorandum within the purview of the statute. *Jones v. Jones*, 701.

GARNISHMENT.

§ 1. Nature and Grounds of Remedy.

Defendant in an action on contract is not entitled to file a cross-action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. *Equipment Co. v. Erectors Co.*, 127.

GUARDIAN AND WARD.

§ 10. Liabilities of Guardian and Surety.

The interest of the successor guardian in regard to the ward's right to recover for misapplications by the original guardian is adverse to the original guardian, and the successor guardian is not in privity with the prior guardian in an action involving such liability. *Bank v. Casualty Co.*, 234.

HABEAS CORPUS.

§ 2. To Obtain Freedom from Unlawful Restraint.

Where defendant files a petition in *habeas corpus* attacking the validity of the indictments under which he had been convicted (even though on feckless grounds) and does not seek to set aside the verdict or allege facts pertinent to the granting of a new trial, the court is without authority to force a new trial upon him over his objection. *S. v. Case*, 330.

§ 3. To Obtain Custody of Infants.

Findings held to support order awarding custody to persons selected by father for care of children during his absence in military service. *Shackleford v. Casey*, 349.

In determining the right of the maternal grandparents to have the custody of the minor children against the father and the custodians selected by him, the fact that the petitioners' child had been committed as a psychopathic personality and, after treatment, might be returned to the household, and that petitioners, nonresidents, might surrender the children to yet another jurisdiction, are properly considered in determining their right to custody. *Ibid.*

HABEAS CORPUS—*Continued.*

Since an order for custody of a minor child is always subject to modification for change of condition, and the Superior Court in the district in which the child resides has jurisdiction to inquire into the matter, the presiding judge or resident judge of the county in which the minor resides has jurisdiction to hear *habeas corpus* proceedings to determine the right to custody, G.S. 17-39.1, notwithstanding prior order of the clerk of the county of the petitioner's residence in an *ex parte* proceeding awarding the custody to petitioner and order of the clerk of the county of the residence of the respondent and the child awarding custody of the child to the respondent. *In re Herring*, 434.

Order awarding the custody of children respectively to their paternal aunt and their maternal uncle and their respective spouses upon the court's findings, supported by evidence, that the divorced parents of the children and the second wife of the father were not suitable persons to have the custody and care of the children, and that the best interest of the children required the awarding of their custody in accordance with the order, will not be disturbed. *Chriscoe v. Chriscoe*, 554.

Order awarding custody of minor children should not be held in abeyance pending review. *Ibid.*

§ 4. Review.

The denial of *certiorari* in a *habeas corpus* proceeding imports no expression of opinion upon the merits. *S. v. Case*, 330.

HIGHWAYS.

§ 1. Powers and Functions of Highway Commission in General.

The State Highway Commission is an administrative agency of the State having the delegated police power to establish, maintain and improve the State and county highways, and having such additional powers as are incidental to the powers expressly delegated. *Byers v. Products Co.*, 518.

§ 2. Ordinances and Regulations of Highway Commission.

G.S. 60-43, prior to its repeal and re-enactment, empowered the Highway Commission, upon the widening of a highway, to require a railroad company to widen its highway crossings so as to conform to the increased width of the highway. *R. R. v. Highway Comm.*, 92.

The State Highway Commission is specifically delegated the power to limit loads on bridges, and when it has posted on a bridge a warning sign limiting the load such provision is not only to prevent damage to the bridge but is also designed to promote the safety of persons using the bridge, and therefore it is a safety regulation so that its violation constitutes negligence *per se* and is actionable if it proximately causes injury. *Byers v. Products Co.*, 518.

§ 7. Construction and Improvement of Highways, Signs and Warnings.

Even though the contract between the State Highway Commission and the contractor improving a highway obligates the contractor to erect proper barricades, warning signs and flares, the Highway Commission may nevertheless assume responsibility therefor, G.S. 136-26, and when the evidence discloses that the Highway Commission did assume responsibility for the segment of highway in question, the contractor cannot be held liable for any negligence of the Commission in the location of barricades or in failing to place and maintain proper warning signs or lights or flares. *Luther v. Contracting Co.*, 636.

HIGHWAYS—*Continued.*

When the Highway Commission has barricaded a portion of the highway under improvement and closed it to the public, such segment of road is not a public highway until it is reopened by the Commission, and whether the contractor working on the project is negligent in parking its equipment at night on the road some 15 feet back of the barricade without placing lights thereon must rest upon common law principles of negligence. *Ibid.*

Contractor parking equipment on closed road is not under duty of anticipating that Highway Commission might fail to erect proper warning signs. *Ibid.*

§ 9. Actions Against the Highway Commission.

The State Highway Commission is not subject to suit on the theory of unjust enrichment to recover costs incurred by a railroad company in widening its grade crossings pursuant to lawful order of the Highway Commission, there being no contention of any "taking" by the Commission, since there is no statutory provision authorizing suit in such instance, and the right to bring a common law action against the Highway Commission where there is no statutory remedy is applicable solely where there has been a "taking" of property by the Commission. *R. R. v. Highway Comm.*, 92.

HOMICIDE.

§ 9. Self-Defense.

The credibility and sufficiency of defendant's evidence to establish his plea of self-defense are for the jury to evaluate under proper instructions from the court, and cannot warrant nonsuit. *S. v. Smith*, 659.

§ 13. Presumptions and Burden of Proof.

The defendant's contention that the killing was accidental is not an affirmative defense and places no burden of proof on defendant, since the contention amounts only to a denial that defendant committed the crime by denying the essential element of intent, and an instruction to the effect that if the State had established an intentional killing with a deadly weapon, the burden was on defendant to prove the defense of unavoidable accident to render the killing excusable homicide, must be held for prejudicial error. *S. v. Fowler*, 430.

In a prosecution for murder, defendant has the burden of proving to the satisfaction of the jury facts in justification or mitigation of the homicide, and an instruction that the burden of proving such matters to the satisfaction of the jury required a higher degree of proof than proof by the greater weight of the evidence, is error, since proof by the greater weight of the evidence may be sufficient to satisfy the jury. *Ibid.*

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence that a nephew badly beat his uncle with a stove-lid lifter and, at the instance of a third person, desisted and left, that the uncle stated that if the nephew came back he was going to shoot him, and that when the nephew returned the uncle shot the unarmed nephew as the nephew stepped in the door, inflicting fatal injury, *held* sufficient to sustain conviction of manslaughter. *S. v. Dunlap*, 301.

The State's evidence tended to show that defendant and decedent had an altercation in regard to the woman with which defendant was living as man and wife, that on the occasion in question defendant found them together at the door of the home of a third person, that as the woman and decedent were standing on the front porch, defendant jumped across the fence of the yard,

HOMICIDE—*Continued.*

threatened decedent, who ran, that defendant ran after him and later returned alone to the woman, that the body of decedent was found beside the house, and that death resulted from a knife wound in the chest, together with defendant's testimony that he and the decedent were fighting beside the house and that he cut decedent, *held* sufficient to be submitted to the jury in a prosecution for homicide. *S. v. Cade*, 438.

Where the evidence tends to show that deceased died from a wound defendant intentionally inflicted with a pistol, defendant's motions for nonsuit are properly denied. *S. v. Smith*, 659.

Defendant's evidence of self-defense cannot warrant nonsuit. *Ibid.*

HOSPITALS.

§ 3. Liability of Hospital to Patients.

Complaint held to state joint action against hospital and staff physician for failure to administer treatment. *McEachern v. Miller*, 591.

HUNTING.

§ 1. Control and Regulations.

Nonsuit in prosecution for hunting deer at night in violation of G.S. 113-109(b) *held* not appealable by State notwithstanding nonsuit was based on unconstitutionality of that part of statute creating evidentiary presumption. *S. v. Vaughan*, 105.

HUSBAND AND WIFE.

§ 3. One Spouse as Agent for Other.

When there is nothing in the record to show that the husband was the agent of the wife or had authority to act for her at the conference in question, and the record discloses that the wife was not present at the conference, statements made at such conference, offered as tending to show the intentions of the parties with respect to the contract sued on by the wife, are not competent for the purpose of showing the wife's understanding and intent in regard to the contract. *Long v. Honeycutt*, 33.

Where there is no evidence that the husband purported to act as agent of the wife in the purchase of certain building materials or that she ratified the purchase or received any benefit therefrom, the purchase price of such material is properly disregarded in striking the balance due as between the wife and the seller of the building materials. *Supply Co. v. Hight*, 572.

§ 6. Liability of Wife for Crimes or Torts Committed by Her in Husband's Presence.

In this prosecution of husband and wife for assault on an 18 year old girl by attacking her and cutting off her hair, the evidence *is held* to disclose that the *feme* defendant was a moving spirit in the attack and to refute any claim that the wife acted under coercion of the husband. *S. v. Marshburn*, 558.

In an action for assault committed by husband and wife, it will not be assumed upon demurrer that the wife cannot be held civilly liable unless it positively appears from the facts alleged in the complaint that she was acting under coercion from the husband. *Miller v. Jones*, 568.

§ 11. Operation and Effect of Separation Agreements.

Separation agreement held to constitute implied contract precluding sale for partition even by grantee of husband. *Properties v. Cox*, 14.

HUSBAND AND WIFE—*Continued.*

§ 12. Revocation and Rescission of Separation Agreements.

While a deed of separation containing a complete property settlement between the parties is not affected by a subsequent reconciliation and resumption of the marital relations by them, the parties may, upon the resumption of the marital relations, rescind the agreement, even by parol, and make a new agreement in connection with the reconciliation. *Tilley v. Tilley*, 630.

INDICTMENT AND WARRANT.

§ 4. Evidence and Proceedings Before Grand Jury.

While an indictment will be quashed when the only witness examined by the grand jury is disqualified, as a matter of law, from giving any testimony against the defendant with reference to the matter under investigation, if the sole witness before the grand jury is a competent witness the indictment returned by the grand jury will not be quashed upon a showing that such witness gave testimony which would not be competent at the trial. *S. v. Turner*, 225.

An indictment will not be quashed on the ground that some of the testimony of the qualified witness heard by the grand jury may have been hearsay and incompetent. *S. v. Cade*, 438.

INJUNCTIONS.

§ 5. Enjoining Enforcement of Statute.

Ordinarily, injunction will not lie to restrain the enforcement of a criminal law, either on the grounds that it is void or that the officials' interpretation of it is erroneous, and its validity or construction may be challenged only by way of defense to a criminal prosecution based thereon; the sole exception to this rule is when the statute or ordinance itself is void and injunction is necessary to protect property and fundamental human rights guaranteed by the constitution. *D & W, Inc., v. Charlotte*, 577.

Restaurateurs may not enjoin the enforcement of the State liquor regulations merely on the ground that the threatened enforcement is based on an erroneous interpretation and would preclude their customers from bringing taxpaid liquor on the premises for consumption with their meals and thus would result in financial loss to them by curtailing their business, since the threatened enforcement does not preclude plaintiffs from engaging in their constitutional right to earn a livelihood in the restaurant business or threaten any other constitutional right, and the mere fact that they may suffer some pecuniary loss from such enforcement is merely consequential. *Ibid.*

§ 8. Enjoining Public Boards, Officers or Agencies.

The courts have the power to restrain a threatened wrongful act by a municipal corporation. *Hall v. Morganton*, 599.

§ 13. Continuance of Temporary Orders.

The court properly continues a temporary order restraining a city from discontinuing water service to a nonresident when the complaint alleges a threatened discontinuance unless the customer switched from a private power company to the city's electric system for his electric service. *Hall v. Morganton*, 599.

In a suit to permanently enjoin a municipality from placing plaintiffs' property on an assessment roll for public improvements, defendant municipality's denial that it intended to place plaintiffs' name upon an assessment roll

INJUNCTIONS—*Continued.*

raises an issue of fact precluding a permanent injunction until resolution of such issue upon the trial upon the merits. *Smith v. Rockingham*, 697.

§ 14. Hearing on the Merits and Judgment.

A permanent injunction is an extraordinary remedy which will be granted only in those cases where adequate relief cannot be otherwise had and is a final judgment in equity which may be granted only at the final trial of the action, and it is error for the court to issue a permanent injunction upon the pretrial conference of the cause. *Smith v. Rockingham*, 697.

INSANE PERSONS.

§ 8. Validity of Contracts and Conveyances of Incompetent.

The executed contract of a mentally incompetent person is ordinarily voidable and not void. *Chesson v. Ins. Co.*, 98.

Actions to rescind contracts of incompetents see Cancellation and Rescission of Instruments.

INSURANCE.

§ 3. Construction and Operation of Policies in General.

Notwithstanding that a policy of insurance will be construed liberally in favor of insured and strictly against the insurer preparing the contract, the courts cannot by construction enlarge the terms of the policy beyond the meaning of the language used. *Henderson v. Indemnity Co.*, 129.

§ 19. Cancellation and Surrender of Life Policy by Insured.

Evidence held for jury in action to annul for mental incapacity insured's surrender of policy for cash value. *Chesson v. Ins. Co.*, 98.

§ 34. Death or Injury by Accident or Accidental Means.

"Accidental means" within the coverage of an indemnity clause providing additional benefits if death results from injuries solely through external, violent and accidental means, requires that the occurence or happening which produces the death be accidental in the sense that it is unusual, unforeseen and unexpected, the word "accidental" being descriptive of the term "means." *Chesson v. Ins. Co.*, 98.

Testimony to the effect that insured had been repeatedly committed for acute alcoholism and resulting mental disorder during the prior year, that on the occasion in question he was standing in a corridor in a nervous condition, and that he suddenly threw his arms and hands across his chest and inexplicably jumped straight backward, striking his head on the cement floor, and died of cerebral hemorrhage, *is held* insufficient to show that his death resulted solely through violent, external and accidental means, since if insured voluntarily jumped backward the fall was not through accidental means, while if he jumped backward as a result of hypertension, delirium tremens, or some other mental or physical infirmity, the fall was not the sole cause of his death. *Ibid.*

In an action on a provision of a policy providing benefits for death resulting directly and independently of all other causes from bodily injuries effected solely through accidental means, the burden is upon plaintiff to show coverage within the terms of the policy. *Henderson v. Indemnity Co.*, 129.

There is a distinction between death by "accident" and death by "accidental means"; death as a result of an intentional act, even though an un-

INSURANCE—*Continued.*

usual and unexpected result of the act, is not a death by "accidental means" when there is no mischance, slip or mishap occurring in the doing of the intentional act. *Ibid.*

Evidence tending to show that insured died from anoxia and cardiac stoppage shortly after exposure to smoke and gases in the discharge of his duties as a fireman is insufficient to show that his death was effected solely through accidental means within the coverage of the policy in suit. *Ibid.*

Evidence of plaintiff tending to show that insured fell, fracturing his right clavicle, and died some 15 days thereafter due to the injury and to insured's acute emphysema and myocarditis, *held* insufficient to show that the death ensued as a direct result of the injury, independent of all other causes. *Bentley v. Ins. Co.*, 155.

§ 53. Payment and Subrogation of Insurer.

Where the owner's insurer pays the owner damages, less a stipulated deduction, inflicted by the negligence of another and the insurer is subrogated *pro tanto* to the rights of the owner against the tort-feasor, a compromise agreement in an action by the owner against the tort-feasor, even though embodied in a consent judgment, does not preclude the insurer from suing the tort-feasor on its subrogated claim when at the time of entering the consent judgment the tort-feasor has knowledge of the payment of the claim by the insurer and its right to subrogation. *Ins. Co. v. Bottling Co.*, 503.

§ 54. Vehicles Insured Under Liability Policies.

In an action on an automobile liability policy, the burden is upon insured to show coverage, and, if insurer relies upon a clause excluding coverage, the burden is on insurer to establish the exclusion. *Ins. Co. v. McAbee*, 326.

Accident occurring while employee of garage was returning vehicle to owner after repairs held covered by garage liability policy. *Ibid.*

INTOXICATING LIQUOR.

§ 1. Validity and Construction of Control Statutes in General.

The Turlington Act remains the law throughout this State except to the extent that it has been modified or repealed by the ABC Act, and the ABC Act repeals only those provisions of the Turlington Act which are irreconcilable with the provisions of the ABC Act, construing the two Acts *in pari materia*. *D & W, Inc., v. Charlotte*, 577.

The ABC Act does not permit consumption of liquor in private clubs or restaurants. *Ibid.*

§ 2. Beer and Wine Licenses.

The fact that an employee of a licensee on a single occasion sold beer to a 17 year old boy does not establish the failure of the licensee to give the licensed premises proper supervision. *Food Stores v. Board of Alcoholic Control*, 624.

G.S. 18-90.1(1) and G.S. 18-78.1(1) will be construed together and harmonized to give effect to a consistent legislative policy, and, so construed, the specific provisions of G.S. 18-78.1(1) prevail over the general provisions of 18-90.1(1) in regard to the sale at retail of beer and wine under a license from the A.B.C. Board. *Ibid.*

Under the provisions of G.S. 18-78.1(1) the sale of beer or wine to a person under 18 years of age by a licensee or an employee of a licensee is ground for the suspension or revocation of the license only if the sale was knowingly

made to such minor, and therefore evidence that an employee of the licensee sold beer on a single occasion to a 17 year old boy, without any evidence that the employee or the licensee knew the boy to be under 18 years of age, will not support order of the A.B.C. Board suspending the license. *Campbell v. Board of Alcoholic Control*, 263 N.C. 224, overruled to the extent of any conflict. *Ibid.*

The fact that the A.B.C. Board proceeds under G.S. 18-90.1 instead of G.S. 18-78.1 in suspending a license to sell beer and wine cannot affect the rights of the parties and does not authorize the A.B.C. Board to suspend the license for violation of G.S. 18-90.1. *Ibid.*

JUDGMENTS.

§ 6. Modification and Correction of Judgment and Record in Trial Court.

Where the trial court, in the exercise of its discretion, enters an oral order during term and after hearing, setting aside the verdict on the ground that it was contrary to the greater weight of the evidence, the court has the power, in signing the minutes of the term some ten days thereafter and out of the county, to incorporate in the minutes his verbal order. *Stamey v. R. R.*, 206.

A decree of the court is *in fieri* during the term and the trial judge has authority during the term to modify or add to its decree. *Chriscoe v. Chriscoe*, 554.

During the term when the judgment is *in fieri* the court has the power to vacate the judgment, and the court's order doing so will not be disturbed on appeal, certainly when the court finds that the judgment was entered as a result of fraud upon the court. *Hopkins v. Hopkins*, 575.

§ 13. Judgments by Default in General.

Where summons is served upon a person as managing agent of a domestic corporation and such person denies the validity of the service on the ground that he is not such agent, but nevertheless later files answer on behalf of the corporation while still denying the agency, the court may strike from the answer those allegations denying agency and thereupon must deny plaintiff's motion to strike the answer and for judgment by default and inquiry, since in such event the answer of defendant corporation is filed. *Beatty v. Realty Co.*, 570.

§ 22. Attack of Default Judgments.

The setting aside of a default judgment upon findings of excusable neglect and a meritorious defense will not be disturbed merely because the order was made upon unverified motion without sworn testimony when plaintiff filed no response to the motion and did not controvert the facts stated therein when the motion was argued. *Bank v. Casualty Co.*, 234.

§ 25. Attack of Consent Judgments.

It is error for the court to dismiss defendants' answers and counterclaims, filed within the time allowed, on the ground that a consent judgment settling the controversy had been entered prior to the filing of the answers and counterclaims, when at the time there was on file and undetermined, defendants' motions to vacate the purported consent judgment on the ground that it was procured by defendants' insurer without their knowledge or consent, since a determination of defendants' motions to vacate the purported consent judgment is a prerequisite to the determination of plaintiff's motions to dismiss the answers and counterclaims, obviating any objection that no notice had been

given of a hearing on defendants' motions to vacate the judgment. *Cranford v. Steed*, 595.

§ 28. Conclusiveness of Judgments and Bar in General.

The doctrine of *res judicata* applies to divorce actions as well as other civil actions. *Garner v. Garner*, 664.

§ 29. Parties Concluded.

Upon the sustaining of a demurrer, the demurring party is no longer a party to the action and is not bound by any judgment subsequently entered therein. *Bank v. Casualty Co.*, 234.

An action was instituted by the surety on the guardianship bond of the original guardian against the guardian and the successor guardian of the same ward. The demurrer of the successor guardian was allowed. Judgment was entered that the original guardian had properly expended funds of the estate for the benefit of the ward. *Held:* The successor guardian and the ward are not bound by the judgment, and such judgment does not preclude the successor guardian from thereafter maintaining an action against the original guardian and her surety for asserted misapplication of the funds of the estate by the original guardian. *Ibid.*

§ 30. Matters Concluded.

Since a consent judgment is but a contract between the parties entered upon the records with the sanction of the court, the matters concluded by such consent judgment must be determined by the construction of the judgment as a contract. *Ins. Co. v. Bottling Co.*, 503.

A judgment estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings which the parties, in the exercise of reasonable diligence, could and should have brought forward. *Garner v. Garner*, 664.

Where, in the husband's action for divorce on the ground of separation, the wife sets up the defense that the husband had abandoned her on a specified date, and the issue of abandonment is determined adversely to her by verdict of the jury, she may not assert an abandonment occurring at a later date as the basis for an independent action instituted by her three days after the judgment in the first action, since it is apparent that the wife, by the exercise of due diligence, must have known the actual date of abandonment, if any, and that any evidence in support of her independent action must have been available to her in the first action. *Ibid.*

§ 33. Estoppel by Judgment — Judgments of Nonsuit.

A plea of *res judicata* based on a prior judgment of compulsory nonsuit can be sustained only when the allegations and evidence in the two actions are substantially the same, and in the second action plaintiff is not limited to the evidence that was adduced at the former trial. *Powell v. Cross*, 134.

It is error for the court to determine a plea of *res judicata* entered in a second action brought within one year of judgment of involuntary nonsuit entered in the prior action, solely from the pleadings in the two actions and the judgment roll in the prior action, since the plea cannot be properly determined until the introduction of evidence in the second action, so that it can be ascertained that not only the allegations but the evidence in the two actions are substantially identical. *Ibid.*

§ 38. Plea of Bar, Hearings and Determination.

The rule that the plea of *res judicata* cannot be determined without an

JUDGMENTS—*Continued.*

examination of the evidence and the judge's charge applies to a second action entered after involuntary nonsuit and does not apply to a final judgment entered on the verdict of a jury, and therefore when defendant introduces the pleadings, issues, verdict and judgment in a prior action and it appears therefrom that the parties are identical, and that the identical issue sought to be raised in the second action was determined by final judgment in the prior action, the court properly allows the motion of defendant in the second action to dismiss that action on the ground of *res judicata*. *Garner v. Garner*, 664.

JURY.

§ 6. Empanelling Jury.

Where, upon an indictment charging homicide, the solicitor announces that he is not seeking a higher verdict than murder in the second degree, the prosecution is no longer for a capital offense, and it is not required that the jury be again sworn to try the particular prosecution, but under the provisions of G.S. 11-11 it is sufficient that the jurors and all others summoned as jurors for the session of court were administered oath to truly try all issues which should come before the jury during the term. *S. v. Smith*, 659.

KIDNAPPING.

§ 1. Elements and Essentials of Offense.

Kidnapping is the unlawful taking and carrying away of a person by force and against his will; the use of actual physical force or violence is not necessary, it being sufficient if there be threats and intimidation and appeals to the fear of the victim which are sufficient to put an ordinarily prudent person in fear of his life or personal safety and to overcome his will. *S. v. Bruce*, 174.

§ 2. Prosecutions.

An indictment charging that defendant "unlawfully, wilfully, feloniously and forcibly did kidnap" a named female person is sufficient, since the word "kidnap" has a definite legal meaning. *S. v. Turner*, 225.

In a prosecution for kidnapping accomplished by intimidation and threats, a statement made by defendant to his victim during the assault that it did not make any difference what he did to her since the law was seeking him for murder in another state, is competent to show intimidation and the inducing of fear in his victim. *S. v. Bruce*, 174.

Kidnapping is punishable by life imprisonment. *Ibid.*

LARCENY.

§ 3. Degrees of the Crime.

An indictment charging defendant with larceny of goods of a value of $18.00, and failing to charge that the larceny was from a building by breaking and entering or any other means of such nature as to make the offense a felony, charges only a misdemeanor. *S. v. Morgan*, 214.

An indictment charging larceny of goods by means of feloniously breaking and entering, charges a felony regardless of the value of the articles stolen. *S. v. Hagler*, 360.

Where the evidence is sufficient to support conviction of larceny of one item having a value less than $200 but insufficient to support a conviction of

LARCENY—*Continued.*

larceny of other items charged in the bill of indictment, the sentence cannot exceed that for a misdemeanor, G.S. 14-72, and the sentence for a felony must be vacated and the cause remanded for proper sentence. *S. v. Foster*, 480.

§ 5. Presumptions and Burden of Proof.

There must be direct evidence that defendant was in possession of recently stolen property in order for the presumption arising from such possession to obtain, and the presumption does not arise from circumstantial evidence of such possession. *S. v. Parker*, 258.

It is not required in order for the doctrine of recent possession of stolen property to apply that the property be found in the hands or on the person of defendant, it being sufficient if the property is under defendant's exclusive personal control. *S. v. Foster*, 480.

Presumption from recent possession of stolen property held to apply to property identified as that stolen but not to property not so identified. *Ibid.*

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to support conviction of larceny by means of felonious breaking. *S. v. Majors*, 146; *S. v. Morgan*, 214.

Evidence that an electric battery charger was stolen from the prosecuting witness' place of business, that shortly thereafter an electric battery charger was found at the place of business owned and operated by defendant and his brother, that the battery charger had the appearance of having been freshly painted, that defendant's brother knew nothing about how the battery charger got into the building, together with evidence identifying by a cigarette burn the battery charger found in defendant's constructive possession as the identical battery charger which had been stolen, *held* sufficient to be submitted to the jury on the question of defendant's guilt of larceny of the battery charger. *S. v. Foster*, 480.

§ 9. Verdict.

Where, in a prosecution for larceny of specified items of merchandise, the State's evidence is sufficient to be submitted to the jury on the question of defendant's guilt of the larceny of one of such items but not as to the others, a general verdict of guilty will be presumed to relate only to that item supported by the evidence, and the verdict will not be disturbed on appeal. *S. v. Foster*, 480.

LIMITATION OF ACTIONS.

§ 4. Accrual of Right of Action and Time from Which Statute Begins to Run in General.

Generally, a right of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at the time under no disability, and once the statute of limitations begins to run, it continues until stopped by appropriate judicial process. *Acceptance Corp. v. Spencer*, 1.

§ 7. Fraud, Mistake and Ignorance of Cause of Action.

An action, or a cross-action against an additional defendant, on the ground of fraud is barred in three years after the right of action accrues, and the right of action accrues and the statute begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. *Acceptance Corp. v. Spencer*, 1.

LIMITATION OF ACTIONS.—*Continued.*

§ 12. Institution of Action, Discontinuance and Amendment.

Plaintiff corporation, the endorsee of a note, instituted action against defendants on the note executed by defendants for the purchase price of machinery. Defendants filed a counterclaim against plaintiff and a cross-action against the manufacturer and the parent corporation of the manufacturer, who were made additional parties, alleging fraud and breach of warranty in the sale of the machinery. *Held:* In the absence of allegation sufficient to warrant the disregard of the separate corporate entities, defendants cannot maintain that the institution of the action by plaintiff corporation tolled the running of the statute of limitations on the cross-action against the manufacturer and its parent corporation. *Acceptance Corp. v. Spencer*, 1.

Where original summons issued prior to the bar of a statute of limitations is not served until after its return date, and an instrument issued after the bar of the statute does not indicate that it was an alias or pluries summons or was related to the original process, there is a discontinuance of the original action and plea in bar to the second action must be allowed. *Webb v. R. R.*, 552.

§ 15. Agreements not to Plead Statute and Estoppel.

A defendant asserting that plaintiff and the additional parties defendant were estopped to plead the statute of limitations against his counterclaim and cross-action must allege facts constituting a basis for the estoppel, and additional facts set forth in the brief as ground for the estoppel cannot be considered. *Acceptance Corp. v. Spencer*, 1.

§ 17. Burden of Proof.

Where the applicable statute of limitations is pleaded, the burden is upon claimants to show that their action, or cross-action, was instituted within the time prescribed by the applicable statute. *Acceptance Corp. v. Spencer*, 1.

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Where the allegations of the cross-actions of the original defendants against the additional defendants for fraud and breach of warranty disclose on the face of the pleading that the acts constituting the basis of the cross-actions were known to the original defendants more than three years prior to the filing of the cross-actions and more than three years prior to the date when one of the additional defendants, without being served with proper process, filed a reply, and more than three years prior to the service of irregular process upon the other additional defendant, and the additional defendants plead the three-year statute of limitations as a bar to the cross-actions, judgment dismissing the cross-actions as to the additional defendants is without error. *Acceptance Corp. v. Spencer*, 1.

MASTER AND SERVANT.

§ 22. Nature and Extent of Employer's Liability for Injury to Employee in General.

The employer is not an insurer of the safety of his employee but is liable for injury to the employee resulting from the employer's negligence in failing to exercise ordinary care under the circumstances to provide the employee a reasonably safe place to work and prevent the employee from being subjected to unreasonable risks or dangers, and the duty to exercise such care is absolute and nondelegable. *Young v. Barrier*, 406.

MASTER AND SERVANT—*Continued.*

The general common law principle governing the liability of a master for injury to his servant applies to domestic servants. *Ibid.*

§ 23. Methods of Work, Rules and Orders.

Defendants are husband and wife who had employed plaintiff as a domestic servant. The evidence tended to show that the *feme* defendant demonstrated the method and instructed the plaintiff to sweep under a porch railing by leaning over the railing, that the railing at the place where it was attached to the post was rotten but that it had been painted over so that the defect was not observable, and that as plaintiff was sweeping under the railing by leaning over it as instructed the railing broke loose from the post on account of the railing's rotten condition, causing plaintiff to fall to her injury. *Held,* the evidence was sufficient to be submitted to the jury on the issue of defendants' negligence and does not disclose contributory negligence as a matter of law on the part of plaintiff. *Young v. Barrier*, 406.

§ 24. Warning and Instructing Servant.

Where the employer has actual or constructive notice of a hidden defect constituting a danger to the safety of the employee in performing his duties, and the employee is not warned of the defect and has no knowledge thereof, the employer is ordinarily liable for injuries to the employee proximately resulting therefrom. *Young v. Barrier*, 406.

§ 32. Liability of Employer for Injuries to Third Persons in General.

The employer is not liable for an injury due to the negligence of his employee when the employee has departed from the course of his employment and embarks on a mission or frolic of his own, and when there has been a total departure from the course of the employment, the employer is not liable even though, at the time, the employee has turned back from his private venture to the direction of the course of his employment. *Duckworth v. Metcalf*, 340.

§ 54. Causal Relation Between Employment and Injury.

The evidence tended to show that intestate in the course of his employment climbed a pole on which there was a transformer and wires, that a witness heard him utter a groan and looked up and saw intestate's body hanging by his safety strap, but did not see any sparks, flashes or smoke, or smell anything. There was evidence that intestate had a heart condition, and all of the evidence tended to show that at the time there was no current in the wires or transformer on the pole. *Held:* The evidence is insufficient to support a finding that an electric shock was a contributing cause of death, notwithstanding expert testimony based upon assumption not shown by the evidence that if intestate came into contact with an electric current the shock could have caused his death. *Petree v. Power Co.*, 419.

§ 76. Compensation Act — Persons Entitled to Payment.

The Administrator of Veterans Affairs may recover from the employer and its insurance carrier the cost of treatment in a Veterans Hospital for compensable injuries received by an indigent ex-serviceman in the course of his employment. *Marshall v. Poultry Ranch*, 223.

§ 93. Review in Superior Court.

While the findings of fact of the Industrial Commission are conclusive when supported by any competent evidence, exception to a finding must be sustained when the finding is not supported by any competent evidence in the record. *Petree v. Power Co.*, 419.

MORTGAGES AND DEEDS OF TRUST.

§ 33. Disposition of Proceeds and Surplus After Foreclosure.

The land in question was foreclosed under the first deed of trust and purchased by defendant, the *cestui* in the second deed of trust, the sale resulting in a surplus above the amount of the indebtedness secured by the first deed of trust. Plaintiff, the owner of the equity of redemption, instituted action by service of summons and filed motion and affidavit for adverse examination of the defendant, seeking to have the second deed of trust declared null and void. The cause came on to be heard upon defendant's motion to vacate the order for adverse examination and petition for determination of the rights in the excess funds in the hands of the clerk, G.S. 45-21.31. Upon the hearing of defendant's petition and motion the court dismissed plaintiff's action before the adverse examination had been taken and before plaintiff had filed a complaint. *Held:* The dismissal of the action was premature. *Sullivan v. Johnson*, 443.

MUNICIPAL CORPORATIONS.

§ 4. Powers of Municipalities.

City may not force home owner to subscribe to city's electric service by threat to discontinue water service. *Hall v. Morganton*, 599.

Municipal corporations have only those powers expressly conferred upon them by the General Assembly, and those necessarily implied from those expressly conferred, and those powers which are essential and indispensable to, and not merely convenient for, the accomplishment of the declared objects of the corporation. *Seibold v. Kinston*, 615.

§ 10. Liability for Torts in General.

A municipality may be held liable for a tort committed in the discharge of a governmental function only if it has waived its governmental immunity by procuring liability insurance as authorized by G.S. 160-191.1, and then only to the extent of the insurance so obtained and in force at the time. *Seibold v. Kinston*, 615.

G.S. 160-191.1 authorizes and empowers, but does not require, a municipality to waive its governmental immunity for a tort only in regard to those torts proximately caused by the negligent operation of a motor vehicle by an officer, agent or employee of such city, and does not authorize or empower a municipality to waive its governmental immunity for injuries to a person proximately caused by its operation of a public library, and an action for such injury is properly dismissed upon the plea in bar of governmental immunity. *Ibid.*

§ 15. Injuries from Water and Sewer and Drainage Systems.

Municipality adopting natural stream as part of its drainage system is under duty to keep it free of obstructions. *Hotel Co. v. Raleigh*, 535.

§ 20. Validity and Attack of Assessments for Public Improvements.

G.S. 160-89 does not limit the property owner's appeal from an assessment for public improvements solely to the amount to be charged against his land, but, if the municipality's failure to comply with the statutory requirements is jurisdictional, the property owner may seek relief against a void assessment after the assessment roll is made up. *Smith v. Rockingham*, 697.

§ 24. Nature and Extent of Police Power in General.

A municipality is without power, in the absence of special legislative au-

MUNICIPAL CORPORATIONS—*Continued.*

thority, to impose criminal liability for acts committed beyond the city limits. *S. v. Freedle*, 712.

§ 25. Zoning Ordinances and Building Permits.

A municipal board of adjustment has authority to permit the construction of a football stadium, with lights and a seating capacity having reasonable relationship to the size of the student body, ancillary to a high school built in a residential zone permitting schools and colleges. *Yancey v. Heafner*, 263.

§ 27. Sunday Ordinances.

Plaintiff sought to restrain the enforcement of defendant municipality's ordinance regulating the sale of merchandise on Sunday. Plaintiff conceded that the municipality had the power to enact the ordinance, G.S. 160-52, G.S. 160-200(6), (7), (10), but contended that the municipal council enacted the ordinance pursuant to a conspiracy with other merchants to destroy plaintiff's competitive advantage over those merchants who did not wish to remain open on Sunday. *Held:* Demurrer was properly sustained, since the courts will not inquire into the motives which prompt a municipality's legislative body to enact an ordinance which is valid on its face. *Clark's v. West*, 527.

§ 28. Regulation and Control Over Streets.

A municipal corporation is authorized to make provision for the removal of motor vehicles abandoned or disabled on its streets so as to promote the free flow of traffic, and to this end may designate towing services which will be called by its officers to render such service. *Truck Service v. Charlotte*, 374.

Where a municipality has divided the city into zones and designated a towing service to be called upon to remove abandoned or disabled vehicles within each of such zones in those instances in which the owners of such vehicles fail to designate or call upon a towing service, and the towing services selected by the city adequately meet the needs of the city, the city may refuse to "license" another service to perform such towing operations for the city without a hearing. The rule proscribing discrimination in licensing concerns offering services to the public is not applicable to the selection by the city of the concerns which it will use in the discharge of its public functions. *Ibid.*

§ 34. Enforcement and Attack of Ordinances.

A municipal board of adjustment, when sitting as a body to review a decision of the city building inspector, is vested with judicial or quasi-judicial powers, and a decision of the board, while subject to review by the courts upon *certiorari*, will not be disturbed in the absence of arbitrary, oppressive or manifest abuse of authority or disregard of law. *Yancey v. Heafner*, 263.

Where plaintiff has made repairs to his condemned house without first making written application and obtaining a permit therefor, and institutes a proceeding under the Declaratory Judgment Act seeking to have those portions of the municipal ordinance prohibiting alterations or repairs without a written permit declared unconstitutional, and seeks to restrain the city from demolishing the structure until a final declaration of the matter, it is error for the trial court to sustain a demurrer to the complaint, and the cause will be remanded to the end that defendant be allowed time to file an answer, so that the questions presented may be properly adjudicated by appropriate decree. *Walker v. Charlotte*, 345.

Courts will not restrain enforcement of ordinance regulating sale of merchandise on Sunday on ground of improper motive of municipal body in enacting the regulation. *Clark's v. West*, 527.

MUNICIPAL CORPORATIONS—*Continued.*

A warrant charging that defendant violated a municipal ordinance by operating a taxi cab carrying alcoholic beverage within the limits of the city, or within one mile thereof, or within designated townships, when there was no passenger in the cab, fails to charge an offense, and judgment quashing the warrant should have been entered. *S. v. Freedle*, 712.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Negligence is the doing of some act or the failure to do some act contrary to the conduct of a reasonably prudent man under the circumstances. *McDonald v. Heating Co.*, 496.

§ 5. Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* does not apply to an explosion occurring about the attic of the building on plaintiff's premises while the individual defendant was delivering gasoline to underground storage tanks in front of the premises, since the underground tanks and building are under plaintiff's and not defendant's control. Further, under the evidence in this case, more than one inference could be drawn as to the cause of the explosion. *Hubbard v. Oil Co.*, 489.

§ 7. Proximate Cause and Foreseeability of Injury.

Only negligence which proximately causes or contributes to the accident in suit is of legal import, and proximate cause is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which a man of ordinary prudence could have foreseen that injury was probable under the circumstances, foreseeability being an essential element of proximate cause. *Williams v. Boulerice*, 62.

It is not required that defendant could have foreseen the injury in the exact form in which it occurred, but it is sufficient if defendant, in the exercise of reasonable care, might have foreseen that some injury would result from his acts or omissions, or that consequences of a generally injurious nature might have been expected. *Ibid.*

An act of negligence relied on must be shown to have had a causal relationship to the injury in order to avail plaintiff. *Hubbard v. Oil Co.*, 489.

Foreseeability of injury is an essential element of actionable negligence, and a person is not required to anticipate negligent acts or omissions on the part of others. *Luther v. Contracting Co.*, 636.

Negligence is actionable if injury to another is reasonably foreseeable, but the law does not require omniscience, and proof of negligence must rest on more than mere conjecture. *McDonald v. Heating Co.*, 496.

There may be two or more proximate causes of injury, and if two or more persons commit separate acts which join and concur in producing the injury in suit, both are liable. *McEachern v. Miller*, 591.

The fact that the injury would not have occurred but for an asserted act of negligence does not constitute such act a proximate cause of the injury unless consequences of a generally injurious nature were reasonably foreseeable as a result of such act. *Ratliff v. Power Co.*, 605.

§ 10. Last Clear Chance.

The issue of last clear chance must be supported by allegation and proof. *Wooten v. Cagle*, 366.

NEGLIGENCE—*Continued.*

§ 11. Contributory Negligence in General.

A person *sui juris* is under duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. *Gibbs v. Light Co.*, 186.

§ 16. Contributory Negligence of Minors.

The legal significance of the presumption that a minor between the ages of seven and fourteen is incapable of contributory negligence is that the burden is upon defendant to satisfy the jury from the evidence and by its greater weight that such minor did not in fact use that care which a child of its age, capacity, discretion, knowledge and experience would ordinarily have exercised under the same or similar circumstances, and an instruction substantially applying this rule to the facts in evidence will not be held prejudicial for technical error which could not have misled the jury. A finding of contributory negligence of such minor necessarily includes a finding that the child was capable of contributory negligence. *Wooten v. Cagle*, 366.

Child under fourteen years of age is rebuttably presumed incapable of contributory negligence. *Champion v. Waller*, 426; *Harris v. Wright*, 654.

§ 21. Presumptions and Burden of Proof.

When the doctrine of *res ipsa loquitur* does not apply, plaintiff has the burden of showing the failure of defendant to exercise the degree of care which would have been exercised by an ordinarily prudent man under the circumstances and that such failure was a proximate cause of the injury complained of. *Hubbard v. Oil Co.*, 489.

No presumption of negligence arises from the mere fact of injury. *Hubbard v. Oil Co.*, 489; *McDonald v. Heating Co.*, 496.

§ 22. Competency and Relevancy of Evidence.

The fact that defendant paid plaintiff's hospital bill, incurred as a result of the injury in suit, is not an implied admission of liability, and is incompetent in evidence. *McDonald v. Heating Co.*, 496.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

In order for plaintiff to be entitled to go to the jury on the issue of negligence he must introduce evidence either direct or circumstantial, or a combination of both, sufficient to support a finding that defendant was guilty of the act of negligence alleged in the complaint and that such act proximately caused plaintiff's injury, including the essential element of proximate cause that injury was reasonably foreseeable under the circumstances. *Moore v. Moore*, 110.

Nonsuit is proper in an action for negligence only when there is no material conflict in the evidence, and the sole reasonable inference therefrom is that there was no negligence on the part of defendant or that the negligence of defendant was not a proximate cause of the injury. *Jackson v. Baldwin*, 149.

In order to recover for wrongful death resulting from negligent injury, plaintiff must establish negligence on the part of defendant and that such negligence was a proximate cause of the injury, including the essential element of foreseeability. *Harris v. Wright*, 654.

Negligence is not presumed from the mere fact of injury, and in order to overrule nonsuit plaintiff must introduce evidence of every material fact necessary to support with reasonable certainty the probability of negligence on the part of defendant and that such negligence was a proximate cause of the in-

NEGLIGENCE—*Continued.*

jury, and evidence which raises a mere guess or possibility is insufficient to overrule nonsuit. *Hubbard v. Oil Co.*, 489.

Evidence on question of defendant's negligence as the proximate cause of explosion held insufficient for jury. *Ibid.*

§ 25. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence.

In determining the sufficiency of the evidence of contributory negligence to require the submission of that issue to the jury, defendant's evidence must be considered in the light most favorable to him, giving him the benefit of all reasonable inferences in his favor and disregarding plaintiff's evidence except insofar as plaintiff's evidence tends to show negligence on the part of the plaintiff as alleged in the answer as a contributing cause of the injury. *Jones v. Holt*, 381.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit for contributory negligence is proper only when plaintiff's own evidence establishes the facts necessary to show contributory negligence so clearly that no other conclusion can be reasonably drawn therefrom. *Bass v. McLamb*, 395; *Byers v. Products Co.*, 518; *Ratliff v. Power Co.*, 605.

Defendant's evidence may not be considered as a basis for nonsuit on the ground of contributory negligence. *Connor v. Bass*, 709.

Nonsuit may not be entered on the ground of contributory negligence of child under 14 years of age. *Champion v. Waller*, 426; *Harris v. Wright*, 654.

§ 28. Instructions in Negligence Actions.

An instruction on forseeability which, in effect, charges that a reasonably prudent man must have been able to foresee the particular injury which ensued, constitutes prejudicial error. *Williams v. Boulerice*, 62.

Where the instruction of the court on the issue of contributory negligence of a twelve year old boy properly places the burden upon defendant to prove that the boy failed to exercise that degree of care which a child of his physical and mental attributes, as disclosed by the evidence in the case, would have exercised under the circumstances, the charge will not be held for prejudicial error, in the absence of request for special instructions, in failing to relate the question of the contributory negligence of such boy to the particular circumstances disclosed by the evidence. *Wooten v. Cagle*, 366.

Plaintiff may not object to the failure of the trial court to instruct the jury on the doctrine of last clear chance when plaintiff has neither *allegata* nor *probata* sufficient to require the submission of the issue to the jury. *Ibid.*

§ 33. Negligence in Maintenance and Condition of Lands in General.

The mere fact that the owner of land permits the construction of a feed storage tank under the power line on the right of way of a power company cannot constitute basis for liability of the landowner to an employee of the owner of the storage tank who was electrocuted while attempting to fill the tank when a part of the unloading apparatus came in contact with the wire, the owner of the land not having given any instructions as to where the driver's truck should be stopped or how the unloading apparatus should be operated. *Floyd v. Nash*, 547.

§ 37a. Definition of Invitee.

A patron at a bingo parlor is an invitee of the proprietor. *Graves v. Order of Elks*, 356.

NEGLIGENCE—*Continued.*

A person in using a parking lot provided by the store owner for use of patrons, and in walking from his parked vehicle to the store is an invitee. *Game v. Charles Stores Co.*, 676.

§ 37b. Duties to Invitees in General.

The proprietor is not an insurer of the safety of his patrons. *Graves v. Order of Elks*, 356.

While the doctrine of *res ipsa loquitur* does not apply to injuries to an invitee on the premises of a store, the store owner is liable for injuries resulting from its failure to exercise ordinary care to keep in a reasonably safe condition that part of the premises where, during business hours, invitees are expected. *Game v. Charles Stores Co.*, 676.

§ 37d. Pleadings in Action by Invitee.

Allegations that plaintiff parked her vehicle in a parking lot provided by a store and walked to the store in that portion of the driveway parallel to the store building, which was the only approach to the entrance of the store, that the store owner had permitted bottles and other trash to accumulate and remain in the parking lot after notice and after ample time had elapsed for their removal, and that the moving wheel of a vehicle using the driveway caused a bottle to be thrown against plaintiff, inflicting serious and permanent injuries, *held* sufficient to state a cause of action and defendant's demurrer thereto should have been overruled, since it could have been anticipated that the wheel of a moving vehicle might impel a loose bottle and cause injury to a customer using the premises. *Game v. Charles Stores Co.*, 676.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence held insufficient to show that burning of child from electric cord was the result of negligence of defendant. *Moore v. Moore*, 110.

No inference of negligence arises from the injury of an invitee from a fall on the premises. *Graves v. Order of Elks*, 356.

The evidence disclosed that the screws holding the backs of the wooden chairs used at a bingo parlor were covered with wooden plugs glued into the recesses in order to hide the screws and to make the surface smooth, that one of the plugs was on the floor, and that when plaintiff invitee stepped on the plug she fell to her injury. There was no evidence as to how long the plug had been on the floor before the accident. *Held:* The evidence is insufficient to be submitted to the jury on the issue of the proprietor's negligence. *Ibid.*

OBSCENITY.

An intentional indecent exposure of the person while sitting in an automobile on a public street, in such manner as to be seen by members of the passing public using the street, constitutes the common law offence of indecent exposure. *S. v. Lowery*, 162.

Evidence that defendant intentionally exposed himself while sitting in a car parked in a parking lot of a store and was so seen by a patron of the store using the parking lot, is sufficient to overrule nonsuit in a prosecution under G.S. 14-190. *S. v. King*, 711.

PARENT AND CHILD.

§ 5. Right to Custody of Minor Child.

The surviving parent has the natural and substantive right to the custody of his infant children, which right the courts may disregard only in the event the welfare of the children requires. *Shackleford v. Casey*, 349.

PARENT AND CHILD—*Continued.*

Where the father of minor children is in military service and the mother of the children is dead, the father has the right to make arrangements for the actual custody of the children in a person selected by him so long as such custody is proper and does not place the welfare of the children in jeopardy, the welfare of the children being paramount as in all other cases. *Ibid.*

PARTITION.

§ 1. Nature and Extent of Right to Partition in General.

General rules governing involuntary nonsuit apply to special proceedings for partition, and nonsuit is properly granted in such proceeding if petitioner fails to establish an interest in the lands in question or fails to establish a present right to partition. *Properties v. Cox*, 14.

Ordinarily, a tenant in common is entitled as a matter of right to partition of the lands, G.S. 46-3, or, if actual partition cannot be made without injury to some or all of the parties interested, he is usually entitled to partition by sale. *Ibid.*

The existence of a life estate does not *per se* preclude sale for partition, although the life estate cannot be disturbed so long as it exists. *Ibid.*

Partition proceedings are equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property and will enforce the equitable principle that he who seeks the relief must do equity. *Ibid.*

§ 2. Waiver of Right to Partition, Limitations and Agreements Affecting Right to Partition.

A tenant in common may by express or implied contract waive his right to partition for a reasonable time, in which instance partition will be denied him or his successors who take with notice. *Properties v. Cox*, 14.

§ 6. Whether Property Should be Sold for Partition.

A petitioner seeking sale for partition has the burden of alleging and proving the facts upon which the order of sale must rest. *Properties v. Cox*, 14.

PHYSICIANS AND SURGEONS AND ALLIED PROFESSIONS.

§ 6. Revocation and Suspension of Licenses.

The Board of Dental Examiners is not a court and is not required to observe the technicalities of a court, and the Board in revoking or suspending the license of a dentist is required by statute to determine and announce its action after a hearing at which the accused is given opportunity to present such evidence as he may desire. *Board of Dental Examiners v. Grady*, 541.

§ 7. Appeal and Review of Orders of Licensing Boards.

On appeal to the Superior Court from order of the Board of Dental Examiners suspending the license of a dentist, the Superior Court should hear the accused in like manner as a consent reference, G.S. 90-41, and the court should weigh the evidence and make its own independent determinations of the matters in dispute. *Board of Dental Examiners v. Grady*, 541.

Where an order of the Board of Dental Examiners is based upon its findings that respondent employed an unlicensed person to repair dental plates without written work orders and that respondent received payment therefor, and the specific time and place of such acts are easily deducible from the records, it is error for the Superior Court to dismiss the proceedings on the

ground that the order of the State Board was not based on sufficiently definite findings of fact. *Ibid.*

§ 11. Nature and Extent of Liability for Malpractice.

A physician who holds himself out as having special knowledge and skill in the treatment of a particular organ or disease is required to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge ordinarily possessed by physicians similarly situated who devote special study and attention to the treatment of such organ or disease. *Belk v. Schweizer*, 50.

A qualified physician or surgeon is not an insurer and does not guarantee the correctness of his diagnosis, and ordinarily is not responsible for a mistake in diagnosis if he uses the requisite degree of skill and care. *Ibid.*

Complaint held to state cause of action against staff physician and hospital for concurring negligence causing death of patient. *McEachern v. Miller*, 591.

§ 19. Sufficiency of Evidence and Nonsuit in Malpractice Actions.

Plaintiff's evidence tended to show that she put herself in the care of defendant, a specialist in the field of obstetrics and gynecology, that thereafter she suffered great pain and continual bleeding, that she asked defendant concerning the possibility of her having a tubular pregnancy, that upon her recurrent complaint of pain and bleeding, defendant by telephone diagnosed her illness as a kidney infection and proceeded to prescribe medicine therefor, that she contacted another physician who said she was in a serious condition and advised her to return to defendant, that plaintiff returned to the defendant who was unable to make a successful manual examination because of her pain, that her condition became progressively worse, and that she was later placed in a hospital and operated on for a ruptured tubular pregnancy. *Held:* The evidence is sufficient to be submitted to the jury in plaintiff's action for malpractice. *Belk v. Schweizer*, 50.

PLEADINGS.

§ 7. Pleas in Bar.

A plea of governmental immunity in an action for negligent injury against a municipality and a county is a plea in bar which, if established, destroys plaintiff's cause of action. *Seibold v. Kinston*, 615.

§ 8. Counterclaims and Cross-actions.

Defendant in an action on contract is not entitled to file a cross-action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. *Equipment Co. v. Erectors Co.*, 127.

In an action brought by an executor in his representative capacity and as an individual for a judgment declaring that the widow was precluded by a deed of separation from filing a dissent to the will, the widow may set up a counterclaim for sums allegedly due her under the terms of the deed of separation, since the widow is entitled to raise all questions relating to the respective rights of the parties growing out of the deed of separation. *Tilley v. Tilley*, 630.

§ 18. Demurrer for Misjoinder of Parties and Causes.

Demurrer will not lie for misjoinder of parties alone, even in those instances when such defect appears on the face of the complaint itself, since such

misjoinder is not fatal and may be cured by the withdrawal of a plaintiff or the dismissal of a defendant, as the case may be. *Miller v. Jones*, 568.

If the complaint fails to state a cause of action against one of defendants, the joinder of such defendant cannot constitute a misjoinder; if the complaint does state a cause of action against such defendant, a voluntary nonsuit as to such defendant prior to the hearing of the demurrer eliminates such defendant and obviates misjoinder. *McEachern v. Miller*, 591.

§ 19. Demurrer for Failure of Pleading to State Cause of Action.

It is premature for the court to dismiss the action upon the hearing of defendant's motion to vacate the order for his adverse examination, plaintiff's complaint not having been filed. *Sullivan v. Johnson*, 443.

Demurrer for failure of the complaint to allege facts sufficient to constitute a cause of action must be overruled if the complaint, in any portion or to any extent, presents facts entitling plaintiff to any relief, or if facts sufficient for that purpose can be fairly gathered from it. *Game v. Charles Stores Co.*, 676.

§ 24. Motions to be Allowed to Amend.

Where order overruling demurrer to an amended complaint recites that the amended complaint, which was filed in apt time, was with leave of the court, and the recital in the order is not challenged, defendant may not thereafter contend that his motion to strike the amended complaint should have been allowed because no motion for leave to amend had been made as required by G.S. 1-131. *Ins. Co. v. Bottling Co.*, 503.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

The issues arise upon the pleadings, and the parties may not agree upon improper issues, and the pleadings must support the judgment, and the judgment may not be based upon facts not alleged in the pleadings or which are entirely inconsistent therewith. *Heating Co. v. Construction Co.*, 23.

The parties may establish any material fact by stipulation or judicial admission and thereby eliminate the necessity of submitting an issue in regard thereto to the jury. *Ibid.*

Allegations of the complaint admitted in the answer as well as allegations of new matter in the further answer favorable to plaintiff are established without the necessity of introducing them in evidence. *Champion v. Waller*, 426.

§ 30. Motions for Judgment on Pleadings.

Judgment on the pleadings is properly entered on motion when the facts shown and admitted by the pleadings entitle movants to judgment as a matter of law, there being no controverted issues of facts sufficient to constitute a cause of action or a defense in favor of the pleader. *Acceptance Corp. v. Spencer*, 1.

On motion for judgment on the pleadings, the pleadings alone will be considered, and additional facts set forth in the brief will not be considered in passing upon the correctness of the granting of judgment on the pleadings. *Ibid.*

Motion for judgment on the pleadings in an action on a note by the payee should be denied when the maker and guarantor of payment allege that the note was given for equipment leased from the payee, that the equipment was defective, and that the payee had breached its representation to put the equipment in good working order, since the pleadings raise controverted issues of fact. *Leasing Corp. v. Service Co.*, 601.

PLEADINGS—*Continued.*

Judgments on the pleadings are not favored, and a motion for judgment on the pleadings admits for the purpose of the motion, the allegations of the adverse party and requires that such allegations be liberally construed. *Tilley v. Tilley*, 630.

A motion to strike a further answer and counterclaim in its entirety is in substance a demurrer to such counterclaim, and the allowance of the motion to strike is proper when the allegations of the counterclaim, construed in the light most favorable to defendant, fail to state a defense or facts sufficient to entitle defendant to any affirmative relief. *Bank v. Hanner*, 668.

§ 34. Motions to Strike.

A motion to strike allegations constituting an entire defense amounts to a demurrer to such defense and requires that the allegations be taken as true. *Ins. Co. v. Bottling Co.*, 503.

PRINCIPAL AND AGENT.

§ 4. Proof of Agency and Extent of Authority.

While extra-judicial declarations of a purported agent are not admissible to show the existence of the agency or the extent of the agent's authority, the agent himself is competent to testify that he was authorized by the principal to make the contract in question and that he made it in the principal's behalf. *Mathis v. Siskin*, 119.

The fact that the court interpolates a statement relating to the test for determining the principal's liability for the agent's tort between correct and adequate statements of the law governing the liability of a principal upon a contract made for him by the agent, is not prejudicial error in an action for breach by the principal of the contract. *Ibid.*

When plaintiff introduces evidence tending to establish the agency and that the agent was authorized to execute the contract in suit in behalf of the principal, the burden devolves upon the principal to show that he thereafter terminated the agency or limited the agent's authority. *Harvel's v. Eggleston*, 288.

PROCESS.

§ 3. Time of Service, Alias and Pluries Summons.

The service of summons after the date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. *Webb v. R. R.*, 552.

Where there is nothing upon a paper writing to indicate that it is an alias or pluries summons or that it related to any original process, such paper writing, even though sufficient to constitute an original summons, cannot constitute an alias or pluries summons. *Ibid.*

§ 13. Service of Process on Foreign Corporation by Service on Secretary of State.

Cause of action must arise from business done in this State by foreign undomesticated corporation in order for it to be subject to service under G.S. 55-144. *Mills v. Transit Co.*, 313.

QUASI-CONTRACTS.

§ 1. Elements and Essentials of Remedy.

A party is not entitled to recover for material and work upon a chattel as against a party later acquiring title to the chattel when at the time the work was done neither he nor the later purchaser owned the chattel. *Sawyer v. Wright*, 163.

RAPE.

§ 18. Prosecutions for Assault with Intent to Commit Rape.

The State's evidence in this case held sufficient to support the verdict of guilt of assault with intent to commit rape. *S. v. Shull*, 209; *S. v. Miller*, 532.

REFERENCE.

§ 3. Compulsory Reference.

Where the complaint seeks to recover the aggregate amount of loans and advancements made by plaintiff to a corporation and other payments made by plaintiff for the benefit of the corporation, which obligations plaintiff alleged that defendant had personally assumed by contract in acquiring plaintiff's stock in the corporation, *held*, the ordering of a compulsory reference by the court in its discretion will be upheld, since it cannot be ascertained as a matter of law from the pleadings that plaintiff's cause of action did not require the consideration of a "long account." *Long v. Honeycutt*, 33.

ROBBERY.

§ 1. Nature and Elements of Offense.

Robbery is the taking of another's personal property from his person or in his presence, against his will, by violence or intimidation, with intent to deprive the owner permanently of his property, and our statute, G.S. 14-87, merely provides a more severe punishment for common law robbery which is attempted or accomplished with the use of a dangerous weapon. *S. v. Smith*, 167.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence held sufficient to sustain conviction of armed robbery. *S. v. Smith*, 167; *S. v. Oliver*, 280; *S. v. Vance*, 287.

§ 5. Instructions.

The evidence tended to show that defendant was apprehended by the owner of a filling station after defendant had broken into the station, and that defendant by the use of a pistol disarmed such owner and took his rifle. *Held:* Even conceding that defendant took the rifle "for a temporary use" and that he intended thereafter to abandon the rifle at the first opportunity, the evidence conclusively shows that defendant intended to deprive the owner permanently of the rifle or to leave the recovery of the rifle by the owner to mere chance, and therefore the evidence discloses the *animus furandi*, and does not require the court to submit the question of defendant's guilt of assault as a less degree of the offense of robbery with firearms. *S. v. Smith*, 167.

In a prosecution for robbery by use of a knife, an instruction to return a verdict of guilty "as charged", without any reference to a knife or other

ROBBERY—*Continued.*

weapon whereby the life of the victim was endangered or threatened, is erroneous. *S. v. Ross*, 282.

Where the State's evidence is to the effect that defendant's companion held a knife to the victim's throat in perpetrating a robbery, and that the victim received a cut on his neck, and that defendant and his companion attacked and beat their victim and took money from his person, but no knife is introduced in evidence or described by any witness, it is error for the court to fail to submit the question of defendant's guilt of the lesser crime of common law robbery. *Ibid.*

SAFECRACKING.

§ 2. Prosecutions.

Evidence held sufficient to sustain conviction of defendant as abettor of offense of attempted safecracking. *S. v. Spears*, 303.

SALES.

§ 10. Actions by Seller to Recover Goods or Purchase Price.

Where plaintiff sues on a contract for the purchase and delivery of goods in a large sum, and defendant denies the contract, plaintiff is entitled to testify that defendant represented to him that he had a large monthly income and produced his bankbook in substantiation of the statement, since such testimony tends to show that defendant thus induced plaintiff to extend him credit and is a relevant circumstance in the negotiation of the contract as alleged by plaintiff. *Harvel's v. Eggleston*, 388.

Where plaintiff sues on an alleged contract of defendant to purchase furnishings for a house which he was providing for the benefit of his daughter, and that defendant constituted his daughter his agent for the selection of the furnishings, defendant's denial that he had ever told his daughter he was giving her a home and furnishings renders competent testimony by the daughter that defendant had told her he intended to remarry and that he and his prospective bride would occupy a certain bedroom in the house, since such testimony tends to establish the circumstances surrounding the negotiation of the alleged agreement. *Ibid.*

§ 14. Conditions Precedent and Right to Maintain Action or Counterclaim for Breach of Warranty and Limitations.

A right of action for damages for breach of warranty is barred three years after the right of action accrues. *Acceptance Corp. v. Spencer*, 1.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant and Waiver.

Evidence upon the *voir dire* tended to show that the owner and operator of an automobile, in response to an officer's request to be allowed to take a look in the vehicle, stated that he would get the key and let the officer look in the trunk. *Held:* The consent to search that part of the automobile beyond the vision of the officers reasonably included parts of the vehicle readily observable, and the order of the court allowing introduction in evidence of the incriminating contents of a paper bag between the legs of one of the passengers was not error. *S. v. Belk*, 320.

Passengers in an automobile may not object to evidence tending to in-

SEARCHES AND SEIZURES—*Continued.*

criminate them found in the vehicle upon a search without a warrant when the person having possession and control of the vehicle consents to the search. *Ibid.*

§ 3. Search Under the Warrant.

Efficacy of a valid search warrant is not affected by the fact that service of the warrant is made on the granddaughter of the owner of the premises who was the sole person there at the time, since the warrant gives the officers authority to search the described premises irrespective of anyone's consent, and the duty of the officers to disclose their authority to the owner or the person in charge before beginning the search is solely to show that they are not trespassing. *S. v. Heckstall*, 208.

SIGNATURES.

Conflicting evidence as to whether appellants did in fact sign the note in suit raises an issue of fact for the jury. *Jones v. Jones*, 701.

STATUTES.

§ 5. General Rules of Construction.

The meaning of a statute must be determined from a construction of the language of the act itself considered *in pari materia* with any other statutes dealing with the same subject matter, together with its preamble, title, legislative history, etc., but the intent and meaning of the Legislature cannot be shown by the testimony of a member of the Legislature which passed the act. *D & W., Inc., v. Charlotte*, 577.

Where one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted. *Food Stores v. Board of Alcoholic Control*, 624.

§ 11. Repeals by Implication and Construction.

Repeal of a statute by implication is not favored, and in order for a later statute to repeal a former by implication the later statute must be irreconcilable with the former and the implication of repeal must be necessary. *D & W, Inc., v. Charlotte*, 577.

TAXATION.

§ 15. Distinction Between Sales and Use Taxes.

There is a distinction between a sales tax, which is a tax on the purchase price of property imposed at the time of sale, and a use tax, which is imposed on the use of property and cannot take effect before such use begins. *Hosiery Mills v. Clayton*, 673.

§ 29. Liability for Sales and Use Taxes.

The purchaser of mill machinery from an out of state dealer is subject to the use tax imposed by G.S. 105-164.4(h), notwithstanding that the contract to purchase was executed prior to the effective date of the statute, when

TAXATION—*Continued.*

the property is not delivered and its use by the purchaser does not begin until after the effective date of the statute. *Hosiery Mills v. Clayton*, 673.

TORTS.

§ 2. Joint Tort-Feasors.

There may be two or more proximate causes of injury, and if two persons commit separate acts which join and concur in producing the result complained of, the author of each act is liable for the damage inflicted, and the injured party may bring action against either one or both. *McEachern v. Miller*, 591.

TRIAL.

§ 6. Stipulations.

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties. *Heating Co. v. Construction Co.*, 23.

A party is bound by his stipulations and may not thereafter take an inconsistent position. *Ibid.*

Where parties stipulate that issues should be based on compromise agreement entered after filing of complaint, the compromise agreement may be considered as an amendment to the complaint to sustain the issues submitted. *Ibid.*

§ 7. Pretrial.

The court may not issue a permanent injunction in the cause upon the pretrial conference. *Smith v. Rockingham*, 697.

§ 11. Argument and Conduct of Counsel.

Where the court offers to recall the jury and instruct them to disregard improper argument of plaintiff's attorney with reference to liability insurance but defendant's counsel refuses the court's offer and enters no exception to the argument and makes no motion for mistrial, and takes a chance on a favorable verdict, defendant may not, after the verdict has been rendered, object to the court's refusal to set aside the verdict because of the improper remarks of plaintiff's counsel. *Gilbert v. Moore*, 679.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion for compulsory nonsuit, plaintiff's evidence supported by allegation is to be taken as true and considered in the light most favorable to him, and defendant's evidence in conflict therewith is to be disregarded. *Jackson v. Baldwin*, 149; *Gibbs v. Light Co.*, 186; *Duckworth v. Metcalf*, 340; *McDonald v. Heating Co.*, 496.

On motion to nonsuit, the evidence of plaintiff, as well as facts alleged in the complaint admitted by the answer, and allegations of new matter in defendant's further answer which are favorable to plaintiff, must be taken as true and interpreted in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences deducible therefrom. *Champion v. Waller*, 426.

Discrepancies and contradictions in plaintiff's evidence do not warrant nonsuit, since they are for the jury to resolve. *McDonald v. Heating Co.*, 496; *Harris v. Wright*, 654.

TRIAL—*Continued.*

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

When it appears affirmatively from the stipulations of the parties and all the evidence that plaintiff, as a matter of law, is not entitled to recover, defendant's motion for judgment of involuntary nonsuit should be allowed. *Heating Co. v. Board of Education*, 85.

An inference may not be based on another inference. *Petree v. Power Co.*, 419.

§ 31. Directed Verdict and Peremptory Instructions.

Where all evidence upon an issue is uncontradicted and tends to support plaintiff's claim, the court may instruct the jury that if it finds the facts to be as all of the evidence tends to show to answer the issue in the affirmative. *Heating Co. v. Construction Co.*, 23.

§ 32. Form and Sufficiency of Instructions in General.

In instructing the jury that it was the sole judge of the credibility of the witnesses and the weight, if any, to be given their testimony, it will not be held for prejudicial error that the court further charged the jury that it was its duty to reconcile conflicts in the testimony, if possible, but that if this could not be done the jury might believe or disbelieve any witness; the instruction as to reconciling the conflicting testimony refers only to the reconciliation of apparently conflicting testimony accepted by the jury as credible. *Wooten v. Cagle*, 366.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

It is the duty of the trial court to explain the law and apply it to the evidence on every substantial feature of the case arising upon the evidence, even in the absence of request for special instructions. *Smart v. Fox*, 284.

It is error for the court to state a contention containing an erroneous statement of the applicable law without correcting such error. It is preferable for the court to limit its statement of contentions only to the facts adduced by evidence and to state only the court's view of the legal principles applicable to such factual situation. *Ratliff v. Power Co.*, 605.

An erroneous instruction in regard to the law in the court's application of the law to the facts in evidence must be held prejudicial, notwithstanding that in other portions of the charge the court in stating the general principles of law gave correct instructions on the point in question. *Ibid.*

§ 35. Expression of Opinion of Evidence in Instructions.

In this action for malpractice, the sole expert testimony offered by plaintiff, apart from the adverse examination of defendant, was the deposition of a physician which was read to the jury. The court charged that the testimony of plaintiff's expert was difficult of comprehension. *Held:* Under the circumstances, the court's statement could be construed as a statement that the expert's testimony was so confused and vague that it was of little probative value, and the charge must be held prejudicial upon plaintiff's appeal from an adverse verdict, plaintiff having offered sufficient evidence to go to the jury upon the issues. *Belk v. Schweizer*, 50.

§ 36. Instructions on Credibility of Witnesses.

An instruction to the effect that the jury should scrutinize defendant's testimony because of his interest in the verdict, but that if, after such scrutiny, the jury should find that defendant had told the truth to give his testimony

TRIAL—*Continued.*

the same weight and credibility as that of any disinterested witness, *is held* not to constitute prejudicial error. *S. v. Choplin*, 461.

§ 40. Form and Sufficiency of Issues.

It is the duty of the trial court to submit such issues as are necessary to settle the material controversies arising upon the pleadings, and in the absence of such issues and the absence of admissions of record sufficient to justify the judgment rendered, the Supreme Court will remand the case for a new trial. *Heating Co. v. Construction Co.*, 23.

In this case, compromise agreement entered after filing of complaint is considered as an amendment to the complaint in furtherance of the ends of justice. *Heating Co. v. Construction Co.*, 23.

The form and sufficiency of the issues is largely in the discretion of the trial court, and when the issues submitted bring into focus each defense alleged by defendant and allow him to present his contentions fully, and embrace all of the essential questions in controversy, defendant's objection that the court submitted improper issues cannot be sustained. *Harvel's v. Eggleston*, 388.

§ 48. Power of Court to Set Aside Verdict in General.

The action of the trial court in setting aside the verdict in its discretion will not be disturbed on appeal when the record fails to disclose any abuse of discretion. *Scott v. Trogdon*, 574.

§ 50. New Trial for Misconduct of or Affecting Jury.

Defendant may not refuse court's offer to correct improper remarks of counsel and fail to move for mistrial, and then, after verdict, object to the court's refusal to set aside the verdict for such improper remarks. *Gilbert v. Moore*, 679.

TROVER AND CONVERSION.

§ 1. Nature and Essentials of Actions for Conversion.

Where the holder of a junior chattel mortgage seizes the property under claim and delivery and refuses the demand for the surrender of the property by the holder of a senior registered chattel mortgage in default, there is a conversion of the property by the junior mortgagee, and the senior mortgagee is entitled to recover from him the value of the property at the time of its conversion, with interest. *Wall v. Colvard Co.*, 43.

After an act of conversion has become complete, an offer to return or restore the property by the wrongdoer does not bar an action for conversion. *Ibid.*

TRUSTS.

§ 7. Investment and Management of Funds.

A trustee, in the management, investment and reinvestment of the trust property, will not be held liable to the beneficiaries for the difference between the value of the *corpus* of the trust at the time of distribution and the value it would have had, in the light of hindsight, if the trustee had sold certain stock of the estate and reinvested, but the trustee may be held liable only for losses resulting from its failure to act in good faith or its failure to use ordinary care and reasonable diligence in the management of the estate. *Lichtenfels v. Bank*, 467.

TRUST—*Continued.*

Where the trustor fixes rules for the exercise of discretionary power in the trustee to invest and reinvest the trust property, the trustee must follow the trustor's directive unless such directive becomes impossible of performance, or is illegal, or there is such a change of circumstances as to justify or require a deviation therefrom. *Ibid.*

UNJUST ENRICHMENT.

§ 1. Nature and Essentials of Remedy.

The equitable principle of unjust enrichment does not apply when the services are rendered gratuitously or in discharge of some legal obligation, and costs incurred by a railroad company in widening its crossings pursuant to lawful order issued by the Highway Commission are *damnum absque injuria* and may not be recovered under the doctrine of unjust enrichment, since the sums are spent in discharge of a legal obligation. *R. R. v. Highway Comm.*, 92.

USURY.

§ 1. Contracts and Transactions Usurious.

Usury is the charging of interest in excess of the legal rate for the hire or use of money, and must be predicated upon a loan and not a *bona fide* purchase, and the usury statutes do not preclude a seller from charging a higher price for sale on credit than the cash price, even though the difference between the credit price exceeds the cash price by more than six per cent. *Bank v. Hanner*, 668.

In an action to recover the amount due on a note given for the balance of the purchase price of a chattel, allegations in purchaser's counterclaim for usury, that the parties entered into a contract to purchase and sell, that the purchaser signed a conditional sales contract and note which was later filled in by the seller in an amount more than six per cent in excess of the cash price, and that the chattel was delivered to the purchaser, discloses a *bona fide* credit sale upon an installment payment basis, and the allegations are insufficient to support the counterclaim. *Ibid.*

UTILITIES COMMISSION.

§ 1. Nature and Function of Commission in General.

A public utility has the same freedom as any other corporation in the management of its properties and its employees except insofar as regulations in the public interest are authorized by common law and by statute. *Utilities Comm. v. R. R.*, 242.

The Utilities Commission has no authority of regulation beyond that conferred by apposite statutes, liberally construed to effectuate State policy. *Ibid.*

§ 6. Jurisdiction and Hearings in Respect to Rates.

In reviewing application for increase in charges for switching services at numerous interchange points in this State, it is not required that the switching charges be determined separately for each switching point on the basis of the relationship between the revenue and costs at such switching points, but petitioning carriers have the burden of proving justification for the requested increase in rates and that the proposed rates are just and reasonable. *Utilities Comm. v. R. R.*, 204.

UTILITIES COMMISSION—*Continued.*

§ 7. Hearings and Orders in Respect to Franchises and Services.

A carrier by rail may not substantially reduce the number of hours a day during which an established station should be kept open without first obtaining authority to do so from the Utilities Commission; nevertheless, curtailment of service cannot be denied arbitrarily, but only upon findings supported by competent, material and substantial evidence that the public convenience and necessity require the continuation of the hours of service undiminished and that in rendering such service the carrier will not incur costs out of proportion to any benefit to the public. *Utilities Comm. v. R. R.*, 242.

Application for consolidation of two stations in question should have been allowed upon the evidence. *Ibid.*

§ 9. Appeal and Review.

Findings and conclusions of the Commission in this case *held* not supported by evidence and were arbitrary and capricious. *Utilities Comm. v. R. R.*, 242.

VENDOR AND PURCHASER.

§ 1. Requisites, Validity and Construction of Contracts in General.

An option giving lessee of a tract of land a preferred right to purchase a contiguous tract at the market price whenever lessor desired to sell does not violate the rule against perpetuities notwithstanding the lease, with renewals, might extend forty years, and, the option being registered, the lessee may maintain an action for specific performance. *Duff-Norton Co. v. Hall*, 275.

§ 2. Duration of Option and Time of Performance or Tender.

Options must ordinarily be construed strictly in favor of the optionor, and when a definite day and hour is stipulated as the limit of the duration of the option, time will ordinarily be held of the essence, and payment or tender within the time limited is necessary to bind the optionor to sell. *Ferguson v. Phillips*, 353.

Where the optionee requests an extension of the option upon specific conditions and the optionor counters with an agreement to extend the time upon different specified conditions, there is no valid extension agreement when the optionee fails to accept the conditions as prescribed by the optionor. *Ibid.*

The option in suit provided for the exercise of the option by a designated hour on a specified date. The optionee appeared at the office of the optionor's attorney before the hour specified, but was unable to tender the purchase price until some seven hours thereafter. *Held:* The optionor was entitled to refuse the tender. *Ibid.*

VENUE.

§ 1. Residence of Parties.

Where the court finds, upon supporting evidence, that neither plaintiff nor defendant is a resident of the county to which defendant seeks removal on the ground of his residence therein, the court properly denies the motion, G.S. 1-82, and retains jurisdiction even though the evidence would support a finding that neither party is a resident of the county in which the action was instituted, since such fact would be merely grounds for removal to a proper county upon motion duly made, G.S. 1-83, and it is not required that the court,

VENUE—*Continued.*

in denying the motion for removal, determine the proper county for trial. *Doss v. Nowell*, 289.

WAIVER.

§ 2. Nature and Elements of Waiver.

The acceptance of payments after default as credits upon the amount stipulated to be due upon such default is not a waiver of such default. *Heating Co. v. Construction Co.*, 23.

§ 3. Pleading, Proof and Determination.

When the facts relied upon as a waiver do not appear from the pleadings, such facts must be specifically pleaded as a defense. *Heating Co. v. Construction Co.*, 23.

WILLS.

§ 17. Presumptions and Burden of Proof.

The burden of proof on the issues of mental incapacity and undue influence are upon the caveator. *In re Will of Simmons*, 278.

§ 21. Instructions in Caveat Proceedings.

In this caveat proceeding, the charge of the court *is held* to have correctly placed the burden on caveator to show by the greater weight of the evidence that decedent did not have sufficient mental capacity to make a will. *In re Will of Adams*, 565.

§ 60. Dissent of Widow.

This action was instituted by the executor for a judgment declaring that the widow was precluded from filing a dissent by a deed of separation embodied in a consent judgment under the terms of which the widow and testator agreed to live separate and apart and released all rights by reason of their marriage to any property then owned or thereafter acquired by the other, including any rights under the laws of distribution. The widow alleged in her answer that subsequent to the execution of the deed of separation the parties became reconciled, resumed cohabitation as husband and wife, and cancelled the contract and deed of separation. *Held:* Plaintiff is not entitled to a judgment on the pleadings, since the answer raises the question whether the deed of separation had been rescinded by the parties. *Tilley v. Tilley*, 630.

§ 71. Actions to Construe Wills.

Where an executor, a beneficiary under the will, brings an action in his representative capacity and as an individual against his testator's widow for judgment declaring the widow precluded from filing a dissent to the will, the executor in his representative capacity is a fiduciary and as such is interested only in obtaining a declaration and determination of the respective rights of the widow and of himself as individuals in and to the estate, and the action is the same as though the executor in his representative capacity was the plaintiff and, in his individual capacity, was a defendant with the widow. *Tilley v. Tilley*, 630.

WITNESSES.

§ 1. Competency of Witnesses — Age.

Whether a child is competent as a witness depends upon the capacity of the child to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters in issue, and is to be determined by the court in its sound discretion in the light of the court's examination and observation of the particular child upon the *voir dire*. *S. v. Turner*, 225.

The holding of the trial court that a nine-year old child was competent as a witness, based upon the court's examination of the child upon the *voir dire* with reference to the child's intelligence, understanding and religious beliefs concerning the telling of falsehoods, is upheld. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-15, 1-46, 1-52(1). Action for breach of warranty is barred three years after right of action accrues. *Acceptance Corp. v. Spencer*, 1.

1-52(9). Statute begins to run against action for fraud upon discovery of fraud or from time it should have been discovered. *Acceptance Corp. v. Spencer*, 1.

1-82, 1-83. Where court finds that neither plaintiff nor defendant is a resident of the county to which defendant seeks removal, court correctly denies the motion for removal, and court is not required to determine proper county for trial. *Doss v. Nowell*, 289.

1-103. Appearance at pretrial examination does not amount to waiver of service. *Acceptance Corp. v. Spencer*, 1.

1-131. Where order recites that amendment was filed with leave of court, contention that motion for leave to amend had been made is untenable. *Ins. Co. v. Bottling Co.*, 503.

1-180. Charge of court held to constitute expression of opinion on credibility of witness. *Belk v. Schweizer*, 50.
Statement by court that he found confession made by defendant to be voluntary held prohibited expression of opinion. *S. v. Carter*, 648.
Statement of contentions held expression of opinion by court in ridiculing defendant's plea of not guilty. *S. v. Douglas*, 267.
Reference to defendants as "three black cats in a white Buick" held prejudicial. *S. v. Belk*, 320.

1-189. Compulsory reference on pleading importing consideration of "long account" held proper. *Long v. Honeycutt*, 33.

1-440.1, 1-440.46. Defendant is not entitled to file cross-action on separate contract against party brought in by plaintiff for purpose of garnishment. *Equipment Co. v. Erectors Co.*, 127.

5-1, 5-8. Distinction between civil and criminal contempt. *Mauney v. Mauney*, 254.

6-20. Court has discretionary power to apportion costs in a proceeding to award custody of minor. *Chriscoe v. Chriscoe*, 554.

7-12, 1-221, 1-298. No order of Superior Court is necessary to implement decision reversing judgment granting injunction. *D & W, Inc., v. Charlotte*, 720.

8-89. Plaintiff held entitled to discovery of purchase price of tract of land sold by defendant, which land defendant had contracted to sell to plaintiff. *Duff-Norton Co. v. Hall*, 275.

11-11. Jurors need not be separately sworn to try felony less than capital. *S. v. Smith*, 659.

14-2, 14-177. Fine or imprisonment in discretion of court is not "specific punishment." *S. v. Thompson*, 447.

14-39. Court may impose sentence of life imprisonment for kidnapping. *S. v. Bruce*, 174.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

14-55. Indictment need not enumerate articles specified in statute when it does specify implements coming within generic term "implements of housebreaking." *S. v. Morgan*, 214.

14-72. Where evidence is sufficient only to support conviction of larceny of article having value less than $200, sentence cannot exceed that for a misdemeanor. *S. v. Foster*, 480.

14-87. Evidence held sufficient to sustain conviction for armed robbery. *S. v. Vance*, 287.

Statute merely provides more severe punishment for robbery attempted or accomplished with use of dangerous weapon; evidence held not to require submission of less degree of assault. *S. v. Smith*, 167.

14-89.1. Evidence held sufficient to be submitted to jury on question of defendant's guilt as aider and abettor in committing offense of attempted safecracking. *S. v. Spears*, 303.

14-190. Intentional indecent exposure while sitting in automobile on public street is violation of statute. *S. v. Lowery*, 162.

Intentionally exposing self while sitting in car parked in parking lot is violation of statute. *S. v. King*, 711.

14-322. Abandonment of wife in purview of divorce statute is not synonymous with offense of abandonment as defined in statute. *Richardson v. Richardson*, 538.

15-41(2). Circumstances held sufficient to justify officer in arresting defendant without warrant. *S. v. Grier*, 296.

15-152. Consolidation for trial of indictments for rape and kidnapping held without error. *S. v. Turner*, 225.

15-173. Judgment of nonsuit has force and effect of verdict of not guilty. *S. v. Vaughan*, 105.

15-179, 113-109(b). State may not appeal from judgment of nonsuit entered in prosecution for illegal hunting of deer on ground that provision of statute relating to *prima facie* case was unconstitutional. *S. v. Vaughan*, 105.

17-39.1. Superior Court has jurisdiction to hear *habeas corpus* proceedings to determine custody of minor, notwithstanding prior order with regard thereto. *In re Herring*, 434.

18-49, 18-58, 18-60. A.B.C. Act does not permit possession by individual at private club or restaurant. *D & W, Inc., v. Charlotte*, 577.

18-78.1(1), 18-90.1(1). Statutes will be construed together and specific provisions of G.S. 18-78.1(1) will prevail in instances to which it is applicable; sale of beer to minor must be knowingly made in order to support revocation of license. *Food Stores v. Board of Alcoholic Control*, 624.

20-71.1. Uncontradicted evidence that driver was on personal mission entitles him to peremptory instruction notwithstanding statute. *Duckworth v. Metcalf*, 340.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-105. Evidence held sufficient to show that both occupants of vehicle were guilty of "temporary larceny" thereof. *S. v. Frazier*, 249.

20-116(e). Special permit not required to transport utility poles during daytime. *Ratliff v. Power Co.*, 605.

20-117. Red flag must hang perpendicular from end of extended load. *Ratliff v. Power Co.*, 605.

20-141(b)(3). Operation of truck in excess of 45 miles per hour in violation of statute is negligence *per se*. *S. v. Fox*, 284.

20-141(c). While violation of statute is negligence *per se*, it is not actionable unless proximate cause of injury. *Day v. Davis*, 643.

20-141(e). Failure of motorist traveling at lawful speed to be able to stop within radius of lights not negligence or contributory negligence *per se*. *Bass v. McLamb*, 395.

20-154(b). Where traffic control signals are installed they, and not the statute, control requirements in regard to stopping. *Jones v. Holt*, 381.

22-1. Person signing note as surety may not plead statute. *Jones v. Jones*, 701.

40-19. Application for *recordari* after failure to follow statutory procedure for appeal, held properly denied. *Redevelopment Comm. v. Capehart*, 114.

45-21.31. Court may not dismiss action upon hearing of motion to vacate order for adverse examination and petition for determination of rights in excess funds after foreclosure. *Sullivan v. Johnson*, 443.

46-3, 46-22, 46-23. Separation agreement held to constitute implied contract precluding sale for partition. *Properties, Inc. v. Cox*, 14.

49-2. Court must submit question of wilful refusal to support child as well as paternity. *S. v. Mason*, 423.

50-7, 50-16. Wife is entitled to alimony without divorce if husband abandons her notwithstanding he may continue to provide her support. *Richardson v. Richardson*, 538.

50-10. Judge may hear contested and uncontested divorce actions on ground of separation in absence of request for jury trial aptly filed. *Langley v. Langley*, 415.

50-16. Statute does not authorize wife to bring independent action for alimony without divorce when issue of abandonment had theretofore been adversely determined by final judgment. *Garner v. Garner*, 664.

55-3.1. Execution of chattel mortgage by person owning entire capital stock of corporation held corporate act. *Wall v. Colvard*, 43.

55-131, 55-154. Foreign corporation does not transact business in this State solely by maintaining an action here, and it may maintain an action without having domesticated here. *Leasing Corp. v. Service Co.*, 601.

55-144. Cause of action must arise from business done in this State by foreign undomesticated corporation in order for it to be subject to service under statute. *Mills v. Transit Co.*, 313.

60-43. Highway Commission held empowered to compel railroad to widen grade crossing. *R. R. v. Highway Comm.*, 92.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

62-118, 62-247. Application for consolidation of freight stations should have been allowed upon evidence in this case. *Utilities Comm. v. R. R.*, 242.

90-14. Board of Dental Examiners may revoke license after a hearing at which accused is given opportunity to present evidence. *Board of Dental Examiners v. Grady*, 541.

105-164.4(h). Date of delivery of property bought from out of state seller, and not date of purchase, determines liability for use tax. *Hosiery Mills v. Clayton*, 673.

113-176. State may not by statute vary terms of lease of oyster beds. *Oglesby v. Adams*, 272.

136-26. Highway Commission may assume responsibility for barricades notwithstanding contractual obligation of contractor repairing highway. *Luther v. Contracting Co.*, 636.

136-72. Limitation of loads on bridges is safety regulation, and its violation constitutes negligence *per se*. *Byers v. Products Co.*, 518.

138-89.52. Deprivation of access to highway should be considered on determining value of lands remaining. *Highway Comm. v. Gasperson*, 453.

148-33.1. Work release program is not subject to limitations prescribed for "farming out" convicts. *In re Work Release Statute*, 727.

148-45. Second escape is felony irrespective of whether original sentence was upon conviction of misdemeanor or felony. *S. v. Worley*, 687.

153-9(44). Authorizes county to waive governmental immunity only to the extent county is indemnified by insurance. *Seibold v. Kinston*, 615.

160-52, 160-200(6)(7)(10). Sunday ordinance may not be attacked on ground of wrongful motive of municipal legislative body. *Clark's v. West*, 527.

160-89. Owner may appeal from assessment if municipality's failure to comply with statutory requirements is jurisdictional. *Smith v. Rockingham*, 697.

160-191.1. Authorizes but does not require municipality to waive governmental immunity, and then only in regard to negligent operation of motorist's vehicle. *Seibold v. Kinston*, 615.

160-200(7), (10), (11), (31), (35), (43). Municipal corporation may contract for towing services and such contract is not "license". *Truck Service v. Charlotte*, 374.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

I, § 13. Defendant may waive right of trial by jury in misdemeanor prosecution. *S. v. Cooke*, 201.

I, § 17. Plea of former jeopardy is valid upon second trial ordered over defendant's objection. *S. v. Case*, 330.

XI, § 1. Work release program is not subject to limitations prescribed for "farming out" convicts. *In re Work Release Statute*, 727.

CONSTITUTION OF UNITED STATES, SECTION OF, CONSTRUED.

Fourteenth Amendment. State court is bound by Federal decision in determining admissibility of confession. *S. v. Gray*, 69; *S. v. Bruce*, 174.